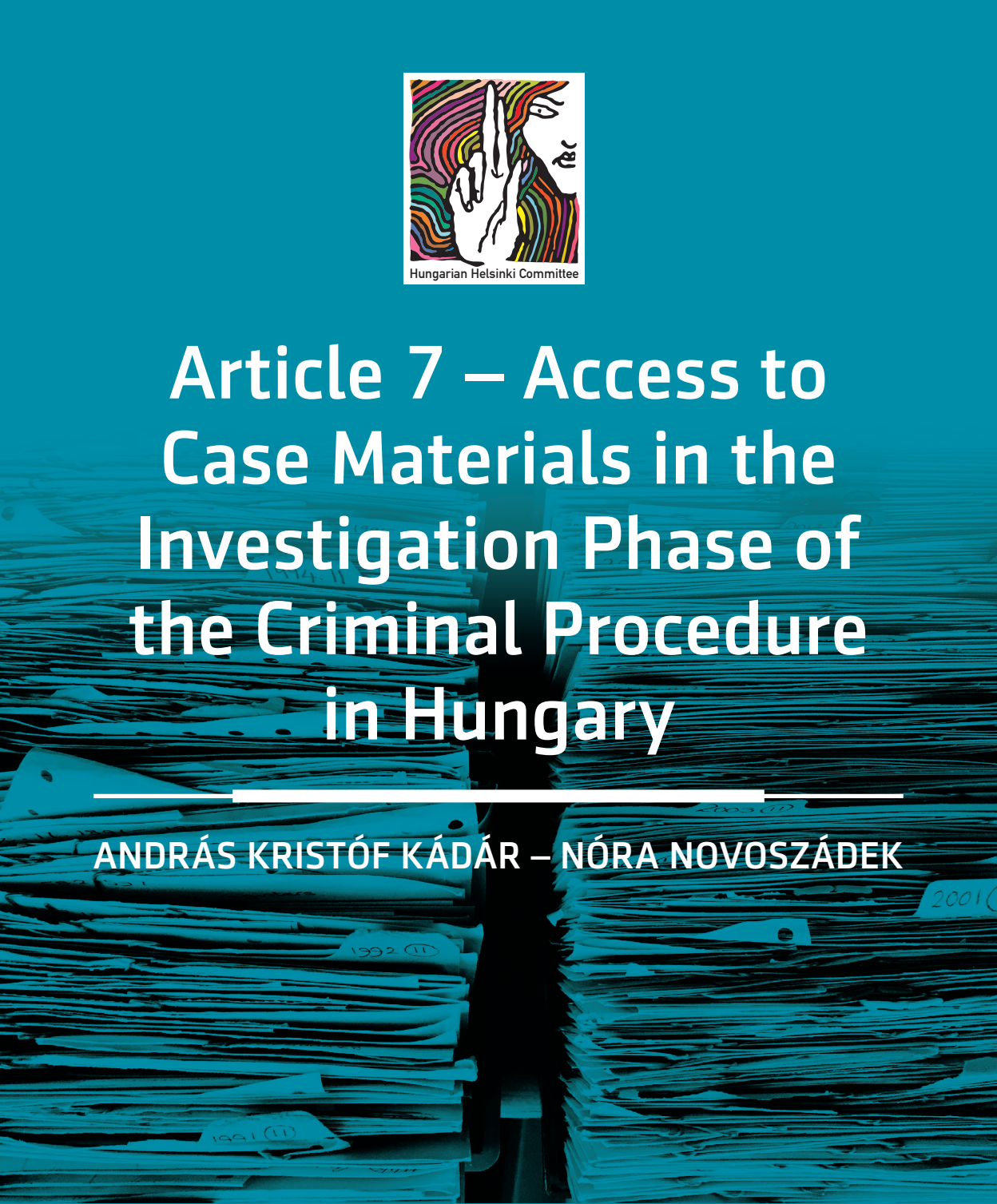
Hungarian Helsinki Committee

Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary



ANDRÁS KRISTÓF KÁDÁR – NÓRA NOVOSZÁDEK

Supported by the Justice Programme of the European Union

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About the Hungarian Helsinki Committee

The Hungarian Helsinki Committee (HHC) is an NGO founded in 1989. It monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The Hungarian Helsinki Committee strives to ensure that domestic legislation guarantee the consistent implementation of human rights norms and promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. The Hungarian Helsinki Committee's main areas of activities are centred on protecting the rights of asylum-seekers and foreigners in need of international protection, non-discrimination, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention, access to justice, the effective enforcement of the right to defence and equality before the law.

Contents

Executive summary

One of the Hungarian Helsinki Committee's (HHC) prominent strategic goals is to decrease unjustified pre-trial detentions in Hungary, to ensure that the regulation and practice of pre-trial detention complies with the standards set by the European Court of Human Rights, and that the Hungarian legal provisions properly transpose the provisions of the respective EU directives. In the HHC's view, one of the outstanding problems of the domestic regulation and practice of pre-trial detention was that in the investigation phase of the criminal procedure (before the indictment) the defence had only restricted access to the materials and files of the case. The European Court of Human Rights also confirmed in several of its decisions that this restricted access to the case files violated the right to a fair trial and the requirement of the equality of arms. Consequently, it meant a significant change when, in order to comply with Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings (hereinafter: Right to Information Directive), ensuring the right of access to case materials, Act XIX of 1998 on the Code of Criminal Procedure (CCP) was amended with regard to defendants whose pre-trial detention had been initiated. As of 1 January 2014, Article 211 of the CCP sets out that if the prosecutor motions to order the defendant's pre-trial detention, the copy of the case files substantiating the prosecutorial motion shall be attached to the motion and shall be provided to the defendant and the defence counsel. As of 1 July 2015, the latter rule also applies when the defendant's pre-trial detention is being prolonged.

The HHC's research project *"Article 7 – Ensuring Access to Case Materials in Hungary"*, concluded in 2017 and supported by the Justice Programme of the European Union, aimed at assessing the practical application of Article 7 of the Right to Information Directive in Hungary, and, accordingly, the above-mentioned new rule of the CCP. The project aimed at assessing, through interviews with judges, prosecutors and attorneys and a case file research, whether there are any legislative or practical shortcomings with regard to the access to case files in Hungary (not only with regard to pre-trial detainees, but also in general), and if yes, in what manner these could be solved.

Research results with regard to access to case materials of criminal cases related to pre-trial detention

As far as the scope of case files to be provided to the defence is concerned, the current text of the CCP does not entirely comply with Article 7 (1) of the Right to Information Directive either, since it allows the authorities not to hand over those case files to the defence which would raise doubts with regard to any of the grounds for pre-trial detention (e.g. case files undermining the well-founded suspicion that a given criminal offence was committed by the suspect, or case files and evidence in favour of the defendant), and the interests of the investigation may override the right enshrined in Article 7 (1) of the Right to Information Directive. Therefore, the manner in which authorities interpret the scope of the case files "substantiating the motion" is an important issue, along with whether withholding certain case files in a given case hinders the defendant and the defence counsel in arguing substantively and effectively against ordering or prolonging pre-trial detention or not. (It is noteworthy that another HHC research showed that the case files and the evidence in question are typically related to the well-founded suspicion that a given criminal offence was committed by the suspect, rather than the "special" grounds for pre-trial detention such as flight risk or the risk of reoffending.)

Responses of attorneys, judges and prosecutors provided in the framework of the research showed that the scope of case files provided to the defence is wider and the practice in that regard is more favourable than what has been foreshadowed by the text of Article 211 of the CCP. However, irrespective of that, the text of the law still carries the strong risk that the defence is not provided with all the case materials essential to challenging effectively the lawfulness of the detention. It gives rise to strong concerns that only the prosecutor's office and the investigation authority (the police), thus, only the side of the "prosecution" has unlimited knowledge as to the scope of the available case files and access to those, while the judge deciding on pre-trial detention does not. In addition, no truly effective remedy is available for defence counsels for instances when they believe that the case file may contain further evidence or documents which may bear relevance in relation to ordering or prolonging pre-trial detention of which material, however, the defence was not provided a copy. Because of these concerns, the HHC's recommendation, among others, is that the CCP is amended in a way that authorities are not only obliged to provide case files "substantiating" the motion for pre-trial detention, but that the scope of case files is compliant with the Right to Information Directive. In addition, the HHC recommends the amendment of the respective rules in a way that the judge deciding on pre-trial detention receives all the case files available to the investigation authority as well as the prosecutor.

It constitutes a problem that the CCP concentrates on the "files" of the case (i.e. documents) and requires that a "copy" of the case files be provided. The latter rule has been partly overridden by practice, but case files are still provided mostly in the form of paper copies, which also results that in many instances photos, videos and audio recordings in

their original format are not submitted to the defence electronically. In addition, providing paper copies represents a significant burden for the police vested with the task of photocopying the case files. Because of that, the HHC recommends that the CCP make it explicitly possible to provide the data or case files in another manner, e.g. by providing them on an electronic data storage device or in an electronic format, via e-mail. It shall be noted that detained defendants may face difficulties both with regard to storing case files provided on paper and examining case files provided in an electronic format.

The preamble of the Right to Information Directive prescribes that case materials shall be provided to the defendant and the defence counsel in "due time". However, the current text of the CCP does not set out any deadline as to how long before the hearing on ordering pre-trial detention the prosecutorial motion and the attached case files shall be provided to the defendant and the defence counsel. Research results show that this legislative shortcoming may result in that the defence does not receive the case files in due time – even receives it less than one hour before the hearing – and does not have the possibility to examine the case files, which spoils the positive effect of the Right to Information Directive's implementation. Due to this problem, the HHC recommends that either a minimum deadline for submitting the motion for pre-trial detention and the related case files to the defence before the hearing is set out, which makes it realistic for the defence to prepare for the hearing, or the requirement of providing case files in "due time" be incorporated into the law. The defence is in a somewhat better position when pre-trial detention is being prolonged, but it also occurs that case files arrive to the defence counsel such a short time before the court is deciding on prolonging the pre-trial detention, that the defence counsel is not in the position to rely on them and will have no substantial benefit from the access to the case files. Therefore, the HHC recommends that every file coming into existence after the pre-trial detention is ordered and relevant in terms of the defendant's pre-trial detention should be submitted to the defence on a continuous basis, without waiting until the prosecutor motions for the prolongation of the pre-trial detention.

The pertinent rules make it the task of the investigation authority to hand over the case files to the defence, as a binding rule in the case of ordering pre-trial detention, and as an option when pre-trial detention is being prolonged. Accordingly, the research showed that typically the copies of case files are handed over to the defence counsel by the police – either in the hallway of the court, at the police station or in the attorney's office, personally. In the present system the cost of providing case files is high both in terms of materials and human resources. In this regard, providing case files electronically would be a solution, e.g., by creating an electronic platform accessible to all participants of the criminal procedure with different access levels, making it easier to provide case files and to follow which case files have been already provided to the defence.

In many cases it is somewhat hard to follow which files of the case have been provided to the defence and the investigation judge deciding on pre-trial detention, or when this occurred, and even whether this has occurred at all, which may be problematic with regard

to the enforcement of the rights of the defence enshrined in Article 7 (1) of the Right to Information Directive. According to the rules adopted by the Chief Prosecutor's Office, the prosecutor's motion should not only refer in general terms to the case files provided to the defence, but shall include an itemized list of those case files whose copy was submitted to the defence. However, research results show that this requirement is not fully complied with, or at least these lists are not available for the defence and the judges. The Chief Prosecutor's Office also requires verifying that the case files have been received by the defendant and the defence counsel, but only if the decision on pre-trial detention is reached at a hearing under the respective rules. This gives rise to concerns because pre-trial detention is often prolonged without any hearing held, while in many cases access to case materials may have an even higher significance before the prolongation of pre-trial detention is due, than before the ordering of pre-trial detention. Interviews showed that the receipt of case files is documented adequately (attorneys verify with their signature that they have received the case files), but it is problematic that in many instances these verification documents do not reach the investigation judge, and only a few judges require verification that the case files have been handed over to the defence. In addition, the defence does not always receive a copy from the document verifying that the case files have been provided, and it is not always shown by the respective documents when exactly the case files have been received by the defence. In the HHC's view, the above shortcomings of the practice should be remedied.

The research also examined the role of the investigation judge deciding on the pre-trial detention with regard to access to the case files substantiating pre-trial detention. One important question in this regard is whether, in the view of the investigation judge, failure to provide the case files to the defence is an obstacle to holding a pre-trial detention hearing or not. Since judicial practice is not fully uniform in this regard, the HHC recommends that it be included in the law that providing the copy of the case files related to the motion aimed at pre-trial detention to the defence be the precondition of holding a hearing or reaching a decision with regard to the pre-trial detention, and if case files have not been provided, no hearing may be held and no decision may be reached. It is also an important question what the consequences are if it turns out that the defence has not received the case files in due time. Research showed a good practice in this regard: in such instances, many judges provide additional time for the defence to examine the case files – it would be reasonable to expressly set out this possibility in the law. As far as the control over the scope of case files provided to the defence is concerned, the role of investigation judges is not considerable, one of the reasons for that being the concept according to which investigation judges have access to the same files of the case as the defence, as a main rule. In relation to the latter, the HHC recommends adopting a rule that would set out that if the investigation judge notes that not all case files essential to challenge the lawfulness of detention have been provided to the defendant and the defence counsel, then he/she may share these case files with the defence at the hearing if he/she has access to them, and has the right to request the prosecutor to provide further case files if necessary. In order for the judge to be able to assess at all whether the preconditions of holding a hearing or

reaching a decision are being met, it is necessary for him/her to have the information as to whether the defence has received the case files or not, when the case files have been received by the defence, and whether the defence has had enough time to examine them. It is obviously also the task of the defence to raise any problems with regard to the fulfilment of these preconditions, but the HHC believes it to be an important guarantee that the judge asks the defence counsel and the defendant about these circumstances automatically, at every hearing.

In addition, the HHC recommends that in order to promote the enforcement of the rights of the defendant, the participation of the defence counsel at the hearings related to pre-trial detention be made mandatory.

According to the provisions of the CCP, defendants and defence counsels may submit a complaint if the case files substantiating the prosecutorial motion aimed at ordering or prolonging pre-trial detention are not provided to the defence or are provided with a delay. However, research results have shown that attorneys rarely submit complaints and are sceptical with regard to the effectiveness of complaints.

Finally, it has to be mentioned that according to the case-law of the European Court of Human Rights, house arrest, and house arrest under the Hungarian rules in particular qualifies as deprivation of liberty under Article 5 of the European Convention on Human Rights. Since Article 7 (1) of the Right to Information Directive prescribes guaranteeing access to case materials with regard to defendants arrested or detained, it may be raised that full compliance with the Right to Information Directive would require that defendants be granted the right to have access to case materials serving as a basis for ordering a coercive measure as per Article 7 of the Right to Information Directive also if they are taken into house arrest. This suggestion was supported by numerous stakeholders interviewed in the framework of the research.

Research results concerning access to case materials of criminal cases in the investigation phase in the case of defendants not detained

To those defendants whose pre-trial detention is not motioned for by the prosecutor, the general rules, already in force before 1 January 2014, shall be applied in terms of accessing case files. In their case, the defence has unrestricted access only to the expert opinion and the minutes of those investigative acts where the defendant or the defence counsel may be present. (These acts are the following: the interrogation of the defendant, the questioning of witnesses whose questioning was initiated by either the defence counsel or the defendant, confrontation held with the participation of the latter type of witness, the hearing of an expert, the inspection of scenes and objects, the reconstruction of events and identity

parades.) Defence can only have access to other case materials if such access does not violate "the interests of the investigation". After the investigation is concluded, the defence has unrestricted access to the case materials of the criminal case.

Thus, the Hungarian rules are in compliance with the requirement enshrined in Article 7 (3) of the Right to Information Directive that access to the materials of the case "shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court". However, the regulatory concept of the CCP does not fully comply with Article 7 of the Right to Information Directive in the sense that it does not make the access to all case files the main rule, subject to exceptions when access may be denied, but applies a reverse concept. In addition, research interviews showed that in practice, access to case files in the investigation phase is denied not only on an exceptional basis but with regard to a significant proportion of case files, which is in contradiction both with the CCP and with Article 7 (4) of the Right to Information Directive. In addition, authorities do not provide details as to why accessing a certain case file would violate the interests of the investigation. In the opinion of the HHC, steps should be taken to ensure that providing copies of case files (i.e. access to case files) is denied only when the access would, in fact, violate the interests of the investigation, and as a main rule, authorities should provide reasons when denying access. The HHC also recommends that case files to which providing access for the defence is mandatory on the basis of the CCP be submitted to the defence automatically, without a separate request.

Since 1 January 2014, the prosecutor and the investigation authority issue a decision when denying access to case files, against which a complaint may be submitted by the defendant and the defence counsel. If such a complaint is rejected, a motion for judicial review may be submitted against the rejection, in compliance with the requirement set out in Article 7 (4) of the Right to Information Directive. However, research experiences show that providing access to case files is characterized by a high level of informality: in many instances, no formal decision is being delivered on denying access to case files or providing copies of them, one of the reasons for that being that in many instances, attorneys also request access in an informal manner. In addition, interviews showed that defence counsels rarely resort to the possibility of submitting a complaint.

1. Introduction

One of the Hungarian Helsinki Committee's (HHC) prominent strategic goals is to decrease unjustified pre-trial detentions in Hungary, to ensure that the regulation and practice of pre-trial detention complies with the standards set by the European Court of Human Rights, and that the Hungarian legal provisions properly transpose the provisions of the respective EU directives. In the past years, the HHC has participated in many domestic and international research projects related to pre-trial detention and the right to effective defence, and its attorneys have represented applicants successfully in strategic cases in which the European Court of Human Rights established that the applicants' pre-trial detention violated Article 5 of the European Convention on Human Rights[1] while also pointing out structural problems. The HHC regularly comments on legislative steps pertaining to pre-trial detention and the right to effective defence, requesting their constitutional review if necessary. Along with providing information to the general public and various international organisations, the HHC also strives to have a good professional relationship with the different participants of the criminal procedure, for example by compiling a manual for judges and attorneys, presenting the practice of the European Court of Human Rights with regard to pre-trial detention.[2] As the HHC regularly remarked in its submissions and reports, one of the outstanding problems of the domestic regulation and practice of pre-trial detention was that in the investigation phase of the criminal procedure (before the indictment) the defence had only restricted access to the materials and files of the case.

Up until 1 January 2014, in the investigation phase the defence had unrestricted access only to the expert opinions and the minutes of those investigative acts where the defendant[3] and the defence counsel may be present. At the same time, Act XIX of 1998 on the Code of Criminal Procedure (CCP) allows for the presence of the defence counsel at the interrogation of the defendant, the questioning of witnesses whose questioning was initiated by either him/her or the defendant and confrontations held with the participation of the latter kind of witnesses,[4] and the defence counsel and the defendant may also be present at the hearing of the expert, the inspection of scenes and objects, the reconstruction of events and identity parades.[5] Access to further materials of the case was granted to the defence only if allowing access did not pose a threat to the "interests of the investigation".[6] Article 70/B of the CCP sets out that a copy of the case files accessible to the defence shall be provided by the proceeding authorities upon request both in the course of the investigation

and with respect to the so-called "presentation of the case file", the latter taking place after the investigation was concluded but before the indictment is filed. (After the indictment, in the trial phase, the defence has unrestricted access to the materials of the case.[7])

The European Court of Human Rights also confirmed in several of its decisions that the above restricted access to the case files in the investigation phase violated the right to a fair trial: before 2014, it delivered many judgments with regard to Hungary ruling that the legal provisions in force restricted access to case files in the investigation phase – including the evidence substantiating pre-trial detention – which amounted to the violation of the requirement of the equality of arms, and, accordingly, Article 5 (4) of the European Convention on Human Rights.[8]

Consequently, it meant a significant change when, in order to comply with Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings (hereinafter: Right to Information Directive), ensuring the right of access to case materials, the CCP was amended with regard to defendants whose pre-trial detention is initiated. As of 1 January 2014, the CCP sets out that if the prosecutor motions to order the defendant's pre-trial detention, the copy of the case files[9] substantiating the prosecutorial motion shall be attached to the motion and shall be provided to the defendant and the defence counsel. Furthermore, since 1 July 2015 the CCP also sets out that if the prosecutorial motion is aimed at prolonging pre-trial detention, the copy of those files of the investigation on which the prosecutorial motion is based and which emerged since the last decision pertaining to pre-trial detention shall be attached to the motion submitted to the defendant and the defence counsel.[10] (To those defendants whose pre-trial detention is not motioned for the by the prosecution, the general rules already in force before 1 January 2014 shall apply.)

Amending the CCP was a significant step, but it is inevitable to examine how the provisions of the Right to Information Directive prevail and how the CCP's respective provisions are applied in the daily practice, and what challenges do the defence and the prosecution face in that regard.

Accordingly, in its research project *"Article 7 – Ensuring Access to Case Materials in Hungary",* launched in 2015 and supported by the Justice Programme of the European Union, the HHC aimed at assessing the practical application of Article 7 of the Right to Information Directive in Hungary. The project aimed at assessing, through case file research and interviews with judges, prosecutors and attorneys, whether there are any legislative or practical shortcomings with regard to the access to case files in Hungary (not only with regard to pre-trial detainees, but also in general), and if yes, in what manner these could be solved. This study presents the results of this research project. Research results and the HHC's related recommendations were discussed with stakeholders and experts at a workshop held on 8 June 2017, and the present research report was finalized also on the basis of the results of that workshop.

It is important to add that just before finalizing the present research report, on 13 June 2017, the Hungarian Parliament adopted Bill T/13972. on the Code of Criminal Procedure,[11] which "replaces the [CCP's] system, based on restricted access [to case files] as a main rule and granting access on an ad hoc basis, with a system of full access where access may be restricted only on an ad hoc basis. [...] Accordingly, access may be denied only with regard to certain files of the case; and the request [aimed at granting access] should be denied in a decision subject to remedy. With respect to the investigation, Article 352 [of the Bill] is also linked to this system: this provision prescribes that access to case files shall be granted on a continuous manner, with a scope widening in parallel with the procedure progressing."[12] According to the reasoning attached to said Article 352, the new Code of Criminal Procedure "makes it possible to the defendant and the defence counsel to access all case files and acquire a copy of them much earlier in the course of the procedure than the legal provisions in force, already after the defendant's interrogation; the possibility of access shall be ensured continuously in the course of the investigation and may be restricted only when strict requirements are complied with."[13] As Gábor Jancsó, representing the Ministry of Justice as a prosecutor assigned to the ministry and deputy head of the ministry's Department of Codification for Criminal Law and the Law of Execution of Punishments submitted at the workshop, under the new Code of Criminal Procedure, the defendant, as a main rule, is entitled to have access to the whole case file, and the new law sets out exceptions to this main rule. In addition, the system of the new Code of Criminal Procedure focuses on "access" and providing a copy of the case files is treated merely as a form of access, while still respecting the "right to a copy of the case files".

Presenting and assessing the new Code of Criminal Procedure's regulatory concept in detail is beyond the scope of the present research report, but we hope that the results of the present research may serve at least in part as a useful resource when drafting the lower level implementation rules for the new Code of Criminal Procedure.

2. The Right to Information Directive and the European Convention on Human Rights

Article 7 of the Right to Information Directive sets out the following requirements for Member States in relation to the right of access to the materials of the case:

Article 7

Right of access to the materials of the case

(1) Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

(2) Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

(3) Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

(4) By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

(5) Access, as referred to in this Article, shall be provided free of charge.

In addition, the Right to Information Directive's preamble provides further guidance as to how the provisions of Article 7 shall be interpreted and applied:

(30) Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) [of the European Convention on Human Rights], and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention.

(31) For the purpose of this Directive, access to the material evidence, as defined in national law, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case, should include access to materials such as documents, and where appropriate photographs and audio and video recordings. Such materials may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law.

(32) Access to the material evidence in the possession of the competent authorities, whether for or against the suspect or accused person, as provided for under this Directive, may be refused, in accordance with national law, where such access may lead to a serious threat to the life or fundamental rights of another person or where refusal of such access is strictly necessary to safeguard an important public interest. Any refusal of such access must be weighed against the rights of the defence of the suspect or accused person, taking into account the different stages of the criminal proceedings. Restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the [the European Convention on Human Rights] and as interpreted by the case-law of the European Court of Human Rights.

