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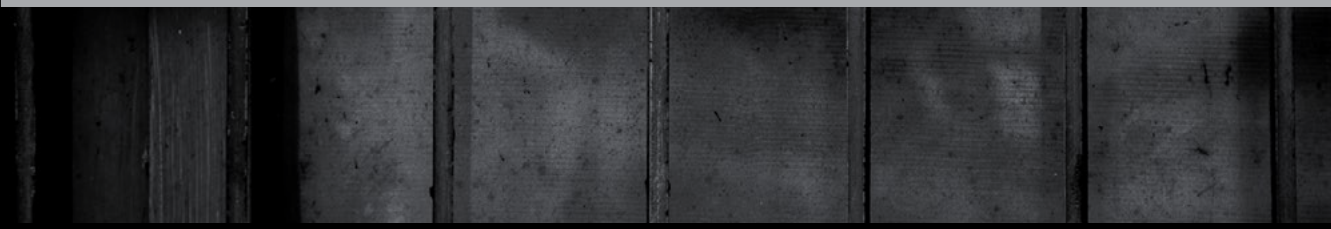
An empirical study of suspects' rights at the investigative stage of the criminal process in nine EU countries

INSIDE POLICE CUSTODY 2



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Country Report for
Hungary

Inside Police Custody 2.

An empirical study of suspects' rights
at the investigative stage of the criminal procedure

INSIDE POLICE CUSTODY 2

An Empirical Study of Suspects' Rights at the Investigative Stage of the Criminal Process in Nine EU countries

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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 centered 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.

Tartalom

1. Introduction

1.1. The nine country study of suspects' rights at the investigative stage of the criminal process

This report is based on research carried out in Hungary as part of a research project in which empirical research was carried out in nine European Union (EU) member states, examining the rights of suspects and accused persons – the right to interpretation and translation, the right to information, and the right of access to a lawyer – as they are applied and experienced in practice at the investigative stage of the criminal process. The research was carried out by partner organisations in the nine countries, co-ordinated by the Irish Council for Civil Liberties (ICCL). The partner organisations are –

- The Ludwig Boltzmann Institute of Human Rights, Austria
- The Bulgarian Helsinki Committee, Bulgaria
- The Hungarian Helsinki Committee, Hungary
- Associazione Antigone, Italy
- The Human Rights Monitoring Institute, Lithuania
- The Helsinki Foundation for Human Rights, Poland,
- The Association for the Defence of Human Rights in Romania – the Helsinki Committee, Romania
- The Peace Institute, Slovenia
- Rights International, Spain

The project was primarily funded by the European Commission under an Action Grant, JUST/2015/Action Grants, reference number 4000008627 "Inside Police Custody: Application of EU Procedural Rights". The action grant funded the research in eight countries. Research in the ninth country, Spain, was funded by the Open Society Justice Initiative. The project was co-ordinated by the ICCL on behalf of the Justicia Network.

The primary objective of the project was to measure the practical operation of suspects' rights at the investigative stage, and to use this evidence to conduct national advocacy directed at improving respect for those rights in practice. It is well established in relation to criminal processes that there is often a significant gap between legal norms and the practical application of those norms. Thus, in addition to establishing and describing the legal norms in the nine countries, the research sought to explore

how they operate in practice by conducting observations in police stations and carrying out interviews with key criminal justice personnel. In this way, the project was designed to contribute knowledge concerning the impact of key aspects of the EU procedural rights roadmap, to identify both good and poor systems, procedures and practices, and to make recommendations, both at the national and EU levels, directed at the improvement of procedural rights at the investigative stage in EU Member States.

Work on the project was carried out between June 2016 and December 2018, although the periods during which fieldwork was carried out varied depending on a range of factors in each country. However, fieldwork in all countries was conducted after the respective transposition dates of the EU Directives concerning the three sets of rights which were the subject of the study (see further section 1.2). In other words, when the fieldwork was carried out, member states should already have introduced the laws, regulations, and administrative provisions necessary to give effect to the respective Directives. Therefore, the project provided a timely opportunity to discover how the actions taken by member states were working in practice, and to make an assessment of whether they complied with the requirements of the respective Directives both in principle and in practice.

The study builds upon earlier research projects examining procedural rights at the investigative stage of the criminal process. In particular, the study sought to adapt the methodology developed for the EU funded project that was published in 2014 as *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, Cambridge, 2014). That study also examined the three sets of rights that are the subject of this study – in England and Wales, France, the Netherlands, and Scotland. However, the fieldwork for that study was carried out before any of the three EU Directives had come into force. A further study, using a similar methodology, was carried out in three non-EU states – Georgia, Moldova and Ukraine – between 2013 and 2016.

As noted earlier, the current project was co-ordinated by the ICCL, and managed by an experienced project management team consisting of representatives from the ICCL and the Open Society Justice Initiative (OSJI), together with the project research consultant, Professor Ed Cape of the University of the West of England, Bristol, UK. Both the OSJI and Professor Cape had been members of the teams that carried out the first *Inside Police Custody* project, and the subsequent project in Eastern Europe. The first meeting of the whole project team took place in London in September 2016. A two-day fieldwork training course for researchers from all national research teams was held, also in London, in January 2017. The training was designed to acquaint researchers with the processes, methods and research instruments to be used in the fieldwork, and to train them in those methods. A third meeting was held in Brussels

in June 2018 to discuss initial results, analysis and plans for national advocacy. The project management team also held regular telephone conferences with research teams to discuss progress, and any problems arising.

The project consisted of four major elements: desk reviews; empirical research; analysis and report writing; and national advocacy. The first two elements require further explanation.

Desk reviews

National teams were required to research and write desk reviews regarding their national systems. The overall purpose of the desk reviews was to provide a critical, dynamic account of the system and processes in each country in the study, using existing sources of information, in order to provide a context against which data collected during the research study may be understood. The objective was two-fold: firstly, to serve as a baseline concerning the laws, regulations, institutions and procedures relevant to the realisation of suspects' procedural rights in each jurisdiction; and secondly, to equip the country researchers with sufficient contextual knowledge to undertake the empirical work. The desk reviews also included relevant information from existing sources about criminal justice systems and processes using, for example, official and other statistics, official reports and existing research (if any).

Empirical research

Following the method adopted in the *Inside Police Custody* project, the original plan for the empirical stage of the research consisted of three elements.

Direct observations

In order to observe criminal justice practitioners as they go about their daily routine work, researchers were to be located in a number of police stations, and to accompany a number of lawyers advising clients at police stations. The purpose was to understand the implementation of suspects' rights from multiple perspectives and to gain a deeper insight into practical influences and constraints upon working practices. Researchers were asked to keep a narrative log of their observations.

Interviews

It was planned to conduct semi-structured interviews with a number of police officers and lawyers. In order to enable researchers to secure relevant information and to ask

appropriate questions, the interviews were planned to take place after the observation stage of the research was completed. This meant that researchers would be able to probe answers that did not reflect their observations, and gain insights into the motivations that influenced practice. Research teams were provided with interview pro-formas that could be adapted to local circumstances.

Analysis of case pro-formas

Case pro-formas (one for cases observed by researchers when based in police stations, and another for researchers when based with lawyers) were adapted from the *Inside Police Custody* study with a view to enabling researchers to secure some quantitative data: for example, about the proportion of suspects who sought to exercise their right of access to a lawyer, socio-demographic characteristics of suspects, the time taken for lawyer/client consultations, and the proportion of suspects who exercised their right to silence.

It was anticipated that national research teams would have to adapt the methodology, and the research instruments, to take account of local circumstances. However, some national research teams had to radically revise their research methodology as a result of lack of co-operation, at a political and administrative (that is, relevant government ministries) level, and on the part of the police. Despite the fact that observational research in police stations has been conducted in previous projects in a range of countries with the co-operation of the relevant authorities, that the research was funded by the European Commission, and that assurances were provided regarding the confidentiality of research data (so that no person or location could be identified from any published data, and that research data would be stored securely), agreement for researchers to be based in police stations and/or to accompany lawyers to police stations, was not forthcoming in a number of countries in the study. Whilst access to police stations by researchers was secured in Austria, Lithuania, Romania and Slovenia, it was not forthcoming in Bulgaria, Hungary and Poland. In Spain, agreement could not be obtained at the national level, but the national research team was able to secure permission to conduct observational research in police stations in the Basque region. Italy may be regarded as a special case. Whilst permission to observe in police stations was not secured, generally suspects are not interviewed by the police following arrest, but appear at an arrest validation hearing where, depending on the procedure adopted, they may be questioned by a judge. Nevertheless, many provisions of the EU Directives apply where a person is arrested and detained, and observations conducted at police stations would have enabled data to have been obtained about implementation of these aspects of the Directives.

In those countries in which observational research could not be carried out, other methods of seeking data about how procedural rights at the investigative stage work in practice were developed and adopted. Such methods included, for example, interviews of arrested detainees in prison awaiting a validation hearing, an enhanced number of interviews of lawyers, interviews of police officers, and interviews of interpreters. Further information about the research methodology adopted in particular countries is provided in the country reports.

The EU Directives require Member States to transmit the text of measures adopted to give effect to the Directives to the Commission, and require the Commission to submit reports to the European Parliament and to the Council assessing the extent to which Member States have taken the necessary measure in order to comply with the Directives. This project, in common with similar research previously conducted, demonstrates that even if legislative and other measures are adopted to give effect to the Directives, it does not follow that the requirement of the Directives are given effect in practice. Even if the provisions of the Directives are faithfully reflected in national legislation and regulations, the nature of the provisions in the Directives is such that effective implementation is reliant on a range of other factors, including financial and other resources, detailed regulation of processes and procedures, and the professional cultures of criminal justice officials and lawyers. The best way of obtaining reliable and comparable data on practical implementation of the Directives, and on the ways in which they are experienced by criminal justice actors, lawyers, and suspects and defendants, is by fieldwork-based research involving observation (including in police stations). A failure by the relevant government ministries, officials and institutions in Member States to facilitate, and to co-operate with, such research will mean that the European Commission, and ultimately the EU itself, will not have an adequate basis for assessing either compliance with, or the effectiveness of, its policies and legislation in this field. Moreover, it will mean that Member States will forgo the opportunity to effectively regulate and improve their criminal justice systems and processes, having particular regard to procedural rights and, ultimately fair trial. This is true for both the EU Directives which are the focus of this research, and for the other Directives adopted under the EU procedural rights roadmap.

1.2. The European Union context

In 2009 the EU adopted a “roadmap” of procedural rights in criminal proceedings, with the aim of adopting EU legislation on a range of procedural rights for suspected and accused persons, to be introduced over a number of years.[1] The EU had, over a decade or more, introduced extensive legislation on police, prosecution and judicial co-

operation and mutual recognition (most notably, the European Arrest Warrant (EAW)), and it was recognised that this should be matched by measures that would protect the rights of individuals in criminal proceedings and those who are the subject of an EAW. The legislative mechanism to be adopted was the EU Directive, which would require EU member states to introduce legislation, regulations and other measures that ensure that the provisions of the Directive are complied with in domestic law. The Lisbon Treaty enhanced the role of the Court of Justice of the European Union (CJEU), and it has competence to deal with questions of interpretation of the Treaty and of Directives. In doing so, it must also take account of the principles, rights and freedoms embodied in the Charter of Fundamental Rights of the EU. National courts may, in criminal proceedings, ask the CJEU to give a preliminary ruling on a question of interpretation of a Directive during the currency of a case, and there is an expedited procedure in cases where the accused is in detention. Further, the European Commission has the power to refer a case to the CJEU on the grounds that a member state has failed to fulfil its obligations. A finding that a member state has not brought its national legislation into compliance may result in financial penalties being imposed by the CJEU.

In drafting the Directives, full account was taken of the relevant provisions of the European Convention on Human Rights (ECHR), and of European Court of Human Rights (ECtHR) case law. However, the EU legislation was informed by a concern that the ECHR regime was not sufficiently able to ensure that national authorities comply with their responsibilities to safeguard the procedural rights of suspects and accused. Some of the limitations are practical, in particular the backlog of cases to be dealt with by the ECtHR, leading to lengthy delays in consideration of and judgments in respect of cases taken before it. However, others were systemic. The mechanisms for enforcing ECtHR decisions are relatively weak, and applications can only be made to the court after all domestic avenues of appeal have been exhausted. Of particular significance was the fact that the court considered the procedural rights of suspects and accused within the context of whether, overall, the proceedings were fair. Together with the fact that the court could only consider principles in the context of the fact of cases taken before it, the result has been that whilst the ECtHR has been successful in establishing general minimum standards, it could not develop a comprehensive set of procedural standards, nor general guidelines on how they could or should be implemented.

The EU Directives, together with the enhanced enforcement regime resulting from the Lisbon Treaty, are able to remedy some of these weaknesses and, whilst detailed implementation of the standards is the responsibility of Member States (with, in certain

respects, a wide margin of appreciation), the Directives are more comprehensive and more detailed than the ECtHR jurisprudence.

The three Directives that are the subject of the current study are the Directive on the right to interpretation and translation, the Directive on the right to information, and the Directive on the right of access to a lawyer. The provisions of the Directives are briefly described here, and are more fully explored in the relevant sections of the report.

1.2.1. The Directive on the right to interpretation and translation

The Directive on the right to interpretation and translation was adopted on 20 October 2010, with a transposition date of 27 October 2013.[2] The Directive provides that suspects and accused persons in criminal proceedings who do not understand the language of the proceedings: must receive interpretation assistance free of charge during police interrogations, for communication with their lawyer, and at trial; and must be provided with a written translation of documents that are essential for them to exercise their right to defence, including the detention order, the indictment, the judgment and other documents that are essential. Similar rights and obligations also apply in proceedings for the execution of an EAW. It appears from the language of the Directive that the rights and obligations regarding translation only apply to documents provided by the relevant authorities, and not to documents produced by the suspect or accused. Whilst waiver at the instance of the suspect or accused is permitted in respect of translation, provided that they have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, there is no provision for waiver in respect of interpretation.

Member States must ensure that interpretation and translation is made available where necessary, and in respect of the former, must ensure that a procedure or mechanisms is in place to ascertain whether suspected or accused persons speak or understand the language of the proceedings and whether they need the assistance of an interpreter. The rights are not limited to persons who cannot speak or understand the language because their first (or only) language is other than that used in the proceedings, but also apply to those who cannot do so because, for example, they have a speech or hearing impediment.

Member States must take concrete measures to ensure that the interpretation or translation provided is of a sufficient quality to safeguard the fairness of proceedings, and in furtherance of this objective, must endeavour to establish a register or registers of independent interpreters and translators who are appropriately qualified. Suspected or accused persons must, in accordance with procedures in national law, have the right

to challenge a decision that there is no need for interpretation or translation, and a right to challenge the quality of interpretation or translation.

1.2.2. The Directive on the right to information

The Directive on the right to information was adopted on 22 May 2012, with a transposition date of 2 June 2014,[3] and regulates three sets of rights: the right to be informed about procedural rights; the right to be informed of the reason for arrest or detention, and about the accusation; and the right of access to case materials.

Right to be informed of procedural rights

Suspected or accused persons, irrespective of whether they are arrested or detained, must be provided promptly, orally or in writing, of certain rights: the right of access to a lawyer; any entitlement to free legal advice; the right to be informed of the accusation in accordance with Article 6 of the Directive, and the right to remain silent (Article 3). Where a person is arrested or detained, they must be provided promptly with a written "Letter of Rights", which they must be given an opportunity to read and allowed to keep throughout the time that they are deprived of their liberty (Article 4). In addition to the information provided in accordance with Article 3, the Letter of Rights must contain information about: the right of access to case materials; the right to have consular authorities and one person informed; the right of access to urgent medical assistance; the maximum time that the person may be deprived of their liberty before being brought before a judicial authority; and basic information about the possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, or making a request for provisional release. In both cases, the information must be provided in simple and accessible language. In the case of the Letter of Rights, if such a document is not available in the appropriate language, the information contained in it may be provided orally in a language that they understand, followed up with an appropriate translated Letter of Rights "without undue delay". Where a person has been arrested for the purpose of the execution of an EAW, they must be provided promptly with an appropriate Letter of Rights containing information about their rights in accordance with Framework Decision 2002/584/JHA.

Right to be informed of the reasons for arrest/detention, and about the accusation

Under Article 6 of the Directive, Member States must ensure that: suspects or accused persons are promptly provided with information about the criminal act they are suspected or accused of having committed, in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence

(Article 6(1)); and suspects and accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected of accused of having committed (Article 6(2)). Recital 28 of the preamble states that the information specified in Article 6(1) must be given, at the latest, before the first official interview by the police or other competent authority, “and without prejudicing the course of ongoing investigations”. This suggests that such information may be withheld if providing it would cause such prejudice.

Detailed information, including the nature and legal classification of the offence, as well as the nature of participation of the accused, must be provided to the accused, at the latest, on submission of the merits of the accusation to a court (Article 6(3)). The suspect or accused must be promptly informed of any in the information provided, for example, if new material information comes to light. Thus, the Directive differentiates between the level of information that must be provided at different stages, but leaves significant room for interpretation, both generally and in specific cases, as to the precise amount of information that must be provided at a particular stage of the criminal process.

Right of access to case materials

Article 7 provides for two rights. First, where a person is arrested or detained at any stage, Member States must 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 the arrested person or their lawyer (Article 7(1)). Second, Member States must ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against the suspect or accused, to them or to their lawyer, in order to safeguard the fairness of the proceedings and to prepare the defence (Article 7(2)). In relation to the latter provision, access must be granted in due time to allow the effective exercise of defence rights, and at the latest upon submission of the merits of the accusation to the judgment of the court (Article 7(3)). Derogation in relation to the disclosure obligations in Article 7(2) and 7(3) is permitted if, provided it does not prejudice the right to fair trial, access may lead to certain consequences such as serious threat to the life or fundamental rights of another person (Article 7(4)). Access under Article 7 must be provided free of charge.

Common provisions

In order to verify that information has been provided in accordance with the Directive, Member States must ensure that this is noted using a recording procedure specified

in the law. Suspects and accused persons must have the right to challenge failure or refusal to provide information in accordance with the Directive.

For the purposes of this project, which is primarily focused on the procedural rights of suspects in police custody, the right of access to documents under Article 7(1) is clearly relevant. It may appear that, at the early stage of the criminal process, the right of access under Article 7(2) is not relevant. However, it is important to note that many jurisdictions have out-of-court disposal schemes and/or expedited proceedings in certain types of case, some of which avoid court hearings altogether. If Article 7(2) is narrowly interpreted, then suspected or accused persons may be required to make decisions about the disposal of their case without an adequate right of access to material evidence.

1.2.3. The Directive on the right of access to a lawyer

The Directive on the right of access to a lawyer was adopted on 22 October 2013, with a transposition date of 27 November 2016.[4] The Directive sets out rights of access to a lawyer, the right to have a third person informed of a deprivation of liberty and to communicate with a third person, and the right (where relevant) to communicate with consular authorities.

The right of access to a lawyer

Member States must ensure that suspects and accused persons have the right of access to a lawyer in such time and in such manner so as to allow the person concerned to exercise their rights of defence practically and effectively (Article 3). Access must be allowed without delay and, in any event, must be permitted from the earliest of:

> *(a) before questioning by the police or other law enforcement or judicial authority;*
> *(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act;*
> *(c) without undue delay after deprivation of liberty;*
> *(d) where they have been summoned to appear before a court having criminal jurisdiction, in due time before the court hearing.*

The Directive explicitly states that suspects and accused persons must have the right: to meet their lawyer in private prior to any questioning; to have a lawyer present when questioned and for the lawyer to be able to participate effectively; and, to have a lawyer present, as a minimum, at the investigative or evidence-gathering acts specified in the

Directive (identity parades, confrontations and crime-scene reconstructions), where those acts are provided for under national law and the suspect or accused is required or permitted to attend.

A person arrested under an EAW must have the right of access to a lawyer in the executing state. The Directive specifies that the right shall include the right: of access to a lawyer in such time and in such a manner as to allow the requested person to exercise their rights effectively and without undue delay from the time that they are deprived of their liberty; to meet and communicate with the lawyer; and the right for their lawyer to be present and, in accordance with national laws, to participate during a hearing by the executing judicial authority.

The right of access to a lawyer may be waived, although this is without prejudice to national laws requiring the mandatory presence or assistance of a lawyer. However, for a waiver to be valid the suspect or accused person must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right to a lawyer and the possible consequences of waiving it. Any waiver must be given voluntarily and unequivocally.

In addition to the exception regarding minor offences (see below), there is provision for temporary derogation from the right of access to a lawyer at the pre-trial stage on the grounds of geographical remoteness (Article 3(5)), or on the basis of specified compelling reasons (Article 3(6)).

Unlike the Directive on the right to interpretation and translation, this Directive does not contain any provisions regarding quality assurance relating to the provision of legal assistance, although the Directive on legal aid does contain a provision regarding the quality of legal aid services (see below).

Rights regarding information to and communication with third parties

Suspects or accused persons who are deprived of their liberty must have the right to have at least one person, such as a relative or employer, nominated by them, informed of their deprivation of liberty without delay. If the suspect or accused person is a child, Member States must ensure that the holder of parental responsibility of the child is informed of the deprivation of liberty as soon as possible, and of the reasons for it; unless it would be contrary to the interests of the child, in which case another appropriate adult must be informed. Temporary derogation from the right concerning information to third parties is permitted on the basis of specified compelling reasons: an urgent need to avert serious adverse consequences for the life, liberty or

physical integrity of a person; or an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised (Article 5(3)).

In addition, suspects or accused persons who are deprived of their liberty must have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them, although this may be limited or deferred “in view of imperative requirements or proportionate operational requirements” (which are illustrated in Recital 36).

These rights also apply to a requested person in EAW proceedings in the executing state.

Right to communicate with consular authorities

Suspects or accused persons who are non-nationals and who are deprived of their liberty must have the right to have the consular authorities of their state informed of the deprivation of liberty without undue delay, and to communicate with those authorities, if they so wish. Such persons also have the right to communicate with those consular authorities, and to have legal representation arranged by them. These rights also apply to a requested person in EAW proceedings in the executing state.

Common provisions

Where the power to temporarily derogate from the right of access to a lawyer, or to have a person informed of deprivation of liberty, or to communicate with a third party, is put into effect, it must: be proportionate and not go beyond what is necessary; be strictly time-limited; not bee based exclusively on the type or seriousness of the alleged offence; and not prejudice the overall fairness of the proceedings.

The particular needs of vulnerable suspects and accused persons must be taken into account in fulfilling the obligations under the Directive.

Member States must ensure that suspects or accused persons, and requested persons in EAW proceedings, have an effective remedy in the event of a breach of rights under the Directive. The Directive is not prescriptive as to the nature of such remedies, but where evidence has been obtained in breach of the right to a lawyer, or in cases where a derogation from the right was authorised under Article 3(6), any assessment of such evidence must respect the rights of the defence and the fairness of the proceedings (see further, Recital 50).

1.2.4. Common issues under the three Directives

All three Directives apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, until the conclusion of the proceedings. This formulation accords with the autonomous interpretation of the concept of "charge" adopted by the ECtHR,[5] and thus certain provisions of a Directive may apply to a person who has not (yet) been arrested. However, there may be further conditions to be satisfied before any particular right under a Directive is applicable.

The three Directives contain a similarly worded exception regarding minor offences: where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, the Directive only applies to the proceedings before a court following such an appeal. The Directive on the right of access to a lawyer also provides that the exception applies to minor offences where deprivation of liberty cannot be imposed as a sanction.

Note that the approach to articulating rights differs slightly as between, and within, the three Directives. Sometimes the rights of suspected and accused persons are expressed as an obligation on Member States to ensure that a particular right is provided; for example, "Member State shall ensure that suspects and accused persons have the right of access to a lawyer…" (Directive 2013/48/EU on the right of access to a lawyer, Article 3(1)). On other occasions they are expressed in the form of an obligation on a Member State without expressly stating that they concern a right; for example, "Member States shall ensure that suspected or accused persons who do not speak or understand the language… are provided, without delay, with interpretation…" (Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Article 2(1)). Such variances in drafting may be interpreted as reflecting nuanced differences between various aspects of the Directives which may have practical implications. For example, the obligation of a state to ensure that interpretation is provided to a person who does not speak or understand the language may suggest, or be treated as suggesting, that a mere claim by a suspect or accused that they do not speak or understand the language is not sufficient, by itself, to put the state under an obligation. However, whilst it is not expressed as a right in Article 2(1), Article 2 is headed "Right to interpretation" and it is expressed as a right in Article 2(3). It is argued, therefore, for the purposes of this research at least, that such difference in wording are irrelevant, and that a provision of a Directive will amount to a right of the suspected or accused person whether or not it is directly expressed as such.

1.2.5. Other procedural rights Directives

Although the research project was primarily concerned with the practical implementation of the first three Directives under the EU procedural rights roadmap, it should be noted that three further Directives have been adopted, one of which came into force during the period that the project was being conducted, and two of which come into force in 2019.

The first of these, the Directive on the presumption of innocence and the right to be present, was adopted on 9 March 2016, with a transposition date of 1 April 2018.[6] This provides that suspects and accused persons are to be presumed innocent until proved guilty according to law. In support of this principle, the Directive imposes a number of obligations on Member States, including a prohibition on public references to guilt, and provisions regarding the public presentation of suspects and accused persons, the burden of proof, and the right to silence and the right of a person not to incriminate themselves. In addition, it includes a number of provisions regarding the right of an accused to be present at their trial.

The Directive on procedural safeguards for children who are suspects or accused persons was adopted on 11 May 2016, and comes into effect on 11 June 2019.[7] This is the longest and most complex of the six Directives adopted under the procedural rights roadmap, and contains a series of provisions designed to ensure that children who are suspects or accused persons in criminal proceedings (and those who are the subject of an EAW in the executing state) are able to understand and follow those proceedings, and able to exercise their right to a fair trial, and to prevent children from re-offending and to foster their social re-integration (Recital 1). In particular, such children must be informed of their rights in simple and accessible language, must normally be accompanied by a person holding parental responsibility, and must normally be assisted by a lawyer.

Note that whilst it was originally envisaged under the procedural rights roadmap that a Directive would cover vulnerable suspects and accused persons in criminal proceedings, there is no specific Directive concerned with the rights of people who are vulnerable (other than children). As noted above, the Directive on the right of access to a lawyer does require that the particular needs of vulnerable suspects and accused persons must be taken into account; and the Directive on the right to information does state that in providing information to a suspect or accused person about their procedural rights, the language used must take into account the particular needs of those who are vulnerable. However, a non-binding Commission Recommendation, issued on 27 November 2013, encourages Member States to adopt

a series of mechanisms and procedures in order to “strengthen the procedural rights of all suspects or accused person who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities”.[8] To facilitate these, vulnerable persons should be promptly identified, with recourse to medical examination in order to determine their degree of vulnerability and their specific needs.

The Directive on legal aid was adopted on 26 October 2016, with a transposition date of 25 May 2019.[9] Broadly, the Directive provides that suspects and accused persons in criminal proceedings who have a right to a lawyer under the Directive on the right of access to a lawyer (EU Directive 2013/48/EU), must be entitled to legal aid if they are:

- deprived of their liberty,
- required to be assisted by a lawyer in accordance with EU or national law,
- required or permitted to attend an investigative or evidence-gathering act.

The right to legal aid also applies to requested persons in EAW proceedings who have a right of access to a lawyer under the Directive on the right of access to a lawyer, upon arrest in the executing state. States are permitted to make legal aid conditional on satisfaction of a merits and/or a means test, although the merits test must be deemed to have been met where a suspect or accused person is brought before a court or judge in order to decide on detention at any stage of the proceedings, and during detention. This would include persons who are arrested and detained by the police. Member States must take measures, including with regard to funding, that are necessary to ensure that there is an effective legal aid system of an adequate quality, and that legal aid services are of a quality adequate to safeguard the fairness of the proceedings (with due respect for the independence of the legal profession).

1.3. The national context

As far as fundamental principles on fair trial are concerned, the **Fundamental Law** (the constitution) of Hungary sets out the following:

> *Article XXVIII*
>
> *(1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.*

> *(3) Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.*

As far as criminal procedures are concerned, **Roadmap Directives are implemented by the Code of Criminal Procedure** (which is an Act of Parliament) **and its bylaws** (governmental and ministerial decrees, etc.).[10]

Up until 1 July 2018, the Hungarian criminal procedure was governed by Act XIX of 1998 on the Code of Criminal Procedure (hereafter: Old CCP). **As of 1 July 2018**, this law was replaced, and **Act XC of 2017 on the Code of Criminal Procedure** (hereafter: New CCP) **and its bylaws came into force**. Below, we outline the criminal procedure as governed by the New CCP.

Under the New CCP a criminal procedure may be launched against a person if there is substantiated suspicion that they have committed a criminal offence.

The criminal procedure consists of **the investigation and the court phase**. It starts with the investigation that is composed of the investigative evaluation and the evidential evaluation. The investigative evaluation aims at collecting information needed for substantiate suspicion and at identifying the perpetrator. During the evidential evaluation, the prosecutor decides about the completion of the investigation based on the collection of the necessary evidence.[11] The investigation is carried out by the investigating authority (in most cases by the police[12]) or by the prosecutor.[13] During the investigation the suspect is heard. At the beginning of the first interrogation, suspects are informed about the charges against them (i.e. the criminal offence they are suspected of committing). This is the so-called “communication of the suspicion”, when the concerned person formally becomes a suspect. Defendants have the right to be informed about their procedural rights, shall be granted access to a lawyer, and are entitled to submit a motion for the appointment of a defence counsel already before the communication of the suspicion.[14]

Upon the completion of the investigation, the prosecutor – in the capacity of a public prosecutor – presses charges by submitting the bill of indictment to the court.[15] As of 1 July 2018, the new rules introduced the **guilty plea** into the Hungarian criminal procedure as a new institution available before the pressing of charges, which can be initiated both by the defence and by the prosecutor. The guilty plea cannot extend to the facts of the case or the qualification of the criminal offence under the Criminal Code, but is focused primarily on the sanction.[16] The court can review the legality of the guilty plea in the framework of a special procedure, but cannot amend its content, only approves or refuses it based on the indictment.[17]

In the court phase, another new institution was introduced by the New CCP, namely the **preliminary hearing** which provides an opportunity for the defendant and the defence counsel to present their arguments about the indictment before the trial begins. Thereafter, the court holds a hearing to which the person under the procedure (now identified as the "accused person") is summoned.[18] The evidentiary procedure starts with the hearing of the accused person,[19] other evidentiary actions and their order are determined by the court.[20] After the evidentiary procedure is completed, the prosecutor and the defence counsel present their closing arguments, and the accused person, the victim and the claimant of compensation may also address the court.[21] Subsequently, the court delivers its judgment, in which it decides about innocence or guilt and the sanction to be applied.[22] If the prosecution or the defence appeals the first instance judgment, it does not become final and binding: the case is referred to the court of second instance. Second instance decisions may be subject to further appeal only in certain cases.[23]

The person subjected to the criminal procedure is called "a person against whom a well-founded suspicion of having committed a criminal offence exists" before the communication of the suspicion, "suspect" from the communication of suspicion on, "accused" after the pressing of charges by the prosecutor, and becomes "convict" by the handing down of the legally binding judicial decision.[24] The persons falling under the last three categories are called **"defendants"** in a summary manner.

Coercive measures in the Hungarian criminal procedure system **that involve the deprivation of the liberty** of suspects and accused persons are the following: 72-hour detention and coercive measures requiring a judicial decision (no contact order, criminal surveillance, pre-trial detention, mandatory pre-trial psychiatric treatment).[25] "Criminal surveillance", introduced as an overarching category by the New CCP, includes house arrest, geographical ban, ban on visits to certain public places, and the obligation to regularly visit the respective police organ.[26]

72-hour detention is the temporary deprivation of the suspect's liberty without a judicial decision, ordered by the proceeding authority (in the investigation phase, this is usually the police). It can be ordered if there is a well-grounded suspicion that the concerned person has committed a criminal offence punishable with imprisonment, provided that their pre-trial detention is likely, or if the perpetrator was caught on act or their identity could not be identified (this latter instance was introduced by the New CCP). This form of detention may last up to 72 hours, after which – unless the court orders another coercive measure requiring judicial order – the suspect shall be released.[27] 72-hour detention is implemented in police jails.[28]

Pre-trial detention is the judicial deprivation of the defendant's personal liberty prior to the delivery of the final decision on the merits of the case. It can be ordered in both the investigation and the court stage (until the submission of the bill of indictment, it is ordered by the so-called "investigation judge" upon the prosecutor's motion,[29] after that, the decision is made by the trial court). Pre-trial detention ordered before the submission of the bill of indictment can be maintained by the trial court. Pre-trial detention ordered or upheld by the first instance court shall last until the promulgation of the first instance judgment. Thus, defendants may spend the whole period from the communication of the suspicion to the delivery of the first instance judgment in pre-trial detention (however, in most – though not all the – cases, there is an absolute upper limit).[30] Pre-trial detention as a main rule shall be implemented in a penitentiary institution.[31]

The 72-hour detention may be preceded by **police custody** under Act XXXIV of 1994 on the Police, which does not qualify as a "coercive measure". The police officer shall arrest and present to the competent authority (i.e. take into police custody) a person who is caught in the act of committing a criminal offence and may take into police custody a person who is suspected of having committed an offence. (Persons taken into police custody are not regarded as defendants – suspects –, since the suspicion has not been formally communicated to them.) The police may maintain the deprivation of liberty until it is absolutely necessary, but for not longer than eight hours. If the objective of the detention has not been realised, this term may be prolonged by four hours on one occasion.[32] The time spent in police custody shall be taken into account when the time spent in the 72-hour detention is calculated.[33]

Interrogations conducted at any point in the investigation phase of the procedure (that is, initial and follow-up interrogations of non-detained defendants, and initial and follow-up interrogations of defendants in police custody, 72-hour detention and pre-trial detention) do not differ in evidentiary value: the minutes of these interrogations are all part the case file submitted to the prosecutor, and, ultimately, to the judge. If a person who later becomes a defendant is questioned in the investigation phase as a witness, their testimony will also be included in the case file to be submitted to the prosecution and the court as evidence, but it will be clear from the file that the given testimony was provided as a witness (thus, without the person affected receiving the warnings defendants receive).

1.4. The research method

In addition to analysing the Hungarian legal provisions, the Hungarian Helsinki Committee (HHC) wished to assess compliance with the Roadmap Directives in Hungary on the basis of strong empirical evidence. According to the original methodology of the *"Inside Police Custody"* project, to be followed by all project partners, the HHC was envisaged to accompany attorneys to interrogations: two researchers of the HHC would have conducted altogether 72 days of research at two police stations (one in Budapest and one in the countryside). According to earlier research experiences from other countries, this would have made it possible for researchers to monitor hundreds of interrogations. Interrogation monitoring would have been supplemented by research interviews with police officers, attorneys and interpreters involved in criminal procedures.

Negotiations aimed at securing access to interrogations began in September 2016 between the HHC, the National Police Headquarters (*Országos Rendőr-főkapitányság, ORFK)* and the Chief Prosecutor's Office (*Legfőbb Ügyészség*). The Chief Prosecutor's Office was included in the negotiations because according to the National Police Headquarters the involvement and professional oversight of the prosecution services was necessary for overseeing the legal background of the research. The Chief Prosecutor's Office gave its approval to the HHC to conduct the research. However, in June 2017, after a long negotiation process, the National Police Headquarters finally informed the HHC that it does not consent to the monitoring of interrogations or the HHC conducting research interviews with police officers.

Therefore, empirical data was finally collected through research interviews with other stakeholders. The HHC conducted research interviews with 15 attorneys, two interpreters with experience in interpreting in the investigation phase of criminal procedures, and staff members of the Independent Police Complaints Board (*Független Rendészeti Panasztestület*) and the Office of the Commissioner for Fundamental Rights (*Alapvető Jogok Biztosának Hivatala, AJBH*) between December 2017 and February 2018. On the average, interviewees have been working in the criminal justice field since 2002; the interviewee with the longest experience works in the field since 1985. Interviewees included a former judge, a former prosecutor, a former police officer with decades of practice, and a former staff member of the Constitutional Court of Hungary. Even though the scope of the Independent Police Complaints Board's investigative powers is narrower than the scope of the present country report, the interview conducted with its staff member contributed to exploring the broader context and related police measures. Interviews were semi-structured, and interviewees were able to provide a detailed account of their experiences. Interview

questions centred on experiences regarding the interrogation of suspects, with respect to the six months preceding the interview. When interviewees did not have a relevant experience concerning an issue from the last six months, they were asked about their latest relevant experience. The HHC would like to hereby thank the interviewees for their cooperation and for their valuable insight.