(33) The right of access to the materials of a case should be without prejudice to the provisions of national law on the protection of personal data and the whereabouts of protected witnesses.

(34) Access to the materials of the case, as provided for by this Directive, should be provided free of charge, without prejudice to provisions of national law providing for fees to be paid for documents to be copied from the case file or for sending materials to the persons concerned or to their lawyer.

(35) Where information is provided in accordance with this Directive, the competent authorities should take note of this in accordance with existing recording procedures under national law and should not be subject to any additional obligation to introduce new mechanisms or to any additional administrative burden.

(36) Suspects or accused persons or their lawyers should have the right to challenge, in accordance with national law, the possible failure or refusal of the competent authorities to provide information or to disclose certain materials of the case in accordance with this Directive. That right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged.

The preamble of the Right to Information Directive refers many times to the European Convention on Human Rights and the case-law of the European Court of Human Rights, setting out for example in Paragraph (30) that restrictions on such access "should be interpreted strictly and in accordance with the principle of the right to a fair trial under the [the European Convention on Human Rights] and as interpreted by the case-law of the European

Court of Human Rights". Article 5 (4) of the European Convention on Human Rights sets out the following with regard to the process and characteristics of deciding on pre-trial detention:

> *Article 5*
>
> ***Right to liberty and security***
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

According to the "consistent case-law [of the European Court of Human Rights], the procedure aimed at deciding on pre-trial detention does not have to entail all the guarantees of a criminal proceedings, but it has to be »judicial« in character, meaning that – within the boundaries set by the pre-trial detention's function and the characteristics of that phase of the procedure – the most important substantive requirements ensuring the fairness of a court procedure as understood by Article 6 shall be met".[14] The provision of Article 6 of the European Convention on Human Rights relevant from the aspect of the present research report sets out the following:

> *Article 6*
>
> ***Right to a fair trial***
>
> 3. Everyone charged with a criminal offence has the following minimum rights: [...]
>
> b) to have adequate time and facilities for the preparation of his defence; [...]

"In the case-law [of the European Court of Human Rights] related to the right to a fair trial, the »principle of equality of arms« bears great importance: according to this requirement, the rights of those participating in the procedure has to be in »balance«. Therefore, each party has to be given an opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his/her opponent (see for example: *Kress v. France*, Application no. 39594/98 [GC], § 72.). The [European Court of Human Rights] requires that the principle of equality of arms is complied with also in the procedure

on pre-trial detention. In the case *Nikolova v. Bulgaria* (Application no. 31195/96, § 58.) the Court stated the following: "The proceedings must be adversarial and must always ensure »equality of arms« between the parties, the prosecutor and the detained person [...]. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention [...]."[15]

3. Research methodology

In the framework of its research project *"Article 7 – Ensuring Access to Case Materials in Hungary"*, the HHC aimed at assessing the practical application of Article 7 of the Right to Information Directive in Hungary through a case file research and interviews with judges, prosecutors and attorneys. In the framework of the project,

- research interviews with 11 investigation judges (judges deciding on pre-trial detention) were conducted at 11 different courts, between September 2016 and January 2017;
- written answers were provided to the HHC's questions by 10 prosecutors from 10 different prosecutors' offices in the autumn of 2016; and
- research interviews were conducted with 17 attorneys, covering eight county bar associations (from the 20), in April and May of 2017.

The aim of the case file research conducted in the framework of the project was twofold: along with mapping the problems in the practice, the case file research, limited to the review of 50 criminal cases, was also aimed at testing the research methodology. Our aim was to provide future researchers with a tested method, should there be a future research into the issue covering a larger number of cases. In addition, the HHC also aimed to provide a starting point for designing a research methodology which may be used to assess how the defendants' and their defence counsels' right of access to the materials of the case prevails in practice also in other member states of the European Union.

In the call for participating in the research (which was, among others, disseminated to all county bar associations in Hungary) we not only asked the attorneys to share their general experiences in the framework of a research interview, but also to grant the HHC access to the files of criminal cases complying with the research criteria below in which they provided defence (while respecting data protection rules and attorney-client privilege), and to consult researchers on access to case files in these cases. The HHC aimed to cover the following kind of cases:

- criminal procedures in which the first interrogation of the defendant was carried out after 1 July 2015,

- preferably in which the investigation has already been concluded and the "presentation of the case file" is over, and
- which constitute a good or bad practice in the view of the given attorney with regard to
  (i) access to the materials of the case in the investigation phase in general, or
  (ii) access to case files substantiating the prosecutorial motion aimed at pre-trial detention.

From among the cases provided by attorneys on the basis of the call, ordering pre-trial detention was motioned in 41 cases where the hearing on ordering pre-trial detention was held after the amended text of Article 211 of the CCP came into force, thus, after 1 January 2014. Accordingly, access to case files substantiating the motion aimed at ordering pre-trial detention was assessed regarding these 41 cases.

In the cases provided by attorneys, altogether 73 decisions were made on prolonging pre-trial detention after 1 July 2015, thus in the period when, on the basis of the repeatedly amended text of Article 211 of the CCP, the prosecution was already under the obligation to attach the copy of the case files substantiating the motion to the motion aimed at prolonging pre-trial detention.

Access to case files in the case of defendants not taken into pre-trial detention was assessed regarding nine individual cases.

As shown by the above, the results of the case file research carried out in the framework of the project may not be considered representative of course, but the results – coupled with the outcome of the interviews – can be used to determine those issues which should be examined further. It has to be added that the case files acquired from the attorneys were in many instances somewhat incomplete: for example, minutes of the hearing on pre-trial detention were sometimes missing. On the other hand, attorneys were able to provide researchers such first-hand information with regard to the individual cases which could not have been acquired via a case file research conducted at the courts.

In the present research report we will also refer to the results of some of the HHC's past or ongoing projects:

- Between 2014 and 2016 the HHC was the implementing partner organization of London-based Fair Trials[16] in the project titled "*The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making*", funded by the European Union. This international research project aimed to assess judicial decision-making with regard to pre-trial detention in 10 Member States of the European Union. In the framework of the project, the HHC assessed the domestic practice of pre-trial detention (along with reviewing the Hungarian legal provisions, related judicial case-law and statistical data) through the following: (i) surveyed 31 defence

attorneys, (ii) reviewed the criminal case files of 116 defendants, primarily convicted for robbery, (iii) conducted interviews with five prosecutors, and (iv) acquired written answers from 10 judges to its standardized questionnaire. Since in the cases covered by the case file research, the then new provisions on access to case files could not have been applied yet, no related data gathering was possible in the course of the case file review, but we asked questions from the attorneys, the prosecutors, and the judges about the then new provisions on access to case files. The country report produced in the framework of this research[17] will be hereafter referred to as a "Fair Trials report", while the research will be referred to as "Fair Trials research".

- The HHC has been the member of the JUSTICIA European Rights Network[18] since 2015. JUSTICIA is a network with member organizations based in 17 EU Member States, focusing on criminal procedural rights of defendants and victim's rights. Under the aegis of JUSTICIA, and with the coordination of the Human Rights Monitoring Institute[19] (Lithuania), the HHC engaged in late 2015 in the international research project *"EU Directives in Practice: Monitoring and Reporting on the Implementation of the EU Directive on the Right to Information in Criminal Proceedings",* covering seven EU Member States and supported by the European Commission and the Open Society Foundations. In the framework of the research project, the HHC assessed the transposition of the Right to Information Directive through analysing the respective legal provisions and through surveying and interviewing attorneys and police officers. The country report summarizing the research results[20] will be hereafter referred to as "JUSTICIA report", while the research will be referred to as "JUSTICIA research".
- At the time of publishing the present research report, the project "*Strengthening procedural rights in criminal proceedings: effective implementation of the right to a lawyer/legal aid under the Stockholm Program"*, coordinated by the Bulgarian Helsinki Committee[21] and supported by the European Union is still ongoing. The aim of the project, in which the HHC participates as a project partner, is to explore whether the requirements set by 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 and European Commission recommendation 2013/C 378/03 on the right to legal aid for suspects or accused persons in criminal proceedings are met in practice in five EU Member States, and to identify and promote examples of transferable good practices. In the framework of the project, the HHC aims to assess the Hungarian practice with regard to the right of access to a lawyer and the right to legal aid through case file research, interviews and focus group discussions. Accordingly, in the framework of the project the HHC conducted interviews with eight police officers, serving at county police headquarters, and organized two focus group discussions (one in Budapest and one in a county seat) with the participation of altogether 13 attorneys and two trainee attorneys. The relevance of the issue of access to case files is shown by the fact that

even though the project does not concern pre-trial detention, both interviewees and participants of the focus group discussions brought up the issue of access to case files substantiating the motion aimed at pre-trial detention repeatedly, without any separate question asked from them in this regard. This research will be hereafter referred to as "BHC research".

The HHC wishes to hereby thank the interviewees and the participants of the focus group discussions for their cooperation, and thank the Chief Prosecutor's Office, the National Judicial Office and the National Police Headquarters for making the interviews possible. Furthermore, we would like to thank the participants of the workshop for their attendance and for their valuable comments.

4. Research results with regard to access to case materials of criminal cases related to pre-trial detention

According to the rules of the Hungarian criminal procedure, until the indictment is filed, the court decides on ordering pre-trial detention upon the motion of the prosecutor.[22] Before the prosecutor submits the motion, the investigation authority (i.e. in most cases the police) submits a proposal to the prosecution for ordering a coercive measure (such as pre-trial detention), but this proposal is not binding for the prosecution.[23] If the prosecution agrees with the proposal, then it puts forth a motion to the court, which decides on the deprivation of liberty.

Article 211 of the CCP, aimed at implementing Article 7 (1) of the Right to Information Directive, links the provision of the copies of the case files to delivering the prosecutorial motion. Currently, this article sets out the following with regard to the defence's access to case files related to pre-trial detention:

> Article 211
>
> (1) The investigation judge shall set the day of the hearing. If the motion was put forth by the prosecutor, than he/she shall send the motion to the suspect and the defence counsel, shall ensure that the suspect will show up before the investigation judge, and shall inform the defence counsel about the day and place of the hearing. If the motion was not put forth by the prosecutor, the investigation judge shall send the motion to the suspect and the defence counsel, shall arrange that the necessary documents are acquired, and shall inform the one putting forth the motion, the prosecutor, the defendant and the defence counsel about the day and

place of the hearing. If the motion aims at prolonging the pre-trial detention, the prosecutor shall send his/her motion to the suspect and the defence counsel also if the investigation judge will reach a decision based solely on the case files [i.e. without holding a hearing].

(1a) If the motion aims at ordering pre-trial detention, the copies of the case files substantiating the motion shall be attached to the motion sent to the suspect and the defence counsel. If the motion aims at prolonging the pre-trial detention, the copies of those case files shall be attached to the motion sent to the suspect and the defence counsel which emerged since the last decision on pre-trial detention. [...]

While interpreting the research results, it shall be kept in mind that in the investigation phase, pre-trial detention – and, in general, any coercive measure entailing the deprivation or the restriction of personal liberty – is ordered at a hearing, in the presence of the defendant. However, the investigation judge is not obliged to hold a hearing when prolonging pre-trial detention, except for the following cases: (i) the respective motion aims at the prolongation of the pre-trial detention, and the motion refers to new grounds for pre-trial detention as compared to the latest judicial decision on pre-trial detention; (ii) the motion aims at prolonging the pre-trial detention exceeding six months from the ordering of the pre-trial detention. Before the filing of the indictment, the prosecutor shall submit its motion for prolonging the pre-trial detention to the court five days before pre-trial detention would end on the basis of the previous court decision.[24]

In accordance with Article 7 (5) of the Right to Information Directive, the defence shall receive the case files under Article 211 (1a) of the CCP free of charge.

The present chapter includes the research results related to applying Article 211 of the CCP in practice, covering (1) the scope of the case files provided to the defence, (2) the meaning of the term "case files" in practice and the manner of providing the case files, (3) the timing of providing the case files, (4) the place of providing the case files and the state authority handing them over, (5) how provision of the case files is documented, (6) the role of the investigation judge, (7) issues related to remedies, and (8) whether it would be justified to provide the case files also in the case if house arrest is motioned for the by prosecutor.

It shall be noted that several participants of the workshop raised the attention to the problems faced by foreign defendants who do not speak Hungarian. Former judge Ágnes Frech, the head of a working group of the National Judicial Office stressed for example that while the right to use one's mother tongue is ensured by the CCP, the law only prescribes the translation of those decisions and official documents which shall be "delivered" to the parties under the CCP (such as the summons and the indictment).[25] However, covering this undisputedly important issue is beyond the scope of the present research report.

4.1. The scope of case files submitted to the defence

Amending Article 211 of the CCP was indeed a prominent positive development. However, at same time, **the current text of the CCP does not fully comply with Article 7 (1) of the Right to Information Directive either**, the latter prescribing that documents essential to challenging effectively the lawfulness of the detention are made available to arrested persons or to their lawyers. Instead, the current text of the CCP makes it possible for the authorities not to hand over those case files to the defence which raise doubts as to the existence of any of the grounds of pre-trial detention, which violates the principle of the equality of arms. Thus, the Hungarian regulation approaches the question from the aspect of the prosecution, which is not in line with the Right to Information Directive's aim. As János Bánáti, the president of the Hungarian Bar Association put it at the conference: it is the court which should a reach a well-founded decision, so the case files necessary to reach a well-founded decision should be at the disposal of the judge, and if so, than these case files should also be handed over to the defence.

Therefore, the manner in which authorities interpret the scope of the case files "substantiating the motion" is an important issue, along with whether the problem – reported already by one of the attorneys in the Fair Trials research – exists that the defence will have access only to those case files which were "chosen by the prosecution to support the culpability [of the defendant]".

The Chief Prosecutor's Office submitted the following in its letter sent to the HHC in January 2016:[26] "It flows from the grammatical interpretation of the respective provision of the CCP that the intent of the legislator was not to make authorities attach the copies of all the case files emerged so far, but to make them attach explicitly the copies of those case files on which the motion is based."

Section 402.1.) of the memorandum issued by the Chief Prosecutor's Office[27] on questions of legal interpretation with regard to Article 211 (1a) of the CCP, to be followed on a mandatory basis by prosecutors (hereafter: Chief Prosecutor's Memorandum) provides the following guidance with regard to the scope of case files to be provided to the defence:

> d) When providing the evidence supporting the well-founded suspicion, it is expedient to proceed with having in mind the following:
>
> - If the well-founded suspicion is supported by more than one piece of evidence, those case files shall be provided to the court and the suspect and their defence counsel (while providing them with the same case files) which duly substantiate the ordering of pre-trial detention (e.g.: expert opinion, minutes of inspection at the scene, police report, witness testimony, etc.), but at the same time endanger the interests of the investigation to the

smallest possible extent. In the future, the investigation authority and the prosecutor shall pay special attention to applying Article 96 of the CCP, and to order even ex officio that the personal data of the witness, primarily his/her address, or if the suspect does not know the witness, the latter's name is handled in a confidential manner.

- If the well-founded suspicion is supported only by evidence providing which to the suspect and the defence counsel would severely endanger the interests of the investigation, attempts shall be made to mitigate the violation of these interests. (For example if the evidence in question is the incriminating testimony of the co-defendant in the case, the two suspects shall be confronted with each other. An incriminating testimony upheld in the course of a confrontation may enhance the well-established nature of the prosecutorial motion aimed at pre-trial detention.)

e)

- Even though it is decided by the prosecutor to motion a coercive measure, the *heads of the investigation authorities shall be called upon* to submit to the prosecutor, along with the police proposal aimed at the pre-trial detention and the case file, the copy of those case files which should be submitted in their view to the suspect and the defence counsel under Article 211 (1) of the CCP. (Investigation authorities may be encouraged also this way to put forth a well-founded proposal, in order to avoid that copies are made unnecessarily because the prosecutor does not motion the pre-trial detention.) [...]

g) Article 211 (3) of the CCP requires the one putting forth the motion to submit and present exclusively those pieces of evidence which substantiate the proposal; the law does not foresee to present the investigation judge the whole case file. The right of access to case files of the detained defendants under Article 211 (1a) is not unlimited, and the scope of the case files to be submitted to the defendant (and to their defence counsel) shall be the same as the whole case file only if the motion aimed at ordering pre-trial detention wishes to rely on all pieces of evidence in it to substantiate the grounds for the coercive measure. [...]

h) [...] Article 211 (1a) shall apply to the scope of case files to be submitted to the suspect and the defence counsel also in the case of prolonging [pre-trial detention]. No evidence detrimental to the defendant may be referred to in the motion which the defence does not have access to. *[NF. 5949/2015/1.]*

In addition, the Chief Prosecutor's Office provided the following information[28] with regard to the scope of case files to be submitted to the defence: "As far as the well-founded suspicion is concerned, those case files shall be provided to the court and the suspect and their defence counsel (while providing them with the same case files) which duly substantiate ordering the pre-trial detention. However, this does not mean that the evidence not accessible to the suspect and the defence counsel in the course of the investigation become accessible to them in relation to the coercive measure. The second sentence of Article 211 (3) explicitly sets out that those present at the hearing held by the investigation judge [on coercive measures] may have access to the evidence at the disposal of the one submitting the motion within the limits set by Article 186 of the CCP. Thus, the defendant and the defence counsel may have access to the existing evidence and the related case files exclusively within the general limits set with regard to the investigation phase also in the course of the procedure of the investigation judge."

Article 211 (3) of the CCP, referred to by the response of the Chief Prosecutor's Office above, sets out the following:

> Article 211
>
> (3) At the hearing, the evidence substantiating the motion shall be provided in writing or shall be presented orally by the one putting forth the motion. Those present shall be granted the possibility to access the evidence at the disposal of the one putting forth the motion – within the limits set by Article 186. [...]

Article 186 of the CCP (referred to in the provision above) includes the general rules of access to case files, making it possible to deny access to copies of the case files by referring to the interests of the investigation:

> Article 186
>
> (1) Those who may be present at an investigative act, may inspect the minutes of it instantly.
>
> (2) The suspect, the defence counsel and the victim may inspect the expert opinion also in the investigation phase, and may inspect further case files if that does not violate the interests of the investigation.
>
> (3) The suspect and the defence counsel are entitled to receive a copy of those case files which they may inspect. [...]

It is clear on the basis of the above that the prosecutor is not obliged to submit the whole case file to the defence before the decision on pre-trial detention is reached – this is not required by Article 7 (1) of the Right to Information Directive either. At the same time, on the basis of the above **the text of the CCP may result in practice that the defence will still not have access for example to the files and evidence supporting the lack of existence of a well-founded suspicion or being favourable for the defendant, and the interests of the investigation may override the right included in Article 7 (1) of the Right to Information Directive.**

It should also be noted that for example the Fair Trials research showed that the evidence presented by the prosecutor in relation to ordering pre-trial detention are mainly evidence aimed at verifying the existence of a well-founded suspicion, and the data on the defendant's criminal record, if any.[29] (The existence of a well-founded suspicion that the defendant committed a criminal offence punishable by imprisonment is the "general" ground of pre-trial detention in the Hungarian system.[30]) Thus, there is usually no evidence as to the existence of the so-called "special grounds" of pre-trial detention (such as for example the risk of flight, the risk of collusion, and the risk of reoffending), or at least no such evidence is presented by the prosecutor. Accordingly, in most cases the defence could have access only to the evidence substantiating the well-founded suspicion anyway, which should be kept in mind when assessing the research results as presented below.

The opinion of attorneys interviewed in the framework of the research was largely divided with regard to the question as to in what proportion of the cases they are provided with the whole case file in the case of a motion aimed at ordering pre-trial detention:

- eight respondents stated that they receive a full case file in all cases,
- four respondents stated that they receive a full case file in more than half of the cases,
- four respondents stated that they receive a full case file in less than half of the cases,
- while according to two respondents they never receive a whole case file.

As far the case files attached to the motions aimed at prolonging pre-trial detention are concerned, impressions of attorneys were also divided:

- according to four respondents, they always receive the copies of all case files which emerged in the case since the latest decision on pre-trial detention,
- five respondents stated that they receive these case files in more than half of the instances,
- three respondents stated that they receive these case files in less than half of the instances,
- and three respondents stated that they never receive all of these case files – one respondent even claimed never receiving any case files if no hearing is held by the investigation judge on the prolongation of pre-trial detention.

It is not by chance that we used the word "impression" above: many attorneys explicitly referred to the problem that when receiving the case files, they are in fact not in the position to check whether they received the whole case file or not, and may ascertain with full certainty only at the presentation of the case file whether the investigation authority or the prosecution had any case files at their disposal the copies of which they had not submitted to the defence as an attachment to the motion aimed at pre-trial detention.

Several attorneys mentioned that conclusions in this regard may be drawn from the prosecutorial motion or the oral submission made by the prosecutor at the hearing, for example because the motion refers to data which is not at the defence's disposal. Another attorney stated that it occurs that it becomes clear from the text of the suspicion that an existing case file was not submitted to the defence, and that such conclusions may be drawn from the fact that a new suspicion is communicated in the case. One of the attorneys interviewed had a case in which the member of the investigation authority explicitly stated that he will submit the attorney the case files pertaining to his client, but not the case files pertaining to the co-defendants. According to two attorneys, the judicial decision on pre-trial detention may also give rise to the conclusion that there are case files which were not submitted to the defence.

According to the responses received, informal data gathering has a significant role in this regard: several attorneys stated that they also rely on information received from co-defendants and other defence counsels involved in the case (e.g. they are informed by other defence counsels that further witnesses have been questioned in the case); it happens that the witness is an acquaintance of the defendant and so the latter knows that the given witness was questioned, while the defence does not receive the copy of the witness testimony; or somebody "misspeaks", for example in the course of a confrontation. Two attorneys added that they are also able to draw conclusions from the context deducted from the case file as to the existence of further documents at the disposal of the authorities, but not accessible to the defence (e.g. they refer to a witness testimony in another witness testimony, the former not being included in the copies). According to one of the attorneys, if authorities are so "sure of themselves" which is not justified on the basis of the available case files, that may also indicate that not all the case files were handed over to the defence.

Thus, defendants and their defence counsels cannot be sure in the investigation phase whether they have received the full case file or not, or what kind and type of case files they have not received, since the prosecutorial motions typically do not even refer to the existence of further case files which have not been submitted to the defence. In the course of the case file research, researchers found only a handful of prosecutorial motions which contained some – but not explicit – information in this regard:

- *"I have handed over […], the defendant, and his retained defence counsel, attorney […], my present motion and the full case file, pursuant to Article 211 (1) of the CCP."*

- *"I attach the original case file to my motion. I also sent the case files substantiating my motion to the ex officio appointed defence counsel and the defendants."*

In relation to the above, one of the judges was of the view that when the defence counsel receives the full case file, the so-called record of delivery (verifying that the case files were actually handed over to the defence) is about handing over the "case files emerged so far", while if there are some – not relevant – case files which are not submitted to the defence, then the case files handed over are listed in the record of delivery in an itemized manner.

In addition to all of that, one of the attorneys interviewed stated that it is hard to follow whether case files were in fact submitted in "due time", i.e. whether case files were in fact attached to the first prosecutorial motion submitted to the defence after the given case file had emerged. In the HHC's view this significantly decreases the chance that defendants and their defence counsels resort to an effective remedy in this regard.

From among the four police officers interviewed in the course of the JUSTICIA research, one interviewee stated that the defence is always being provided with the whole case file, while the other three interviewees stated that in general, defence is being provided with the whole case file (thus, there are exceptions to that).[31]

It is a separate issue whether withholding certain case files in a given case **hinders the defendant and the defence counsel in "challenging the lawfulness of detention effectively"** or not, but this may be decided only on a case-by-case basis. Accordingly, we asked attorneys in the framework of the present research whether they consider the case files submitted to them adequate also from this perspective, while prosecutors and judges were asked whether in their view the defence receives also the case files favourable for the defence.

From among the three Budapest-based prosecutors interviewed in the framework of the Fair Trials research,[32] concluded in 2015, two stated that the practice in this regard in Budapest is "extensive" – or, from another perspective, it is "strict" – thus, "essentially the whole case file" is provided to the defence. (As one of the interviewees put it, "in practice, this is an early »presentation of the case file«".) A third interviewee, working in the countryside, submitted that the "relevant case files" are handed over to the defence, and there are cases in which this means copying the whole case file.