In addition to the results of the above research activities conducted in the framework of the *"Inside Police Custody"* project (hereafter: IPC research), in the present country report we will also refer to the results of some of the HHC's past researches, particularly to the following ones:

- The HHC has been the member of the JUSTICIA European Rights Network[34] 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[35] (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 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings through analysing the respective legal provisions and through surveying and interviewing over 20 attorneys and 5 police officers.[36]
- Through its 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 to monitor the implementation of Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, ensuring access to case materials, to advocate for the correct implementation of Article 7 of the Directive in Hungary by identifying deficiencies in law and practice and to produce concrete proposals to address them, and to contribute to the correct implementation of Article 7 of the Directive across the EU by developing, testing and disseminating a method for assessing whether the right to information of defendants is respected. Related research activities included interviews with 11 judges and 10 prosecutors, and in-depth interviews with 17 defence attorneys, coupled with a case file review covering 50 criminal cases. Research results and the HHC's related recommendations were discussed

with stakeholders and experts at a workshop held in June 2017. The research report was finalized on the basis of the results of that workshop.[37]

- The HHC was a partner in the international project *"Strengthening procedural rights in criminal proceedings: effective implementation of the right to a lawyer/legal aid under the Stockholm Programme",* coordinated by the Bulgarian Helsinki Committee.[38] The project, launched in June 2016 and supported by the Justice Programme of the European Union, aimed to increase understanding of the shortcomings and dysfunctions of the issues addressed by Directive 2013/48/EU on the right of access to a lawyer and Recommendation 2013/C 378/03 on the right to legal aid among key stakeholders in five EU jurisdictions, and to identify and promote examples of transferable good practice. The project also aimed to facilitate communication and coordination between legal practitioners and to build and strengthen the capacity of stakeholders on the international and EU standards on the rights to access to a lawyer and legal aid of suspects and accused in criminal proceedings. In the framework of the national research conducted as part of the project, the HHC reviewed 150 criminal case files, 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, in addition to holding holding capacity-building workshops for attorneys.[39]

Since the criminal procedure is governed by the New CCP only since 1 July 2018, the interviews made in the framework of the IPC research (and earlier researches) obviously could not cover the emerging practice under the New CCP, and cover the practice under the Old CCP instead. Therefore, in the present country report we aim to assess both the compliance with the Roadmap Directives of the law and practice under the Old CCP, and to what extent the New CCP and its bylaws seem to remedy certain legal and practical shortcomings and whether they comply with the Roadmap Directives.

2. The right to interpretation and translation in criminal proceedings

2.1. The normative framework and its compliance with the EU Directive on the right to interpretation and translation in criminal proceedings

In accordance with Article 2(1) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (hereafter: Directive 2010/64/EU), the Old CCP stipulated that in criminal proceedings, everyone has the right to use both in writing and verbally their mother tongue; regional or minority language as stipulated in an international treaty promulgated in an Act of Parliament and within the scope specified therein; and – if they do not speak or understand Hungarian – any other language that they claim to speak or understand.[40]

The New CCP has not brought along significant changes in this respect, its **provisions are also compliant with Article 2(1) of Directive 2010/64/EU, guaranteeing the defendants' right to use their mother tongue, minority language or other language spoken or understood by them**:

Article 8(1) The language of criminal proceedings in Hungarian. Members of national minority groups living in Hungary and recognised by law may use their national minority language in the criminal proceeding.

(3) Everyone has the right to use their mother tongue in the criminal proceeding.

Article 78(1) If a person participating in the criminal proceeding wishes to use their non-Hungarian mother tongue, national minority language, other mother tongue as stipulated in an international treaty promulgated in an Act of Parliament, an interpreter shall be appointed, preferably with adequate proficiency in the language of law.

(2) If the use of the mother tongue raises disproportionate difficulties, the use of another language that the person not speaking or understanding Hungarian identifies as spoken or understood by them shall be guaranteed through the appointment of an interpreter.

Furthermore, Government Decree 100/2018. (VI. 8.) on the Detailed Rules of Investigation and the Preparatory Procedure (hereafter: New Investigation Decree) stipulates the following:

Article 47(1) If the mother tongue of the person participating in the criminal proceeding is not Hungarian, upon their request an interpreter shall be appointed even if the person speaks or understands Hungarian.

In terms of Article 2(3) of Directive 2010/64/EU, the right to interpretation "includes appropriate assistance for persons with hearing or speech impediments". In accordance with this, the Old CCP stipulated that that persons with hearing impediments or deaf and blind persons shall be heard with the assistance of sign-language interpreters, while persons with hearing and speech impediments may – upon their request – testify in writing instead of being interrogated.[41]

The New CCP is also compliant with Article 2(3) of Directive 2010/64/EU, since it provides for the possibility of the involvement of sign-language interpreters and of testifying in writing:

Article 78(3) If the person to be heard has a hearing impediment, upon their request they shall be heard with the assistance of a sign language interpreter, or they may choose to testify in writing instead of being heard.

(4) If the person is deaf and blind, upon their request they shall be heard with the assistance of a sign language interpreter.

(5) If the person to be heard has a speech impediment, upon their request they may choose to testify in writing instead of being heard.

Furthermore, the New CCP **introduces additional flexibility** into the system, when it provides the right to request the assistance of a sign language interpreter to those who do not fall into the categories of persons with hearing or speech impediments or deaf and blind persons, but are for any other reason unable to communicate or are severely impeded in their communication:

Article 78(6) If the person to be heard is unable to communicate or is severely impeded in their communication for a reason other than what is set forth under Paragraphs (3)–(5), they shall be heard with the assistance of a sign language interpreter or in any other way that guarantees adequate communication with them.

In breach of Article 2(2) of Directive 2010/64/EU, the Old CCP did not provide the defence counsel with the right to communicate with the defendant with the assistance of an interpreter appointed by the authority. (At the same time, in practice, when the consultation took place before the interrogation, the defence counsels could rely on the assistance of the interpreter who was appointed to interpret during the interrogation.)

The New Investigation Decree has brought along significant improvements in order to ensure compliance with Directive 2010/64/EU, when it expressly states that interpretation shall be provided for the purposes of the defence counsels' communication with their client:

Article 141 The investigating authority ensures through the appointment of an interpreter that during their communication with their legal counsel the following persons be provided with the right to use their mother tongue:

a) detained suspects or detained persons against whom a well-founded suspicion of having committed a criminal offence exists at the premises of the detention, and

b) non-detained suspects and persons against whom a well-founded suspicion of having committed a criminal offence exists before or after the procedural act [that they are subjected to].

It is however not compliant with Article 2(4) of Directive 2010/64/EU that neither the Old or New CCP, nor their bylaws determine any mechanism or procedure "to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter".(However, this is ameliorated to a certain extent by Article 47(1) of the New Investigation Decree cited above, which states that if the mother tongue of the person participating in the criminal proceeding is not Hungarian, upon their request an interpreter shall be appointed even if the person speaks or understands Hungarian.)

As far as the right to **the translation of essential documents** is concerned, the Old CCP stipulated that "the translation of the decisions and other official documents to be served to the addressee shall be the responsibility of the court, prosecutor or investigating authority which has adopted the decision or issued the official document".[42] Since the decisions on the deprivation of liberty, the bill of indictment and the judgment had to be served to the defendant under the Old CCP, this regulation was in compliance with Article 3(1) and 3(2) of Directive 2010/64/EU. Furthermore, the Old CCP contained the possibility that the concerned person may expressly waive the right to the translation of the documents to be served, which is also allowed by Article 3(8) of the Directive.

The New CCP follows the concept of the Old CCP, when it also requires the translation of those documents that are to be served to the concerned person, which therefore also meets the requirements of Articles 3(1) and 3(2) of Directive 2010/64/EU:

> *Article 78(7) The translation of those case materials that are to be served to the addressee shall be the responsibility of the court, prosecutor or investigating authority which has adopted the decision or issued the case material.*
>
> *(8) Unless an Act of Parliament stipulates otherwise, the case material to be served does not have to be translated if the addressee expressly waives his/her right to translation.*

Furthermore, similar to the Old CCP, the New CCP also expressly stipulates that only those parts of the bill of indictment, judgment or other substantive decision on the merits of the case shall be translated into the language used in the proceeding which concern the defendant with regard to whom the need of translation has arisen.[43]

Neither the Old CCP, nor the New CCP provides suspected or accused persons or their legal counsel to submit a reasoned request for the translation of other documents on the basis that they regard those essential for the given case, which is in breach of Article 3(3) of Directive 2010/64/EU. Under neither the Old CCP, nor the New CCP is a separate decision made about translation or interpretation being unnecessary, and thus, the Hungarian legislation is not compliant with Articles 2(5) and 3(5) of Directive 2010/64/EU, according to which suspects or accused persons shall have "the right to challenge a decision finding that there is no need for interpretation" or "the translation of documents or passages thereof".

As far as the **recording requirement** set out in Article 7 of Directive is concerned, **both the Old CCP and the New CCP comply with it**, since both prescribe that the records of procedural acts shall include the name and procedural status of all persons present, including that of the interpreter.[44] In addition, the New Investigation Decree stipulates that the records shall also indicate the interpreter's availabilities and the number of their license, or in the absence thereof, other personal data required for identification, as well as the language of the interpretation.[45]

According to the Old CCP, if the defendant has a hearing or speech impediment, blind or does not speak or understand Hungarian, or uses their regional or national minority language, the costs of interpretation and translation are borne by the state, even if the defendant is found guilty.[46] This is also in line with Article 4 of Directive 2010/64/

EU, of which prescribes that “Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings”.

The New CCP has not brought changes in this regard, and, **in compliance with Article 4 of Directive 2010/64/EU, it exempts the defendant from the costs of language use,** irrespective of the outcome of the proceedings:

Article 576(1) The state bears […]

b) the costs that arise in relation to the fact that the accused person has a hearing or speech impediment, blind, deaf and blind, or does not speak or understand Hungarian or has used in the course of the proceeding their national minority language.

It must also be pointed out that **according to the New CCP, participation may be ensured through telecommunication technology**, which also concerns interpreters, who may participate in procedural acts through not only videoconferencing devices, but also devices that transfer only sound.[47] This possibility is in line with Article 2(6) of Directive 2010/64/EU, and may facilitate the availability of adequate interpretation for defendants who speak rare languages, and may prevent the protraction of the proceeding due to the lack of interpretation (as the interpreter does not need to travel to another corner of the country, if the necessary competency is not in place at a certain location).

As regards the **quality of translation and interpretation**, while the Old CCP provided that **only persons having the qualification stipulated in a separate legal regulation may be employed as interpreters, it was also set forth that if appointing an interpreter or translator with the prescribed qualification was not possible, any other person having sufficient knowledge of a certain language could be appointed**.[48] This might threaten adequate compliance with the requirement set out in Directive 2010/64/EU that the quality of translation and interpretation shall be sufficient to ensure the right to a fair trial (see Section 2.8 below on this issue). At the same time, Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organisations under the Minister of Interior (hereafter: Old Investigation Decree) prescribed that the witness and defendant shall be asked whether they understood the appointed interpreter. The answer to this question had to be recorded in the minutes of the hearing.[49]

The **New CCP's provisions on appointing interpreters and translators** are similar to those of the Old CCP:

Article 201(1) The provisions pertaining to experts shall also apply to interpreters, with the addition that persons having the qualification stipulated in a separate legal regulation shall be appointed as interpreters. If this is not possible, any other person having sufficient knowledge of a certain language could be appointed as an ad hoc interpreter. The term interpreters shall be understood to include translators as well.

Partly similarly to the Old Investigation Decree, the New Investigation Decree contains the following safeguards:

Article 47(2) If an interpreter must be employed in the course of the procedural act, the records of the act shall contain the following: […]

d) the declaration of the person participating in the criminal procedure on whether he/she has understood the interpretation.

(3) The investigating authority shall strive to assess without the assistance of the interpreter too whether the person participating in the criminal proceeding has actually understood the interpreter.

The "separate legal regulation" that Article 201(1) of the New CCP encompasses the same norms as the ones invoked in the Old CCP, since no new bylaws have been passed in this regard. Based on these, only persons possessing a certificate proving their professional translating and interpreting skills are authorised to provide legal interpretation or translation services.[50] The National Translating and Translation-attesting Office (*Országos Fordító és Fordításhitelesítő Iroda, OFFI*) has exclusive authorisation to provide certified translations, to certify translations and certified foreign-language copes, unless otherwise stipulated by a legal provision.[51] Furthermore, the relevant Ministerial Decree[52] stipulates the following with respect to interpretation:

Article 6(1) The National Translating and Translation-attesting Office shall be authorised to provide interpretation in the course of proceedings before the courts, prosecutors and investigating authorities in Budapest.
(2) If the [National Translating and Translation-attesting] Office is not able to provide an interpreter in a certain language, or the court is not located in Budapest, an interpreter registered with the competent administrative body within the geographical scope of competence of the court should be appointed.

(3) If interpreting cannot be granted in the way prescribed in Paragraphs (1)–(2) above, any other person with sufficient language skills shall be appointed.
(4) If an interpreter cannot be provided through the appointment of a verified interpreter or another person who is suitable to act as interpreter in a proceeding conducted by a court not located in Budapest, the [National Translating and Translation-attesting] Office is obliged to provide interpretation for any court in the country.

In order to ensure **compliance with Article 5(3) of Directive 2010/64/EU**, the pertaining decree was amended to stipulate that that "interpreters and translators participating in the proceedings conducted by the court or authority shall be required to **observe confidentiality** regarding the facts and data of the case".[53]

As far as the **right to put forth a complaint** as required by Articles 2(5) and 3(5) of Directive 2010/64/EU is concerned, **neither the Old CCP, nor the New CCP has stipulated expressly** that the defence may file a complaint if the quality of interpretation or translation is sufficient to ensure the fairness of the proceeding.

2.2. The level of need for interpretation and translation

There are no publicly available data on the number of instances when interpreters or translators are appointed annually, or in how many cases the defendant has difficulties understanding the appointed interpreter. The degree of need for translation or interpretation may be assessed on the basis of the nationality-based distribution of the defendants of completed criminal proceedings. **In 2016** (i.e. most recent the year with regard to which data are available on the website of the National Judicial Office – *Országos Bírósági Hivatal, OBH*), **6.2% of adult and 0.1% of juvenile defendants were citizens of a foreign country**.[54]

2.3. Identification of the need for interpretation or translation, and identifying the appropriate language

As it was demonstrated above, neither the Old CCP, nor the New CCP has provided explicit guidance for the authorities on how they should ascertain "whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter".

In the IPC research, the interviewed defence counsels have claimed almost unanimously **that the police have no established practice to ascertain whether**

there is a need for interpretation. One of the respondents said: “if [the defendant] is not a Hungarian citizen, they do not think, they immediately appoint an interpreter”. Five respondents have confirmed that the police would appoint an interpreter on the basis of the suspect’s citizenship. Three interviewees recalled cases when the police had identified the language of interpretation and appointed the interpreter on the basis of the suspect’s name. The Independent Police Complaints Board’s experience also shows that there is no established practice or method within the police for ascertaining whether an interpreter needs to be involved, and what the language of interpretation should be.

The defence counsels’ experience shows that the police try to convince suspects speaking rare languages to accept interpretation in English. A number of respondents have said that if the suspect speaks any Hungarian, no matter how little that is, no interpretation is provided, which often means that the suspect will not understand everything. One of the lawyers mentioned an instance when his client had obviously had difficulties understanding the legal jargon used by the CCP, but the police had refused to appoint an interpreter.

The representative of the Office of the Commissioner for Fundamental Rights called the attention to the fact that full compliance with the procedural rights requires the appointment of an interpreter even if the investigating officer speaks the language the suspect wishes to use. Their own experience is that interpretation is usually provided at a satisfactory level.

2.4. Interpretation at the initial stages of detention

According the experience of the Independent Police Complaints Board, the absence of interpreters is a recurring problem in the early stages of the proceedings. The Independent Police Complaints Board’s representative has said that **interpreters are frequently not involved in the proceeding before the first interrogation of the suspect** – this is something that the Board has signalised to the National Police Headquarters on a number of occasions. She has added that the police usually carry out procedural acts before the arrival of the interpreter, but its ability to communicate with the suspect is obviously largely limited, which undermines the proper implementation of procedural rights. In such cases the right to information may be severely breached.

2.5. Interpretation during lawyer/client consultations

As we already pointed out in a 2009 study, under the Old CCP it was a problem that "no interpreter is provided by the state for the purposes of consultation between the lawyer and the client. This creates a significant inequality between indigent and paying clients. While clients who can afford to retain a lawyer can also pay an interpreter to translate during the consultation, indigent defendants can – unless the lawyer speaks the language – only consult their appointed lawyer immediately before the procedural act (when the interpreter is around) and are forced to rely on interpreters chosen by the authority. This is especially problematic in the investigation phase."[55] As presented above, **this issue has been largely resolved by the New Investigation Decree** through providing for interpretation for detained defendants and prescribing that defendants who are not detained may consult with their defence counsels before or after the procedural act with the assistance of the interpreter whom the authority appointed for the purposes of the given procedural act.

The counsels interviewed in the IPC research have said that if the lawyer can conduct the consultation in the language of the client, they will prefer this solution, as most counsels find it problematic if the police-appointed interpreter provides the interpretation during both the consultation and the interrogation. According to one of the respondents, "**it is not easy to twist the police's arm into accepting that the defence counsel wishes to bring their own interpreter to the consultation with the client**". Another interviewee has found it worrisome that the **interpreters are appointed and paid by the police**, because this may create a structural link between the police and the interpreters, **thus undermining the independence** of the latter. **This problem has not been resolved by the New Investigation Decree, as it does not provide an option to choose**, failing to provide the defendants with the possibility of relying on their own interpreter even if they could afford it.

2.6. Interpretation during interrogations

According to the interviewees, **interpretation during the interrogation is typically provided**, so if the suspect does not speak or understand Hungarian, the police usually appoint an interpreter. However, as it is set out above, if the suspect speaks any Hungarian, the investigating officers often try to avoid having to appoint an interpreter, while in other cases they try to provide interpretation in languages for which interpretation is easily available, e.g. in English.