In the course of the present research, we asked prosecutors whether in their interpretation the text of Article 211 (1a) of the CCP means that "prosecutors are not required to provide the defence evidence or case files that might weaken the prosecutorial motion (which question the existence of a well-founded suspicion or the special grounds for pretrial detention)". It is a positive outcome that six from 10 prosecutors responded unequivocally that in their interpretation the above provision of the CCP does not mean that prosecutors are not obliged to hand over favourable evidence or documents, thus, according to

six interviewees, both evidence supporting and weakening or questioning the existence of the grounds for pre-trial detention shall be submitted to the investigation judge, and the copies of these case files shall be provided to the suspect and the defence counsel. At the same time, one of the prosecutors remarked that Article 211 (1a) "could also mean" that they are not obliged to submit to the defence the case files countering pre-trial detention. As elaborated on by another responding prosecutor:

> *„Even though it would flow from the verbatim interpretation of the legal provision referred to above [Article 211 (1a) of the CCP] that pieces of evidence weakening the general and special grounds for a coercive measure restricting personal liberty do not have to submitted to the defendant and the defence counsel, Article 211 (1a) of the CCP may not be interpreted taken out of the context of the Hungarian legal order, in an isolated manner. The Fundamental Law of Hungary guarantees to everyone that their affairs are handled impartially and fairly and that their rights and obligations are adjudicated in a fair trial by the court. On the basis of Article 16 (1) b) of Act CLXIII of 2011 on the Prosecution, prosecutors shall ensure that nobody is held criminally responsible and deprived of his/her personal liberty in an unlawful manner, and that nobody is subject to the unlawful deprivation or restriction of his/her rights, or to harassment. According to the second sentence of Article 28 (1) of the CCP it is the obligation of the prosecutor to take into account both the incriminating and extenuating circumstances and both the circumstances aggravating and mitigating the defendant's criminal responsibility, in every phase of the procedure. The joint interpretation of the laws above excludes that the prosecutor does not submit the evidence weakening the general and special grounds [for pre-trial detention] to the defendant and the defence counsel.*

A third prosecutor brought up arguments related to the task and function of the investigation judge when responding to the question:

> *"If, based on deliberating all the evidence, data and fact, the prosecutor takes the stance that the general and the special ground(s) of the coercive measure entailing the deprivation of liberty prevail, than he/she puts forth a motion, and shall submit to the investigation judge all case files covered by this deliberating exercise, thus, all case files substantiating the motion aimed at ordering/prolonging the pre-trial detention – both the ones supporting and the ones weakening or questioning the existence of the grounds for the coercive measure –, and shall submit the copies of these case files to the defendant and the defence counsel. The reason for that is that, with a view to the rule of law requirement of a fair trial, the defendant and the defence counsel may not receive less evidence than what is submitted by the prosecutor to the court in order that it decides on the issue of ordering pre-trial detention. This is the only way the investigation judge can be put in a position in which he/she can reach a well-founded decision on the prosecutorial motion aimed at ordering/prolonging pre-trial detention by deliberating all the evidence, data and fact at disposal as a result of all the investigative acts conducted in the course of the investigation so far."*

Besides the six clearly negative answers to the question above, there were two responses which may be categorized as "middle-of-the roader": according to one of the respondents, "if such an evidence is relevant with regard to the coercive measure, it should be submitted to the investigation judge and the defence", while according to another prosecutor, "the investigation judge and the defence receive all case files necessary to and relevant in terms of adjudicating the motion".

Two prosecutors answered the question with a yes, but with the important addendum that if there is evidence which questions either the well-founded suspicion or the existence of the special grounds for the coercive measure, the motion for pre-trial detention is not put forth anyway. (One of the prosecutors, answering with a no, modulated this by saying that pre-trial detention cannot be motioned for if "pieces of evidence weakening the motion are predominant".)

Prosecutors were also asked about the procedure they follow when they should submit a case file to the defence the submission of which would in their view violate the interests of the investigation. Responses show that prosecutors continuously search for a balance between taking into account the interests of the investigation and ensuring that the principle of the equality of arms prevails, and it is an important aspect when providing a case file whether it is absolutely necessary to substantiate the motion or not.

Three prosecutors submitted with regard to the question above that those case files are not submitted either to the defence, nor the investigation judge the provision of which would violate the interests of the investigation. One of the respondents added that in this regard prosecutors rely on the investigation authority's proposal, which includes the reasons as to why submitting a certain piece of evidence would violate the interests of the investigation, while in the cases supervised by another prosecutor they decide after a consultation with the proceeding prosecutor whether providing a given evidence could violate the interests of the investigation or not.

Another group of respondents (four prosecutors) stated that they take into account further evidence at disposal when deciding on submitting a given case file to the defence, and it is an important aspect whether this further evidence duly substantiates the motion or not:

- *"In these cases those case files are handed over which duly substantiate and support the motion, but at the same time endanger the interests of the investigation to the smallest possible extent."*
- *"We withhold case files from the defence (and the court) only in exceptional cases, if the well-founded suspicion can be securely substantiated without the given evidence, and submitting the given case file [to the defence] would significantly endanger the interests of the investigation."*
- *"If the well-founded suspicion is supported by more pieces of evidence, those case files substantiating the motion are submitted [to the defence] which endanger the*

interests of the investigation to the smallest possible extent. If the well-founded suspicion is supported only by evidence which would violate the interests of the investigation, we try to mitigate the harm to these interests (through conducting further witness questionings and confrontation). Case files containing evidence which clearly endanger the interests of the investigation are not submitted [to the defence]. […]"

- *"If the well-founded suspicion is supported by more than one piece of evidence, those case files should be provided to the court and the suspects and their defence counsels (while providing them with the same case files) which duly substantiate the ordering/ prolongation of the pre-trial detention, but at the same time do not endanger the interests of the investigation (or endanger it to a smaller extent). However, if the well-founded suspicion is supported only be evidence providing which to the defendant and the defence counsel would violate the interests of the investigation, there is no place for discretion, since Article 211 (1a) of the CCP prescribes for the prosecutor as an obligation not allowing for discretion that the same case files on which the prosecutorial motion is based are handed over to the investigation judge, the defendant and the defence counsel."*

One of the respondents stressed that prosecutors "shall continuously strive to eliminate those concrete circumstances due to which the defendant's access to a given piece of evidence may endanger the interests of the investigation. There are plenty of possibilities for that: legal instruments aimed at protecting witnesses providing an incriminating testimony (handling personal data in a confidential manner, witness protection), measures serving the protection of persons requiring special treatment, and instructing the investigation authority to carry out the remaining investigative acts without delay".

In relation to that, another respondent also stressed that if providing a case file violating the interests of the investigation is "necessary", the case file is handed over to the defence by making the personal data of the person concerned (the victim or the witness) unreadable.

One prosecutor's answer showed that the obligation to submit case files to the defence may have an effect on the type of coercive measure motioned for the by prosecutor:

"[…] case files violating the interests of the investigation are also handed over, if this does not entail the risk of the investigation being frustrated. If providing the case file may result in the investigation being frustrated, I arrange for ordering another coercive measure."

Thus, the responses of **prosecutors** show that most of them **strive to ensure access to case files to the defence with regard to a wide scope of case files, and the typical approach is that not only the case files favourable for the defence are accessible to the defence**. At the same time, a police officer interviewed in the framework of the BHC research was of the view that customs vary by prosecutor's office: at some prosecutors' offices the full case file is provided, at others case files are sorted, and there are also prosecutors' offices which entrust the police to decide which case files are handed over.

The issue whether the case files handed over are sufficient was examined also from another aspect: from the aspect of the attorneys. They were asked about the proportion in which they receive all the documents necessary in order to argue substantively and effectively against the pre-trial detention. As Table 1 shows, **the majority of attorneys were of the view that in most cases the scope of case files handed over to them was sufficient**.

Table 1

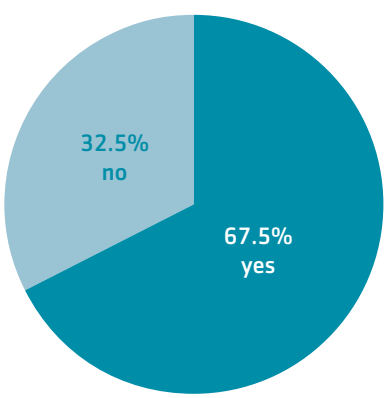
In what proportion does the defence counsel receive all the case files necessary in order to argue substantively and effectively against the ordering or the prolongation of pre-trial detention?

	in all instances	in more than half of the instances	in half of the instances	in less than half of the instances	never
ordering pre-trial detention (N=17)	7	4	1	2	3
prolonging pre-trial detention (N=15)	4	5	3	0	1

With regard to the majority of the cases selected by the attorneys for the research (which, as mentioned when presenting the research methodology, cannot be considered a representative sample) defence counsels were of the view that they had received the copy of those case files which were necessary for them to be able to argue against the pre-trial detention of their client (see Figure 1).

Figure 1

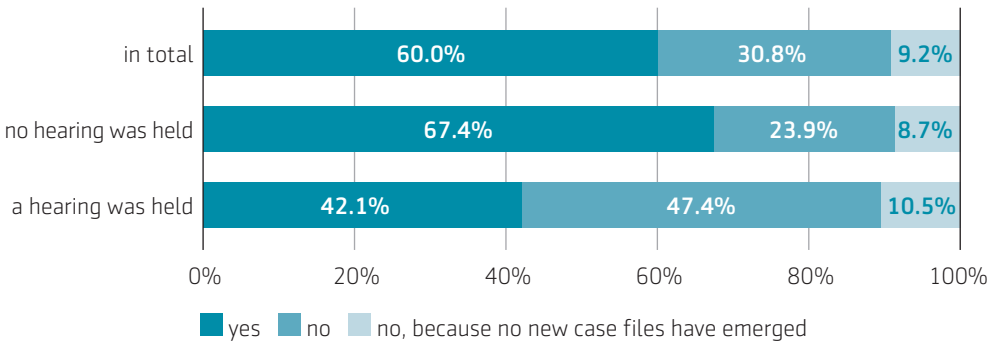
Did the defence receive the copies of all case files necessary in order to argue substantively and effectively against the ordering of pre-trial detention? (%, N=40)



In the cases covered by the research the proportion of decisions on the prolongation of pre-trial detention in which attorneys found that they had not received all the case files necessary to argue substantively and effectively against prolonging pre-trial detention was only slightly lower than the proportion with regard to decisions on ordering pre-trial detention. However, it is remarkable that attorneys were of the view that they receive these case files in a lower proportion if a hearing is held about prolonging pre-trial detention.

Figure 2

Did the defence receive the copies of all case files necessary in order to argue substantively and effectively against the prolongation of pre-trial detention? – Responses divided on the basis of whether a hearing was held (%, N=65)



Besides the prosecutors and the attorneys, judges were also asked about whether in their view the fact that Article 211 (1a) of the CCP prescribes that the "case files substantiating the motion" shall be submitted to the defence results in prosecutors not providing the investigation judge and the defence with the evidence or case files weakening the prosecutorial motion, and if yes, how can that turn out.

All judges interviewed stated that in their view no such problem arises, and they were of the opinion that **the prosecution does not "sort" case files, does not withhold substantive evidence, and seven of them explicitly stated that they think they receive full case files**. (According to certain respondents, the latter means that many times literally all the documents in the case file are copied, because that is easier for the investigation authority, and they – unnecessarily – submit to the defence also documents such as the decision on appointing the ex officio defence counsel. Because of that, it was a possible scenario right after the new text of Article 211 of the CCP came into force that even though a witness requested that his/her personal data are handled in a confidential manner, these personal data were accessible to the defence e.g. through the text of the police report.)

Several judges said that they had not received any complaints or signals yet from the defence about the defence not receiving relevant case files, and one of the judges explicitly stated that it would be essentially the task of the defence to signal this. (With regard to

the latter it is a question though how the defence could be in the position at all to say that it has not received certain case files, since neither the defence counsel, nor the defendant has any official or certain knowledge about the existence of further case files.) It shall be stressed that five judges explicitly mentioned that in fact they do not know for sure either at the time the case files are submitted whether the prosecution or the investigation authority have any further case files at their disposal which would weaken the motion. As one of them put it, the prosecutor may "mislead" the court by not handing over certain case files without any consequence.

One of the Budapest-based judges interviewed (the member of the Investigation Judge Group of the Buda Central District Court, covering the whole capital with regard to coercive measures) shared her strong concerns with regard to the Chief Prosecutor's Memorandum, which aims to ensure the equality of arms between the investigation judge and the defendant, while the prosecution has access to all files of the case. According to her assessment, after the new text of Article 211 of the CCP came into force, prosecutors in Budapest also "tried" to narrow the scope of the case files to be submitted on the basis of the text of the CCP and the Chief Prosecutor's Memorandum, but Budapest-based investigation judges insisted that they have access to all case files, which resulted that both the defence and the judges receive all the case files. (This was also confirmed at the workshop by Tamás Matusik, the head of the Investigation Judge Group at the Buda Central District Court.) According to the interviewee, in the countryside the text of Article 211 results that only the case files substantiating the motion are submitted to the defence and the judge, and cited the following example: if there is a pub fight and there are 30 witness testimonies about what happened, exonerating the suspect, but there is one which incriminates the suspect, then it can be said that the motion is based on the latter, and so only that testimony will be submitted to the defence and the judge. (Attorneys typically have experience with regard to one county, but four of them mentioned that the situation is better in the capital in terms of the submission of case files substantiating the motion aimed at ordering pre-trial detention, and according to three attorneys, this is also the case in terms of prolonging pre-trial detention.)

At the workshop, the head of the Investigation Judge Group at the Buda Central District Court said that in practice, in the majority of the cases the prosecution does not misuse the "possibility" entailed in the text of the CCP, they act in line with the Right to Information Directive, and both the defence and the judge receive the full case file. In his view, in general there are no aspects related to investigative tactics or any other aspects which would justify that the prosecution does not hand over certain case files to the defence and the judge, and it happens only in very exceptional cases that the defence is not provided with certain case files – he could recall only two or three cases where they encountered a graver problem in this regard.

Several judges mentioned in the course of the interviews that it may turn out only later on in the course of the procedure, typically when the investigation judge decides on the

prolongation of pre-trial detention in a case in which he/she was the one ordering the pre-trial detention, that the defence and the investigation judge has not received a full case file, has not received certain case files, or has received certain case files in a "delayed" manner. In these cases the judge may notice while studying the case files attached to the motion aimed at prolonging pre-trial detention that certain case files were at the disposal of the prosecution already before the pre-trial detention was ordered, but the prosecutor did not attach them to the motion aimed at ordering pre-trial detention. (In relation to this, different practices were shared with the HHC at the local courts where judges carrying out the tasks of the investigation judge are at the same time also trial judges, and typically carry out investigation judge tasks in a duty system. At certain courts, prolongations of pre-trial detention up until the indictment is filed are automatically assigned to the judge who ordered the pre-trial detention, one of the reasons for that being to ensure that fewer judges are excluded from the case in the trial phase, since a judge involved in the case as an investigation judge cannot be the trial judge in the case. This system also has the advantage that one judge sees through the whole case in the investigation phase, and other judges do not have to acquaint themselves with the case and study the case file when a prolongation is coming up. In contrast, at another local court the main rule is that it is not the judge ordering the pre-trial detention who decides on the prolongation, but the judge during whose duty time the prolongation decision is due, which then again is good in the view of the concerned interviewee because more judges deal with the issue of coercive measures in the given case, and "two heads are better than one".)

The fully contradicting perception of two interviewed attorneys also show how difficult it is to assess the issue of access before the presentation of the case file happens in the absence of objective standards, and how large regional differences may be in how the text of the CCP is interpreted and applied. While according to one of them in the past half a year the number of those cases in which the defence was provided with the full case file before the pre-trial detention was ordered has increased, the other attorney was of the view that while right after the amended text of Article 211 of the CCP came into force, "everything" was handed over to the defence, the newly emerging practice is that only a narrow selection of case files is provided. In his view, the prosecution started to claim about 9-10 months ago that it does not submit a case file to the defence because the motion is not based on that given case file (e.g. the testimony of a co-defendant quashing the well-founded suspicion, which the defence counsel knows about because he/she knows the co-defendant's defence counsel), and this emerges as a problem mainly with regard to prolongations. By contrast, two judges were of the opinion that only in the period directly following the coming into force of the new text of Article 211 of the CCP did it occur that the prosecutors "sorted" the case files.

Furthermore, it is a question **whether the case files provided to the defence and the investigation judge are identical or not**. Section 402.1.) of the Chief Prosecutor's Memorandum sets out the following in this regard:

> b) Based on the rule of law requirement of a fair trial, the defendant and the defence counsel may not receive less evidence than what is submitted by the prosecutor to the court in order that it decides on the issue of ordering pre-trial detention. [...]

As far as the stakeholders involved in the research are concerned, prosecutors were the ones in the position to provide a response to the question as to whether the above provision is applied in the practice or not, and seven of them replied with a yes. The eighth prosecutor said that the judge and the defence does not always receive identical case files, the reason for that being the rule on handling personal data in a confidential manner, hence these data are accessible to the court, but they may not be accessed by the defendant and the defence.[33] Two further prosecutors submitted the following answers, saying that the scope of case files submitted to the defence and the judge are not identical:

- *"The case file submitted to the judge contains all the case files gathered in the course of the investigation, while the case file submitted to the suspect and the defence counsel includes the documents containing the evidence substantiating the motion concerning the given suspect. The two case files are not always identical, and this issue is influenced by the stage of the investigation, the number of co-defendants, and the interests of the investigation."*
- *"They are not identical (e.g. pieces of evidence pertaining only to the other defendants in the case, and case files which in my view do not qualify as substantive evidence, so notes on ordering the investigation, records of extending deadlines, decisions on appointing an expert, requests sent but not yet complied with [are not handed over to the defence])."*

One of the police officers participating in the BHC research was also of the opinion that it is an almost uniform practice that the defence and the investigation judge receive identical case files, but there are exceptions (it occurs that the judge receives three full folders of case files, while the defence counsel receives only one thin folder).

It flows from the concept of how case files are provided that defence counsels and defendants cannot know for sure how the case files they received relate to the case files received by the investigation judge.[34] Accordingly, nine attorneys submitted that they cannot be sure, cannot ascertain, and they do not get to know whether they receive a set of case files identical to the one received by the judge or not, even though in theory they should receive an identical set of case files. Six attorneys explicitly stated that the case files received by the judge and the defence are not always entirely identical. According to their responses, it may unravel from the reasoning of the judicial decision or if the investigation judge refers at the hearing to an evidence unknown to them that they have not received the same case

files as the judge, or they can also simply see this from the size of the folder containing the case files – one of them added though that even though it occurs that the judge receives more case files, but as defence counsel, he always receives the files relevant for the pre-trial detention. Another defence counsel submitted that he does not exclude the possibility that there is a difference between the case files pertaining to a given defendant as submitted to the defence and the judge, while one single attorney replied that in his view the case files received by the defence and the judge are identical.

What is more problematic that the judge does not necessarily know either if the case files submitted to him/her and the defence are identical or not and what case files the defence received. (In more detail, see Chapter 4.5. on documenting the provision of case files, and Chapter 4.6. on the role of the investigation judge.) Seven judges stated that they cannot ascertain whether they and the defence receive identical case files, and that neither the judge nor someone else checks whether the case files received by the defence and the investigation judge are identical or not. (It shall be noted that e.g. in the absence of an itemized list of the case files – which, as it will be discussed later on, is often missing – checking this would mean a significant workload for the investigation judge.) Several judges mentioned that they can lean on the remarks of the defence counsels in this regard, and one of them also said that he checks the scope of case files received by the defence if he notices something "suspicious" in the course of the hearing. Thus, enforcing the above provision in a given case mainly relies upon the intuition of the defence counsel and the judge. The head of the Investigation Judge Group at the Buda Central District Court submitted in relation to this at the workshop that in the capital, the investigation judge is provided with an itemized list of the case files and knows on the basis of that what case files were received by the defence counsel and the investigation judge, which are identical in a very high proportion of the cases, equalling to a full case file. Three interviewed judges also submitted that the defence and the judge always or in 90% of the cases receive identical sets of case files.

Two judges mentioned that it occurred in their practice that the investigation judge indeed received more case files than the defence, but this only meant a "physical" difference: the prosecutor did not sort the case files unilaterally in these instances either, and only "non-relevant" documents were missing from the case file of the defence, having no importance in terms of deciding on the motion. According to their responses, the defence does not receive for example the police reports, the requests, or the notes about how the authorities could not reach a witness, but these do not constitute relevant information for the judge deciding on the motion, so the defence will be in the same position in terms of assessing the motion as the court.

Three prosecutors mentioned that while in cases involving more suspects the judge receives the case files substantiating the pre-trial detention of all the suspects, individual suspects do not receive the case files substantiating the co-defendants' pre-trial detention – unless if for example their co-defendant testified against them. This practice is in line with the CCP.

From the 11 judges interviewed, six stated that it has not occurred yet in their practice that **the defendant or the defence counsel had not received the case files at all**, and that they have not received any such information or complaint from the defence yet. (One of them said that such things happened only in the period directly after the coming into force of the new text of Article 211 of the CCP.) Four further judges could recall only one such case, and with regard to one of them the concerned judge was of the opinion that the authorities had done everything in their power to pass the case files over to the defence counsel (they visited his office for example), but to no avail. One judge said that in 2016 only a few such cases happened.

The majority of the attorneys, 11 of them, submitted that it had never occurred that they or their clients had not received case files at all before the pre-trial detention was ordered, but one of them stated that it occurred in turn that he did not receive the prosecutorial motion in advance. (As it will be explained later on, prosecutorial motions and case files may be handed over separately.) Two additional attorneys responded that they had only one such case (in one of them the attorney received the copy of the case files at the hearing, while the other case was an older one, from 2014). From among the 17 attorneys interviewed, four stated that it happened that they had not received any case files at all before the hearing on ordering pre-trial detention, which is clearly in contradiction with the text of the CCP.

As far as the prolongation of the pre-trial detention is concerned, stakeholders interviewed in the JUSTICIA research at the end of 2015 told the HHC that in spite of the amendment of the CCP in force as of 1 July 2015, certain prosecutors' offices still did not attach to the motions aimed at the prolongation of pre-trial detention the case files which emerged since the latest respective decision, being clearly in violation of Article 211 of the CCP. This was raised by an attorney working in the capital and one working in the countryside. A third attorney informed the HHC that one of the local prosecutors' offices refused to attach to the motion aimed at prolonging pre-trial detention the case files which emerged since the previous decision while claiming that in their interpretation case files shall be attached to such motions only if the motion asks for pre-trial detention on different grounds than the earlier motions. (This case was also investigated by the Chief Prosecutor's Office, which investigation supported the complaint of the attorney, and it was established that this practice is not in compliance with the CCP.)[35] It is a positive development that in the present research no similar complaints were made by the attorneys.

However, the responses showed also in the present research that **attorneys hold the practice of providing case files worse with regard to the prolongation of pre-trial detention**: from the 17 attorneys, nine replied that it occurs that they do not receive the copy of the case files before the pre-trial detention is prolonged, and only seven attorneys stated that it had never happened to them that they had not received case files before the prolongation of pre-trial detention. One attorney submitted that he does not receive case files only if there is nothing to hand over, because no investigative acts have been carried out in the case since the last decision on pre-trial detention.

It is a question though – especially if the investigation judge does not hold a hearing when prolonging the pre-trial detention – **whether the attorney will know at all that he/she has not received any case files because no investigative acts had been carried out in the case since the last decision on pre-trial detention**. (It is not the subject of the present study, but it shall be added here that it may give rise to serious concerns if the defendant is held in pre-trial detention but the investigation is not progressing meanwhile – this is in contradiction with the principle of conducting procedures involving a pre-trial detainee in a timely manner, thus with the requirement that these procedures must be conducted with special diligence and speed.[36]) It is a positive development that the amended version of the Chief Prosecutor's Memorandum currently in force already includes instructions to that end:

> i) […] If the case files are sent by the prosecutor to the concerned persons, the prosecutor shall give a concrete instruction in the internal documentation to issue these, listing the case files to be delivered. Otherwise the prosecutorial motion shall include the statement that no new case file substantiating the motion has emerged during the investigation. […]

In the course of the case file research we encountered many prosecutorial motions which explicitly stated that the defence will not receive case files because no new case files have emerged:

- *"Since the latest decision [prolonging pre-trial detention] no new, substantive evidence has emerged beyond the already existing ones, therefore, no case files have been sent to the suspects and their defence counsel."*
- *"I have delivered my motion to suspect […] and his retained defence counsel, […]. Since the last decision reached on pre-trial detention, a confrontation is being organised on the basis of the defence's motion, but no new case file has emerged."*

There was a prosecutorial motion which – making use of the possibilities flowing from the text of the CCP – contained only the information that no case files which could serve as a basis for prolonging pre-trial detention have emerged, which does not mean that no case files have emerged at all:

> *"After the suspects were taken into pre-trial detention, no investigative acts have been carried out which would serve as a basis for prolonging pre-trial detention and which the defendants have no knowledge of, therefore, I have not sent the defendants and the defence counsels any further documents beyond the motion."*

Other prosecutorial motions showed examples of how prosecutors document if they do not hand over case files to the defence for the reason that the defence received those case files

parallel with the investigation progressing, supposedly by resorting to the general rules on access to case files:

- *"Since […] the defence had access to the case files and the copy of the case files emerged has been already handed over, I have not arranged for sending further copies of substantive case files to the defendants and the defence counsels."*
- *"Minutes of suspect interrogations, minutes of confrontations and expert opinions were handed over to the defendants and their defence counsels parallel with the investigation progressing, and so no further evidence has been sent to them when motioning the prolongation of pre-trial detention this time."*

In relation to the prolongation of pre-trial detention, two judges raised the attention to the problem that in the case of motions aimed at prolonging pre-trial detention it occurs that **between the time the police proposal is submitted and the time when the judicial decision is made** (the two may be two weeks apart) **further investigative acts are carried out**, about which the police does not inform the prosecutor, and so the defence and the judge will not receive the case files related to these investigative acts. According to the head of the Investigation Judge Group at the Buda Central District Court, it is true that this occurs, but only very rarely, and so in his view this is not a systemic problem. One of the investigation judges interviewed stated that if there is data suggesting that further investigative acts have been carried out after the submission of the proposal (e.g. because the suspicion changed, giving rise to the need to request an expert opinion, or the defendant confessed to committing a further offence), than he asks the prosecutor (or, if it is urgent, directly the police) whether there are any new case files, and if yes, requests a copy of these – in his view, this is a relatively common situation.

Attorneys were also asked whether in their experience the scope of case files to which access is "granted" by the prosecution is **influenced by the type of criminal offence underlying the criminal procedure, the number of defendants involved in the case, or other factors related to the criminal proceedings**. One of our reasons for posing this question was that for example in the JUSTICIA research one of the police officers raised that in his view it is not characteristic for the cases before the local police headquarters that only selected case files are submitted to the defence, but for example at the (higher level) county police headquarters "one must pay more attention to this", since the cases there are "graver".

The responses of the attorneys also supported this suggestion: eight attorneys responded that in their view the type, gravity and complexity of the case influences the scope of case files accessible for the defence, but not only because for example in a larger economic criminal offence the audio recordings or the results of covert data gathering are not made accessible with a view to the interests of the investigation, or because if the criminal offence was committed by a criminal organization the authorities try to "shield" the information on co-defendants from the suspect. Three attorneys mentioned that in a more complex case,

the amount of the case files in itself may result that the defence receives less case files proportionally, because the authorities try to decrease the administrative tasks flowing from the case. The larger the size of the case file, the more "onerously" the prosecutor and the investigation authority proceed. One of the attorneys was of the view that the graver a criminal offence is, the more attention authorities pay to respect the right to information, and this also goes for cases receiving large publicity. One of the attorneys participating in the JUSTICIA research reported a case in which the necessity of pre-trial detention was substantiated only with regard to one out of the five criminal offences included in the suspicion, and this turned out to be enough for the judge, while the defence did not know what evidence the prosecution had with regard to the remaining criminal offences.

One of the judges submitted that typically, it may occur for example if a criminal offence is committed in an organized manner or in cases of distributing or trafficking in drugs that certain case files are not submitted to the defence. At the workshop, Tamás Matusik, head of the Investigation Judge Group at the Buda Central District Court said that in the majority of the "simple" cases, there is no problem with granting the defence access to the case files.

Attorneys also mentioned considerations related to investigative tactics as influencing factors: one of them stated that the scope of accessible case files is influenced by how "strong" the prosecution's case is – if the defence has a chance, than it is more likely that authorities will withhold case files. Further influencing factors mentioned included the approach of the given prosecutor, the defendant's characteristics (e.g. that the defendant has a "bad reputation", that he/she is "connected to criminal gangs", and according to one attorney the right to information tends to be violated more seriously in the case of Roma defendants), and how good the relationship between the defence counsel and the investigation authority and the prosecution is, i.e. can the defence counsel make use of its personal acquaintanceships or not.

The list of case files mentioned by attorneys in the interviews as **case files "typically" withheld from the defence** and of case files which were not handed over to the attorneys in the cases covered by the case file research despite the fact that in the opinion of the attorneys (based on the presentation of the case file before the indictment or further developments in the procedure) these case files would have been relevant, thus, they would have been necessary for them to be able to argue substantively and efficiently against ordering or prolonging pre-trial detention, is extremely diverse. Attorneys submitted in many interviews and with regard to many cases that they did not receive the testimonies of the co-defendant(s), even though these were relevant and concerned the merits of the case. In one of these cases the testimony of a co-defendant (not subject to any coercive measure) would have "rocked" the well-founded suspicion against the defendant in the opinion of the interviewed attorney, but he could not rely on this testimony before the authorities since he had no "official" knowledge about its content and received the testimony from another defence counsel in the case instead. (In relation to that, János Bánáti, the president of the Hungarian Bar Association added at the workshop that defence counsels may communicate freely

with each other, and in a situation like that the attorney is obliged to reveal the information at the hearing on pre-trial detention and motion for submitting the testimony in question without delay.) As far as withholding the testimonies of co-defendants is concerned, it was also raised that this may affect the situation of the defence also because in the absence of these testimonies the correlations (or the lack of them) cannot be revealed, even if that would concern the merits of the case. The responses of the attorneys involved in the JUSTICIA research also showed that authorities filter, among others, testimonies, and e.g. submit only certain testimonies of the same co-defendant to the defence. Several judges mentioned that if there are more defendants involved in the case, co-defendants do not necessarily receive an identical set of case files, since the CCP only prescribes the provision of the case files substantiating the given defendant's pre-trial detention and the motion pertaining to that. There also structural reasons for these issues: as János Bánáti submitted at the workshop, the CCP is essentially based on the "one accused, one criminal offence" model, and so handles cases with more co-defendants onerously.

Further case files mentioned as withheld from the defence included witness testimonies, the results of covert data or information gathering, expert opinions, call list and its analysis, police reports and police inquiries, photos (e.g. those taken at the inspection of the scene), video recordings (e.g. about capturing the defendant, the circumstances of which might be relevant), minutes of inspections, searches and seizures, and documents on bank transactions.

Police officers stated in the JUSTICIA research that it may arise when covert investigative techniques are used that related documents are not handed over to the defence. In the present research, three judges were of the opinion that it may arise with regard to the materials of the covert data or information gathering ("wire-tapping materials") that they are not handed over to the defence and the investigation judge.

In our view, the following may be deducted from the rather colourful list above: **testimonies of co-defendants and the results of covert data and information gathering** are more likely to be withheld from the defence – the research showed no further tendencies in this regard. It shall be added that the defence will not have access to the personal data of witnesses handled in a confidential manner even if witness testimonies are handed over to the defence, and according to the police officers interviewed in the framework of the JUSTICIA research, if the witness requests that his/her name and personal data are handled confidentially, but he/she could be clearly identified on the basis of the circumstances and the statements made, than the respective case file is not handed over to the defence.

At this point, the question arises as **to what kind of possibilities defence counsels have if they think that there might be further pieces of evidence or documents in the case file which may be relevant with regard to ordering or prolonging pre-trial detention** but are withheld from the defence. (It shall be kept in mind that the possibilities of the defence are already rather limited, since defence counsels and defendants cannot be sure and cannot have official information on whether authorities have further case files at their disposal at

all.) Interviews with attorneys and the case file research showed that defence counsels try to gain access to further case files in basically four ways:

- One, rather obvious solution is to raise their concerns and objections with regard to the scope of case files received or the failure to provide the case files at the hearing on pre-trial detention, if such a hearing is held by the investigation judge. The attorneys reported various judicial reactions to that: in one of the instances, the judge ordered a break and the prosecutor had to provide the missing defendant testimony during the break, while in another case the investigation judge refused to prolong the pre-trial detention in light of the defence counsel's respective complaints. Other attorneys submitted that even though they had asked at the hearing that their related complaints are included in the minutes of the hearing, these objections had no effect on the judge's decision. (It is a different situation if the case files are not handed over to the defence at all before the hearing on pre-trial detention, even though there are case files at the authorities' disposal – this will be discussed in more detail in Chapter 4.6. on the role of the investigation judge.) However, this approach cannot be followed if the investigation judge does not hold a hearing on prolonging pre-trial detention, since by the time the defence counsel could complain about the lack of case files, the judicial decision on pre-trial detention is already issued.
- Several attorneys stated that they submit a complaint in these instances. However, these complaints are typically not successful, and they are usually rejected, so the attorneys do not consider complaints as an effective way of remedy.
- Two attorneys submitted that they complained about the problems related to the provision of case files (also) in the appeal against the decision on pre-trial detention. One of them complained in the appeal against the decision ordering pre-trial detention that the defendant had not received the case files, and while the second instance court terminated the defendant's pre-trial detention, it did not address that particular complaint. The other attorney also reported that the second instance court had not dealt with the complaint.
- The fourth way is to submit a request to access the case files to the prosecution or the investigation authority. Two attorneys reported that if they do not receive some case files on the basis of Article 211, then they "switch" to accessing the case files on the basis of the general rules on accessing the case files, thus, request a copy of the case files on the basis of Article 70/B of the CCP – however, this request may be denied, citing the interests of the investigation. (See Chapter 5. on the details.)

Based on the above, it may be concluded that **no truly effective remedy is available for defence counsels for instances when they do not receive the copy of the case files** – as one attorneys put it: they do not have any real weapon in their hand –, and it largely depends on the attitude of investigation judges and how they perceive their role what the consequences are if the defence counsel complains to them. (The role of the investigation judge with regard to the provision of the case files is covered by Chapter 4.6.)

To sum it up, we are of the view that the above results show the following: the scope of case files provided to the defence is wider and the practice in that regard is more favourable than what has been foreshadowed by the text of Article 211 (1a) of the CCP. However, irrespective of that, the text of the law still carries the strong risk that the defence is not provided with all the case materials essential to challenging effectively the lawfulness of the detention. It gives rise to strong concerns that only the side of the "prosecution" has unlimited knowledge as to the scope of the available case files and access to those, while the judge deciding on pre-trial detention does not.

RECOMMENDATIONS

- In order to comply with Article 7 of the Right to Information Directive, Article 211 of the CCP should be amended in a way that that authorities are not only obliged to provide the defence with the case files substantiating the motion for pre-trial detention, but all the documents related to the specific case which are essential to challenging effectively the lawfulness of the detention, and are relevant in terms of the pre-trial detention.
- Irrespective of amending the law, the prosecution should ensure that proceeding prosecutors uniformly interpret Article 211 of the CCP in a way that they shall provide the defence, attached to their motion aimed at pre-trial detention, all case files essential to challenging effectively the lawfulness of the detention, including those which counter the necessity of pre-trial detention.
- The provisions of the CCP should be amended in a way that the investigation judge, deciding on pre-trial detention, shall have access to all the case files at the disposal of the investigation authority and the prosecutor. In addition to that, when handing over the case files to the investigation judge, the prosecutor should inform the investigation judge about the case files withheld from the defence.
- The problem that further investigative acts may be carried out between submitting the police proposal aimed at pre-trial detention and issuing the decision on pre-trial detention, about which the defence and the judge are not informed, should be handled (e.g. by setting out that in such circumstances the defence and the judge shall be provided with the copies of the case files emerging in relation to these investigative acts out of turn).

4.2. The meaning of the term "case files" and the manner of providing the case files

Based on Paragraph (30) of the Right to Information Directive's preamble, "case materials" and "documents […] in the possession of the competent authorities" as included in Article 7 (1) shall cover not only written documents (files), but also, where appropriate, photographs, audio recordings, and video recordings. However, the CCP prescribes only the provision of "case files" (which term indicates "documents" in Hungarian). In relation to that, police officers involved in the JUSTICIA research raised that **Article 211 of the CCP** "prescribes to hand over the copies of the case files, and not to provide access to documents/data", thus, "it focuses on the case files, but at the same time **in certain instances it does not provide for the possibility to access the means of evidence not treated as part of the files [documents] of the case**" – this is a problem which was also raised in one of the preparatory working documents for the new Code of Criminal Procedure.[37]

Furthermore, it is a problem that – as also pointed out by the working document referred to above – **the current system of the CCP excludes the possibility that the proceeding authority, upon the request of the concerned persons and in cooperation with them, provides in merit access to data/documents in another way than issuing a copy**. (Ensuring this possibility would be justified also because when case files are provided under the general rules and not under Article 211 of the CCP, than the law in force allows for providing the copies in an electronic format or on an electronic data storage device.[38])

Because of the discrepancies above, attorneys participating in the research were asked about the format in which case files substantiating the motion aimed at pre-trial detention are handed over to them.

- 15 attorneys stated that when the prosecution motions the ordering of pre-trial detention, they receive the copy of case files on paper (one of them receives the case files sometimes also in email), while two attorneys submitted that this depends on the size of the case file: if the case is difficult and large, they receive the case files on a CD.
- 13 attorneys stated that when the prolongation of pre-trial detention is motioned for, they always or mostly receive the copy of the case files on paper. Several attorneys mentioned though that at this point in the procedure case files may be provided in email or on a CD/DVD. Some thought that the format of providing the case files depends on the amount of the documents in the case file, whether there are many pictures among the materials, and whether there is a video recording. An attorney even said that he can choose between receiving the case files electronically or on paper.

In most procedures covered by the case file research, case files were handed over in the form of a paper copy before the decision on ordering or prolonging pre-trial detention.

Table 2

In what form did the defence counsel and the defendant receive the copies of the case files before the decision on ordering pre-trial detention?

Defence counsel	N	%	Defendant	N	%
on paper	31	83.8	on paper	33	100.0
on CD/DVD	2	5.4			
other	4	10.8			
total	37	100.0	total	33	100.0

Table 3

In what form did the defence counsel receive the copies of the case files before the decision on prolonging pre-trial detention?

Defence counsel	N	%
on paper	38	74.5
other	13	25.5
total	51	100.0

The above data shows that the restrictive rule of the CCP has been partly overridden in practice, but **case files are** still **provided mostly in the form of paper copies**, which also results that in many instances photos, videos and audio recordings are not submitted to the defence counsels electronically, in their original format.

- According to 10 attorneys, photos are provided to them always on paper (printed in black and white or in colour), which evidently decreases the usefulness and the usability of the photos. (Two attorneys responded that they always receive the photos on a CD/DVD, another attorney receives the photos in a digital format if he asks, while according to two further attorneys, the practice varies.)
- A lower number of attorneys had experience with video recordings. Four respondents said that they do not receive the video recordings themselves, only the frames in a printed format, while five respondents submitted that they are provided access to video recordings in a digital format.
- Similarly, only a few attorneys had experience with audio recordings. Six of them stated that they only receive the transcripts of audio recordings, while three attorneys submitted that they have access to the audio files.

It shall be added that it may also cause problems for the defence counsel if case files are handed over in an electronic format: for example, in one of the cases covered by the case file research the defence counsel received the photos and audio recordings supporting the well-

founded suspicion right before the hearing on a DVD, so of course he had no chance to view and listen to the recordings before the hearing. At the workshop, the head of the Investigation Judge Group at the Buda Central District Court added in this regard that the failure to provide the video recording may be remedied by showing the recording at the hearing.

The format in which case files are provided may cause difficulties also for defendants, but in another way: in their case, accessing documents provided to them in an electronic format may pose a problem. Ten attorneys submitted in this regard that in their experience, defendants do not have access to a computer in the penitentiary institutions.

However, according to the information provided by the National Penitentiary Headquarters in May 2017,[39] computers designated to ensure access to detainees to case files provided to them electronically, including photos, videos and audio recordings, are available in all penitentiary institutions. According to the information provided by the National Penitentiary Headquarters, in the case of special electronic data formats (e.g. scarce video formats, databases, special software) "the penitentiary arranges for ensuring access to case files in cooperation with the proceeding authority".

At the beginning of May 2017, there were altogether 56 computers available in penitentiaries for case file inspection, as shown by Table 4. Compared to the number of pre-trial detainees on 31 December 2016, amounting to 3,622 persons, the number of computers may seem rather low. However, the penitentiary system's budgetary limitations have to be taken into account in this regard, along with the fact that according to the information provided by the individual penitentiaries (shown in the third column of Table 4), in most penitentiaries detainees use the computers only scarcely, so the degree of their utilization is low.

Table 4.

Computers available to defendants in the Hungarian penitentiary institutions

Name of the penitentiary institution	Number of computers designated to accessing case files	Frequency of usage
Állampuszta National Penitentiary Institution	1	scarce, ad hoc
Bács-Kiskun County Penitentiary Institution	1	scarce, ad hoc
Balassagyarmat High and Medium Security Prison	1	scarce, ad hoc
Baranya County Penitentiary Institution	1	scarce, ad hoc
Békés County Penitentiary Institution	1	on a monthly basis
Borsod-Abaúj-Zemplén County Penitentiary Institution	1	scarce, ad hoc
Budapest High and Medium Security Prison	7	on a daily basis
Metropolitan Penitentiary Institution	8	on a daily basis
Győr-Moson-Sopron County Penitentiary Institution	1	scarce, ad hoc

Name of the penitentiary institution	Number of computers designated to accessing case files	Frequency of usage
Hajdú-Bihar County Penitentiary Institution	1	once in every 2 months
Heves County Penitentiary Institution	1	scarce, ad hoc
Jász-Nagykun-Szolnok County Penitentiary Institution	1	scarce, ad hoc
Kalocsa High and Medium Security Prison	1	scarce, ad hoc
Central-Transdanubian National Penitentiary Institution	2	scarce, ad hoc
Márianosztra High and Medium Security Prison	1	scarce, ad hoc
Pálhalma National Penitentiary Institution	3	scarce, ad hoc
Sátoraljaújhely High and Medium Security Prison	1	scarce, ad hoc
Somogy County Penitentiary Institution	1	not used
Sopronkőhida High and Medium Security Prison	5	3 persons per week
Szabolcs-Szatmár-Bereg County Penitentiary Institution	1	scarce, ad hoc
Szeged High and Medium Security Prison	3	scarce, ad hoc
Szombathely National Penitentiary Institution	4	on a weekly basis
Tiszalök National Penitentiary Institution	1	not used
Tolna County Penitentiary Institution	1	scarce, ad hoc
Tököl Penitentiary Institution + Penitentiary Institution for Juveniles	1	scarce, ad hoc
Vác High and Medium Security Prison	1	2–3 times per month
Veszprém County Penitentiary Institution	1	once in every 2 months
Zala County Penitentiary Institution	1	scarce, ad hoc
Central Hospital of the Penitentiary System	1	not used
Judicial and Observational Psychiatric Institution	1	scarce, ad hoc
Total	**56**	

In relation to this issue, the National Police Headquarters provided the following information at the beginning of May 2017: "in the past years, the average length of detentions executed in police cells has not exceeded 40 hours, and, accordingly, typically there was no demand [from the detainees] to access case files or copies provided on an electronic device by the court, the prosecutor or the investigation authority. With a view to that, there was no need for any IT developments. Should an exceptional, individual need arise, the police cell staff ensures the preconditions of accessing the case files for the defendant while upholding the security of custody."[40]

According to Section 402.1.) of the Chief Prosecutor's Memorandum, the task of photocopying the case files falls mostly on the police:

> e) Even though it is decided by the prosecutor to motion a coercive measure, the *heads of the investigation authorities shall be called upon* to submit to the prosecutor, along with the police proposal aimed at the pre-trial detention and the case file, the copy of those case files which should be submitted in their view to the suspect and the defence counsel under Article 211 (1) of the CCP. (Investigation authorities may be encouraged also this way to put forth a well-founded proposal, in order to avoid that copies are made unnecessarily because the prosecutor does not motion the pre-trial detention.) [...]
>
> h) The provisions included in the first paragraph of Section 402.1.e) shall be applied also when pre-trial detention is being prolonged, thus, it is justified to resort to the investigation authority in terms of copying the case file. [...]
>
> i) If the investigation authority fails to attach the copy of those case files which should be submitted in their view to the suspect, the defence counsel and the statutory representative under Article 211 (1a) of the CCP when submitting its proposal aimed at ordering or prolonging pre-trial detention, the copies shall be arranged for by the prosecutor. [...]

In the BHC research, several police officers raised objections against this system:

> *"Imagine the amount of work [entailed by photocopying] in cases involving co-defendants, let's say four or five co-defendants, and an equal number of defence counsels, meaning four or five defence counsels, scattered across the country. It can easily happen that the case files fill let's say four or five folders. Not to speak about scanning [...], redacting the data of victims, and to ensure that nothing remains in the case file which may give rise to problems later on. Thus, this means a huge burden for us."*

Both a police officer participating in the BHC research and an attorney involved in the present research mentioned that in addition to the problems above, detainees are reluctant to keep the files of their ongoing cases in their cells (where they often cannot even lock away the files), so the case files photocopied with a lot of effort are sent out by the detainees from the penitentiary via their attorneys or to their relatives:

- *"I have a case now in which the suspect is past his second decision on pre-trial detention, and he said that I should not even try to hand him over the case files before the third decision, because he will refuse to take them over. He said that he would not like others in the penitentiary to know why he is detained, because he is detained for committing fraud, and if others would know that then they would rip him off, which he*

does not want. I told him that we have a legal obligation [to hand over the case files], and I have to have a paper saying that I tried to do this, so I will bring the case files there. And it is very likely, that I will photocopy 8-10 folders in vain, because he will not take them."

- *"Those who are subject to a procedure due to rape already know that their case files should not be stored in the penitentiary institution, because they will come off badly if it turns out why they are [detained]. They hand over their set of copies to the attorney, and I [...] am making copies for half an hour in vain, since in general suspects do not even open the case files."*

The above problems present themselves in an elevated manner when the case file is of great volume. At the workshop, János Bánáti, the president of the Hungarian Bar Association, submitted in this regard that it is a question for example in the economic cases involving thousands of pages of case files how the defendant in pre-trial detention is able to prepare for the trial. Handing over the case files on paper is not an option, since penitentiary institutions are not able to store case files amounting to 8-10 folders, while if case files are provided electronically, it is a problem that defendants have access to a computer only for an hour daily or in every two days, and so they have no realistic chance to review large amount of case files in due time.

Several stakeholders suggested that in the case of certain defendants the question is rather whether they read the case files provided to them at all, and that this depends also on the defendants' level of education and whether they have "experience" in terms of criminal procedures.

Another blowback of handing over copies of case files on paper is that while the investigation progresses, the defence receives unnumbered pages from the case file – which is mostly unavoidable –, which makes it hard both for the defence and the police to follow which case files have been submitted already and which ones not. As one of the attorneys put it, this is unjust and a waste – police officers are not for making photocopies.

RECOMMENDATIONS

- The CCP should be amended in order to make it possible for the defence to access also the means of evidence not treated as part of the files of the case when accessing case files on the basis of Article 211 (1a) of the CCP.
- The CCP should allow for the possibility that, upon the request or with the consent of the concerned persons, access to data/documents under Article 211 (1a) of the CCP is ensured also in another way than issuing a copy, such as providing case files on a data storage device or in an electronic format, via email.

- It should be made mandatory to provide photographs, videos and audio recordings in an electronic format.
- In the long run, penitentiary institutions should strive to ensure that pre-trial detainees have the possibility to lock away their case files, possibly outside their cells.