2.7. Arrangements for translation of documents

As indicated above, in this regard the New CCP has not brought along significant conceptual changes. So, the **structural problems** we called attention to in relation to the Old CCP have remained: "the translation of the decisions and other official documents to be delivered to the addressee shall be the responsibility of the court, prosecutor or investigating authority which has adopted the decision or issued the official document. Other documents (e.g. minutes of the procedural actions) are not translated by the proceeding authorities, and if the suspect wishes to receive them in his/her mother tongue, he/she is required to pay for the translation. This means that while at the beginning of the investigation, the communication of the suspicion is translated by an interpreter, the records thereof are not available for the suspect free of charge. The bill of indictment is translated and costs are borne by the state, the records of the court hearings are again not available for free. Those **indigent defendants who cannot afford to pay for the interpretation of those documents that the state authorities are not obliged to have translated, are in a significantly disadvantageous situation compared to wealthy defendants who can pay for this service**."[56]

The respondents of the IPC research have regarded the translation of documents as generally satisfactory. Three interviewees claimed that it happened in their practice that not all parts of a given document were translated (which – if those parts were not "relevant" – was in compliance with Article 3(4) of Directive 2010/64/EU), and three other respondents said – without being expressly asked – that in their view the police failed to have all those documents translated that are necessary in their view (it must be added: this problem stems from the CCP's structural deficiency). One interviewed lawyer has recommended that "all documents should automatically be sent to the translating firm". The respondents think that the **slowness of the process of translation** is a severe problem. Out of 12 respondents 10 said that documents were not translated on time (one of the remaining two thinks that the practice is diverse, another believes that most of the translations are done on time). One interviewee is of the view that somehow translators should be forced to respect the deadline, even by applying sanctions for delays.

2.8. The quality of interpretation and translation

The CCP provision according to which if this is not possible to find an interpreter who meets the statutory criteria, any other person having "sufficient knowledge of a certain language" could be appointed as an ad hoc interpreter, may cause problems in practice

with regard to the quality of interpretation and translation, as there are no measurable guarantees for what is sufficient, and **persons not having a sufficient command of a given language may be appointed**. In the IPC research, one respondent said that once the interpreter had not had sufficient knowledge of the particular accent that the suspect had used (Irish accent of English), so the defence counsel had had to take over the task of interpreting. (60% of the 13 respondents who replied to our questions concerning interpretation – 3 of the interviewees had no experience concerning interpretation – was unable to estimate what percentage of interpreters are professionals and what is the proportion of ad hoc interpreters in the police practice. Two of the respondents think that the police employ ad hoc interpreters in less than half of the cases, while one respondent is of the view that all the interpreters appointed by the police are ad hoc interpreters.)

Respondents were of the view that **translations were of better quality than interpretation**: most respondents gave a three on a scale of five when asked about interpretation quality, whereas most of them think that translations are of acceptable quality. One lawyer thinks that the reason for this is that the quality of translations can be controlled subsequently, so translators are more accountable, which results in better quality.

It must be noted that the lawyer can draw inferences concerning the quality of interpretation from only certain circumstances if not speaking the given language. One respondent called attention to differences between simultaneous and consecutive interpretation, quoting an example when the interpreter providing consecutive interpretation kept only summarising the longer statements of his client, and so he had serious doubts in relation to the quality of the interpretation. When simultaneous interpretation is provided, the chances of such problems are much smaller, since in those cases the interpreter does not reformulate or summarise the statement.

The long-standing problem that **there is no regulated quality assurance in relation to the work of translators and interpreters**, was mentioned by a number of respondents in the IPC research. Some of them are of the view that the audio recording of interrogations would resolve the issue, as this would make the assessment of the quality of interpretation possible later on, however, this is very rare in the investigation phase, although the law would allow for this solution. One respondent mentioned as a good practice a case, when a judge audio recorded both the original statement of the defendant and the interpretation – this however is not usual practice. Another respondent would only allow those persons to act as interpreters or translators in criminal proceedings who participate in a serious training program and pass an exam. She would also prescribe higher fees for interpreters,

since – in her experience – “good” interpreters refuse to work for the police due to the low remuneration, so the investigators are forced to accept mediocre or even worse interpreters.

It has to be added that there is no official rate set out by any legal norm for interpreters and translators: according to the New (and the Old) CCP, the amount of their remuneration is established by the proceeding authorities, on the basis of a claim submitted by the interpreters or translators themselves.[57]

2.9. Conclusions

The New CCP has not brought along fundamental conceptual changes in relation to interpretation and translation: its provisions comply with Article 2(1) of Directive 2010/64/EU and ensure the right to use the defendant’s mother tongue, national minority language or any other language spoken or understood by the defendant as well as the use of sign language interpretation. At the same time, it is a problem in the practice that the interpreter is seldom involved before the interrogation, even if the police perform procedural acts, which undermines the guaranteeing of procedural rights. It is positive that the participation of the interpreter may under the New CCP be ensured through telecommunication technologies.

The bylaws of the New CCP have brought along significant improvements in order to ensure compliance with Article 2(2) of Directive 2010/64/EU, when it is expressly stated that the investigating authority shall ensure through the appointment of an interpreter that detained suspects could consult with their defence counsel at the premises of the detention, and that non-detained suspects could use the assistance of the interpreter appointed by the investigating authority in order to consult with their counsel before or after the procedural act. Using an interpreter hired by the defence for the purposes of consultation has remained to be difficult, the new provisions also fail to provide this possibility even for those who could afford to pay for the services of an interpreter.

It is against Article 2(4) of Directive 2010/64/EU that neither the Old or New CCP, nor their bylaws determine any mechanism or procedure “to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter”, and no such mechanism have evolved in the practice either. The respondents’ experience shows that the police often appoint the interpreter on the basis of the suspect’s citizenship. If the suspect speaks any Hungarian, no matter how little that is, no interpreter is appointed, and it happens

that investigating officers try to convince suspects speaking rare languages to accept interpretation in English.

The New CCP follows the concept of the Old CCP, when it only requires the translation of those documents that are to be served – a solution which is fundamentally compliant with Articles 3(1) and 3(2) of Directive 2010/64/EU, but neither of the procedural codes have provided the right to the defendants or their counsels to request the translation of those documents that they regard to be essential, which is against Article 3(3) of Directive 2010/64/EU. This results in a situation whereby those indigent defendants who cannot afford to pay for the interpretation of those documents that the state authorities are not obliged to have translated, are in a significantly disadvantageous situation compared to wealthy defendants who can pay for this service. Delays in the translation of documents has been mentioned as a serious problem

Neither the Old CCP, nor the New CCP prescribes that a separate decision shall be made about the absence of the need for translation or interpretation, so the Hungarian regulation is not compliant with Articles 2(5) and 3(5) of Directive 2010/64/EU.

In accordance with Article 4 of Directive 2010/64/EU, suspects and accused persons are exempted from the costs arising in relation to their language use, irrespective of the outcome of the proceedings.

The CCP provision according to which if it is not possible to find an interpreter who meets the statutory criteria, any other person having “sufficient knowledge of a certain language” could be appointed as an ad hoc interpreter, may cause problems in practice with regard to the quality of interpretation and translation, as there are no measurable guarantees for what is sufficient, and persons not having a sufficient command of a given language may be appointed. The lack of a formalised quality assurance system has also been mentioned as a problem in this regard.

3. The right to information in criminal proceedings

3.1. Information about rights

3.1.1. The normative framework and its compliance with the EU Directive on the right to information in criminal proceedings

The Old CCP prescribed as a general rule that the court, the prosecutor and the investigating authority "shall – before procedural acts – inform the person concerned by the given procedural act about their rights and warn them about their obligations",[58] and with regard to defendants it specifically stipulated that they shall be informed about – in the terms used by Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (hereafter: Directive 2012/13/EU) – their right to the right of access to a lawyer; any entitlement to free legal advice and the conditions for obtaining such advice; and the right to remain silent. The Old CCP did not however contain any provision that expressly prescribed the authorities' obligation to inform suspects and accused persons about their right to be informed of the accusation, and their right to interpretation and translation.[59] Thus, **the Old CCP failed to prescribe the information of defendants about all the rights listed by Article 3(1) of Directive 2012/13/EU**.

In accordance with Article 3(2) of Directive 2012/13/EU, the Old CCP expressly contained the requirement of accessibility, stipulating that the authorities shall strive to use simple and accessible language when communicating orally or in writing with the persons participating in the criminal proceedings. Information of the rights and cautions about the obligations shall be communicated in a language that is understandable for the affected person, and in a way that has regard to their condition and personal characteristics.[60]

Article 39(4) of **the New CCP prescribes that the defendant shall be informed about their rights when their participation in the criminal proceeding commences**, As Article 42(2) of the New Investigation Decree puts it: **information about procedural rights shall be provided at the time when the participant of the criminal proceeding has their first encounter with the authorities, but at the latest when the first procedural act affecting them commences.**

Article 39(1) of the CCP lists (among others) the rights the person affected shall be informed of, stipulated in Points (a), (c) and (e) of Article 3(1) of Directive 2012/13/EU (the right of access to a lawyer, the right to be informed of the accusation and the right to remain silent):

Article 39(1) The defendant has the right to

a) be informed about the suspicion and the accusation, and the changes thereof,

b) be provided by the court, the prosecution or the investigating authority with sufficient time and circumstances to prepare for his/her defence,

c) be informed by the court, the prosecution or the investigating authority about their rights and obligations in the criminal proceeding,

d) retain a defence counsel or put forth a motion for the appointment of a defence counsel,

e) have a consultation with their defence counsel confidentially,

f) testify or refuse to testify […].

The New CCP prescribes – somewhat illogically – in a separate provision – Article 39(4) – that the defendants shall be informed about their right under Article 3(1)(d) of Directive 2012/13/EU:

(4) When their participation in the criminal proceeding commences, the defendant shall be informed about their rights and cautioned about their obligations by the court, the prosecution or the investigating authority. The information shall include the right to request an exemption of costs and the conditions thereof, as well as the right to use the mother tongue.

The New CCP also stipulates **the requirement of accessibility**:

Article 74(2) In the course of communicating with persons participating in the criminal proceeding, the court, the prosecution and the investigating authority shall strive to ensure that the persons participating in the criminal proceeding would understand what has been communicated to them and would be able to make themselves understood.

> *(3) In order to achieve the purpose set out in Paragraph (2), the court, the prosecutor, and the investigating authority shall when communicating with the participants of the criminal proceeding*
>
> a) *use simple and accessible language,*
>
> b) *have regard to the condition and personal characteristics of the person participating in the criminal proceeding,*
>
> c) *make sure that the affected person has understood the contents of the oral communication addressed to them, and if not, shall explain the information provided.*

In compliance with Articles 4(1), 4(4) and 4(5) of Directive 2012/13/EU, **the domestic legal provisions prescribe that suspects or accused persons who are arrested or detained (i.e., in the Hungarian context, taken into 72-hour detention or pre-trial detention) are provided promptly with information about their rights in writing**, in simple and accessible language and in a language they understand. Article 14(4) of Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement (hereafter: Penitentiary Code) stipulates that "convicts

and persons detained on other grounds must be informed in writing, in a languagethey understand, in a simple and accessible manner", while Article 12(5) provides that "persons subject to coercive measures must be informed in writing, in a language they understand, in a simple and easily accessible manner, at the time of admission" about the criminal procedural rights that the Penitentiary Code specifies. In addition, Article 12(8) of the Penitentiary Code sets forth in compliance with Article 4(5) of Directive 2012/13/EU the following: "If the convict or person held in detention on other grounds is unable to read or write or if the written Letter of Rights is not available in a language he/she understands at the time when the information is provided, the information specified in Paragraphs (4)–(5a) shall be given orally, in the presence of two witnesses, the performance of which shall be documented in writing. If after that, the written Letter of Rights specified in Paragraphs (4)–(5a) is prepared in a language understood by the convict or person held in detention on other grounds, it shall be provided to them promptly."

In terms of Article 12(7) of the Penitentiary Code, **detainees may keep the written Letter of Rights in their possession**. Therefore, the legal provisions meet the requirement set out in Article 4(1) of Directive 2012/13/EU providing that "suspects or accused persons [...] shall be allowed to keep [the written Letter of Rights] in their

possession throughout the time that they are deprived of liberty". As the Letter of Rights is handed over at the time of admission to the detention facility, the requirement set out in Article 4(1) of Directive 2012/13/EU providing that suspects or accused persons who are arrested or detained must be provided "promptly" with a written Letter of Rights is also formally fulfilled. In our opinion, however, **the fact that** pursuant to the Penitentiary Code**, the defendants are provided with the written Letter of Rights only after they have been questioned as suspects,** and not before it, **gives rise to concern**, since providing the information in the detention facility strips this requirement from its role as a guarantee with regard to certain rights, and also questions whether the requirements of Directive 2012/13/EU are actually met. For example, it is likely that after the questioning, the written Letter of Rights relating to the right to silence will not be of much help for the person held in the police detention facility or penitentiary.

Therefore, it is a positive novelty that Article 42(2) of the New Investigation Decree makes it **possible** (although not mandatory) **that information about procedural rights be provided through "the handing over of a written information leaflet"** at the time when the participant of the criminal proceeding has their first encounter with the authorities, but at the latest when the first procedural act affecting them commences – provided that the circumstances making the handing over of the document are in place [see Article 42(1) of the New Investigation Decree].

3.1.2. Information about procedural rights in practice

As far as the practical implementation of the right is concerned, defendants are informed of their rights at the beginning of the interrogation in such a way that the investigating officers read out aloud to them those cautions generated by the RobotZsaru NEO system (the integrated administrative, case processing and electronic document management system of the police) that are included in the template minutes mandatorily applicable by police officers at the questioning of suspects and are available from the central document repository of the RobotZsaru NEO system. **The new version of the template** (which was revised due to the coming into effect of the New CCP) **contains information about all the rights listed in Article 3(1) of Directive 2012/13/EU**. (The earlier versions did not provide information about the right to language use, and for some time no information was provided about the possibility of requesting personal cost exemption and the conditions thereof.) However, we do not have information on the practical implementation of Article 42 (2) of the New Investigation Decree, according to which information about procedural rights shall be provided at the time when the defendants have they first encounter with the

authorities, but not later when the first procedural act is realized in practice. Thus, all these warnings are included in the records of the questioning of the suspect, which are accessible for both the suspect and the defence counsel subsequently. However, the fact that the information is included in the records, does not always guarantee that the warnings were provided in their entirety as they are required by the RobotZsaru NEO system, so the revision of the template does not in itself ensure full compliance with Directive 2012/13/EU in practice.

The defence counsels interviewed in the IPC research have said that the police always provide some information about at least some of the procedural rights. The main problem is that **information about all the rights is rare, and the way in which the information is provided is usually not accessible**. **Most respondents mentioned deficiencies with respect to the right of access to the case materials and the right to silence.** 70% of the respondents are of the view that information is provided in a detailed and accessible manner in only half of all the cases or even less often. 80% of the counsels have said that the provision of information is usually limited to the reading out of the text of the CCP, while the remaining 20% are of the view that in more than half of the cases, the investigating officer only reads out the text of the law. Two thirds of the respondents think that the officers never use everyday expressions, easily accessible terms when providing information about rights. The remaining one third of the interviewed lawyers are of the view that such explanations occur in less than half of the cases. More than half of the respondents have said that if a suspect has a follow up question concerning their rights, the officers never give a substantive response. It is important to note that these responses concern suspects who are questioned in the presence of their defence counsels – the way in which more vulnerable suspects without legal representation are informed may be different.

The representatives of the Office of the Commissioner for Fundamental Rights and the Independent Police Complaints Board are of the view that the use of simple and accessible language in both the written and oral communication of the police would not only be indispensable for the better implementation of the procedural rights of suspects, but would also improve the efficiency of police work, since it could contribute to “real communication” and “more information could be acquired from the suspect”. The interviewed representative of the Office of the Commissioner for Fundamental Rights thinks that resistance to police measures often stems from the fact that the defendant does not fully understand what is happening. Accessible communication may reduce the number of instances when the contradictions of a case surface only in the judicial phase of the proceeding. They also believe that the high level of fluctuation within the police is also problematic, since it takes time to learn the necessary communication skills. The interviewed officials have

mentioned as potential factors working against accessibility that a simple and more accessible style of communication may reduce the “statistical success rate” of investigations, i.e. the wish to produce a suspect as soon as possible. The representative of the Independent Police Complaints Board is of the view that there has been progress in the accessibility of police communications, more and more information leaflets produced by the police (e.g. the leaflet on the rights of persons taken into police custody) use simple and accessible language. She says that there is no unified methodology within the police to assess whether the suspect has difficulties understanding the information provided, the assessment and addressing of this issue is seen as the individual task of the case officer. In her experience, a large part of tensions between the suspect and the police officer stems from communication problems, and thus could be reduced through communication trainings (on how to communicate in an accessible manner with Hungarian or foreign suspects).

The respondents have said the following about how information is provided concerning the individual rights:

- The suspects are usually informed during the questioning about the right to a lawyer, but according to many, there can be differences between the interrogation of those who have a lawyer and those who do not.
- According to the large majority of the respondents, suspects are informed about their right to translation and interpretation, but the depth of the information is not satisfactory.
- According to the unanimous view of the interviewees, the suspects are always informed about their right to silence, but the accessibility of this information is regarded to be severely problematic. It happens that the information is provided in a formal manner, which is not accessible for the suspect. As one respondent has put it: “the scared suspects without lawyers” do not understand this piece of information. Only 20% of the respondents are of the view that information about the right to silence is provided in a satisfactory manner. According to two respondents, the right to silence “is presented as if the suspect would waive the right to defence if resorting to this”, or “repeat it 20 times that a confession shall be made”. In other instances, they arrange the situation “as if refusing to answer questions would not fall within the [defendant’s] rights.
- Most respondents (eight persons) think that information about the right of access to the case materials is unsatisfactory, difficult to understand or fully missing. As one of the lawyers has put it: “they say it in a way that even I don’t understand it”. Less than 20% of the respondents think that information about this right is provided in an acceptable manner, some of the interviewees are not able to have a conclusive opinion on the matter or have mixed experience.

73% of the respondents believe that **in more than half of all the cases or in all the cases, the police use information in the investigation that the suspects said before they were informed about their procedural rights**. Only one respondent believes that no such instance occurs, and two lawyers have said that this happens in less than half of the cases. The representative of the Independent Police Complaints Board believes that audio and video recording systems could have a crucial role in the adequate implementation of the right to information. A dashboard camera recording what is happening inside the police car could contribute greatly to the prevention of "informal" questioning before information about the rights is provided. In her view, police cars and interrogation rooms could be equipped with cameras from a reasonably low amount of money.