4.3. The timing of providing the case files

According to Paragraph (30) of the preamble of the Right to Information Directive, the materials of the case should be made available to defendants or to their lawyers "in due time" to allow the effective exercise of the right to challenge the lawfulness of the detention. However, **the current text of the CCP does not set out any deadline as to how long before the hearing on ordering pre-trial detention the prosecutorial motion and the attached case files shall be submitted to the defendant and the defence counsel**. In addition, Section 402.1.) b) of the Chief Prosecutor's Memorandum sets it out also without foreseeing a deadline that "the prosecutorial motion and the copies of the case files substantiating the motion shall be submitted to the suspect and the defence counsel before the hearing under Article 210 (1) of the CCP".

Research results show that **this legislative shortcoming may result in that the defence does not receive the case files in due time and does not have the possibility to examine the case files, which spoils the positive effect of amending the CCP, and is clearly in contradiction with the aim of the Right to Information Directive**.

In the present research, five attorneys submitted that they receive the copy of the case files only a very short time before the hearing on ordering pre-trial detention (thus, 15 or 30 minutes before the hearing, "in the last minute"), with some saying that this is a uniform practice and with some saying that this happens only occasionally. A further interviewee stated that there are extreme instances when he receives both the prosecutorial motion and the copy of the case files from the investigation judge. Two attorneys submitted that they receive the case files a few hours before the hearing, while other respondents said that they receive the case files the day before the hearing, in the afternoon or in the evening the day before the hearing, within 24 hours, or 24 hours before the hearing. Seven attorneys were of the view that defendants also receive the copy of the case files only a short time before the hearing (thus, directly before the hearing, 15 minutes, half an hour, or an hour before the hearing).

The responses of attorneys varied greatly also with regard to the prolongation of pre-trial detention. Five respondents stated that they receive the copy of the case files on the day

of the decision or hearing on the prolongation of pre-trial detention or on the day preceding that, which is clearly too late, especially because in the case of prolongations, authorities are not bound by the length of the so-called 72-hour detention preceding the ordering of the pre-trial detention,[41] thus, there would be a possibility to hand over the case files earlier. One of the respondents submitted that he often receives the case files together with the judicial decision. Six respondents receive the copy of the case files days before the decision or hearing on prolongation (2–3 or 3–5 days earlier, or even a week before).

One of the attorneys submitted that if no hearing is held on the prolongation of pre-trial detention, then it is completely unforeseeable when he will receive the case files, and if they are submitted by post, then he does not receive the case files in time. Two attorneys mentioned that since they have access to the case files parallel with the investigation progressing, providing them with the copy of the case files before the pre-trial detention is prolonged does not have any particular significance. As far as defendants are concerned, six attorneys were of the opinion that defendants also receive the copy of the case files days before the decision or hearing, while five attorneys submitted that they have no information on when defendants receive the case files in these instances.

When attorneys were asked whether they have **enough time to study the case files** in order to be adequately prepared, their responses were a bit more positive when it came to the prolongation of pre-trial detention. At the same time, it was also submitted that the time provided is not enough before the prolongations either to acquire further documents (e.g. proof of employment), etc., while one respondent stated that the time ensured for preparation is enough only if a hearing is held on prolonging pre-trial detention. If there is no hearing, than by the time he receives the case files, he should have already submitted his counter-motion on pre-trial detention, so the time is never enough to prepare in these instances. In relation to the latter, a judge submitted that in many cases by the time the motion of the defence counsel arrives to the court, the decision on prolonging pre-trial detention has already been issued.

Table 5

Does the defence counsel have enough time to study the case files in order to be adequately prepared?

	in all instances	in more than half of the instances	in half of the instances	in less than half of the instances	never
ordering pre-trial detention (N=17)	2	5	3	4	3
prolonging pre-trial detention (N=16)	7	2	0	1	5

Results of the case file research also showed that in the opinion of the attorneys they are in a somewhat better position in terms of the time available to prepare when case files are provided with a view to the envisaged prolongation of pre-trial detention.

Figure 3

Did the defence counsel have enough time to study the case files in order to be adequately prepared before the ordering of pre-trial detention? (%, N=37)

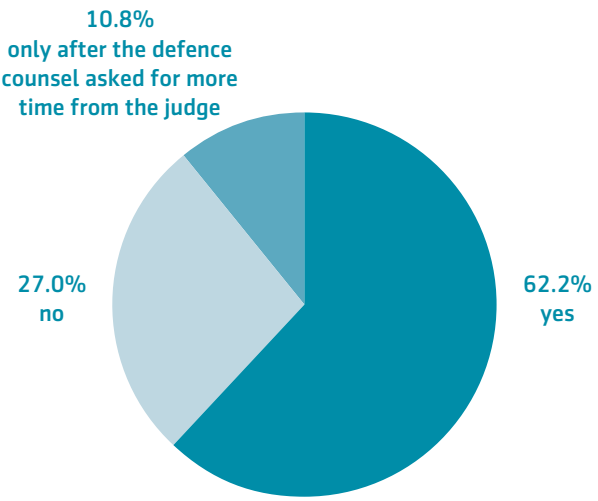
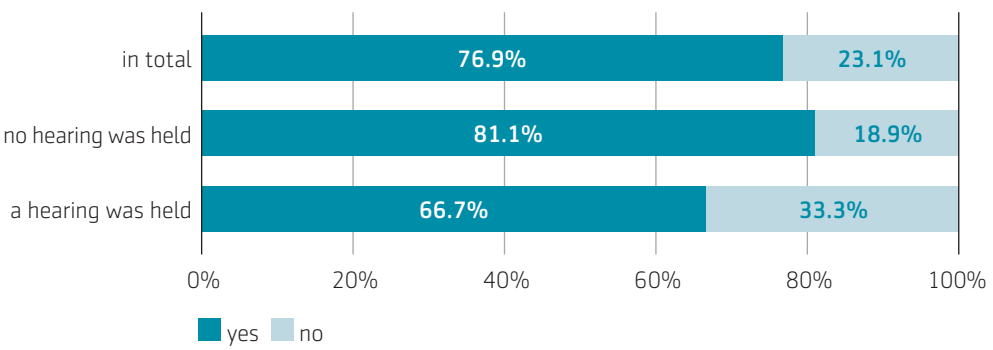


Figure 4

Did the defence counsel have enough time to study the case files in order to be adequately prepared before the prolongation of pre-trial detention? – Responses divided on the basis of whether a hearing was held (%, N=52)



It is an important addendum also with a view to the research methodology that based on the case files at the disposal of the attorneys it could be traced in only a handful of cases when the defence counsel or the defendant had received the copy of the case files (in three cases in relation to the ordering of pre-trial detention and in six instances in relation to the prolongation of pre-trial detention), thus, researchers had to rely on the memories of the attorneys interviewed in this regard. The tables below show the time when, according to the case files and the oral information provided by the attorneys, copies of the case files were submitted to the defence counsel and the defendant.

Table 6

When did the defence counsel receive the copies of the case files before the ordering of pre-trial detention?

	N	%
1–2 days before the hearing	10	38.5
1–24 hours before the hearing	3	11.5
less than 1 hour before the hearing	13	50.0
total	26	100.0

Table 7

When did the defendant receive the copies of the case files before the ordering of pre-trial detention?

	N	%
1–2 days before the hearing	7	30.4
1–24 hours before the hearing	3	13.0
less than 1 hour before the hearing	13	56.5
total	23	100.0

It shall be noted that the attorneys participating in the focus group discussions organised in the framework of the BHC research also mentioned that the timing and manner of providing case files is still not adequate, and defence counsels usually receive the case files directly before the hearing on pre-trial detention, and have no chance to review the case files in substance. At one of the focus group discussions it was also submitted that the survival of the present practice is supported by the fact that this approach is accepted by several attorneys, who do not want to prepare more adequately and do not want to review the case files before the hearing.

Interviews with police officers conducted in the framework of the JUSTICIA research showed a somewhat brighter picture (they submitted that the defence receives the case files 1–2 days before the hearing on pre-trial detention), but one of them added that the timing of providing the case files also depends on the size of the case file, and the defence receives the case files "at the latest" 1–2 hours before the hearing on ordering pre-trial detention.

In addition, the responses of police officers also showed that there are less problems in this regard when it comes to hearings or decisions on prolonging pre-trial detention, and the defence receives the case files usually in due time, even days before the decision on the prolongation.

Responses of prosecutors also showed a mixed picture as to when the defence receives the copy of the case files before the hearing on ordering pre-trial detention: one of them stated that case files are handed over at least 12 hours before the hearing, another respondent indicated that this happens 5–24 hours before the hearing, while a third respondent submitted that "it is not uncommon that copies of the case files are handed over to the suspect and his/her defence counsel the day before the hearing". According to a fourth respondent, "defendants and their defence counsels usually receive the copies of the case files the day before the hearing, or in the early morning or morning of the day of the hearing", while a fifth prosecutor stated that this varies case by case. It can be identified as a good practice that one of the prosecutors submitted that the timing of the hearing also depends on the timing of providing the case files:

> *"If it is to be expected that preparing the copies of the case files will take longer, then we take that into consideration when organising the hearing, we inform the judge about the anticipated time when the defendant and his/her defence counsel will have access to the copies, and the judge establishes the date of the hearing with a view to that."*

Some prosecutors added that it also depends on the defence counsels when they are able to take over the case files, and one of them submitted that they encountered cases – although only very few – when "the defence tried to hinder the delivery of the case files in an administrative way, by becoming unavailable". One of the police officers interviewed in the framework of the BHC research reported a case when the defence counsel refused to take over the case files at 5 p.m. the day before the hearing, but complained at the hearing next day about the late submission of the case files. Another police officer reported a case where the defence counsel was "caught" by the judge, because he knew the content of the case file he supposedly received late, and "so the judge said that it seems that it was not true that he had received the case files late". In the present research prosecutors submitted that it occurs that defence counsels do not resort to the possibility to receive the case files earlier and not just directly before the hearing:

- *"In many cases the defence counsel does not resort to the possibility to take over the case files in advance. In these instances the case files are […] handed over before the hearing."*
- *"We usually hand over the case files within one hour before the hearing, at the court, directly after we submitted the motion to the court. When informing the defence counsel [about the hearing], we tell the defence counsel that he/she can get the case files in that period and there is a possibility to agree on a different [way/timing] for the delivery. Since the law changed, not one defence counsel has explicitly asked to have access to the case files in a period other than the one directly preceding the hearing."*

The following quote from a police report shows an example for documenting that:

> *"Furthermore, I called […], the retained defence counsel of […], and I also informed him that his client's pre-trial hearing will take place today at 10.30 a.m. The defence counsel submitted that he will take over the copy of the case files at the court before the hearing, at 10.15 a.m."*

However, according to one of the police officers participating in the BHC research, investigation judges take a dim view of this approach, irrespective of whether it suits the defence counsel or not:

> *"There was a prosecutor who was caught with this and who was then dressed down and told that this is not a way to go, but ex officio appointed defence counsels tend not to have a problem [with this approach]."*

Furthermore, one of the prosecutors mentioned that it happens many times that defence counsels submit their retainers on the day of the hearing, and so obviously the evidence cannot be handed over to them earlier than the day of the hearing anyway. In relation to that it was also mentioned by one of the judges that it may create a problem if relatives retain a defence counsel after an ex officio defence counsel was already appointed in the case, and if authorities get to know only at the hearing that a defence counsel has been retained. Therefore, retained counsels often receive the case files only at the hearing, sometimes from the ex officio appointed defence counsel who already received them. However, sometimes case files are handed over to the ex officio defence counsel, who then fails to show up at the hearing, so the retained defence counsel cannot take over the case files on site from him/her. For example in one of the procedures covered by the case file research the retained counsel received extra time from the judge to study the case files on the basis that he received the case files from the ex officio defence counsel in the hallway of the court, in the last moment before the hearing.

As far as the prolongation of pre-trial detention is concerned, responses of the prosecutors showed a more or less uniform practice: almost all of them submitted that they proceed in accordance with Article 131 (2) of the CCP – according to which, before the filing of the indictment, the prosecutor shall submit its motion for prolonging the pre-trial detention to the court five days before pre-trial detention would end on the basis of the previous court decision –, and submit the case files together with their motion. However, in this way the time of delivery may depend on the post, and – as shown by the interviews with attorneys – may result that case files arrive to the defence counsel with such a short time before the decision that, especially if the judge does not hold a hearing, access to the case files will have no substantial use or affect. At the workshop, Tamás Matusik, the head of the Investigation Judge Group at the Buda Central District Court added however, that extending the current 5-day deadline would be counterproductive in practice and could counter the efficiency of the investigations, because for example in the case of a 1-month long prolongation it would result that the police should put forth a proposal on pre-trial detention already 15–20 days after the previous decision. In our view it would be a solution to that

if the law would establish a different deadline with regard to the first prolongation of pre-trial detention, taking place 30 days after the pre-trial detention was ordered (in these cases a deadline for submitting the motion and the case files longer than 5 days could indeed be problematic), and with regard to the subsequent prolongation decisions, since there is significantly more time between the latter ones, and so it would be possible for the authorities to comply with a deadline longer than 5 days as well.

Form among the 10 prosecutors participating in the research, eight were of the view that **case files are sent to the defence counsel and the judge at the same time**, while one of them stated that given that the prosecutor shall prove that the defendant and the defence counsel received the case files, the defendant and the defence counsel usually receive the copy of the case files before the court does. In addition, one prosecutor and several judges mentioned that it may occur that the defendant and the defence counsel receive the motion and the copies earlier than the judge, because the defence is in the position to take over the case files also in the afternoon, while at the courts they cannot receive any case files after 4 p.m.

Responses of the judges showed that **several judges do not really have any information about the time when the case files were received by the defence counsel and the defendant before the hearing or decision on pre-trial detention and whether the timing was adequate or not**. Three of them explicitly stated that they do not have any knowledge about when the defence receives the case files, and four of them responded to another question that they do not receive complaints from defence counsels which would indicate that the defence has received the copy of the case files too late – thus, many judges expect proactivity from the defence in this regard.

Two judges submitted that only retained defence counsels use to complain about not receiving the case files in due time before the hearing or decision on pre-trial detention, and four other judges stated that they encounter this problem only in very few cases. One judge submitted that they receive complaints from the defence about the authorities' failure to provide the case files in due time before the ordering of pre-trial detention in 15-20% of the cases, and two judges submitted that they continuously witness that the defence receives the case files directly before the hearing on pre-trial detention, in the hallway of the court. It shall be noted that the reason behind the judges somewhat better opinion than that of the defence counsels on the timeliness of handing over case files may be that, as referred to above, they do not track specifically when the defence receives the case files, and it seems that defence counsels complain about late submission fewer times than the number of instances they are of the view that the time available to prepare was not enough. (For details in that regard, see Chapter 4.6. on the role of the investigation judge.)

Judges were also posed the question that in their opinion, how long before the hearing/decision should the defendant or the defence counsel have access to the case files in order to have a realistic chance to prepare for the hearing, to submit motions, to gather documents, etc. The predominant majority of judges, namely nine of them were of the view that no such

deadline may be set in general, since the time needed to prepare depends also on the case and the amount of documents in the case file. One of them highlighted that in his view it would mean an unimaginable burden for the prosecution if it would be prescribed that case files shall be handed over the day before the hearing, since authorities would be able to comply with a 24-hour deadline only in certain cases, and for example if the hearing is on a Monday, than authorities would have to get the case files to the judge sometime during the weekend. Only a few judges recommended deadlines: according to one of them, courts should have at least 24 hours to prepare for the hearing on the basis of the case files, while another judge said that the prosecution should provide the case files at least the day before the hearing. A third judge, essentially being of the opinion that no such deadline can be set, added that the adequate time to prepare varies case by case, nevertheless, providing the case files at least one hour before the hearing could be prescribed. At the workshop, the head of the Investigation Judge Group at the Buda Central District Court stated that he would support introducing the requirement of providing case files "in due time".

Last but not least, **judges** were also asked about **when they receive the case files** before ordering pre-trial detention. Eight of the 11 judges interviewed responded that this varies and depends on the case, and the time periods submitted by the judges also varied: it occurs that they receive the case files only one hour or a few hours before the envisaged start of the hearing, or even only directly before the hearing or when the hearing is scheduled to start, while in other instances the case file arrives to the court one or even two days before the hearing. According to one of the judges, the scheduled time of the hearing also plays a role in this regard: if the hearing is scheduled to start at 9 a.m., the judges ask the prosecution to provide the case file the day before, but if the hearing is scheduled to start after 9 a.m., they ask the prosecution to provide the case file in a way that judges have them at their disposal two hours before the hearing. However, in the latter scenario it may also occur that the judge already has hearings the whole morning, and so it is hard for him/her to make time to prepare for the hearing in question.

Several judges mentioned that of course the situation of the prosecution is not easy either, since they (and the investigation authority) are limited by the length of the 72-hour detention, nevertheless, several judges feel that the time they have to review the case files is too short in certain cases. At the same time, investigation judges obviously have more possibilities to extend the time available to them to study the case files than defence counsels:

- Several judges mentioned that they can take into account the envisaged time of receiving the case file, the size of the case file and the type of the case already when setting the date of the hearing or discussing the date of the hearing with the prosecutor. Working hours end at 1.30 p.m. on Friday, and the practice of the one of the judges is that if she does not receive the case files by 10 a.m. that day, then she holds the hearing during the weekend – this is better in her view than to hold a hearing in a "rushed" way, "squeezed into" the remaining working hours on Friday. It is a good practice in terms of consultation and cooperation between stakeholders that according to the interview carried out with one of the investigation judges, in larger cases,

e.g. involving white-collar crime, the prosecution contacts the investigation judge already when the defendant is taken into 72-hour detention, suggesting that the judge should leave e.g. Monday afternoon free, because he/she will receive a large case file that day.[42]

- Another solution, mentioned by five judges, is that if they did not have enough time to study and "learn" the case files, they start the hearing later than scheduled, pushing the start of the hearing until they finish with reviewing the case files – hearings commence approximately half an hour or one hour later than scheduled in this scenario.
- Furthermore, one judge submitted that they also communicate informally to the prosecutor if he/she provides them with the case file too late e.g. for the third time that the late submission is a problem.

Establishing formal consultation between state authorities in this regard may also be raised here. At the workshop, the head of the Investigation Judge Group at the Buda Central District Court expressed his view that for example it is worth establishing local rules, together with the concerned prosecutor's office, as to when and how the prosecution should hand over the case files to the investigation judge, also with a view to the local characteristics, and even to lay down these rules in an agreement.

In relation to prolonging pre-trial detention, all the judges submitted that the prosecution always – or at least in general – complies with the deadline set by Article 131 (2) of the CCP, and judges receive the prosecutorial motion and the copy of the case files five days before the pre-trial detention would expire. One of them highlighted though that the CCP sets out a 5-day deadline of and not a deadline of five working days, so if judges receive the case files on Friday, than they have in fact only three days to study the case files and reach a decision, because they will be able to start dealing with the case only on Monday, which may cause problems at courts where investigation judges also serve as trial judges.

RECOMMENDATIONS

- A minimum deadline should be set out for submitting the motion for ordering pre-trial detention and the related case files to the defence before the hearing/decision, which makes it realistic for the defence to prepare for the hearing.
- As a minimum, it should be incorporated into the CCP that the motion for ordering pre-trial detention and the related case files should be provided in adequate and "due time", and the characteristics of the case shall be taken into account by the authorities in this regard.
- The CCP should be amended in a way that every case file emerging after the pre-trial detention is ordered and relevant in terms of the defendant's pre-trial detention is submitted to the defence on a continuous basis.

- As a minimum, the CCP should be amended in a way that the motion aimed at prolonging pre-trial detention is submitted separately from the related case files, at least in cases when there is no hearing held on the prolongation of pre-trial detention. In these instances, case files should be handed over to the defence verifiably before the prosecutorial motion is submitted, in a way that the defence has a realistic chance to study the case files, gather documents and submit motions.
- In the absence of the amendments suggested above, as a minimum, steps should be taken to ensure that if possible, case files are not submitted by post before the prolongation of the pre-trial detention.
- It should be ensured that, if necessary and if required, judges have the possibility to take over case files to study them also after the official working hours (e.g. in an electronic way).

4.4. The place of handing over the case files and the state authority handing them over

Section 402.1.) of the Chief Prosecutor's Memorandum sets out the following with regard to the actual handing over of case files substantiating the motion, making it the task of the investigation authority to hand over the case files to the defence as a binding rule in the case of ordering pre-trial detention, and as an option when pre-trial detention is being prolonged:

e) […] The prosecutorial motion and the copy of the case files may be handed over to the *suspect* in 72-hour detention at the place where he/she is detained, *via the investigation authority*, without any particular problems. However, the copy of the case files to be provided may not be submitted to the defence counsel via fax, but it should be provided *via the investigation authority* instead. […]

h) The provisions included in the first paragraph of Section 402.1.e) shall be applied also when pre-trial detention is being prolonged, thus, it is justified to resort to the investigation authority in terms of copying the case file. Providing the defendant and the defence counsel with the copy of the case files may also be carried out via the investigation authority. […]

According to the information provided to the HHC by the Chief Prosecutor's Office, "in some cases" case files are provided "via the investigation authority, while in other cases, case files are provided by the prosecutor, before the date of the hearing under Article 210 (1) of the CCP".[43]

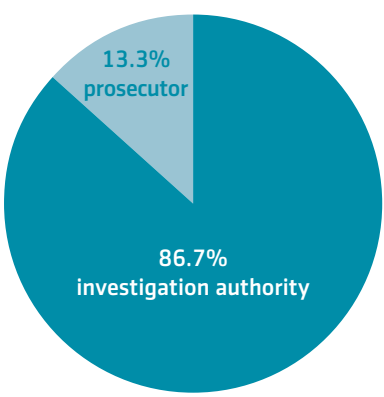
Accordingly, it was submitted by 13 attorneys with regard to the **ordering of pre-trial detention** that **the copy of case files is handed over** to them and the defendant in every case or typically **by the investigation authority**. It was also typical for procedures covered by the case file research that case files were handed over to the defence counsel and the defendant by the investigation authority before the ordering of pre-trial detention (see Figures 5 and 6).

Figure 5

Who provided the defence counsel with the copy of the case files? (%, N=36)

Figure 6

Who provided the defendant with the copy of the case files? (%, N=30)



Six of the attorneys interviewed responded that before the ordering of pre-trial detention, case files are always or typically handed over to them **in the hallway of the court**, and two further attorneys also submitted that it occurs that they receive the case files in the hallway of the court (which is obviously linked to the issue that the defence often receives the case file only a short time before the hearing). In the experience of four attorneys, **the defence counsel has to go to the police station** to get the case files, while four further attorneys reported that even though in some instances they have go to the police station to get the case files, in other instances **the police deliver the case files** to the law office or even to the home address of the defence counsel.

In the criminal procedures covered by the case file research (at least in those where the respective data was available), the defence received the case files 12 times in the hallway of the court before the ordering of pre-trial detention, case files were handed over 12 times at the police station and two times at the prosecutor's office, and in two instances case files were delivered by the authorities to the office or home address of the attorney. According to the statements of the attorneys, in the criminal procedures covered by the case file research defendants received the case files 14 times at the place of their detention (typically in the police cell), while in 11 cases case files were provided to them at the court, in the court hallway. (In one of these cases, the defendant received the case files only in the courtroom, at the hearing, and a judge also mentioned that defendants mostly receive the case files at the hearing.)

One of the prosecutors submitted that the timing of taking over the case files also influences who is handing over the case files to the defence counsel in the end:

> *"According to the practice established in [...] county, the prosecutor [...] informs the investigation authority and the defence counsel about the date and place of the hearing as established by the investigation judge, and at the same time, the prosecutor also informs the defence counsel that he/she may take over the copies of the case files to which he/she is entitled to from the investigation authority in the period of more than three hours before the hearing, and from the prosecutor after that [in the three hours preceding the hearing]. If the defence counsel does not take over the case files from the investigation authority and does not make a statement with regard to taking them over either, the investigation authority passes on the respective copy to the proceeding prosecutor. Accordingly, the defence has the possibility to take over the motion and the copies of the case files either at the prosecutor's office or directly before the hearing held by the investigation judge. This practice takes into account also that not only local attorneys, but also attorneys working in a city further away from the seat of the prosecutor's office may proceed in a given case, and they will arrive only when the hearing begins."*

As far as the **prolongation of pre-trial detention** is concerned, only six attorneys submitted that they typically receive the copy of the case files by post. (According to one of them,

if the investigation judge holds a hearing, the defence counsel receives the case files only in the hallway of the court.) In turn, according to seven attorneys, it is more typical that case files are handed over to them personally (mostly at the police station). Three attorneys mentioned that at this point in the procedure, case files may also be delivered in email.