3.1.3. The "Letter of Rights"

Persons held in detention at a police station (under 72-hour detention or in pre-trial detention) are informed in writing via Annex 11 to Order no. 3/2015. (II. 20.) of the National Police Headquarters on the Regulations of Service in Police Detention Facilities (hereafter: Police Detention Facilities Regulations), while persons admitted to penitentiary institutions as pre-trial detainees are informed via Annex 2/A to the Model House Rules issued by the National Penitentiary Headquarters (*Büntetés-végrehajtás Országos Parancsnoksága, BVOP*). Not all the rights and information required by Directive 2012/13/EU were included in these.[61] These Letters of Rights (annexes) must be revised to reflect the changes brought along by the New CCP, however, at the time of writing this paper we have no information whether this has been done, so we cannot formulate an opinion about their compliance with Directive 2012/13/EU. (In 2015, both Letters of Rights were available in 18 languages beyond Hungarian,[62] but we have no information available on the current state of affairs in this regard.)

In addition to content-related problems, there were problems with the accessibility of the above Letters of Rights too: for instance, the length, as well as the text and structure of the 10-12-page long annex to the Police Detention Facilities Regulations – containing information about not only criminal procedural rights, but also about the rights the detainees had in petty offence proceedings and in the course of their detention – gave rise to the question to what extent it was accessible and simple, and to what extent it helped – the often uneducated – defendants in exercising their rights.

The conclusion that defendants are not informed in a simple and accessible language in Hungary was also substantiated by a survey conducted on a sample of 200 persons by the Hungarian Helsinki Committee (HHC) in the framework of the EU-funded project

"Accessible Letters of Rights in Europe".[63] Half of the participants (whose composition reflected the composition of the pre-trial detainee population with regard to age, gender and the level of education) were given information on their rights orally, as happens in Hungary at the beginning of interrogations, while the other half of the participants were given information in writing as happens when defendants are detained. (For the purposes of the survey, we combined all information provided for defendants, i.e. the texts of both the oral and the written information that defendants receive in the course of an actual Hungarian criminal procedure by any authority.) Subsequently, the participants were asked questions, aiming to check whether and to what extent they had understood the information given to them and whether they were aware of their procedural rights as included in Directive 2012/13/EU (the questionnaire was compiled with the assistance of experts of law, plain language and sociology). We found that **the level of comprehensibility of the Letter of Rights we had compiled using the texts produced by the Hungarian authorities was very low, only 38.5%**. Based on the results – and again with the assistance of our experts – we produced a revised Letter of Rights, which we tested on another 200 persons. This new Letter of Rights was much more easy to understand, the level of comprehensibility increased to 62%.[64] Unfortunately, this revised version was not adopted by the police.

It must be pointed out that under Article 12(9) of the Penitentiary Code, "for convicts and persons held in detention on other grounds who suffer from long-term or permanent sensual, communicational, physical, mental or psycho-social conditions (or any combination of the foregoing) or who are unable to read or write, as well as for convicts and detainees who are minors, the information must be provided in a manner that is accessible to them having regard to their condition, facilities and situation". At the same time, based on the information available to us, no central "alternative" (or accessible) Letter of Rights has been prepared for defendants with the above characteristics, and therefore the manner in which the above legal requirement is implemented in practice (or whether it is implemented at all) depends completely on the qualification and attitude of the personnel.

3.2. Information about the reasons for arrest or detention, and the suspected offence or accusation

3.2.1. The normative framework and its compliance with the EU Directive on the right to information in criminal proceedings

In accordance with Articles 6(1), 6(3) and 6(4) of Directive 2012/13/EU, the Old CCP and the Old Investigation Decree ensured that suspects and accused persons be

provided with information about the criminal act they are suspected or accused of having committed (including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person), as well as any changes regarding the suspicion or accusation.[65]

The provisions of the New CCP are also compliant with Articles 6(1), 6(3) and 6(4) of Directive 2012/13/EU, as they stipulate the following:

Article 39(1) The defendant has the right to

a) be informed about the subject matter of the suspicion and the accusation, as well as the changes thereof […].

Article 388(1) In the course of their interrogation, after the required warnings have been administered, the suspect shall be informed about the facts of the case that is the subject matter of the suspicion and the legal classification of the offence under the Criminal Code.

Article 422(1) The legally required elements of the bill of indictment are:

b) the accurate description of the act that is the subject matter of the indictment,

c) the legal classification of the indicted offence under the Criminal Code, […].

The New Investigation Decree stipulates the following provisions in relation to the provision of information about the suspicion and the changes thereof:

Article 144(1) The investigating authority communicates the suspicion to the person against whom a well-founded suspicion of having committed a criminal offence exists by informing them about the essence of the facts of the case (indicating the time and place of the perpetration, but not providing information about the evidence at hand) and the legal classification of the offence under the Criminal Code. The essence of the facts of the case shall be communicated in a way which makes the individual elements of the offence's definition in the Criminal Code identifiable.

(3) If the suspicion concerns more offences and these are separable regarding the time and place of the perpetration, information about the individual offences and their classification under the Criminal Code shall be provided separately.

Article 145(1) If, based on the available data and evidence, there is a change in the criminal offence or its legal classification as communicated to the suspect, the investigating authority shall in the course of the subsequent interrogation communicate the full suspicion in a way that also identifies those elements of the suspicion communicated earlier that have changed. If only the legal classification under the Criminal Code has changed, the investigating authority shall not be obliged to recommunicate the offence the suspect is suspected of having committed.

(2) If, based on the available data and evidence, the suspicion of another criminal offence arises against the suspect in addition to the one he/she has already been suspected of, the investigating authority shall inform the suspect about it in accordance with the provisions of Paragraph (1). In such cases the new communication of suspicion shall include the new suspicion separately, however, the investigating authority shall not be obliged to recommunicate the earlier suspicion if there have been no changes thereof.

The provisions that were in force before 1 July 2018 guaranteed in accordance with Article 6(2) of Directive 2012/13/EU that suspects and accused persons be informed about the reasons for their arrest or “detention” (in the Hungarian context: pre-trial detention), including the criminal offence they are suspected or accused of having committed. Under Articles 169(1) and (2) of the Old CCP, the decisions about coercive measures (i.e. 72-hour detention or pre-trial detention) that were delivered by the investigating authority or the prosecutor and provided to the defendant were supposed to contain information about the offence concerned by the proceeding and the legal provisions on which the given decision was based.

In compliance with Article 6(2) of Directive 2012/13/EU, the New CCP prescribes the following:

- any decision which is delivered during the investigation about coercive measures and which is to be communicated to the suspect shall contain the legal classification of the offence,66 and
- after the bill of indictment is submitted, the reasons of any decision delivered about coercive measures concerning personal liberty shall contain "a reference to the accusation, the legal classification as set forth by the accusation, and – if necessary – the essence of the facts of the case as described by the bill of indictment".67

3.2.2. Information about the reasons for arrest and detention in the practice

As far as the practice is concerned, reference may be made to a 2015 research by the HHC, which was based on a questionnaire filled out by defence counsels and interviews made with police officers and defence lawyers.[68]

The questionnaire-based survey with lawyers showed that in practice the quality of information provided about the reasons for both 72-hour detention and pre-trial detention left room for improvement. Several counsels claimed that reasons provided for 72-hour detentions were less detailed than reasons given for pre-trial detention. However, in line with the earlier experience of the HHC,[69] it was a recurring complaint that reasons provided for pre-trial detention are "stereotypical", "not individualised", "formal", which is non-compliant with the jurisprudence of the ECtHR.[70] (These criticisms were raised in relation to both the decisions on pre-trial detention and those parts of the decisions on 72-hour detention that set out why the eventual ordering of pre-trial detention was likely.) Despite these problems, **we are of the view that the requirements set forth by Article 6(2) of Directive 2012/13/EU are mostly complied with in the practice.**

3.2.3. Information about the suspected offence (accusation) in the practice

The 2015 research of the HHC revealed **only sporadic problems** in relation to the information suspects or accused person are provided with about the criminal act they are suspected or accused of. According to the questionnaire-based survey of defence counsels, the defendants were usually informed about the legal classification of the offence, however, it happened much more often that information about the facts of the case and the nature of participation by the suspect or the accused person was not

fully adequate. A number of defence counsels claimed that while the defendants were informed about the name of the offence and the relevant Article of the Criminal Code was also identified, no detailed explanation or reasons were provided in relation to this or the classification. Some of the lawyers were of the view that this might undermine the lawfulness of the suspicion or the accusation, since certain elements required for a certain legal classification were missing, or the text of the law was simply "copy-pasted" into the bill of indictment, but in most cases this practice is not sanctioned by the courts.

In the IPC research, 80% of the counsels have said that usually no full information is provided about the basis of the suspicion. Their experience is that instead of the facts of the case, it is only the text of the Criminal Code that is set out, which may not be regarded as substantive information, and is means only formal compliance with the obligations concerning the provision of information. Some of them have mentioned that certain details and facts that could be relied on in designing a defence strategy are missing from the information that is provided. One of the lawyers has said that the police "tries to say as little as possible", which goes back to the investigation strategy. Other lawyers think that the deficiencies are due to the "sloppiness" of the police. According to one of the respondents, if the defence counsel is not present during the interrogation, the basis for the suspicion is not communicated at all.

Thus, in the practice, the requirement set forth in Article 6(1) of Directive 2012/13/EU, according to which information about the criminal act the suspect or the accused person is suspected or accused of having committed "shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence", **is not fully complied with**.

The lawyers interviewed in the 2015 research **did not mention any specific problem** in relation to the **provision of information on the changes of the suspicion or accusation**. However, some lawyers mentioned that the investigating authority tended to modify the suspicion with some "delay", i.e. around the end of the investigation, before the presentation of the case materials. The responses from the lawyers seem to suggest that in the defence counsels' view the suspicion is changed officially (and therefore, information about this change is communicated to the defence) later than the investigating officer actually comes to the conclusion that a change in the suspicion would be necessary. It also happens according to the interviewed lawyers that the prosecutor amends the accusation only in the closing speech, i.e. right before the delivery of the judgment. **These practices may run counter to the requirement of Article 6(4) of Directive 2012/13/EU, according to which "suspects or accused persons are informed promptly of any changes** in the information given in accordance with this Article **where this is necessary to safeguard the fairness of the proceedings"**.

3.3. Access to case materials and documents

3.3.1. An overview of the changes in the domestic normative framework

One of the outstanding problems of the Hungarian 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 ECtHR 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.[71]

Consequently, it meant a significant change when, in order to comply with Article 7 of Directive 2012/13/EU, the Old 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.

However, to those defendants whose pre-trial detention was not motioned for by the prosecutor, the general rules, already in force before 1 January 2014, were to be applied in terms of accessing the case file. In terms of the Old CCP, in their case, the defence had unrestricted access only to the expert opinion and the minutes of those investigative acts where the defendant or the defence counsel could be present. (These acts were the following: the interrogation of the defendant, the hearing 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 could only have access other case materials if such access was not deemed to violate "the interests of the investigation". After the investigation was concluded, the defence had unrestricted access to the case materials of the criminal case.

Thus, the implementation of Article 7 of Directive 2012/13/EU brought along positive changes in the legislative framework, but as the HHC's 2017 *research "Article 7 – Ensuring Access to Case Materials in Hungary"* showed there still was room for improvement in terms of both legislation and practice.

The New CCP has brought further significant conceptual changes in the area of access to case materials. In the following chapters we assess to what extent the New CCP and its bylaws seem to remedy those deficiencies of the legal framework and practice that

our 2017 research[72] identified and how the solutions chosen by the legislator are related to the HHC's recommendations.

3.3.2. The scope of the materials that can be accessed and the manner of providing access

As far as the scope of case files to be provided to **pre-trial detainees** is concerned, the text of the **Old CCP** did not entirely comply with Article 7(1) of Directive 2012/13/EU, since **it allowed 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 could override the right enshrined in Article 7(1) of Directive 2012/13/EU. Therefore, the manner in which authorities interpreted the scope of the case files "substantiating the motion" was an important issue, along with whether withholding certain case files in a given case hindered the defendant and the defence counsel in arguing substantively and effectively against ordering or prolonging pre-trial detention. (It is noteworthy that a 2015 HHC research[73] showed that the case files and the evidence in question were typically related to the well-founded suspicion that a given criminal offence had been committed by the suspect, rather than to the "specific" 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 2017 research showed that **the scope of case files provided to the defence was in fact wider and the practice in that regard was more favourable than what was envisaged by the text of Article 211 of the Old CCP**. However, irrespective of that, the text of the law still carried the strong risk that the defence would not be provided with all the case materials essential to challenging effectively the lawfulness of the detention. It gave rise to strong concerns that only the prosecutor's office and the investigation authority (the police), thus, only the side of the "prosecution" had unlimited knowledge as to the scope of the available case files and access to those, while the judge deciding on pre-trial detention did not. In addition, no truly effective remedy was available for defence counsels for instances when they believed that the case file might 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, was that the CCP be amended in a way that authorities would not only be obliged to provide case files "substantiating" the motion for pre-trial detention, but that the

scope of case files should be compliant with the Directive 2012/13/EU. In addition, the HHC recommended the amendment of the respective rules in a way that the judge deciding on pre-trial detention would receive all the case files available to the investigation authority as well as the prosecutor.

As far as **non-detained defendants** are concerned, the provisions of the Old CCP were in compliance with the requirement enshrined in Article 7(3) of Directive 2012/13/EU 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 Old CCP did not fully comply with Article 7 of the Directive in the sense that it did not make the access to all case files the main rule, subject to exceptions when access may be denied – in fact, it applied a reverse concept.

In addition, the 2017 research interviews showed that in practice, **access to case files during investigations regarding non-detained suspects was denied not only on an exceptional basis but with regard to a significant proportion of case files, which was in contradiction both with the Old CCP and with Article 7(4) of Directive 2012/13/EU**. Furthermore, the authorities regularly failed to give detailed reasons why access to the materials would violate the interests of the investigation. As one of the lawyers interviewed in the IPC research explained: counsels had to "fight a close combat" in order to be provided with access to the case materials. Participants of the IPC research also mentioned that the suspects were not always informed about which materials they are entitled to an own copy of, or the copies were handed over with significant delay.[74]

Based on the research results, our position was that steps should be taken to ensure that providing copies of case files (i.e. access to case files) be 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 recommended 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.

Article 100 of the New CCP prescribes the following in relation to access to “case materials”:

Article 100 (1) The materials of the case can be accessed upon request by

a) the defendant and the defence counsel after the interrogation of the defendant,

b) the victim in relation with the criminal offence concerning them, and

c) the other interested third party and the third party having a financial interest within the scope concerning them.

(2) The right of access under Paragraph (1) extends to all case materials, including the documents and other evidence acquired by the court, the prosecuting or the investigating authority, or submitted or attached by any party participating in the criminal procedure.

(3) Case materials do not include the documents produced in relation to the overview and guidance exercised by the prosecution over the investigating authority, with special regard to prosecutorial instructions, the investigation plan, the drafts of resolutions and the investigating authority’s requests addressed to the prosecution.

(4) The court, the prosecution or the investigation authority provides access to any case material

a) by allowing its examination,

b) by providing information, disclosure about the contents of the material, in case there is a motion requesting so, or an approval has been given,

c) by allowing the party to copy or photograph the material for their own use,

d) by serving the material’s copy or resumé prepared by the court, the prosecution or the investigating authority, or

e) in any other manner regulated in an act of law.

(5) The right of access does not override the special provisions relating to confidential case materials and the obligation to handle personal data confidentially.

(6) Until the end of the investigative phase and unless the present law sets forth otherwise, the court, the prosecution or the investigating authority may in a formal decision restrict access to certain case materials or any manner of providing access listed under Paragraph (4).

(7) The right of access and the manner of providing access set forth under Point (d) of Paragraph (4) shall not be restricted in relation to

a) case materials produced about procedural acts at which the person setting forth the motion for access was present or could have been present under the provisions of this law, and

b) expert opinions.

(8) No remedy shall be available if the access is provided as requested in the motion.

(9) Unless this law sets forth otherwise, the court, the prosecution or the investigating authority shall provide within 15 days from the submission of the motion access to any case material which is listed in Paragraph (2) and with regard to which no restriction has been put forth.

Thus, the New CCP has brought a fundamental – positive – change in the materials to which access must be provided: according to the explanatory memorandum attached to Article 100, "**the restricted access allowed on a case-by-case basis** [as regulated by the Old CCP] **has been replaced by the principle of full access and restriction on a case-by-case basis**. […] Thus, the restriction of access is only possible with regard to specific case materials and on the basis of a formal rejection of the motion [for access] against which a remedy is available. This system is augmented by Article 352, which prescribes that access to case materials shall be guaranteed continuously, with a scope that is getting wider as the procedure progresses."[75] This Article runs as follows:

Article 352 (1) During the investigation, Article 100 shall be applied continuously and in a way that the suspect and the defence counsel be provided with access to all the materials of the case, and be able to put forth their motions and comments with at least a month before the pressing of charges.

(2) The time period stipulated by Paragraph (1) may be shortened or fully disregarded if the defendant and the defence counsel give their consent.

The explanatory memorandum attached to this Article states that "going beyond and extending the existing legislation, [the New CCP] provides the defendant and the defence counsel with access to all materials of the case and the copies thereof much sooner, already after the interrogation of the suspect; this possibility shall be provided continuously throughout the investigation, and its limitation is subjected to very strict criteria".[76] Hence, under the New CCP, **the defence is, by default, entitled to get access to all the case materials already during the investigation**, and the law provides for exceptions to this main rule.

It is also an important improvement that **a formal decision shall be delivered about the restriction of the access or the manner of access, and a remedy** (a complaint) **may be sought against this decision** under Article 369 of the New CCP. Article 108 of the New Investigation Decree stipulates the following in relation to the contents of such decisions*:*

(1) The decision delivered under Article 100 of the CCP on the restriction of access to case materials or the manner of access shall define the case materials concerned by the restriction in a way which – while protecting the interests of the procedure – makes the identification of the material possible.

(2) The investigating authority may in one decision restrict access to more than one case material.

*(3) The delivery of a decision on the restriction of access is not mandatory is access is provided in a manner that is different from the one indicated in the motion, but the person putting forth the motion accepts the [alternative] manner prescribe*d.