Based on the above, it can be concluded that from a logistical aspect, it is not easy to arrange the delivery of the case files. In addition, if the procedure is conducted by an investigation authority with a different seat than the seat of the local court (where investigation judges hold the hearings), or if the prosecutor having jurisdiction in the case is seated in another city than the seat of the local court, that makes the whole situation even more difficult. In the latter instances, it is an issue whether the member of the investigation authority or the prosecutor will travel to the court's seat separately to deliver the case files e.g. to the defendant held in a police cell at the seat of the court, or will only deliver the case files when arriving for the hearing.

All four police officers participating in the JUSTICIA research highlighted that the new rules of the CCP resulted in a **significant increase in the workload of the police**, and in the BHC research several police officers mentioned without any question on that that delivering case files is difficult, it entails countless extra working hours, time and money, and that they feel that the prosecution "pushes" this task their way:

> *"I have already asked at the prosecutor's office, that what am I, a postman? They said that I am. I would like to note that in theory, under the law, photocopying should also be done by the [prosecution], and they should deliver [the case files]."*

It is not only the photocopying of case files which is a burden (as already referred to above, and especially in cases with more defendants and defence counsels), but also the delivery of the case files and "travelling" with them. Not only personal delivery to penitentiary institutions means a difficulty in this regard, but also delivering the case files to defendants held in police cells, since there is only one police cell in each county, so it may take hours for the member of the investigation authority to transport the case files to the other side of the county, and personal delivery is time-consuming also in Budapest. In the BHC research one of the police officers interviewed mentioned that since the law does not set out where case files shall be handed over to the defence, in theory they could also tell the defence counsel seated in another county to come and get the case files at the police station, but they rather do not take any risks:

> *"We rather proceed in a way that [a police officer] delivers [the case files] by car, since it may be objected to [that the defence has not received the case files], and we do not want the case to depend on that, but at the same time this means a huge burden for [us]."*

Thus, the cost of providing case files is high both in terms of materials and human resources. Two of the police officers participating in the BHC research were of the view that introduc-

ing the electronic delivery of case files would be a step forward (it would cost much less and would entail less work, since case files are already at their disposal in an electronic format), while the two other police officers interviewed only had practical counterarguments. The latter interviewees were of the view that under the "current circumstances in Hungary" and with the current technical background electronic delivery would not be possible, for example because the email system of the police does not have enough storage capacity (and, in addition, their IT background and computers are not adequate either: an interviewee submitted for example that they work on computers discarded from elsewhere), and it is also questionable whether attorneys would have the storage capacity. One of the police officers mentioned that they tried to deliver the case files electronically (not in pre-trial detention cases), but one of the defence counsels claimed for example that his client does not have a computer, and they requested the case files on paper. Electronic delivery was supported by attorneys in the JUSTICIA research and several attorneys in the present research, and one judge also mentioned that this would be the ideal solution. However, János Bánáti, the president of the Hungarian Bar Association raised the attention to several important sources of risk in this regard at the workshop. In his view, it is a question for example what ex officio defence counsels could be obliged to in this regard, what devices should they have at their disposal so that they can attend the judicial hearing on pre-trial detention while having access to the case files delivered to them electronically, and what IT facilities would be necessary to ensure that all participants of the case are present in the courtroom with such devices.

The system detailed above, i.e. that handing over the case files is the task of the police, may result that **case files are delivered to the defence counsel and the defendant not together with the prosecutorial motion, but separately, at a different point in time**, which is a common scenario in the experience of the attorneys interviewed.

Table 8

Providing the case files and the prosecutorial motion

	case files are provided together with the motion	case files are provided separately from the motion	the practice varies
ordering pre-trial detention (N=17)	7	4	6
prolonging pre-trial detention (N=16)	9	6	1

Results of the case files research showed similar dividedness.

Table 9

Did the defence receive the copies of the case files at the same time as the prosecutorial motion before the ordering of pre-trial detention?

In the case of the defence counsel	N	%	In the case of the defendant	N	%
case files and motion were provided together	24	66.7	case files and motion were provided together	17	65.4
case files and motion were provided separately	12	33.3	case files and motion were provided separately	9	34.6
total	36	100.0	total	26	100.0

Table 10

Did the defence receive the copies of the case files at the same time as the prosecutorial motion before the prolongation of pre-trial detention?

In the case of the defence counsel	N	%	In the case of the defendant	N	%
case files and motion were provided together	37	75.5	case files and motion were provided together	24	68.6
case files and motion were provided separately	12	24.5	case files and motion were provided separately	11	31.4
total	49	100.0	total	35	100.0

The phenomenon that case files and prosecutorial motions are provided separately may be the reason behind instances similar to what happened in one of the procedures covered by the case file research: in that case, the defence counsel did not receive any case files before the decision on pre-trial detention, even though the prosecutorial motion said that the defence received the copy of the case files.

RECOMMENDATIONS

- The CCP should allow for the possibility that, upon the request or with the consent of the concerned persons, access to data/documents under Article 211 (1a) of the CCP is ensured in another way than issuing a copy, such as providing case files on a data storage device or in an electronic format, via email.
- In the long run, in order to enhance the efficiency of the defence and to ease the burden on the investigation authorities, it may be considered to establish an electronic platform accessible to all participants of the criminal procedure with different access levels, making it easier to provide case files and to follow which case files have been already provided to the defence.

4.5. Documenting and verifying the delivery of the case files

As referred to earlier, research results show that it may give rise to problems from many aspects that it is often somewhat hard to follow which files of the case have been provided to the defence and the investigation judge deciding on pre-trial detention, or when this occurred, and even whether this has occurred at all (for example when no hearing is held), which may be problematic with regard to the enforcement of the rights of the defence enshrined in Article 7 (1) of the Right to Information Directive.

Order 11/2003. (ÜK. 7.) LÜ of the Chief Prosecutor on the Prosecutorial Tasks Related to Preparing the Indictment, Supervising the Lawfulness of the Investigation and the Indictment sets out the following in this regard since 18 January 2014:

> Article 21
> (4) […] In the prosecutorial motion aimed at ordering pre-trial detention, the prosecutor shall – in order to comply with the provisions of Article 211 (1) of the CCP – refer to the means of evidence supporting the [prosecutor's] measure the copy of which was submitted to the suspect and the defendant via the investigation authority.

Section 402.1.) of the Chief Prosecutor's Memorandum adds the following in this regard:

> h) When prolonging pre-trial detention, […] the case files the copy of which have been submitted by the prosecutor to the defendant and the defence counsel shall be referred to in the motion; and if the decision shall be delivered at a hearing, it shall be verified that the defendant and the defence counsel received the case files pursuant to Article 211 (1a) [of the CCP]. […]
>
> i) […] The prosecutorial motion shall include an itemized list of the case files the copy of which has been submitted to the suspect, the defence counsel and the statutory representative directly by the prosecutor or via the investigation authority, naming the concrete pieces of evidence. The manner of delivery shall be unequivocally apparent from the internal documentation [of the prosecution]. If case files are handed over [to the defence] by the investigation authority, a note on the fact that case files have been delivered and that the case files listed in an itemized manner have been taken over shall be included in the internal documentation as an attachment to the motion. If the case files are sent by the prosecutor to

> the concerned persons, the prosecutor shall give a concrete instruction in the internal documentation to issue these, listing the case files to be delivered. Otherwise the prosecutorial motion shall include the statement that no new case file substantiating the motion has emerged during the investigation. [...]

Thus, the Chief Prosecutor's Memorandum confirms that **the prosecutor's motion should not only refer in general terms to the case files provided to the defence, but shall include an itemized list of the case files the copy of which was submitted to the defence**. However, research results show that this requirement is not fully complied with, or at least these documents and lists are not available for the defence and the judges.

When attorneys were asked whether case files the copy of which are handed over to the defence are listed in an itemized manner in the prosecutorial motion or in any other related document (in the so-called "list of case files" attached to the motion, in the "record of delivery", or on an acknowledgment of receipt), only seven attorneys answered with a yes, while six attorneys submitted that no document seen by them or known to them lists the case files provided. According to four attorneys, the practice varies (e.g. it also depends on which prosecutor's office proceeds in the case). As shown by Table 11, many prosecutorial motions covered by the case file research did not list the case files delivered neither in a fully itemized manner, nor in a partly itemized manner. (In the research, the category "partly itemized" was applied to instances when e.g. only the type of evidence appeared in the motion, thus the motion referred e.g. to "witness testimonies" in general.)

Table 11

Did the prosecution list in the motions aimed at ordering and prolonging pre-trial detention the case files the copies of which were submitted to the defence?

Motions aimed at ordering pre-trial detention	N	%	Motions aimed at prolonging pre-trial detention	N	%
yes	5	20.8	yes	11	44.0
no	18	75.0	no	14	56.0
partly	1	4.2	partly	0	0.0
total	24	100.0	total	25	100.0

The prosecutorial motions covered by the case file research may be divided into basically four groups in terms of recording the case files delivered.

The first group of motions do not refer to the provision of case files at all, while motions in the second group refer only in general to the delivery of the case files, for example in the following format:

- *"I have arranged for the delivery of the copy of the case files to the suspect and the defence counsel under Article 211 (1) via the investigation authority."*
- *"Pursuant to Article 211 (1) a) of the CCP, I am sending the suspects and their retained defence counsels the copy of the case files related to the motion."*
- *"I have attached to the motion sent to the suspect, the defence counsel and the guardian the case files prescribed by Article 211 (1a) of the CCP, substantiating the motion, emerged after the last decision reached on pre-trial detention."*
- *"Pursuant to Article 211 (1a) of the CCP, the Central Investigative Prosecutor's Office has sent, attached to the motion, to the suspect and the retained defence counsel the copies of the police and medical documents acquired, witness testimonies emerged and the documents on inspections carried out since the [suspect's] pre-trial detention was ordered."*

Prosecutorial motions in the third group refer to the list of case files or record of delivery attached to the motion as the document listing case files provided in an itemized manner, for example in the format below. (In one of the cases covered by the case file research however, the defence counsel did not receive the list of case files even though the motion referred to this list as "attached".)

- *"On the basis of Article 211 (1a) of the CCP, I have entrusted the investigation authority to deliver the prosecutorial motion and the case files included in the list of case files attached to the suspect and the defence counsel."*
- *"At the same time as submitting the prosecutorial motion, the suspects and the defence counsels are provided with the case files included in the record of delivery. Delivery is carried out by the investigation authority."*
- *"On the basis of Article 211 (1a) of the CCP, I have sent the suspects and their defence counsels the case files emerged since the last prolongation of the pre-trial detention as showed by the list of case files attached, at the same time as the prosecutorial motion."*

Finally, the fourth group consists of prosecutorial motions which list the case files provided themselves, within the motion itself:

- *"I inform [the court] that in order to comply with the second sentence of Article 211 (1) of the CCP, the following case files were delivered to the defendant and the defence counsel: [detailed table]."*
- *"With a view to Article 211 (1a) of the CCP, I order that the following is submitted to the suspect and his defence counsel: [detailed and itemized list of pieces of evidence]."*
- *"On the basis of Article 211 (1) of the CCP, the set of case files attached to the motion submitted to the suspect and the defence counsel via the investigation authority contains the following pieces of evidence: [list]."*

From the aspect of the defence, there is no qualitative difference between the third and the fourth group, but it seems that the most secure solution, also complying with the Chief Prosecutor's Memorandum to the highest extent, is when the list of case files is not included in a separate document, but in the motion instead.

The experiences of the judges interviewed also varied greatly as to what prosecutorial motions contain: according to three judges, motions include in an itemized manner the case files submitted by the prosecution to the defence or the delivery of which the prosecution arranged for, while according to two other judges, prosecutorial motions never list in an itemized manner the case files submitted or to be submitted to the defence. Five judges stated that the practice varies: it depends on the prosecutor whether the case files submitted are listed in an itemized manner in the prosecutorial motion or not. At the workshop, the head of the Investigation Judge Group at the Buda Central District Court added that in the capital, case files are always delivered in a way that there is a list of case files attached, and so even though the case files submitted are not always included in the motion itself, they are either listed in a separate list or record of delivery, and so he can compare that list with the case file provided to him, or the motion says that "the full case file" is submitted.

Along with recording the case files provided in an itemized manner, **the Chief Prosecutor's Memorandum also requires verification that the case files have been received by the defendant and the defence counsel, but only if the decision on pre-trial detention is reached at a hearing** under the respective rules. This gives rise to **concerns** because pre-trial detention is often prolonged without any hearing held, while in many cases access to case materials may have an even higher significance before the prolongation of pre-trial detention is due than before the ordering of pre-trial detention.

All but one attorneys interviewed submitted that when they take over the copy of the case files personally, they verify with their signature in some form that they have received the case files, i.e. by signing a list of case files, a record of delivery, an acknowledgment of receipt, etc. (When case files are delivered by post, it is obviously the post receipt which serves as proof of delivery.)

Similarly, prosecutors responded with one exception that they always verify in some way that the defence received the copy of the case files:

- when a hearing is held, an itemized list of case files or an itemized record of delivery is compiled about the copies provided, which is signed both by the defence counsel and the defendant, or they sign an acknowledgment of receipt;
- if no hearing is held, an acknowledgment of receipt or a delivery sheet contain the list of case files provided;
- or delivery is recorded in a (police) note or police report;
- but email and fax receipt sheets may also serve as proof.

Thus, it seems that that the receipt of case files is documented adequately, but, based on the responses of the judges interviewed, it is problematic that **in many instances** the above **verification documents do not reach the investigation judge**, and only a few judges require a separate verification (with the signature of the defence counsel and the defendant) that the case files have been handed over to the defence.

From among the 11 judges interviewed, only three stated that they are provided with a copy of the list of case files, the record of delivery, or at least a delivery sheet, on which the defence verifies the receipt of the case files with its signature. (It is a good practice in this regard that in the procedures supervised by the prosecutor's offices operating in the capital, case files are always handed over to the defence accompanied with an itemized list of case files, and prosecutors have to present the investigation judge the "verification" signed by the defendant and the defence counsel on the receipt of the case files.[44]) However, proving that case files were handed over is not always smooth even when it is done with a list of case files. In the view of one of the Budapest-based judges it occurs in the case of the local-level district prosecutors' offices that the record of delivery only says that the case files were taken over by the defence, thus, case files are not listed in an itemized manner, while according to another judge they do not always have at their disposal a signed list of case files when deciding on the prolongation of pre-trial detention not on a hearing but only on the basis of the case files.

Two judges submitted that the practice varies: they either receive a record of delivery, or they rely on the prosecutorial motion which includes that the prosecution "has handed over" the relevant case files to the defence. Six judges consider the prosecutorial motion as proof of delivery (or said that they can only rely on the prosecutorial motion in lieu of a list of case files and a record of delivery), the prosecutorial motion saying either that the prosecutor already handed over the copy of the case files to the defence or that the prosecutor arranged for the delivery of the case files. (One of these six judges knew that case files are delivered to the defence by making the defence sign a delivery sheet, but in his opinion this document is only included in the files of the investigation and does not reach the judge deciding on pre-trial detention.)

Attorneys were able to say in 32 of the cases covered by the case files research whether authorities used a record a delivery or not when handing over the case files substantiating the motion aimed at pre-trial detention, and they answered with a yes with regard to 26 cases (81.3%). However, even though several attorneys interviewed stated that those receiving the case files (including the defence counsels) also receive a copy of the record of delivery, in the case files covered by the case file research the record of delivery was to be found in only five cases out of the 26 above. Case files the copies of which were provided to the defence were listed in all of these records of delivery in an itemized manner.

It is also a significant issue from the aspect of the defence **whether it may be ascertained or proven on the basis of the case files when exactly (by the hour and the minute) the**

copy of the case files has been received by the defence. According to the overwhelming majority of the attorneys interviewed (11 respondents), only the day of the delivery is recorded, even though when case files are delivered before the hearing on ordering pre-trial detention, recording the exact time of delivery would be inevitable for being able to prove that the defence received the case files too late. Only four attorneys submitted that the time of delivery may be ascertained from the case file by the hour and the minute, while two other attorneys added that this is only the case if the defence counsels themselves put the exact time on the record of delivery, delivery sheet, etc. As mentioned earlier, researchers could examine only a few records of delivery in the framework of the research, with three of these showing the time of delivery by the hour and the minute and two of them showing only the date. Furthermore, a couple of judges and a prosecutor also mentioned that in their experience, lists of case files and records of delivery show the time of delivery by the hour and the minute.

RECOMMENDATIONS

- The prosecution should take steps to ensure that the respective provision of the Chief Prosecutor's Memorandum is complied with every time also in practice, so that the prosecutorial motion or the list of case files, etc. attached to it lists the case files delivered in an itemized manner in every case.
- The delivery of the case files should be always documented in a way trackable also for the defence and the judge, with a separate list of case files, signature sheet, etc., not only when a hearing is held.
- The record of delivery, list of case files, etc. signed by the defence when receiving the case files should in every case include (i) an itemized list of the case files delivered, (ii) if case files are not delivered by post, the exact time of delivery (by the hour and the minute), (iii) and the defence counsel and the defendant should always receive a copy of the record of delivery.
- The record of delivery, list of case files, etc. signed by the defence when taking over the case files should always reach the investigation judges, who should hold a hearing or decide on the pre-trial detention only if the record of delivery is in their possession.

4.6. The role of the investigation judge

The role of the investigation judge with regard to the provision of case files substantiating the motion was examined in the framework of the research in three areas: (i) supervising whether case files have been provided to the defence and the possible legal consequences of failing

to provide the case files, (ii) late submission of the case files and the possible legal consequences of that, (iii) and the judicial approach related to the scope of case files provided.

It was an unfavourable development in terms of access to case materials at the beginning of 2014, undermining the practical effect of amending the CCP, that the Criminal Law Chamber of the Budapest Regional Court took the following standpoint in its Chamber Opinion 2/2014. (III. 3.) BK: "It is not an **obstacle to holding a hearing** if the motion is aimed at ordering pre-trial detention and the prosecution fails to submit the copy of the case materials substantiating the motion to the suspect and the defence counsel." Even though the chamber opinion adds that "in the later phase of the [criminal procedure] it cannot be omitted to examine whether the right to defend oneself and the right to defence fully prevailed or not", this does not change the fact that according to the chamber opinion a hearing may be held and pre-trial detention may be ordered without the defence getting access to the case materials and receiving the case materials, which contradicts the objective of Article 7 of the Right to Information Directive.

Furthermore, Section 402.1.) c) of the Chief Prosecutor's Memorandum currently provides the following guidance in this regard: "The lack of [providing the] case files is not an obstacle in itself to holding a hearing." In line with that, eight prosecutors submitted in the present research that it is not an obstacle to holding a hearing or issuing a decision on the prolongation of pre-trial detention that the case files have not been submitted to the defence. (According to one of the prosecutors, the reason behind that is that the failure of providing the case files before the hearing may be remedied by providing the case files at the hearing, while another prosecutor stated that Article 211 of the CCP uses the word "send", which does not equal to "being delivered", however, in practice, the obligation to "send" the case files is understood both by the prosecution and the courts as the actual delivery of the case files.)

A similar approach of the courts was detected by an attorney practising outside of Budapest and participating in the survey conducted in the Fair Trials research: the lack of submitting the copy of the case files was considered only a "procedural mistake" by both a local and a county-level court and was not considered an obstacle of proceeding with the case. In the present research, five out of the 11 judges interviewed were of the opinion that the hearing shall be held and a decision on prolonging pre-trial detention shall be delivered also if the authorities failed to hand over the case files to the defence, thus, they were of the view that providing the case files to the defence is not a precondition of holding a hearing. (Two judges added that investigation judges are no tasked with supervising whether case files have been handed over or not, and judges may not make it dependant on the provision of the case files to hold a hearing or issue a decision on pre-trial detention.)

This practice renders the obligation to provide access to case files related to pre-trial detention devoid of substance, and therefore is in contradiction with Article 7 (1) of the Right to Information Directive, which does not allow for such derogation.

At the same time, **the lack of a uniform application of the law** – which may be deemed fortunate in this instance – is shown by the fact that one of the prosecutors interviewed in the Fair Trials research stated that if the defence did not receive the case materials "the investigation judge would not even hold the hearing", while according to another interviewee in such a case pre-trial detention would not be ordered. In the present research, two prosecutors were also of the view that providing the case files to the defence is a precondition of holding a hearing or issuing a decision on pre-trial detention.

According to an article written by the current head of the Investigation Judge Group at the Buda Central District Court, the practice followed by the group is that "handing over the case files at a time also adequate for preparing for the hearing is a precondition of holding a hearing in the same way as notifying the defence counsel properly".[45] The head of the Investigation Judge Group stressed at the workshop that Chamber Opinion 2/2014. (III. 3.) BK is not applied by investigation judges.

Three judges participating in the research were also of the standpoint that it is an obstacle to holding a hearing that the case files have not been handed over to the defence. Three further judges chose the middle-of-the-road approach: in such instances, they ensure (or would ensure) by ordering a break or setting a new time for the hearing for a bit later that the defence counsel is able to study the case files and that the right to defence prevails. (The reason for the conditional in the previous sentence is that several respondents gave a theoretical answer to the respective question, due to the fact that they have not yet encountered the problem of the defence not receiving the copy of the case files.) One of the judges added that he also takes into account the behaviour of the defence counsel in this regard, since the defence counsel may also be expected to be available. He requires a detailed report form the police, and if that shows for example that the police tried to hand over the case files to the defence counsel three times, but without any success, thus, the police did what could be done, the hearing will be held (especially if after all this the defence counsel does not even show up for the hearing).

An attorney reported that it occurred that the judge obliged the prosecutor at the hearing to hand over the case files to the defence, and granted one hour to the attorney to study the case files, while an another attorney reported that in one case the judge ordered a break and the prosecutor had to get the missing case files and bring them to the court during the break, while in a third case the investigation judge refused to prolong the pre-trial detention of the suspect after the authorities failing to provide the case files. Other attorneys reported that even though they requested at the hearing that their respective complaints are included in the minutes of the hearing, these complaints had no effect on the judge's decision.

That said, in order to be able to assess whether the preconditions of a hearing or a decision are fulfilled or not, the judge has to have information as to **whether the defence has received the case files or not, and whether the defence has had enough time to examine**

them. It is obviously also the task of the defence to raise any problems with regard to the fulfilment of these preconditions, but we believe it to be an important guarantee that **the judge asks the defence counsel and the defendant about the fulfilment of these circumstances automatically, at every hearing**. It is to be welcomed that nine attorneys interviewed in the present research reported that investigation judges ask them whether they have received the case files or not and whether they have had enough time to examine them, while four attorneys reported that only the former question is posed. Only four attorneys reported that judges do not ask them about these circumstances.

However, only five of the judges interviewed reported that they always ask the defence whether they have received the copy of the case files, while one further judge asks this only when he does not receive a record of delivery. Several judges stated that these questions and the responses provided to them are included in the minutes of the hearing, but it was also submitted by one of the judges that these are not included in the minutes. (The case files covered by the research contained only 13 minutes of hearings on ordering pre-trial detention. Ten of these contained information on whether the copy of case files was handed over to the defence, and six out of these 10 showed that the investigation judge asked both the defence counsel and the defendant whether they had received the copy of the case files.) It shall be noted though that the situation is generally more difficult when it comes to prolonging pre-trial detention, since in the absence of a hearing, the defence cannot be asked the questions above, and so the judges have to rely on the remarks of the defence, on the prosecutor's motion or the list of case files verifying the delivery of the case files in this regard, while they are not necessarily are able to wait before reaching a decision for the list of case files verifying the delivery to arrive due to the respective deadlines.

Research results showed a mixed picture in terms of investigation judges asking the defence about the timeliness of receiving the case files and whether they had enough time to prepare for the hearing. The 13 hearing minutes available in the case files covered by the case file research showed that the defendant and the defence counsel were never asked about when they received the copy of the case files (or at least this was not included in the minutes), while in 11 cases they were not even asked whether they had sufficient time to prepare for the hearing and to review the case files. By contrast, according to the responses of certain prosecutors, investigation judges ask the suspects and the defence counsels at the beginning of every hearing about when they received the copy of the case files, and whether they had sufficient time and possibility to study the case files or they would like to request extra time to review the prosecutorial motion and the copies of the case files.