According to the 2017 research, it constituted a problem that **the Old CCP focused on the "files" of the case** (i.e. documents), and thus – as one of the preparatory studies of the New CCP's codification also raised – "in some cases it prevented access to material evidence that was not stored and handled among the documents produced during the investigation".[77] Furthermore, the Old CCP required that a "copy" of the case files be provided. This rule was partly overridden by practice, but case files were still provided mostly in the form of paper copies, which also resulted that in many instances photos, videos and audio recordings in their original format were not submitted to the defence electronically. In addition, providing paper copies represented a significant burden for the police vested with the task of photocopying the case files. Because of that, the HHC recommended that the CCP would 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. We also noted however 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.[78]

The pertinent rules made it the task of the investigating 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 was being prolonged. Accordingly, the research showed that the copies of case files were handed over to the defence counsel typically by the police – either in the hallway of the court, at the police station or in the attorney's office, personally. Thus, while the Old CCP was in force, the costs of providing case files were high both in terms of materials and human resources. In this regard, we recommended that case files would be

provided electronically, 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.[79]

Realising the above problem, **the New CCP introduces the concept of "case material"**, and Article 100(2) expressly declares that **the scope of accessible case materials includes not only documents, but "other evidence" too**.

Furthermore, the New CCP focuses on "access", and regards the handing out of copies only as one of the means of providing access, while continuing to respect the right to copies. The above quoted Article 100(4) outs an end to the hegemony of providing "copies" by listing the following means of providing access:

a) allowing the case material's examination,

b) providing information, disclosure about the contents of the material, in case there is a motion requesting so, or an approval has been given,

c) allowing the party to copy or photograph the material for their own use,

d) serving the material's copy or resumé prepared by the court, the prosecution or the investigating authority, or

e) any other manner regulated in an act of law.

The detailed rules of the above listed means of providing access are stipulated by Articles 15–27 of Decree 12/2018. (VI. 12.) of the Minister of Justice on Certain Criminal Procedural Acts and the Persons Participating in the Criminal Procedure (hereafter: MoJ Decree 12/2018.). Article 27 sets forth **"electronic access" to case materials as one on the "other manners"** referred to under Point (e) of Article 100(4) of the New CCP:

Article 27(1) The court, the prosecution and the investigating authority may provide access to the materials of the case through electronic access to the case material – including through an online platform developed for this specific purpose – if the required technical preconditions are in place.

(2) In the course of the electronic access it is possible – after the required identification – to examine and directly download the electronic case material, the fact of which shall be duly registered.

In this regard, the latest developments in the area of e-administration are also of importance, however, a detailed analysis of these exceeds the framework of the present research.

3.3.3. Documenting and verifying the provision of access

As we pointed out in the previous section, **under the Old CCP in many cases it was somewhat hard to follow which files of the case were provided to the defence and the investigation judge deciding on pre-trial detention, or when this had occurred**, and even whether this had occurred at all, which was be problematic with regard to the enforcement of the rights of the defence enshrined in Article 7(1) of Directive 2012/13/EU. According to the rules adopted by the Chief Prosecutor's Office,[80] which were in force during the 2017 research, it was an expectation 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 those case files the copy of which was submitted to the defence. However, research results showed that this requirement was not fully complied with, or at least these lists were not available for the defence and the judges.

The Chief Prosecutor's Office also required the verification of the fact that the case files had been received by the defendant and the defence counsel, but only if the decision on pre-trial detention was reached at a hearing under the respective rules.[81] This gave rise to concerns because pre-trial detention is often prolonged without any hearing held, while in many cases the significance of access to case materials may even be higher before the prolongation of pre-trial detention than before the ordering of pre-trial detention. Interviews showed that the receipt of case files was documented adequately (attorneys verified with their signature that they had received the case files), but it was problematic that in many instances these verification documents did not reach the investigation judge, and only few judges required verification that the case files had been handed over to the defence. In addition, the defence did not always receive a copy of the document verifying that the case files had been provided, and it was not always shown by the respective documents when exactly the case files had been received by the defence. In the research report we expressed the view that the above shortcomings of the practice should be remedied.[82]

It is a positive novelty that MoJ Decree 12/2018. expressly prescribes that as a **rule records shall be kept of what case materials were accessed by the individual participants of the criminal procedure and when exactly the access was provided for them**; furthermore, the records and the document verifying the provision of the access shall be included in the "file" of the given case, and thus they become accessible for all participants of the procedure:

Article 19(1) Records shall be kept of the provision of access, indicating the following:

a) the name and the procedural function of the person with the right of access,

b) the manner in which the access has been provided,

c) the identification of the case material,

d) the first and last page of the case material, in the case of recordings: the hour and minute of the beginning and the end of the recording,

e) the fee paid for the copy or the fact that the copy was free of charges,

f) the fact of any irregular occurrence during the provision of the access, if need be,

g) the date and time and the length of the provision of access.

(2) If the access is provided through the personal appearance of the person having the right of access, the fact that the access has been provided – including the handing over of a personally served copy – shall be verified with the dated signature by the person having the right of access.

(3) The records referred to in Paragraph (1) and the documents verifying the provision of access set forth in Paragraph (2) shall be included among the materials of the case.

Hence, the MoJ Decree seems to remedy the deficiencies revealed by the 2017 research.

3.3.4. The timeliness of the provision of access

The preamble of Directive 2012/13/EU prescribes that case materials shall be provided to the defendant and the defence counsel in "due time". However, **the Old CCP did 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 from 2017 showed that **this legislative shortcoming could result in that the defence did not receive the case files in due time** – sometimes even received it less than one hour before the hearing – and did not have the possibility to examine the case files, which compromised the positive effects of the Directive's implementation. Due to this problem, the HHC recommended that either a minimum deadline for submitting the motion for pre-trial detention and the related case files to the defence before the hearing be set out, which would make 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.

According to the 2017 research results, the defence was in a somewhat better position when pre-trial detention was being prolonged, but it also occurred that case files arrived to the defence counsel such a short time before the court was deciding on prolonging the pre-trial detention, that the defence counsel was not in the position to rely on them and had no substantial benefit from the access to the case files. Therefore, the HHC recommended that every document produced after ordering the pre-trial detention that was 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.[83]

The New CCP solves some of the above problems through the concept of the full and continuous provision of access, and it sets forth further guarantees in relation to motions concerning pre-trial detention. For instance, it expressly declares that if the prosecutor sets forth a motion for the prolongation of pre-trial detention, access shall be provided to all those case materials which the motions relies on and which have been produced since the last decision on detention. **It is a particularly positive development that the New CCP prescribes that access to the case materials shall be provided at a time and in a manner that enables the defence to prepare, but in any case, at least an hour before the hearing starts**:

Article 470(1) If the motion is aimed at the ordering of pre-trial detention or mandatory pre-trial psychiatric treatment, after the submission of the motion, the suspect and the defence counsel shall be provided with access to those materials of the case that the motion relies on.

(2) If the motion is aimed at the prolongation of the pre-trial detention, after the submission of the motion, the suspect and the defence counsel shall be provided with access to those materials of the case that the motion relies on and that were produced after the most recent decision on pre-trial detention.

(3) The prosecution shall provide the suspect and the defence counsel with access to the case materials referred to in Paragraphs (1) and (2) at a time and in a manner that enables the defence to prepare, but in any case, at least an hour before the hearing starts. The prosecution may rely on the investigating authority in order to comply with the provisions set forth by Paragraphs (1) and (2).

It will depend on the practice however what the time and manner "that enables the defence to prepare" will exactly mean in cases when no hearing is held.

It must be noted that Article 24(4) of Instruction 9/2018. (VI. 29.) of the Chief Public Prosecutor on the Prosecutorial Tasks Related to the Preparatory Procedure, the Overview of Investigations and the Closing Measures sets forth the following:

> *Article 24(4) […] The motion for the ordering or prolongation of pre-trial detention shall refer to how the prosecution has complied with its obligations under Articles 469(2)84 and 470(1) and (2), and how it has ensured the presence of the suspect and the notification of the defence counsel. […*]

3.3.5. Role of the investigation judge

The 2017 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 was **whether or not, in the view of the investigation judge, failure to provide the case files to the defence was an obstacle to holding a pre-trial detention hearing**. The judicial practice was not fully uniform in this regard: whereas the investigation judge unit of the Buda Central District Court held that "providing access to the case materials at a time that is sufficient for adequate preparation is as important a criterion of holding a hearing as the proper notification of the defence counsel",[85] some investigation judges interviewed in the course of the research had an opposing view. Therefore, the HHC recommended that 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.

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 provided additional time for the defence to examine the case files – we suggested that this possibility be expressly set out 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 did not seem 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

recommended the adoption of 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 was of the view that it would be an important guarantee that the judge should ask the defence counsel and the defendant about these circumstances automatically, at every hearing.[86]

The New CCP stipulates the following in relation to the court's tasks before indictment:

> *Article 477(1) If a motion falling under Article 466(1)87 [any motion on the basis of which a hearing shall be held] is submitted by the prosecution, and the court concludes before the commencement of the hearing that the preconditions of holding the hearing have not been met, the court shall return the case materials to the prosecution without delivering a decision [on the motion].*

Thus, **investigation judges are expressly authorised to sanction the absence of the preconditions of the hearing by returning the case materials and denying the delivery of a decision**, providing them with an effective tool to implement the above provisions and enforce the defence's right to get timely access to the case materials on which the prosecutorial motion relies. However, **in this regard a lot will depend on the practice developed by investigation judges and courts, as well as on the assertiveness of defence counsel**s.

It must also be noted that the law does not provide the investigation judge with a similar option for cases when a decision on the prolongation of pre-trial detention is to be delivered in camera, on the basis of the case file, and the prosecution does not provide the defence with timely access to the new case materials, thus preventing the defence from meaningfully respond to the prosecutorial motion.

3.3.6. Remedies

According to the provisions of the Old CCP, defendants and defence counsels could submit a complaint if the 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. However, research results showed that **attorneys rarely submitted complaints and were sceptical with regard to the effectiveness of complaints**.

As far as non-detained defendants are concerned, under the Old CCP as in force of 1 January 2014, the prosecutor and the investigation authority issued a decision when denying access to case files, against which a complaint could be submitted by the defendant and the defence counsel. If such a complaint was rejected, a motion for judicial review could be submitted against the rejection, in compliance with the requirement set out in Article 7(4) of Directive 2012/13/EU. However, research showed that providing access to case files was characterized by a high level of informality: in many instances, no formal decision was 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 requested access in an informal manner. In addition, interviews showed that defence counsels rarely resorted to the possibility of submitting a complaint.[88]

As we mention above, under Article 369 of the New CCP, **a formal decision shall be delivered about the restriction of access or of the manner in which the access is provided, and this decision may be challenged through a complaint**. In addition, under Article 108(1) of the New Investigation Decree, such decisions shall define the case materials concerned by the restriction in a way which – while protecting the interests of the procedure – makes the identification of the material possible, and this provision seems to facilitate the submission of a substantive complaint against restrictions of access.

These are positive developments in relation to the right to remedy, however, **a lot will depend on the practice** in this regard too: how the authorities will interpret the "protection of the interests of the procedure", and whether the practice of deciding on complaints and its perception on the side of defence counsels will change.

3.4. Conclusions

The New CCP prescribes that the defendant shall be informed about their rights under Article 3(1) of Directive 2012/13/EU when their participation in the criminal proceeding commences (i.e., as put by the New Investigation Decree, when they have their first encounter with the authorities, but at the latest when the first procedural act affecting them commences), and also stipulates the requirement of accessibility. As far as the practical implementation of the right is concerned, in the investigation phase defendants are informed of their rights at the beginning of the interrogation in such a way that the investigating officers read out aloud to them those cautions generated by the RobotZsaru NEO system, or provide information on the basis of that. The new version of this template (which was revised due to the coming into effect of the New CCP) contains information about all the rights listed in Article 3(1) of Directive 2012/13/EU. According to the experiences of interviewees in the IPC research, the main problem is that information about all the rights is rare, and the way in which the information is provided is usually not accessible. Most respondents mentioned deficiencies with respect to the right of access to the case materials and the right to silence. It is a positive novelty that new rules make it possible that information about procedural rights be provided through “the handing over of a written information leaflet”.

In compliance with Article 4 of Directive 2012/13/EU, the domestic legal provisions currently in force prescribe that suspects or accused persons who are arrested or detained are provided promptly with information about their rights in writing, in simple and accessible language and in a language they understand. In accordance with Article 4 of Directive 2012/13/EU, detainees may keep the written Letter of Rights in their possession. However, problems emerged with the accessibility of the above Letters of Rights too. The conclusion that defendants are not informed in a simple and accessible language in Hungary was also substantiated by a survey conducted on a sample of 200 persons by the HHC: we found that the level of comprehensibility of the Letter of Rights we had compiled using the texts produced by the Hungarian authorities was very low, only 38.5%.

As far as providing information about the reasons for arrest or detention and the accusation is concerned, the rules included in the New CCP comply with the requirement included in Article 6 of Directive 2012/13/EU. No practical deficiencies have been revealed with respect to informing defendants about the reasons for their arrest or detention. On the other hand, in the practice, the requirement set forth in Article 6(1) of Directive 2012/13/EU, according to which information about the criminal act the suspect or the accused person is suspected or accused of having committed “shall be provided promptly and in such detail as is necessary to safeguard the fairness

of the proceedings and the effective exercise of the rights of the defence", is not fully complied with.

As far as access to case materials is concerned, the New CCP has brought a fundamental – and, in terms of complying with Article 7 of Directive 2012/13/EU, positive – change: under the New CCP, the defence is, by default, entitled to get access to all the case materials already during the investigation, and the law provides for exceptions to this main rule. In addition, the New CCP focuses on "access", and regards the handing out of copies only as one of the means of providing access, putting an end to the hegemony of providing "copies". It is also a positive novelty that it is now prescribed by law and in a wider scope than before that as a rule, records shall be kept of what case materials were accessed by the individual participants of the criminal procedure and when exactly the access was provided for them. It is also an important improvement that a formal decision shall be delivered about the restriction of the access or the manner of access, and a remedy may be sought against this decision.

The preamble of Directive 2012/13/EU prescribes that case materials shall be provided to the defendant and the defence counsel in "due time". However, the Old CCP did 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 showed that this legislative shortcoming could result in that the defence did not receive the case files in due time. In order to solve this problem, the New CCP prescribes that access to the case materials shall be provided at a time and in a manner that enables the defence to prepare, but in any case, at least an hour before the hearing starts. In addition, under the new rules investigation judges are authorised to "sanction" by denying the delivery of a decision if for example the defence was not able to access the case materials relied on in the prosecutor's motion in due time.

The changes outlined above facilitate that the right of access to the materials of the case is enforced in the practice in a way that truly contributes to the enforcement of the right to an effective defence. At the same time, we are of the view that as far as the depth of the changes in the practice are concerned, a lot will depend on the practice developed by the judges and courts, as well as on the assertiveness of defence counsels.

4. Access to a lawyer, and legal aid in criminal proceedings

4.1. Access to a lawyer and legal aid in the Hungarian law: retained and appointed defence counsels

The New CCP sets it out as a fundamental principle in Article 3 that defendants shall have the right to effective defence in every phase of the criminal procedure. Defendants may defend themselves, may resort to the assistance of a defence counsel, or the court, the prosecution and the investigating authority provides them a defence counsel according to the provisions of the New CCP. Thus, the New CCP keeps up the system that defendants either retain an attorney, or the authorities appoint one for them.

According to the regulatory concept of the Old CCP, having a defence counsel is mandatory in certain cases stipulated in the law (e.g. if the criminal offence the defendant is suspected of is punishable with a sentence of imprisonment of five years or more, the suspect is detained, is a juvenile, etc.) Whether these so-called **"mandatory defence"** grounds are in place is established by the proceeding authority, and in these cases the defendant may not decide to participate in the procedure without a defence counsel. In the Hungarian system, this equals the **"merits test"** in terms of the Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03) (hereafter: Recommendation on legal aid). In these cases, if the defendant does not have an attorney, the authorities appoint one for them. In addition, the Old CCP sets out that if it is foreseen that due to their financial situation the defendant will be unable to pay the costs of the procedure, authorities may grant them a so-called **personal cost exemption**. If such cost exemption is granted, upon the defendant's request the authorities shall appoint a defence counsel for him/her. In the Hungarian system, this equals the **"means test"** in terms of the Recommendation on legal aid.

According to Article 386(1) of the New CCP, the right to defence and the right of access to a lawyer is granted to the future defendant from the moment they are captured, summoned, taken into police custody, wanted or if an arrest warrant is issued against them – if no such act takes place, they are entitled to these rights once they formally become a suspect.

The **New CCP** does not change the above regulatory concept of the Old CCP in merit, and **provides for the "mandatory defence" grounds in a similar manner as the Old CCP:**

Article 44 The participation of a defence counsel in the criminal procedure is mandatory if

a) the underlying criminal offence is punishable by a sentence of imprisonment of five years or more,

b) the defendant is subject to a coercive measure concerning personal liberty, is subject to pre-trial detention or mandatory pre-trial psychiatric treatment in another case, or serves an imprisonment, a confinement or an education term in a juvenile correctional facility,

c) the defendant is hard of hearing, deaf and blind, blind, unable to speak, is unable to or severely limited in communicating for any other reason, or has a mental disability, regardless of their mental capacity,

d) the defendant is unfamiliar with the Hungarian language,

e) the defendant is unable to defend themselves in person for any other reason,

f) the court, the prosecution or the investigating authority appointed a defence counsel upon the motion of the defendant, or because they deemed it necessary for any other reason, and

g) if the CCP provides for mandatory participation separately.89

In addition, Article 46(1) of the New CCP sets out that **if the participation of a defence counsel is mandatory in the criminal procedure, but the defendant does not have a retained defence counsel,** the court, the prosecution or the investigating **authority appoints one for them**.

In addition to that, the New CCP also upholds the possibility of personal cost exemption as **"cost reduction"** – if this is granted, **the fee and the costs of the defence counsel are advanced and born by the state***:*

> *Article 75(1) In order to facilitate the enforcement of theirs rights, […] the defendant may be granted a cost reduction, if, due their income and financial situation, is unable to cover the costs of the criminal procedure or parts of it.*
>
> *Article 76 Cost reduction*
>
> *a) in case of a defendant means that the fees and costs of the appointed defence counsel are advanced and born by the state […].*
>
> *Article 77(1) Cost reduction may be granted upon the request of the person participating in the criminal procedure by the Legal Aid Service, pursuant to the law.*

In our view, it could be raised also at the time of the Old CCP that the **conditions for personal cost exemption were too rigid**, and the question arose whether cost exemption was indeed available for all indigent defendants. This may be raised also with regard to the cost reduction provided for by the New CCP, because under Articles 5 and 9 of Act LXXX of 2003 on Legal Aid (hereafter: Legal Aid Act), defendants may be regarded as indigent (and so eligible for cost reduction) if their net monthly income does not exceed the actual minimum old age pension (or, if they live alone, 150% of the actual minimum old age pension), and have no assets. To put these criteria into context: in 2016, the minimum old age pension was HUF 28,500 per month, whereas in the same year, Policy Agenda calculated the subsistence income level for a single adult household to be HUF 88,619 in a month,[90] so for defendants living on their own to be eligible for personal cost exemption, they must live way below the minimum subsistence level. At the same time, the Legal Aid Act upholds the system that under certain circumstances a defendant shall be regarded indigent regardless of their income and financial situation: under the rules currently in force, this is the case for example when someone is homeless and lives in a temporary shelter, or if the defendant is a refugee. [91]

Results of the HHC's another research, conducted in the framework of the project *"Strengthening procedural rights in criminal proceedings: effective implementation of the right to a lawyer/legal aid under the Stockholm Programme"*, coordinated by the Bulgarian Helsinki Committee (BHC) and closed in 2018 (hereafter: BHC research) showed that **defence counsels are appointed on the basis of cost exemption very rarely**, and the research revealed significant shortcomings concerning the information provided to defendants about personal cost exemption as well. The results also seemed to confirm the HHC's experience that if there is a ground for mandatory defence, it is much more likely that a defence counsel will be appointed on that basis, even if the defendant is indigent and their eligibility for personal cost exemption could

be examined. This is detrimental to indigent defendants, since if a lawyer is appointed for them on the basis of cost exemption (or, under the rules currently in force, on the basis of cost reduction), the state will bear all the costs of the defence even if the defendant is convicted, whereas in cases of mandatory defence, these costs are only advanced, and if convicted, the defendant must reimburse them.[92] This issue has not been handled by the new CCP either.

The assessment of the system of appointments in general is hindered by the fact that **no statistical data are available as to the ex officio appointments broken down according to the grounds for appointment**.[93] The National Police Headquarters provided the following figures in relation to suspects and the total number of appointments:[94]

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

The current Hungarian legal framework meets the requirements of Article 3(2) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (hereafter: Directive 2013/48/EU) as to **the time from which the right of access to a lawyer is in place,** since the right to defence and the right of access to a lawyer is granted to the future defendant even before the suspicion is communicated to them:

Article 386(1) If a person against whom a well-founded suspicion of having committed a criminal offence exists is captured, summoned, taken into police custody, wanted or if an arrest warrant is issued against them, they have the right before the communication of the suspicion only to

a) receive information on their rights in the criminal procedure as related to their interrogation as a suspect,

b) retain a defence counsel or motion for the appointment of a defence counsel,

c) consult with their defence counsel without supervision.

Accordingly, the new CCP abolishes the former shortcoming that the right to defence (before the first interrogation) was not guaranteed to those who were taken into police custody upon the simple suspicion of having committed a criminal offence (thus, not caught in the act).[95]

Under the Old CCP, a significant **limitation** of the participants' procedural rights, such as the right of access to a lawyer **could** – in compliance with Article 12(2) of Directive 2013/48/EU – **lead to the exclusion of the testimony as evidence** (as opposed to the substandard performance of the defence counsel, which may not have a similar effect). In this regard Decision no. 8/2013. (III. 1.) of the Constitutional Court was a real breakthrough: it concluded that it is a constitutional requirement that the investigating authority must notify the appointed defence counsel about the time and place of the interrogation in a verifiable manner and at a time allowing the counsel to effectively exercise his/her procedural rights and attend the questioning, and in the absence of such a notification the statement of the defendant shall be inadmissible. (However, it shall be added that according to the results of the BHC research it happens still often that the information on notifying the defence counsel on investigative acts is not recorded properly, which may also make it harder to prove that the right to defence had been limited.[96])

The New CCP upholds the above when setting out the following:

Article 167(5) Facts derived from evidentiary means which were acquired by the court, the prosecution or the investigating authority […] via a criminal offence, in another prohibited way, or by significantly limiting the procedural rights of the participants of the criminal procedure cannot be taken into account as evidence.

4.2. The arrangements for providing legal assistance, and legal aid, at the police station

Defendants are free to choose their retained defence counsel. According to Article 45(1) of the New CCP, beyond the defendant, the defendant's legal representative or adult relative, or, in case of a foreign citizen, the consular representative of their home country may also give a retainer. Interviewees in the IPC research had varying experiences as to cases when the defendant tells the police that they would like to retain a particular attorney. According to seven of the respondents, the police do not or only very rarely call the attorney in these instances, and so it is up to the family and friends of the suspect to notify the defence counsel. In contrast to that, according to the experiences of five respondents the police are cooperative and try to notify the defence counsel requested. One interviewee added that if the police cannot reach the defence counsel selected, then they do not wait around, but appoint another defence counsel instead, but in the view of the interviewee this is not problematic.

If the defence counsel is appointed, then, **according to the Old CCP, it was the proceeding authority** (in the investigation phase the investigating authority, i.e. most often the police) **who decided whom to appoint** (i.e. whom to choose from the regional bar association's register of the attorneys who can be appointed). This system of appointments has for long been strongly criticised by many stakeholders; the HHC's researches also showed that the discretionary appointment system threatens the right to effective defence: it is **non-transparent** and **opens room for abuses**; and available data prove that as a result of the present system, the same few attorneys or law firms are appointed regularly by certain police units.[97] In consort with that, many attorneys interviewed in the framework of the IPC research criticized this system as well: in their view, it results in the police appointing their "favourites", and creates a "situation of dependency", since it essentially depends on the police whether the attorney has work and clients or not. The staff member of the Office of the Commissioner for Fundamental Rights was also of the view that it is common that the police favours certain defence counsels when deciding on appointments.

As a response to the criticisms, **the new CCP introduced a significant change: it made the selection of the appointed defence counsel the task of the respective regional bar association** located in the geographical area of competence of the proceeding court, prosecution or investigating authority. In addition, it prescribes **the introduction of a computerised system**:

Article 46(1) The court, the prosecution or the investigating authority shall decide on appointing a defence counsel if the participation of a defence counsel in the criminal procedure is mandatory and the defence counsel does not have a retained defence counsel. On the basis of the appointment, the attorney proceeding in the case as a defence counsel shall be selected by the regional bar association located in the geographical area of competence of the proceeding court, prosecution or investigating authority.

(3) The regional bar association shall perform the selection of the defence counsel through operating a computerised system, which to the extent that it is possible, guarantees the immediacy of the selection and the effective availability of the selected defence counsels.

However**, if "the regional bar association fails to select a defence counsel within an hour from receiving the proceeding authority's decision on appointment", the participation of a defence counsel will be provided for by the proceeding authority:** selection will be made (as it was the rule under the Old CCP) by the prosecutor or the investigating authority during the investigation, and by the court in the trial phase.[98]

Supplementing the above, Act LXXVIII of 2017 on the Activities of Attorneys (hereafter: New Attorneys Act), prescribes that the regional bar association shall identify the appointed defence counsel through **random, electronic selection,** in a procedure defined by the bar association's internal regulations. Furthermore, when the selection is made, regard must be taken of the **proportionate workload** of attorneys who can be appointed and to the geographical proximity between the attorney's office and the appointing authority.[99] Finally, in order to guarantee that appointments can be made in mandatory defence cases, bar associations are – similarly to the rules under the Old CCP – **required to organise a duty lawyer system for weekends and banking holidays**.100

86% of the attorneys interviewed in the IPC research expressed the hope that the new rules of the CCP as presented above will bring along a positive change.

Results of the BHC research also showed that **in the investigation phase, provisions of the Old CCP related to the notification of and the presence of defence counsels at interrogations, or – in some cases – the lack of such provisions could lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU**, according to which "Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and

effectively". For example, in the investigation phase **the mandatory nature of defence did not mean that the defence counsel's *presence*** at the investigative acts **is also mandatory**. This means that **the authorities may question the suspect also in cases of mandatory defence if the** – adequately notified – **defence counsel does not appear for any reason**. (The New CCP does not change the situation in this regard as a main rule, only with regard to juveniles – see below.) In addition, results of the BHC research supported the conclusion for example that **the late notification of defence counsels** about investigative acts is also a problem, primarily in relation to the first questioning of suspects taken into police custody and 72-hour detention. According to previous research, in addition to the delays in notifications it was also a frequent problem that the notifications were sent at a time and in a manner that did not give defence counsels a realistic chance to attend the first interrogation. In the absence of any pertaining rule, practice varied on whether or not the police wait up for the lawyer letting them know that they can only arrive to the interrogation later than the scheduled time. These circumstances **can in practice eliminate the "effectiveness" of exercising the right of access to a lawyer** as required by Article 3(4) of Directive 2013/48/EU in terms of suspects or accused persons who are deprived of their liberty.[101]

As far as the results of the IPC research are concerned, less than half of the respondents (47%) said that in the cases of mandatory defence, the interrogation of the suspect commences only when an attorney is actually present. The same proportion of defence counsels stated that in less than half of the mandatory defence cases the interrogation commences without a defence counsel being present. According to the experiences of one of the attorneys, in smaller local police stations it occurs that the police "downplay" the underlying criminal offence, meaning that they launch the criminal procedure on the basis of a criminal offence in which defence is not mandatory, and so do not appoint a defence counsel for the defendant, and change the legal qualification of the act in a later investigative phase in order to correspond with the real severity of it.

The attorneys interviewed in the IPC research unanimously stated that they are notified by the police about the interrogation and their appointment predominantly via phone. A few attorneys mentioned notification via e-mail and fax in addition the phone. According to their responses, the police provides 1.5 to 2 hours for the attorney to show up, and more than half of the defence counsels mentioned that in the case of the interrogations subsequent to the first one it is possible to agree on a time with the police in advance. According to 87% of the responding defence counsels, they are notified about the interrogation in such time that they can participate in more than half of the instances or always. However, bad practices occur: two attorneys mentioned that in one case each they were notified about their appointment as a defence counsel via a postal letter, which

in practice meant that they received the notification only after the interrogation took place. One defence counsel said that “it occurs that the investigating authority faxes the notification at 11 p.m.”, but only scarcely. Another interviewee said that there is precedent for the police subtly trying to dissuade the appointed defence counsel from showing up at the interrogation with questions such as “You do not have time to participate, right?”. The staff member of the Office of the Commissioner for Fundamental Rights also confirmed that it still occurs that the appointment decision is sent outside office hours, during the night via fax, and in these instances there is extremely little chance of course that the notification will be seen by the defence counsel in time.

The New CCP brought about positive change in relation to notifying the defence counsels about the interrogation of the suspects as well: it sets forth that **authorities shall wait for the defence counsel for at least two hours before they can commence with the interrogation**:

> *Article 387(3) If a suspect or a person against whom a well-founded suspicion of having committed a criminal offence exists wishes to retain a defence counsel, or if the investigating authority or the prosecution appoints a defence counsel, the investigating authority or the prosecution shall immediately notify the defence counsel and shall postpone the questioning until the defence counsel’s arrival, but for a maximum of two hours. If within this time*
>
> *a) the defence counsel does not appear, or*
>
> *b) if – after consulting the defence counsel – the suspect or a person against whom a well-founded suspicion of having committed a criminal offence exists agrees that the interrogation can be started,*
>
> *the investigating authority or the prosecution commences the interrogation of the suspect.*

However, as a main rule, the presence of the defence counsel remains non-mandatory at the interrogations of suspects. On the other hand, it is a positive development that **the New CCP made the presence of the defence counsel mandatory at interrogations**, confrontations, identity parades, on-site interrogations, event reconstructions and hearings held with regard to coercive measures concerning personal liberty subject to judicial authorization **involving juvenile102 defendants**.[103]

In the IPC research, many interviewees welcomed the above provision of the New CCP according to which attorneys shall be notified about the interrogation at least two hours in advance. According to the experiences of the interviewees, this “two-hour rule”

was actually often enforced by the police already before the New CCP came into force, but, as one of the attorneys put it, “it will be good that this is written down [in the law]”. Some expressed concerns in relation to the time needed for travel, saying that in the capital, Budapest and in Pest county it may be difficult for the attorneys to arrive to the police station in question within two hours.

4.3. The suspect’s decision regarding access to a lawyer, and waiver of the right

Persons about to be interrogated **must be informed of their right to retain a defence counsel or to motion the appointment of a defence counsel:**

> *Article 387(1) If they do not have a defence counsel, the suspect or the person against whom a well-founded suspicion of having committed a criminal offence exists shall be informed before their interrogation – if they are taken into police custody or 72-hour detention, then without delay – that they may retain a defence counsel or motion the appointment of a defence counsel. The latter motion is decided on by the investigating authority and the prosecution instantly.*
>
> *(2) If the participation of the defence counsel is mandatory in the procedure, the suspect or the person against whom a well-founded suspicion of having committed a criminal offence exists also has to be informed that unless they retain a defence counsel, the investigating authority or the prosecution will appoint a defence counsel for them. If the suspect or the person against whom a well-founded suspicion of having committed a criminal offence exists declares that they do not wish to retain a defence counsel, the investigating authority or the prosecution immediately appoints one.*

However, as opposed to Article 9(1)(a) and Article 9(3) of Directive 2013/48/EU, the New CCP does not prescribe that the suspect must be provided with information about the content of the right of access to a lawyer as well as about the possible consequences of waiving it and the possibility of revoking the waiver subsequently at any point during the criminal proceedings – this was not set out by the Old CCP either. (But, of course, defendants may decide at any point during the proceedings to retain a defence counsel and also to withdraw a retainer given earlier to an attorney.)

In the IPC research we asked interviewees about how the police react when suspect say that they want to be interrogated in the presence of a defence counsel. (It is important to note that the interviewees had only indirect information on this issue, since they are of course not present at this point.) 70% of the interviewees stated that they have heard about instances when the police pressured suspects in order to

convince them not to stick to the presence of a defence counsel. According to one of the interviewees, in half of these instances the police promises certain things to the defendant, for example that “this [interrogation] will only be a short one”. According to another interviewee on the other hand, “if the suspect says at the first interrogation that they are willing to give a testimony only in the presence of a defence counsel, the police are happy because they have no work to do [at that point]”.

Even though it is not closely related to the waiver of the right of access to a lawyer, it has to be mentioned here that two interviewees in the IPC research stated that in half of their cases their clients are interrogated first as witnesses and then, subsequently, as suspects, which severely undermines the right to silence. According to one further respondent, this happens in more than half of the procedures, while 80% of the respondents had the experience that this occurs only in half of the procedures, or never. Five attorneys submitted that the number of these instances is on the decrease: two or three years ago it happened much more often that the future suspect was interrogated as a witness first, even though the police knew that they want to make them a suspect later on. The staff member of the Office of the Commissioner for Fundamental Rights also confirmed that it occurs that a future suspect is interrogated at first as a witness.

4.4. How legal advice and assistance is provided and the initial lawyer/client consultation

With regard to **defendants deprived of their liberty** the Old CCP expressly stated that they **can consult with their defence counsel before the interrogation**, and that they have the right to contact their lawyer. However, if the defence counsel did not appear at the first interrogation, **there was no possibility of consultation between the lawyer and the detained defendant via phone before the first interrogation**, in contradiction with Article 3(3)(a) of Directive 2013/48/EU and also Recital 23 of the Directive’s Preamble.

As far as the **time available for consultation** is concerned, 87% of the respondents in the IPC research submitted that there is adequate time available to consult with their clients in all instances, while 13% of them submitted that the time allowed for consultation is adequate in more than half of the instances. According to the attorneys, the police allow 10 to 30 minutes for consultation, which in most cases is enough. This latter information shall be assessed however in the light of the fact that some of the attorneys submitted that before the first interrogation they often just tell their clients not to testify, and for that this timeframe is enough indeed. Some said that they have

to fight for an adequate timeframe for consultation, and the timeframe depends on how "gritty" the defence counsel is. As one of the attorneys put it: "I know I have the right to [an adequate time to consult with my client], [enforcing it] depends on how well-prepared and brave the defence counsel is." It is a general method in this respect that defence counsels gain more time to consult with the client by saying that if the adequate time is not provided, their client will refuse to testify, and so make the police interested in securing a longer consultation timeframe.

The **New CCP introduced an important safeguard** with regard to the time available for consultation when setting out that **authorities shall grant one hour for consultation as a minimum** if the consultation could not take place earlier due to reasons beyond the defence counsel and the defendant:

Article 39(6) In order to exercise the rights ensured in Paragraph (1) b)104 and e)105 the court, the prosecution or the investigating authority shall delay the commencement or the carrying out of the investigative act with an hour if the defendant did not have the possibility to prepare for their defence or to consult with the defence counsel before the commencement of the investigative act, for reasons beyond any fault on their part.

The New Investigation Order strengthens the guarantees further in cases **when defence is mandatory**, making it possible for example for defendants who are detained or are unfamiliar with the Hungarian language to **consult with their defence counsel before the interrogation via phone** ("via a short rou*te"):*

Article 138(1) If the investigating authority detects directly before the procedural act or in the course of it that the participation of a defence counsel in the criminal procedure is mandatory, but the suspect or the person against whom a well-founded suspicion of having committed a criminal offence exists does not have a defence counsel or wants to retain a defence counsel, the investigating authority

a) makes it possible before the procedural act or, if necessary, by interrupting the procedural act and providing adequate time for the suspect or the person against whom a well-founded suspicion of having committed a criminal offence exists to retain a defence counsel, or

b) appoints a defence counsel.

(2) In the case of a defence counsel being retained, the investigating authority checks whether the retainer is accepted.

(3) After the actions in Paragraph (1) and (2) the investigating authority provides for the notification of the defence counsel without delay, and provides adequate time – at least an hour – for the suspect to consult with their defence counsel via a short route [by phone].

*(4) If, based on the consultation with the defence counsel the suspect agrees to the commencement of the interrogation, the investigating authority may begin the interrogation also if the deadline set in Article 387(3) of the CCP [for commencing the interrogation – see Section 4.2. of the country report] is not over yet. The circumstances of the consultation and the declaration related to the consent of the suspect [to commence the interrogation] shall be included in the mi*nutes.

Based on the BHC research, it may threaten the **confidentiality** of the consultations that not every police building has premises for consultations where the requirements of both confidentiality and security, including the appropriately secure guarding of detained suspects, can be met simultaneously. In addition, since prison mobile phones were introduced, pre-trial detainees have often been compelled to consult with their defence counsels in front of their cellmates. Attorneys also signalled difficulties in terms of getting in contact with defendants detained in penitentiary institutions. [106]

4.5. The role played by lawyers at police interrogations

According to the Old CCP, defence counsels could, in addition to the questioning of their clients, be present at certain other investigative acts, the scope complying with Article 3(3)(c) of Directive 2013/48/EU, thus, no issues emerged in terms of the Directive's implementation.