At the workshop, Tamás Matusik, the head of the Investigation Judge Group of the Buda Central District Court submitted in this regard that in 2015 he examined 150 case files at the Buda Central District Court, and he found that investigation judges examined in all the instances whether the preconditions of holding a hearing were fulfilled, and this was apparent from the minutes in every case (not necessarily in the form of questions and answers, but as statements instead). Tamás Matusik added that if the case files were handed over

without any problem in a given case, then he himself includes in the minutes that the judge established that the case files had been handed over to the defence in due time, rather than including the conversation about that between the defence and the judge, and he only includes the conversation itself in the minutes if the defence counsel submits that he/she has not received the case files in due time. In our view, this approach fulfils the important requirement that the facts related to the delivery of the case files should be apparent from the minutes of the hearing, while at the same time it does not increase the volume of the minutes unnecessarily.

The next question is what the consequences are if it turns out that **the defence received the case files belatedly**. It is to be welcomed that nine out of the 11 judges interviewed submitted that if the defence receives the case files too late, thus, it does not have sufficient time to study the case files, they grant the defence extra time at the beginning of the hearing to study the case files, either by ordering a break, starting the hearing later also formally, or setting a new time for the hearing for a bit later. The following quote from the minutes of a hearing serves as an example of how holding a break is documented in these instances:

> *"Defence counsel: I have received the case files just now. I would like to ask one hour to study them. My client received the case files 20 minutes ago.*
>
> *The police officers escorting [the suspect] confirm the statements made by the suspect and the defence counsel with regard to the delivery of the case files.*
>
> *The judge orders a break for the purpose of studying the case files.*
>
> *[The participants of the procedure] leave the courtroom at 11:44 a.m.*
>
> *[The participants of the procedure] return to the courtroom at 12:45 a.m.*
>
> *Defence counsel: The time [granted] was enough [to review the case files].*
>
> *Defendant: The time [granted] was enough, I tried to review [the case files]."*

There are judges who determine the length of the extra time granted with a view to the size of the case file; judges mentioned extra preparation times of 10 minutes, one hour, and one and a half hour. There are judges who take into account in this regard when the 72-hour detention will end, and there are judges who do not. One of the judges would consider it insufficient if the defence would receive the case files only half an hour or an hour before the hearing, while another considers it inadequate when the defence receives the case files only directly before the hearing, in the hallway of the court. A third respondent mentioned a concrete case as an example, in which the large amount of case files was handed over to the defence 10 minutes before the scheduled start of the hearing at 9 a.m., while the suspects' 72-hour detention was about to end at 11 a.m. In this case the judge did not hold a hearing and the suspects' pre-trial detention was not ordered. At the workshop, the head of the Investigation Judge Group at the Buda Central District Court submitted in this regard that in the capital it is a uniform practice that if there is any problem with the delivery of

the case files, and if the problem cannot be remedied instantly or within a short time, no hearing is held. Tamás Matusik also referred to a case covered by the press in which the defence counsels claimed at the hearing scheduled originally for a Saturday that they had not received the large amount of case files in due time, and the investigation judge decided that since the 72-hour detention was not yet over, he will hold the hearing on Sunday instead, so the defence counsels had time to study the case files. He also added that in his view the tendencies of the practice are positive in the whole country in this regard.

Furthermore, several prosecutors responding to the HHC's questions added that in their experience if case files are submitted too late or the defence counsels claim that they have not had enough time to prepare, courts either establish that the preconditions of holding a hearing are not fulfilled and start the hearing later than scheduled, in order to grant the defence time to prepare, set a new time for the hearing for hours later, or provide the defence a possibility to review the case files before the start of the hearing or at the beginning of the hearing without any such formalities.

Two judges answered with a clear no to the question above: according to one of them, handing over the case files is not a precondition of holding a hearing, so the investigation judge is not tasked with examining when the case files were handed over to the defence, and cannot make holding a hearing or issuing a decision dependant on that information. The other judge answering with a no was of the view that the main thing is that the defence has the case files in its hands at the hearing – directly after the new text of Article 211 of the CCP entered into force it occurred that the defence received the case files only at the beginning of the hearing, and in these instances the hearing was held. (The prosecutor argued in these cases that case files were submitted not only to the defence, but also to the judge at the beginning of the hearing.)

Two judges mentioned that attorneys know that they may signal that they have not had enough time to review the case files and that they may ask for extra time to prepare, but according to one of these judges, only around twice in every hundred cases do defence counsels claim at the beginning of the hearing that they would need an extra few minutes to prepare, since defence counsels know that it is not an obstacle to holding a hearing that the defence counsel did not receive the case files in due time, so they "make an effort" to go through the case files in the time available and do not ask for extra time.

Five attorneys submitted in the course of the interviews that they had never asked for extra time to study the case files (but one of them asked for extra time to study the case files on behalf of the foreign defendant in the case, which resulted that the investigation judge did not held a hearing in the case and did not order the suspect's pre-trial detention). The overwhelming majority of the attorneys submitting that it occurred that they asked for extra time to study the case files reported that in these instances the extra time was granted, amounting to 5-10 minutes, 10-15 or 20 minutes, half an hour or one hour maximum, with some of them saying that they were granted the amount of time they asked for. Responses

varied on whether granting extra time is recorded in the hearing of the minutes or not. In the opinion of one of those two attorneys who reported that they are not granted the extra time, cases are dealt with as on a "production line", and so he has never been granted extra time by the investigation judge to prepare.

It shall be noted though that defence counsels do not always seem consequent either when it comes to asking for extra time to study the case files. In relation to this issue, one of the prosecutors reported the following case:

> *"There was one instance in our county when the defence counsel objected to that he had received the prosecutorial motion and the copies of the case files directly before the hearing. The investigation judge included the defence counsel's objections in the minutes [of the hearing] and asked the defence counsel whether he would like a break to be ordered for the purpose of reviewing the case files. The defence counsel replied with a no to that. The proceeding prosecutor's office considered the defence counsel's objection included in the minutes a complaint against a prosecutorial measure and submitted it to the higher-level prosecutor's office for adjudication, which refused the complaint. In the reasoning of his decision, the higher-level prosecutor pointed out that the prosecution was not in omission with regard to the delivery of the prosecutorial motion and the related case file copies, since the law does not set out any concrete deadline or time period for the delivery, the prosecutor started to execute the delivery already half an hour before the hearing held by the investigation judge, and the defence counsel himself submitted that he does not request extra time to prepare for the defence."*

As far as the control over the scope of case files provided to the defence is concerned, the role of investigation judges is not considerable, one of the reasons for that being the concept according to which investigation judges have access to the same files of the case as the defence, as a main rule. For example, nine of the 10 responding prosecutors experienced that investigation judges never claim the whole case files or request that further case files are submitted to them beyond those submitted to them already. (Prosecutors think that one of the reasons for that is that investigation judges receive all relevant case files, or even all the files of the case.)

There was only one judge who submitted that if he notices that not all case files necessary to assess the lawfulness of the pre-trial detention have been provided to the defendant and the defence counsel (and, accordingly, to the judge himself) under Article 211 of the CCP, he considers that as an obstacle to holding a hearing, and in these instances, he does not issue a decision on pre-trial detention. Two judges stated that they use or may use their own copy of the case files to provide information to the defence: if the defence asks a question or if the judges see case files in their own copy which could be relevant for the defence but was not submitted to the defence, they may outline the content of the case files at their disposal to the defence. (One of them mentioned as an example the report on arrest in this regard, since the circumstances of the arrest – e.g. that the defendant

ran away and was caught after pursuit – may have a relevance e.g. in relation to the flight risk as a special ground for pre-trial detention.) One judge added furthermore that if he notices that a case file was submitted later than it should have been (i.e. was not attached to the first prosecutorial motion submitted to the defence after the given case file had emerged) he remarks that to the prosecution. No further activities or steps were reported by the investigation judges in the course of the interviews in this regard. However, a judicial decision of February 2016, terminating the defendant's pre-trial detention and ordering his house arrest, from which the following quote originates, shall be considered a good example in this regard:

> *"At the hearing, both the suspects and their defence counsels contested the existence of a well-founded suspicion, and objected to that the pieces of evidence exonerating [the defendants] were not handed over to them in the course of the investigation. They also presented a piece of evidence (the written testimony of X.Y., dated 18 December 2015) which was not even to be found in the copy of the case files at the disposal of the judge.*
>
> *[…]*
>
> *The following well-founded objections may be raised with regard to the investigation in the present case:*
>
> - *The written testimony of X.Y. from December, in which he accused someone else instead of [the defendant] with selling the drugs, is not included in the case file at the disposal of the investigation judge, even though it was surely submitted to the police.*
> - *The defence has not been provided either with all the case files which, based on Article 7 of the directly applicable Directive 2012/13/EU, are necessary to substantively challenge the necessity of pre-trial detention."*

RECOMMENDATIONS

- It should be included in the law that providing the copy of the case files related to the motion aimed at pre-trial detention to the defence is the precondition of holding a hearing or reaching a decision with regard to the pre-trial detention, and if case files have not been provided, no hearing may be held and no decision may be reached.
- Irrespective of amending the law, courts should ensure the uniformity of the application of the law in order to ensure that it is a precondition of holding a hearing or reaching a decision with regard to pre-trial detention that the case files related to the motion aimed at pre-trial detention have been submitted to the defence in due time.

- In order to achieve the above, the court system should take steps in order to ensure that investigation judges always ask the defence counsel and the defendant at the hearing about (i) whether they have received the prosecutorial motion and the copy of the case files (ii) and whether they had sufficient time to study the case files and to prepare, (iii) and all of this should be apparent from the minutes of the hearing.
- An explicit rule, saying that if the defence counsel or the defendant states that they have not had enough time to study the case files, the investigation judge may allow the defence to study the case files on the spot or may set a later time for the hearing, should be adopted.
- The participation of the defence counsel at the hearings related to pre-trial detention should be made mandatory.
- An explicit rule should be adopted that would set out that if investigation judges notice that not all case files essential to assess the lawfulness of pre-trial detention have been provided to the defendant and the defence counsel, (i) they may share these case files with the defence at the hearing if they have access to them, and that (ii) they have the right to request the prosecutor to provide further case files if necessary.

4.7. Remedies

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 investigation authority can file a complaint within eight days from becoming aware thereof." Hence, in theory, defendants and their defence counsels may file a complaint also if for example case files substantiating the prosecutorial motion aimed at ordering or prolonging pre-trial detention have not been provided to the defence or have been provided with a delay. However, there is no national data available as to how often defence counsels submit complaints based on that and how successful these complaints are.[46]

From among the attorneys participating in the present research, 12 attorneys reported that they have never submitted a complaint on the basis that case files substantiating the prosecutorial motion aimed at ordering or prolonging pre-trial detention were not provided to the defence or were provided with a delay. An attorney has not submitted a complaint yet because that has not been necessary yet, another attorney submitted that he seeks other avenues of remedy (e.g. raises the problem in the appeal against the decision on pre-trial detention), while a third attorney said that he does not submit complaints because that

would "backfire". In addition to that, attorneys were rather sceptical as to the efficiency of complaints. Several attorneys submitted that complaints are typically rejected (one respondent even stated that complaints are not even adjudicated), while another attorney submitted that even though it occurs that he does not receive case files, he does not submit any complaints about that, because complaints "are rejected anyway". Another attorney added that the complaints would have no "benefit" even if they would be accepted and it would be confirmed that the defence has not received certain case files. Attorneys could remember only a few instances when the complaint was successful and they could access case files due to that. One of the attorneys reported that in his view it is a recent development that complaints are rejected by the prosecution with the reasoning that the motion is not substantiated by a certain case files claimed as missing by the defence, and so they are not obliged to hand it over.

The above results are supported also by the results of the case file research: in the 41 procedures examined, the defence submitted a complaint only once in relation to accessing the case files substantiating the motion aimed at ordering pre-trial detention, and that complaint was not successful. Altogether six complaints were submitted in relation to accessing case files substantiating motions aimed at prolonging pre-trial detention, with only one of them being successful. Only one of the judges interviewed stated that he has already encountered one or two formal complaints submitted by the defence in relation to accessing case files, and those complaints were successful.

4.8. Providing case files in the case of house arrest

Section 402.1.) f) of the Chief Prosecutor's Memorandum expressly raises the attention of prosecutors to the fact that Article 211 (1a) of the CCP does not apply to house arrest:

> f) The provision in Article 211 (1) of the CCP pertaining to the copy of the case files applies *exclusively* to the prosecutorial motions aimed at *ordering and prolonging* pre-trial detention. It does not apply to the ordering and prolonging of other coercive measures. [It does not apply to house arrest either; Article 138 (3) of the CCP does not refer to Article 211 (1).] Accordingly, in the future, the *principle* included in Article 60 (2) shall be kept in mind even more vigorously when choosing the type of coercive measure to be motioned for. *(NF.3346/2013.)*

Article 60 (2) of the CCP[47] referred to above requires courts to examine whether the aims wished to be achieved by the pre-trial detention may be achieved by a less restrictive

coercive measure. Hence, the Chief Prosecutor's Memorandum seems to raise the attention of prosecutors that choosing alternative coercive measures have the advantage in terms of investigative tactics that in the case of defendants not in pre-trial detention the general rules of the CCP on accessing case files shall apply, being far more restrictive than Article 211. The Department for the Supervision of Investigations and the Preparation of Indictments of the Chief Prosecutor's Office informed the HHC in this regard in a letter dated 13 October 2016[48] that Section 402.1.) f) of the Chief Prosecutor's Memorandum "does not include any orientation in terms of »investigative tactics«, as assumed [by the HHC], but instead, it only interprets the content of the given (cogent) legislative provision, similarly to the other sections" of the Chief Prosecutor's Memorandum.

In relation to this, it is worth covering the issue (also raised by one of the attorneys interviewed in the JUSTICIA research) **whether it would be justified to ensure access to case files to those under house arrest in a similar way than to those in pre-trial detention**. Article 7 (1) of the Right to Information Directive prescribes ensuring access to case materials for defendants "arrested and detained", while Paragraph (21) of the preamble of the Right to Information Directive sets out the following: "References in this Directive to suspects or accused persons who are arrested or detained should be understood to refer to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) [of the European Convention on Human Rights], as interpreted by the case-law of the European Court of Human Rights." According to the case-law of the European Court of Human Rights, house arrest, and house arrest under the Hungarian CCP in particular,[49] qualifies as deprivation of liberty under Article 5 of the European Convention on Human Rights.[50] Accordingly, it may be raised that full compliance with the Right to Information Directive would require that defendants be granted the right to have access to case materials serving as a basis for ordering a coercive measure as per Article 7 of the Right to Information Directive also if they are taken into house arrest.

This suggestion was supported by eight of the judges interviewed, and only one judge submitted that he would not support extending the provision included in Article 211 (1a) of the CCP to house arrest. (Two judges reported that according to their experiences, the prosecution attaches the copy of the case files also to the motions aimed at house arrest.) Furthermore, the suggestion was supported by 16 interviewed attorneys.

RECOMMENDATION

- It should be considered to extend the rule on accessing case files related to pre-trial detention to house arrest.

4.9. General assessment

Finally, it is worth reviewing the general reflections of the participants of the criminal proceedings in relation to the amended text of Article 211 and the related practice.

In the Fair Trials research, in response to the question whether the amendment of the law widened the scope of case files accessible to the defence in practice, 22 out of the 28 responding **attorneys** answered with a yes, but at the same time it was also pointed out by some of them that since the defence still does not receive the case files before the hearing commences, or receives them not in due time before the hearing, there is no possibility to examine them, which counters the positive effect of the legislative amendment. The participants of one of the focus group discussions conducted in the BHC research mentioned without any separate question pertaining to that that prescribing the submission of case files before the decision on pre-trial detention was an important and positive development. In the present research, attorneys gave an average 3.1 points on a scale from 1 to 5 when asked to assess the current regulation on providing pre-trial detainees with the case files, while they gave an average 2.8 points when assessing the practice. Several attorneys voiced their frustration, because they feel that implementing the Right to Information Directive and ensuring access to case files has not fulfilled their expectations, and it has no real influence on whether their clients' pre-trial detention is ordered or not.

In the BHC research, several **police officers** voiced their disagreement with the new rules and the practice, considering the scope of case files submitted or to be submitted too wide, and one of them also voiced his concerns that once he hands over the case files, he has no influence over who will have access them.

Prosecutors interviewed in the Fair Trials research were unanimously of the view that the change in the legal provisions widened the scope of case files available to the defence also in practice, and several of them reported that as a result, hearings on pre-trial detention became more "substantive".

Several **judges** interviewed in the present research also stressed that from their aspect it is an advantage that the defence receives the case files in advance, since hearings can become "livelier" this way, and the defence counsels know what the hearing is about. The head of the Investigation Judge Group of the Buda Central District Court added in this regard at the workshop that the obligation to submit the case files also resulted that the defence contests the existence of a well-founded suspicion more often than earlier.

Finally, many different participants of the criminal proceedings raised in the different researches of the HHC that the implementation of Article 7 of the Right to Information Directive may have been one of the reasons behind the decrease in the number of pre-trial detentions ordered (more precisely, the decrease in the motions aimed at pre-trial deten-

tion), and that the hearings becoming more "substantive" had an effect on the success rate of prosecutorial motions aimed at pre-trial detention, while others were of the view that the latter had no decisive effect on the success rate of prosecutorial motions.

5. Research results concerning access to case materials of criminal cases in the investigation phase in the case of defendants not detained

As already mentioned in the introduction, the defendant and the defence counsel have limited access to the case files during the investigation. According to Article 186 (1) of the CCP, the defence has unrestricted access only to expert opinions and the minutes of those investigative acts where the defendant and the defence counsel may be present. At the same time, the rules of the CCP allow for the presence of the defence counsel practically only at the interrogation of the defendant, the questioning of witnesses whose questioning was initiated by either him/her or the defendant and confrontations held with the participation of the latter kind of witnesses.[51] Furthermore, the defence counsel and the defendant may also be present at the hearing of the expert, the inspection of scenes and objects, the reconstruction of events and identity parades.[52] The defence may have access to the further materials of the case if allowing access would not violate the "interests of the investigation".[53] If the defendant or the defence counsel may be present at an investigative act, than they may inspect the minutes of that instantly,[54] and they are entitled to receive a copy about the case file which they may inspect.[55]

The so-called "presentation of the case file" takes place after the investigation is concluded: in the course of this, the prosecutor or the investigation authority "hand over the bound case files of the investigation" (that is, the complete documentation of the investigation) "to the defence counsel and the suspect in a room designated for that", and during which "the suspect and the defence counsel shall be enabled to access all case files – with the exception of those treated confidentially – that may serve as the basis for a possible indictment".[56] The suspect and the defence counsel may request a copy of these case files; suspects shall be warned of their right to do that.[57] After the presentation of the case file

– and so throughout the whole trial phase – the defence has unlimited access to the files of the case.[58]

It can be concluded on the basis of the above that **the Hungarian rules are in compliance with the requirement enshrined in Article 7 (3) of the Right to Information Directive that access to the materials of the case** "shall be granted in due time to allow the effective exercise of the rights of the defence and **at the latest upon submission of the merits of the accusation to the judgment of a court**". The regulation also complies with Article 7 (5), setting out that access to case files under Article 7 of the Right to Information Directive shall be provided free of charge.[59]

5.1. The scope of case files accessible to the defence; grounds for denying access

In addition to the above, the Hungarian regulation formally complies with Article 7 (2) and (4) of the Right to Information Directive as well, which require on the one hand that access is granted to defendants or their defence counsels "at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons", on the other hand, however, allow for such access to be refused under certain conditions.

Nevertheless, practical experience indicates that there are numerous cases in which the defence counsel does not have access to all case files during the investigation phase.

Only 11 of the 17 attorneys interviewed during the present research stated that they always have access to all case files granting access to which is obligatory (i.e. the minutes of the investigative acts which the defendant and the defence counsel are allowed to attend, and the expert opinions), while three of them stated that they have access to these case files in more than half of the procedures. Thus, defence counsels face difficulties even when wishing to access case files to which it would be obligatory to provide them access upon request. By contrast, all the prosecutors stated that the defence has access to these case files in all of the procedures, and only one of them mentioned the following:

> *"Of course infringement caused by omission does occur, however, releasing these case files is refused intentionally – potentially in a written format – in an insignificant number. It occurs, occasionally, that the defendant or the defence counsel had already received a copy free of charge, which they lost, and they consider it injurious when the investigation authority wants to charge a fee for an additional copy."*

It shall be noted that the regulatory concept of the CCP does not fully comply with Article 7 of the Right to Information Directive in the sense that it does not make the access to all case files the main rule, subject to exceptions when access may be denied, but applies a

reverse concept. However, **the provision of the CCP declaring that the inspection of the case files may be refused with consideration to the interests of the investigation is in accordance with Article 7 (4) of the Right to Information Directive,** which explicitly says that access to certain materials may be refused for example "in cases where access could prejudice an ongoing investigation" (provided that this does not prejudice the right to a fair trial).

When attorneys were asked – also with a view to the lack of official statistics in this regard – **how frequently authorities refuse access to case files** (the issuing of copies of case files) **which are not mandatorily accessible**, while referring to the interests of the investigation, they gave the following answers:

- according to seven attorneys the authorities refuse access in all of the cases,
- according to two attorneys access is refused in more than half of the cases,
- according to two attorneys access is refused in half of the cases,
- according to three attorneys the authorities refuse access to these case files in less than half of the cases,
- while according to two respondents access to the case materials is never refused.

Six out of 10 prosecutors stated that authorities refuse to release case files "rarely", "sporadically", "in an insignificant number of cases", or "exceptionally". It should be noted that according to the interviews, attorneys carefully pick the occasions when they request copies of case files at all which are not mandatorily accessible: eight out of the 17 attorneys request these in less than half of the criminal procedures, while three attorneys never request these additional case files. Several attorneys indicated that a reason for not requesting access is that according to their experience, requesting access to these case files is pointless, since their requests will surely be denied.

In addition, all but one attorney stated that authorities do not provide any details why accessing a certain case file would violate the interests of the investigation. Moreover, most of them could not identify tendencies and could not define any criteria in terms of categories of case files or procedures which make it more likely that access is denied.

- According to one of the attorneys, access depends on relationships, on whether the attorney knows the police officer or not, and it occasionally happens that the attorney gets to know the content of a case file due to this relationship, in an informal manner: the police officer tells her what is in the case file or what she would like to know, but she cannot make a copy or take a picture of the given document.
- According to another attorney, the time factor is crucial: in his view, authorities make "manoeuvres" when refusing access rather in the initial phase of the investigation, but after the first three months of the investigation this is less likely to happen.

- A third attorney was of the opinion that case files including extenuating or mitigating pieces of evidence or failures and procedural irregularities are the ones not released.

Besides claiming that access would violate the interests of the investigation, attorneys encountered the reasoning that the release of a case file would violate personal rights, or that the requested expert opinion does not pertain to the given defendant, so it cannot be released. According to one of the prosecutors, access to case files including personal data treated confidentially may be refused on that ground, instead of referring to the interests of the investigation.

According to a police officer interviewed in the JUSTICIA research, they rather make use of the option of handling data confidentially than refuse to release case files (thus, they prevent access to the data of the different participants of the proceedings). According to another interviewee, the local police department is not the "level" at which restricting access to case files would be greatly necessary. One of the respondents said that they strive to question every concerned person except the future suspect and to acquire all pieces of evidence prior to communicating the suspicion and interrogating the suspect – in this way they do not have any reason in terms of investigative tactics to refuse the release of copies of case files after the suspect's interrogation. According to their responses, reference to the interests of the investigation could arise when for instance the testimonies of two defendants differ significantly, or if for example only one witness statement is available in a procedure involving a series of criminal offences.

On the other hand, **two further police officers interviewed in the JUSTICIA research reported a practice that is clearly in contradiction with the relevant provisions of the CCP**: both of them stated that **during the investigation the defence may only have – and has – access to those documents that the CCP expressly enumerates**. Moreover, according to one of them, it may occur that with a view to the interests of the investigation they do not even grant access to those case files that are specifically mentioned as case files accessible to the defence (for instance if, according to their assessment, the procedure could be frustrated by the defendant based on a particular information included in an otherwise accessible document). Therefore, in these instances they do not refer to the interests of the investigation when refusing to release copies of certain case files, but claim instead that on the basis of the CCP, the defence cannot access the given case files.

To sum it up: research interviews showed that **in practice, issuing copies of case files in the investigation phase is denied not only on an exceptional basis but with regard to a significant proportion of case files, which is in contradiction both with the CCP and with Article 7 (4) of the Right to Information Directive**.

RECOMMENDATIONS

- Steps should be taken to ensure that the practice of the investigation authorities comply with the CCP and Article 7 of the Right to Information Directive, and issuing copies of case files (i.e. access to case files) is refused only when the access would, in fact, violate the interests of the investigation.
- Case files to which providing access for the defence is mandatory on the basis of the CCP should be submitted to the defence automatically, without a separate request. (One solution for that would be that authorities submit to the defence regularly, e.g. in every month, the case files emerged in that month, or via establishing an electronic platform accessible to all participants of the criminal procedure with different access levels, as already raised in Chapter 4.4. and also proposed by two attorneys participating in the research.)
- When investigation authorities refuse to release a copy of a case file, and so access to a case file, while referring to the interests of the investigation, they should provide a reasoning as to why the defence accessing the given case file would violate the interests of the investigation, with the exception when the reasoning itself could also give rise to conclusions which would endanger the success of the investigation.

5.2. Form of access

Based on Article 70/B of the CCP, **copies** of accessible case files are issued both in the course of the investigation and the presentation of the case file by the preceding authority upon the request of the participants of the criminal proceedings, "no later than within eight days of submitting the request".[60] Those who may receive a copy of a case file emerged in the course of the proceedings may request that the court, the prosecutor and the investigation authority release the copy **electronically or on an electronic data storage device.** If the case file requested is at the disposal of the court, the prosecutor or the investigation authority in an electronic format, it shall be released electronically or on an electronic data storage device, although the copy released this way is not a certified copy.[61] According to the judicial practice, copies of documents may be released not only as paper copies: according to leading judgments BH2006. 316. and BH2006. 44., the request of a defence counsel to make copies of the case files with a digital camera cannot be denied. However, in the present research three attorneys submitted that according to their experience, it is not possible to take photos of the case files.

It is a problem that the CCP – similarly to Article 211 (1a) on the right to access to case files of pre-trial detainees – prescribes the issuing of copies of the "case files", thus, it focuses on the files (documents) of the investigation, and so **it does not expressly provide for the possibility to access the means of evidence not treated as part of the files of the case**. **This is contrary to the aim of the Right to Information Directive**, which explicitly sets out in Paragraph (31) of its preamble that "for the purpose of this Directive, access to the material evidence, as defined in national law, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case, should include access to materials such as documents, and where appropriate photographs and audio and video recordings". (It should be added that in relation to Article 70/B of the CCP, Chamber Opinion 4/2007. BK refers to the release of copies of "objects recording data in technical, chemical or other ways" as well, beyond the copies of "files", but it would be justified to include this out in the law.)

RECOMMENDATIONS

- The CCP should be amended in order to make it explicitly possible for the defence to access also the means of evidence not treated as part of the files and to receive electronic copies of these, if possible.
- The necessary infrastructure should be ensured for the authorities in order to make it possible also in practice, as widely as possible, that the copies of the case files are issued electronically or on an electronic data storage device, in a form that complies with the right to a fair trial.

5.3. The form of denying access; available remedies

Since 1 January 2014, based on Article 169 (1) of the CCP, the prosecutor and the investigation authority **shall issue a decision when refusing to issue a copy of a case file.** However, in the present research many attorneys reported that providing access to case files is characterized by a high level of informality: **in many instances, no formal decision** is being delivered on denying access to case files or providing copies of them, one of the reasons for that being that in many instances, attorneys also request access in an informal manner (for example on the phone).

If a formal **decision** is delivered, the defendant and the defence counsel may **submit a complaint against it** within eight days of the communication of the decision.[62] If this complaint is rejected, **a motion for judicial review may be submitted against the rejection** within eight days of delivery, **which will be adjudicated by the court**. This is in compliance with the requirement enshrined in Article 7 (4) of the Right to Information Directive that

the decision to refuse access to certain materials in accordance with Article 7 (4) "is taken by a judicial authority or is at least subject to judicial review".

There is no national data available as to how frequently attorneys file complaints on account of the refusal to issue copies of case materials, and to what extent these complaints are successful.[63] However, the responses of the attorneys show that defence counsels rarely resort to the possibility of filing a complaint: 11 attorneys stated that they never file complaints against the refusal to issue copies of case files, while five attorneys reported that they file a complaint in less than half of the instances. In line with the latter, prosecutors were of the unanimous opinion that defence counsels file complaints "extremely rarely", "sporadically" or never against the refusal to release copies of case files. One of the judges submitted in connection with this that in his view it is still not common knowledge that it is possible to file a complaint against a decision on refusing to release copies of case files, and the participants of the criminal proceedings overlook this possibility.

5.4. The relationship between the two ways of accessing case files

It is a further issue how access to case files under Article 70/B and Article 186 of the CCP and providing case files substantiating the prosecutorial motion aimed at pre-trial detention relate to each other, since in our view this question is not settled unequivocally by the CCP. Section 402.1.) of the Chief Prosecutor's Memorandum sets out the following to settle this issue:

> j) If the defendant or the defence counsel requests the release of copies of further case files – not attached to the [prosecutorial] motion –, referring to the second sentence of Article 211 (1a) of the CCP, the request shall be adjudicated according to Article 70/B of the CCP. If the prosecutor finds that the request should not be granted, a decision shall be issued on the refusal pursuant to Article 169 (1) of the CCP. Based on Article 195 (6) of the CCP, a motion of judicial review may be filed to the investigation judge against the decision rejecting the complaint on the refusal of issuing a copy of a case file *[KF. 7906/2014/3-II.].*

In spite of the above provision, 12 attorneys stated that they never request copies of the case files (access to case files) on the basis of Article 70/B of the CCP if their client is in pre-trial detention. Three attorneys submitted that they attempt to gain access to further case files on the basis of the general rules on access to case files for example after the

court hearing on pre-trial detention or "between" the decisions on prolonging pre-trial detention. According to one of them, Article 211 of the CCP is a special rule as compared to Article 186 of the CCP.

It is partly related to this subject that the head of Investigation Judge Group of the Buda Central District Court noted at the workshop that in his view it is a problem that for example expert opinions are only submitted to the defence when the prosecution puts forth a motion for the prolongation of the pre-trial detention, although for instance an expert opinion issued three months earlier should have been submitted to the defence at the time it was completed.

6. Recommendations

RECOMMENDATIONS ON ACCESS TO CASE FILES RELATED TO PRE-TRIAL DETENTION

- In order to comply with Article 7 of the Right to Information Directive, Article 211 of the CCP should be amended in a way that that authorities are not only obliged to provide the defence with the case files substantiating the motion for pre-trial detention, but all the documents related to the specific case which are essential to challenging effectively the lawfulness of the detention, and are relevant in terms of the pre-trial detention.
- The provisions of the CCP should be amended in a way that the investigation judge, deciding on pre-trial detention, shall have access to all the case files at the disposal of the investigation authority and the prosecutor. In addition to that, when handing over the case files to the investigation judge, the prosecutor should inform the investigation judge about the case files withheld from the defence.
- The problem that further investigative acts may be carried out between submitting the police proposal aimed at pre-trial detention and issuing the decision on pre-trial detention, about which the defence and the judge are not informed, should be handled (e.g. by setting out that in such circumstances the defence and the judge shall be provided with the copies of the case files emerging in relation to these investigative acts out of turn).
- The CCP should be amended in order to make it possible for the defence to access also the means of evidence not treated as part of the files of the case when accessing case files on the basis of Article 211 (1a) of the CCP.
- The CCP should allow for the possibility that, upon the request or with the consent of the concerned persons, access to data/documents under Article 211 (1a) of the CCP is ensured also in another way than issuing a copy, such as providing case files on a data storage device or in an electronic format, via email.

- It should be made mandatory to provide photographs, videos and audio recordings in an electronic format.
- In the long run, penitentiary institutions should strive to ensure that pre-trial detainees have the possibility to lock away their case files, possibly outside their cells.
- A minimum deadline should be set out for submitting the motion for ordering pre-trial detention and the related case files to the defence before the hearing/decision, which makes it realistic for the defence to prepare for the hearing.
- As a minimum, it should be incorporated into the CCP that the motion for ordering pre-trial detention and the related case files should be provided in adequate and "due time", and the characteristics of the case shall be taken into account by the authorities in this regard.
- The CCP should be amended in a way that every case file emerging after the pre-trial detention is ordered and relevant in terms of the defendant's pre-trial detention is submitted to the defence on a continuous basis.
- As a minimum, the CCP should be amended in a way that the motion aimed at prolonging pre-trial detention is submitted separately from the related case files, at least in cases when there is no hearing held on the prolongation of pre-trial detention. In these instances, case files should be handed over to the defence verifiably before the prosecutorial motion is submitted, in a way that the defence has a realistic chance to study the case files, gather documents and submit motions.
- In the absence of the amendments suggested above, as a minimum, steps should be taken to ensure that if possible, case files are not submitted by post before the prolongation of the pre-trial detention.
- It should be ensured that, if necessary and if required, judges have the possibility to take over case files to study them also after the official working hours (e.g. in an electronic way).
- In the long run, in order to enhance the efficiency of the defence and to ease the burden on the investigation authorities, it may be considered to establish an electronic platform accessible to all participants of the criminal procedure with different access levels, making it easier to provide case files and to follow which case files have been already provided to the defence.

- The prosecution should take steps to ensure that the respective provision of the Chief Prosecutor's Memorandum is complied with every time also in practice, so that the prosecutorial motion or the list of case files, etc. attached to it lists the case files delivered in an itemized manner in every case.
- The delivery of the case files should be always documented in a way trackable also for the defence and the judge, with a separate list of case files, signature sheet, etc., not only when a hearing is held.
- The record of delivery, list of case files, etc. signed by the defence when receiving the case files should in every case include (i) an itemized list of the case files delivered, (ii) if case files are not delivered by post, the exact time of delivery (by the hour and the minute), (iii) and the defence counsel and the defendant should always receive a copy of the record of delivery.
- The record of delivery, list of case files, etc. signed by the defence when taking over the case files should always reach the investigation judges, who should hold a hearing or decide on the pre-trial detention only if the record of delivery is in their possession.
- It should be included in the law that providing the copy of the case files related to the motion aimed at pre-trial detention to the defence is the precondition of holding a hearing or reaching a decision with regard to the pre-trial detention, and if case files have not been provided, no hearing may be held and no decision may be reached.
- Irrespective of amending the law, courts should ensure the uniformity of the application of the law in order to ensure that it is a precondition of holding a hearing or reaching a decision with regard to pre-trial detention that the case files related to the motion aimed at pre-trial detention have been submitted to the defence in due time.
- In order to achieve the above, the court system should take steps in order to ensure that investigation judges always ask the defence counsel and the defendant at the hearing about (i) whether they have received the prosecutorial motion and the copy of the case files (ii) and whether they had sufficient time to study the case files and to prepare, (iii) and all of this should be apparent from the minutes of the hearing.
- An explicit rule, saying that if the defence counsel or the defendant states that they have not had enough time to study the case files, the investigation judge may allow the defence to study the case files on the spot or may set a later time for the hearing, should be adopted.

- The participation of the defence counsel at the hearings related to pre-trial detention should be made mandatory.
- An explicit rule should be adopted that would set out that if investigation judges notice that not all case files essential to assess the lawfulness of pre-trial detention have been provided to the defendant and the defence counsel, (i) they may share these case files with the defence at the hearing if they have access to them, and that (ii) they have the right to request the prosecutor to provide further case files if necessary.
- It should be considered to extend the rule on accessing case files related to pre-trial detention to house arrest.

RECOMMENDATIONS ON ACCESS TO CASE FILES IN THE INVESTIGATION PHASE IN GENERAL

- Steps should be taken to ensure that the practice of the investigation authorities comply with the CCP and Article 7 of the Right to Information Directive, and issuing copies of case files (i.e. access to case files) is refused only when the access would, in fact, violate the interests of the investigation.
- Case files to which providing access for the defence is mandatory on the basis of the CCP should be submitted to the defence automatically, without a separate request. (One solution for that would be that authorities submit to the defence regularly, e.g. in every month, the case files emerged in that month, or via establishing an electronic platform accessible to all participants of the criminal procedure with different access levels.)
- When investigation authorities refuse to release a copy of a case file, and so access to a case file, while referring to the interests of the investigation, they should provide a reasoning as to why the defence accessing the given case file would violate the interests of the investigation, with the exception when the reasoning itself could also give rise to conclusions which would endanger the success of the investigation.
- The CCP should be amended in order to make it explicitly possible for the defence to access also the means of evidence not treated as part of the files and to receive electronic copies of these, if possible.
- The necessary infrastructure should be ensured for the authorities in order to make it possible also in practice, as widely as possible, that the copies of the case files are issued electronically or on an electronic data storage device, in a form that complies with the right to a fair trial.

Endnotes

1. See: *Bandur v. Hungary* (Application no. 50130/12, Judgment of 5 July 2016), *Süveges v. Hungary* (Application no. 50255/12, Judgment of 5 January 2016), *Baksza v. Hungary* (Application no. 59196/08, Judgment of 23 April 2013), *A.B. v. Hungary* (Application no. 33292/09, Judgment of 16 April 2013), *X.Y. v. Hungary* (Application no. 43888/08, Judgment of 19 March 2013), *Ferencné Kovács v. Hungary* (Application no. 19325/09, Judgment of 20 December 2011), *Darvas v. Hungary* (Application no. 19547/07, Judgment of 11 January 2011).
2. András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth*: Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára / Kézikönyv bírák számára [The Practice of the European Court of Human Rights Related to Pre-Trial Detention – Manual for attorneys / Manual for judges]*. Hungarian Helsinki Committee, Budapest, 2014. Available at: http://www.helsinki.hu/az-emberi-jogok-europai-birosaganak-elozetes-letartoztatassal-kapcsolatos-gyakorlata/.
3. The term "defendant" will be used to refer to the subject of the criminal procedure irrespective of the actual phase of the procedure, i.e. both the suspect (before the indictment) and the accused person (after the indictment).
4. CCP, Article 186 (1) and 184 (2)
5. CCP, Article 185 (1)
6. CCP, Article 186 (2)
7. CCP, Article 193 (1)
8. See e.g.: *Baksza v. Hungary* (Application no. 59196/08, Judgment of 23 April 2013), *Hagyó v. Hungary* (Application no. 52624/10, Judgment of 23 April 2013), *A.B. v. Hungary* (Application no. 33292/09, Judgment of 16 April 2013), *X.Y. v. Hungary* (Application no. 43888/08, Judgment of 19 March 2013).
9. In order to follow the Hungarian wording as closely as possible, the term "case file" will be used both for the full set of case materials and for the individual documents and materials constituting part of the full case file.

10. CCP, Article 211 (1a). It shall be noted that the transposition deadline of the Right to Information Directive (2 June 2014) was not fully complied with by the Hungarian legislator.
11. The text of Bill T/13972. on the Code of Criminal Procedure as submitted to the Parliament by the Government and its reasoning is available here: http://www.parlament.hu/irom40/13972/13972.pdf.
12. Bill T/13972. on the Code of Criminal Procedure, p. 370.
13. Bill T/13972. on the Code of Criminal Procedure, p. 433.
14. András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára [The Practice of the European Court of Human Rights Related to Pre-Trial Detention – Manual for attorneys]*. Hungarian Helsinki Committee, Budapest, 2014, p. 37. Available at: http://www.helsinki.hu/wp-content/uploads/HHC_Kezikonyv_ugyvedek_szamara_2014_web.pdf.
15. András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára [The Practice of the European Court of Human Rights Related to Pre-Trial Detention – Manual for attorneys]*. Hungarian Helsinki Committee, Budapest, 2014, p. 37.
16. https://www.fairtrials.org/
17. Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report – Hungary.* Hungarian Helsinki Committee, October 2015. Available at: http://www.helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf.
18. http://eujusticia.net/
19. http://hrmi.lt/en/
20. *EU-irányelvek a gyakorlatban: A büntetőeljárás során a tájékoztatáshoz való jogról szóló EU-irányelv átültetésének vizsgálata. Országjelentés – Magyarország [EU Directives in Practice: Monitoring and Reporting on 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.
21. http://www.bghelsinki.org/en/
22. CCP, Article 130 (1)
23. CCP, Article 132 (5); Joint Decree 23/2003. (VI. 24.) BM-IM 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, Article 63

24. CCP, Article 131 (2)

25. CCP, Article 9 (3)

26. Response of the Chief Prosecutor's Office to the HHC's information request, Ig. 42/28/2015. Legf. Ü., 14 January 2016

27. The text of the memorandum was provided to the HHC by the Chief Prosecutor' Office in its response dated 5 May 2017, ABOIGA//6-61/2017.

28. Chief Prosecutor's Office, Department for the Supervision of Investigations and the Preparation of Indictments, 9 May 2016, NF. 1052/2016/3-II.

29. See: Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report – Hungary.* Hungarian Helsinki Committee, October 2015, Chapter IV. 1.3.

30. CCP, Article 129 (2)

31. *EU-irányelvek a gyakorlatban: A büntetőeljárás során a tájékoztatáshoz való jogról szóló EU-irányelv átültetésének vizsgálata. Országjelentés – Magyarország [EU Directives in Practice: Monitoring and Reporting on the Implementation of the EU Directive on the Right to Information in Criminal Proceedings. Country report – Hungary].* Hungarian Helsinki Committee, December 2015, p. 27.

32. See: Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report – Hungary.* Hungarian Helsinki Committee, October 2015, Chapter IV. 1.4.

33. Article 96 (1) It may be ordered ex officio by the court, the prosecutor or the investigation authority and shall be ordered upon the request of the witness or the lawyer acting on behalf of the witness that the personal data of the witness […], except the data not covered by the request, is handled separately among the case files, in a confidential manner. In such cases the data of the witness handled in a confidential manner may only be inspected by the court, the prosecutor and the investigation authority proceeding in the case.

    (2) If it is ordered that the personal data of the witness is handled in a confidential manner, from that moment on

        a) the court, the prosecutor and the investigation authority proceeding in the case shall ensure that the data of the witness handled in a confidential manner may not become known from other data of the procedure;

        b) the court, the prosecutor and the investigation authority establishes the identity of the witness by examining documents suitable for identification;

        c) the confidential treatment of the personal data of the witness may only be terminated with the consent of the witness.

(3) From the time of ordering the confidential treatment of the personal data of the witness, copies of case files containing the personal data of the witness may only be provided to the participants of the criminal proceedings in a way that the personal data of the witness is redacted.

34. One prosecutorial motion was covered by the research which contained information on that, in the following form: "At the same time as sending the prosecutorial motion, a copy of the case files identical with the case files submitted to the court will be delivered to the defendants and the defence counsels via the investigation authority."

35. In one of the cases concerned, it was also established by the court that the prosecution had broken the law, but the violation was classified as a relative procedural violation with no effect on the merits of the case.

36. In more detail, see: Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report – Hungary*. Hungarian Helsinki Committee, October 2015, pp. 27–32.

37. See: *Az új büntetőeljárási törvény kodifikációjának előkészítő munkaanyaga: A büntetőeljárásban részt vevő személyek és az eljárási cselekményekre vonatkozó általános szabályok [Preparatory working document for the codification of the new Code of Criminal Procedure: the general rules on procedural acts and participants of the criminal procedure],* p. 100.

38. CCP, Article 70/B (11)

39. Response of the National Penitentiary Headquarters to the HHC's freedom of information request, 5 May 2017, 30500/4019-/2017.

40. The National Police Headquarters' response to the HHC's freedom of information request, 4 May 2017, 29000/14356-9/2017.ált.

41. "72-hour detention" is the temporary deprivation of the defendant's personal liberty without a judicial decision, which may be ordered upon a reasonable suspicion that the defendant committed a criminal offence punishable with imprisonment, provided that a probable cause exists to believe that the defendant's pre-trial detention will be ordered. If the pre-trial detention of the defendant is not ordered by the court within the maximum 72 hours of the detention, he/she shall be released.

42. One of the judges mentioned in relation to that that the police often know in advance when they will "strike", i.e. when they will take the defendant(s) into 72-hour detention (in cases involving several defendants, such as drug-trafficking cases, this happens in a coordinated manner), and in these cases taking the defendants into 72-hour detention is preceded by an extensive investigation. According to the interviewee, it would be good if in these cases the files would be submitted to the investigation judge already before taking the concerned person into 72-hour detention, allowing the judge more time to prepare. This would not decrease the police measure's chances of success, since judges are also bound by confidentiality.

43. Chief Prosecutor's Office, Department for the Supervision of Investigations and the Preparation of Indictments, 9 May 2016, NF. 1052/2016/3-II.

44. Along with the interviews conducted with prosecutors in the Fair Trials research and certain interviews conducted with police officers in the JUSTICIA research, this information is based on the following article: Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán [Thoughts on the critical remarks made against the domestic practice of pre-trial detention]. *Magyar Jog*, 2015/5., pp. 289–293.

45. Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán [Thoughts on the critical remarks made against the domestic practice of pre-trial detention]. *Magyar Jog*, 2015/5., pp. 289–293.

46. According to the information provided to the HHC by the Chief Prosecutor's Office (Ig. 42/28/2015. Legf. Ü., 8 December 2015), none of the statistical and case-management systems operated by the prosecution service collects data on the basis of the complaints submitted.

47. "If the present Act of Parliament [the CCP] allows for the restriction of the concerned person's constitutional rights in relation to applying coercive measures, these acts may, even if the further conditions for them prevail, only be ordered if the aim of the procedure may not be ensured through a less restrictive act."

48. NF/6484/2016/1.

49. According to the Hungarian rules, if under house arrest, the defendant may only leave the place of residence designated by the court and the enclosed area for a purpose defined in the decision ordering the house arrest – especially in order to satisfy regular everyday needs or for the purposes of medical treatment –, and for the time and distance (destination) defined in the decision.

50. See for example: *Süveges v. Hungary* (Application no. 50255/12, Judgment of 5 January 2016), § 77. ("In the present case it has not been disputed by the parties that the applicant's house arrest constituted deprivation of liberty within the meaning of Article 5 and the Court sees no reason to hold otherwise (see *Vachev v. Bulgaria*, no. 42987/98, § 64, ECHR 2004VIII (extracts); *Lavents v. Latvia*, no. 58442/00, § 63, 28 November 2002). The Court considers that period spent in house arrest shall be taken into consideration when assessing the length of pre-trial detention.")

51. CCP, Article 184 (2)

52. CCP, Article 185 (1)

53. CCP, Article 186 (2)

54. CCP, Article 186 (1)

55. CCP, Article 186 (3). Article 186 (4) of the CCP adds that the personal data of the victim and the witness must not be indicated on the copies of the case files which emerged,

were obtained, submitted or attached in the course of the investigation and contain the confession or the personal data of the victim or the witness. In addition, no copies may be issued about the draft of the decision of the prosecutor and the investigation authority, or of the documents which emerged in the course of the communication between the prosecutor and the investigation authority (documenting the progress of the investigation).

56. CCP, Article 193 (1)

57. CCP, Article 193 (1)

58. The CCP sets out only one limitation regarding this: according to Article 70/B (6) and Article 60, issuing copies to the defendant and the defence counsel may only be refused if that would violate human dignity, the personal rights of a person concerned or the right to reverence, or it would result in making data on private life public unnecessarily.

59. Based on Article 57 (2) of Act XCIII of 1990 on Duties, one copy of the case files shall be issued free of charge.

60. CCP, Article 70/B (1)–(2) and (5). According to Article 70/B (4), in cases when the suspect's interrogation or the appointing or retaining of a defence counsel takes place after a given case file has emerged, the defendant is entitled to a copy of the accessible case files from the date when the summons to his/her first interrogation as a suspect is delivered, while the defence counsel is entitled to a copy from the date when the decision on his/her appointment as ex officio defence counsel is delivered to him/her or from the date when the retainer is submitted.

61. CCP, Article 70/B (11)

62. CCP, Article 195 (1)

63. According to the information provided to the HHC by the Chief Prosecutor's Office (Ig. 42/28/2015. Legf. Ü., 8 December 2015), none of the statistical and case-management systems operated by the prosecution service collects data on the basis of the complaints submitted.


1995-II
1994-II
1992 (II)
1991 (II)
2003 (II)
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