The New CCP also sets out that **defence counsels may, in addition to the interrogation of the suspect and confrontations,107 be present at certain further investigative acts, corresponding with Article 3(3)c of Directive 2013/48/EU** (and, as it was mentioned earlier, the presence of the defence counsel at these procedural acts is mandatory if the defendant is a juvenile[108]):

Article 393(1) In the course of the evidential evaluation the suspect and their defence counsel may be present at expert hearings, inspections, event reconstructions and identity parades if the procedural act concerns the subject of the suspicion.

(2) The defence counsel may be present at the questioning of witnesses whose hearing was motioned by the defence counsel or the suspect represented, and also at evidentiary acts that are held with the participation of such witnesses.

Similar to the Old CCP, the New CCP upholds the possibility that **authorities may exceptionally decide not to notify the defendant and the defence counsel** about these further investigative acts, but extends it to the witness interrogation motioned by the defence, which is in our view problematic, but is in accordance with the text of Directive 2013/48/EU:

Article 393(3) Notifying the suspect and the defence counsel may exceptionally be omitted if the urgency of the procedural act requires so.

(4) Notifying the suspect and the defence counsel may exceptionally be omitted and the suspect and the defence counsel may exceptionally be removed from the procedural act if the interests of the investigation require so, or the protection of a person requiring special treatment cannot be ensured in any other way.

However, it is still contrary to Article 8(2) of Directive 2013/48/EU that only upon the request of the defence shall temporary derogations (the omission of notifying the defence) be included into a formal decision (a similar provision has been already included in the Old CCP in October 2016 – according to the reasoning provided by the legislator, the amendment was adopted with the aim of complying with Directive 2013/48/EU):

Article 393(5) In the cases specified in Paragraphs (3) and (4), the prosecution or the investigating authority shall notify the suspect and their defence counsel about the procedural act subsequent to it, within eight days maximum – provided if the CCP does not exclude the notification of the defendant and the defence counsel. If the suspect or the defence counsel motions so within three days from receiving the notification, the omission of the notification shall be included in a resolution subsequently, which shall be delivered to the person putting forth the motion.

It shall be added though that according to the results of the BHC research, authorities practically never resort to the possibility of not notifying the defence about investigative acts.[109]

As far as the participatory rights of the defence counsel are concerned, the New CCP sets out for example explicitly that **the defence counsel may consult with the defendant also in the course of the procedural acts:**

Article 393(6) The prosecution and the investigating authority ensures that the suspect may consult with their defence counsel before the procedural act, or in the course of the procedural act, without disturbing that.

As far as the active participation of defence counsels at procedural acts are concerned, the New CCP does not bring along any substantive changes, and continues to make it possible for the defence counsel to actively participate at interrogations:

Arti*cle383(5) […] Persons whose presence at a procedural act is allowed by the CCP may pose questions to the suspect, the expert and the witness, and may make comments and may put forth moti*ons.

4.6. The relationship between the police and lawyers

In the IPC research, when asked the question on how police officers conducting the interrogation relate to defence counsels in the course of the interrogations, only three respondents said that in a "correct, cooperative way". According to 73% of the respondents, police officers have never inhibited them in providing defence, while the rest of the attorneys experienced such problems only in less than half of the cases. The predominant majority of the respondents have mixed experiences: in some cases, the police's approach is correct, collegial, or they keep their distance but do not inhibit the work of the attorneys, while in some cases the approach of the police makes the work of the defence counsels harder. According to the response of one of the attorneys, police officers relate to the defence counsel "in a normal way" in 50-60%, and in a fraction of the cases the defence counsel is treated if he or she is not even there: the police regularly fail to ask them whether they have a question or a motion. It also occurs that police officers demonstrate the power they have by not allowing consultation during the interrogation, and make the suspect and the defence counsel sit far from each other. According to another defence counsel, "it is a part of the game" that they are "ragging on each other" with the police officer. According to one of the attorneys, a lot depends on personal relationships (e.g. acquired through cases on which the police officer and the attorney worked together), on the age of the defence counsel and how they hold themselves. One of the most negative opinions was that "the defence counsel is generally regarded as an accomplice to the suspect, but there

are exceptions to that of course". Eight of the interviewees are taking on appointments as defence counsels, and most of them (five respondents) were of the view that there is no difference in the approach of the police based on the attorney being an appointed or a retained defence counsel. (In contrast, focus group participants in the BHC research said that in their experience, retained counsels are generally taken more seriously than appointed defence counsels, and are therefore usually notified in a timely manner about interrogations.[110])

The experiences of the staff member of the Office for the Commissioner for Fundamental Rights also show that verbal pressurizing sometime exists. Since these issues cannot be challenged via a separate remedy, the Independent Police Complaints Board is entitled to deal with complaints regarding the police officer's tone or degrading speaking style. According to the staff member of the Independent Police Complaints Board, they receive such complaints, but most of the these cannot be substantiated.

4.7. The quality of legal advice and assistance

There are no additional statutory conditions that a lawyer must meet in addition to being a member of the bar association if wishing to be included in the list of attorneys who can be appointed as ex officio defence counsels. This means that the Hungarian system does not satisfy the requirement formulated in § 19 of the Recommendation on legal aid, according to which "A system of accreditation for legal aid lawyers should be put in place and maintained in each Member State". **Nor is there a system "to ensure the quality of legal aid lawyers"**, as required by § 17 of the Recommendation.[111]

The lack of quality assurance is a problem also because many researches showed deficiencies with regard to the level of performance of appointed defence counsels as compared to retained defence counsels, e.g. in terms of their presence at investigative acts and their level of active involvement. The BHC research has reinforced that this difference still prevails, so **indigent defendants represented by appointed defence counsels are still often provided with less effective defence** than those who can afford to retain a lawyer. Accordingly, for example in the cases covered by the BHC research, **57.7% of appointed defence counsels attended the first interrogation** (personally or substituted by their trainee attorneys or other lawyers), while as opposed to this, **retained lawyers attended the first interrogations in 94.4% of the cases**. In those cases where the suspect had an appointed defence counsel throughout the whole investigation phase (not counting fast-track procedures), the defence counsel did not show up for any investigative act in 32.4% of the cases (including the presentation of the evidence at the end of the investigation).[112]

According to earlier research and experts, apart from the fact that appointments were made by the authorities, the causes underlying this difference include the fact that **as compared to market rates, the fees of appointed defence counsels are still low**, currently being 5,000 HUF (approximately 15.5 EUR) + 27% VAT per hour. In addition to that, under the Old CCP it was a problem as well that appointed **defence counsels were not compensated at all for certain activities that are necessary for carrying out defence work**, such as preparation for court hearings, writing the closing arguments or an appeal, etc., or travelling to the place where the defendant is detained for consultation. In addition, they were entitled to only half of the hourly fee when consulting with a detained client.[113]

An amendment of Decree 32/2017. (XII. 27.) of the Minister of Justice on the Fees of Patron Attorneys, Trustees and Ex Officio Appointed Defence Counsels, **in force since 1 July 2018, made important steps in the direction of solving the problems above**:

- It introduced a so-called "preparation fee", which is 20% of the fee the defence counsel is otherwise entitled to for participating at a given procedural act.[114]
- The fee to be paid for consultation with a detained defendant was raised from 50% of the hourly fee to 70% of the hourly fee.[115]
- Appointed defence counsels are entitled to reimbursement of travel costs for consultations conducted with a detained defendant if the institution executing the detention is located not at the seat of the attorney's office or branch office.[116]

However, defence counsels will still not be compensated for consultations with non-detained defendants or for the time spent with travelling to the consultation with a detained defendant, even if the detention site is not located at the seat of the attorney's office or in their hometown.

4.8. Conclusions

According to the regulatory concept of both the Old and the New CCP, having a defence counsel is mandatory in certain cases stipulated (e.g. if the criminal offence the defendant is suspected of is punishable with a sentence of imprisonment of five years or more, the suspect is detained, is a juvenile, etc.) Whether these so-called "mandatory defence" grounds are in place is established by the proceeding authority, and in these cases the defendant may not decide to participate in the procedure without a defence counsel: in these cases, if the defendant does not have an attorney,

the authorities appoint one for them. In the Hungarian system, this equals the “merits test” in terms of the Recommendation on legal aid.

If it is foreseen that due to their financial situation the defendant will be unable to pay the costs of the procedure or parts of it, authorities may grant them cost reduction, entailing that the fee and the costs of the defence counsel are advanced and born by the state. In the Hungarian system, this equals the “means test” in terms of the Recommendation on legal aid. With regard to this, it may be raised that conditions for cost reduction are too rigid, and the question arises whether cost reduction is indeed available for all indigent defendants. In addition, research shows that defence counsels are appointed on the basis of the means test very rarely.

The current Hungarian legal framework meets the requirements of Article 3(2) of Directive 2013/48/EU as to the time from which the right of access to a lawyer is in place, since the right to defence and the right of access to a lawyer is granted to the future defendants even before the suspicion is communicated to them.

Earlier research results showed that in the investigation phase, provisions of the Old CCP related to the notification of and the presence of defence counsels at interrogations, or the lack of such provisions could lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU. The New CCP brought about positive change in relation to notifying the defence counsels about the interrogation of suspects as well: it sets forth that authorities shall wait for the defence counsel for at least two hours before they can commence with the interrogation. However, as a main rule, the presence of the defence counsel remains non-mandatory at the interrogations of suspects, even if defence is otherwise mandatory. On the other hand, it is a positive development that the New CCP made the presence of the defence counsel mandatory for example at the interrogations of juvenile defendants.

The New CCP introduced an important safeguard also with regard to the time available for consultation when setting out that authorities shall grant one hour for consultation as a minimum if the consultation could not take place earlier due to reasons beyond the defence counsel and the defendant. In addition, new rules make it possible in mandatory defence cases (for example for defendants who are detained or are unfamiliar with the Hungarian language) to consult with their defence counsel before the interrogation via phone, in accordance with Article 3(3)(a) of Directive 2013/48/EU and also Recital 23 of the Directive’s Preamble.

In line with Article 3(3)b and 3(3) c, the New CCP sets out that defence counsels may, in addition to the interrogation of the suspect and confrontations, be present at certain

further investigative acts, corresponding with Article 3(3)c of Directive 2013/48/EU. As far as the active participation of defence counsels at procedural acts are concerned, the new CCP sets out explicitly that the defence counsel may consult with the defendant also in the course of the procedural acts, and continues to make it possible for the defence counsel to actively participate at interrogations, including the posing of questions, making comments and putting forth motions.

The significant limitation of the defendants' procedural rights, such as the right of access to a lawyer could – in compliance with Article 12(2) of Directive 2013/48/EU – lead to the exclusion of their testimony as evidence.

As a response to the criticisms of the appointment system under the Old CCP, the New CCP introduced a significant change: it made the selection of the appointed defence counsel the task of the respective regional bar association instead of the proceeding authority, prescribing that selection should be random, but proportionate. On the other hand, it gives rise to concerns that there is still no system "to ensure the quality of legal aid lawyers" in place in Hungary, opposite as to what is required by § 17 of the Recommendation on legal aid. The lack of quality assurance is a problem also because many researches showed deficiencies with regard to the level of performance of appointed defence counsels as compared to retained defence counsels, e.g. in terms of their presence at investigative acts and their level of active involvement, thus, indigent defendants represented by appointed defence counsels are still often provided with less effective defence than those who can afford to retain a lawyer. Apart from the fact that appointments were made by the authorities, the causes underlying this difference include the fact that as compared to market rates, the fees of appointed defence counsels are still low. In addition to that, under the Old CCP it was a problem as well that appointed defence counsels were not compensated at all for certain activities that are necessary for carrying out defence work. New rules enhance the situation also in this regard, for example by introducing a "preparation fee".

The assessment of the system of appointments in general is hindered by the fact that no statistical data are available as to the ex officio appointments broken down according to the grounds for appointment.

5. Conclusions and recommendations

5.1. Major conclusions

5.1.1. The right to interpretation and translation

The New CCP has not brought along fundamental conceptual changes in relation to interpretation and translation: its provisions comply with Article 2(1) of Directive 2010/64/EU and ensure the right to use the defendant's mother tongue, national minority language or any other language spoken or understood by the defendant as well as the use of sign language interpretation. At the same time, it is a problem in the practice that the interpreter is seldom involved before the interrogation, even if the police perform procedural acts, which undermines the guaranteeing of procedural rights. It is positive that the participation of the interpreter may under the New CCP be ensured through telecommunication technologies.

The bylaws of the New CCP have brought along significant improvements in order to ensure compliance with Article 2(2) of Directive 2010/64/EU, when it is expressly stated that the investigating authority shall ensure through the appointment of an interpreter that detained suspects could consult with their defence counsel at the premises of the detention, and that non-detained suspects could use the assistance of the interpreter appointed by the investigating authority in order to consult with their counsel before or after the procedural act. Using an interpreter hired by the defence for the purposes of consultation has remained to be difficult, the new provisions also fail to provide this possibility even for those who could afford to pay for the services of an interpreter.

It is against Article 2(4) of Directive 2010/64/EU that neither the Old or New CCP, nor their bylaws determine any mechanism or procedure "to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter", and no such mechanism have evolved in the practice either. The respondents' experience shows that the police often appoint the interpreter on the basis of the suspect's citizenship. If the suspect speaks any Hungarian, no matter how little that is, no interpreter is appointed, and it happens that investigating officers try to convince suspects speaking rare languages to accept interpretation in English.

The New CCP follows the concept of the Old CCP, when it only requires the translation of those documents that are to be served – a solution which is fundamentally compliant with Articles 3(1) and 3(2) of Directive 2010/64/EU, but neither of the procedural codes have provided the right to the defendants or their counsels to request the translation of those documents that they regard to be essential, which is against Article 3(3) of Directive 2010/64/EU. This results in a situation whereby those indigent defendants who cannot afford to pay for the interpretation of those documents that the state authorities are not obliged to have translated, are in a significantly disadvantageous situation compared to wealthy defendants who can pay for this service. Delays in the translation of documents has been mentioned as a serious problem.

Neither the Old CCP, nor the New CCP prescribes that a separate decision shall be made about the absence of the need for translation or interpretation, so the Hungarian regulation is not compliant with Articles 2(5) and 3(5) of Directive 2010/64/EU.

In accordance with Article 4 of Directive 2010/64/EU, suspects and accused persons are exempted from the costs arising in relation to their language use, irrespective of the outcome of the proceedings.

The CCP provision according to which if it is not possible to find an interpreter who meets the statutory criteria, any other person having “sufficient knowledge of a certain language” could be appointed as an ad hoc interpreter, may cause problems in practice with regard to the quality of interpretation and translation, as there are no measurable guarantees for what is sufficient, and persons not having a sufficient command of a given language may be appointed. The lack of a formalised quality assurance system has also been mentioned as a problem in this regard.

5.1.2. The right to information

The New CCP prescribes that the defendant shall be informed about their rights under Article 3(1) of Directive 2012/13/EU when their participation in the criminal proceeding commences, and also stipulates the requirement of accessibility. As far as the practical implementation of the right is concerned, in the investigation phase defendants are informed of their rights at the beginning of the interrogation in such a way that the investigating officers read out aloud to them those cautions generated by the RobotZsaru NEO system, or provide information on the basis of that. The new version of this template (which was revised due to the coming into effect of the New CCP) contains information about all the rights listed in Article 3(1) of Directive 2012/13/EU. According to the experiences of interviewees in the IPC research, the main problem is that information about all the rights is rare, and the way in which the information

is provided is usually not accessible. Most respondents mentioned deficiencies with respect to the right of access to the case materials and the right to silence. It is a positive novelty that new rules make it possible that information about procedural rights be provided through “the handing over of a written information leaflet”.

In compliance with Article 4 of Directive 2012/13/EU, the domestic legal provisions currently in force prescribe that suspects or accused persons who are arrested or detained are provided promptly with information about their rights in writing, in simple and accessible language and in a language they understand. In accordance with Article 4 of Directive 2012/13/EU, detainees may keep the written Letter of Rights in their possession. However, problems emerged with the accessibility of the above Letters of Rights too. The conclusion that defendants are not informed in a simple and accessible language in Hungary was also substantiated by a survey conducted on a sample of 200 persons by the HHC: we found that the level of comprehensibility of the Letter of Rights we had compiled using the texts produced by the Hungarian authorities was very low, only 38.5%.

As far as providing information about the reasons for arrest or detention and the accusation is concerned, the rules included in the New CCP comply with the requirement included in Article 6 of Directive 2012/13/EU. No practical deficiencies have been revealed with respect to informing defendants about the reasons for their arrest or detention. On the other hand, in the practice, the requirement set forth in Article 6(1) of Directive 2012/13/EU, according to which information about the criminal act the suspect or the accused person is suspected or accused of having committed “shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence”, is not fully complied with.

As far as access to case materials is concerned, the New CCP has brought a fundamental – and, in terms of complying with Article 7 of Directive 2012/13/EU, positive – change: under the New CCP, the defence is, by default, entitled to get access to all the case materials already during the investigation, and the law provides for exceptions to this main rule. In addition, the New CCP focuses on “access”, and regards the handing out of copies only as one of the means of providing access, outing an end to the hegemony of providing “copies”. It is also a positive novelty that it is now prescribed by law and in a wider scope than before that as a rule, records shall be kept of what case materials were accessed by the individual participants of the criminal procedure and when exactly the access was provided for them. It is also an important improvement that a formal decision shall be delivered about the restriction of the access or the manner of access, and a remedy may be sought against this decision.

The preamble of Directive 2012/13/EU prescribes that case materials shall be provided to the defendant and the defence counsel in “due time”. However, the Old CCP did 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 showed that this legislative shortcoming could result in that the defence did not receive the case files in due time. In order to solve this problem, the New CCP prescribes that access to the case materials shall be provided at a time and in a manner that enables the defence to prepare, but in any case, at least an hour before the hearing starts. In addition, under the new rules investigation judges are authorised to “sanction” by denying the delivery of a decision if for example the defence was not able to access the case materials relied on in the prosecutor’s motion in due time.

The changes outlined above facilitate that the right of access to the materials of the case is enforced in the practice in a way that truly contributes to the enforcement of the right to an effective defence. At the same time, we are of the view that as far as the depth of the changes in the practice are concerned a lot will depend on the practice developed by the judges and courts, as well as on the assertiveness of defence counsels.

5.1.3. Access to a lawyer and legal aid

According to the regulatory concept of both the Old and the New CCP, having a defence counsel is mandatory in certain cases stipulated (e.g. if the criminal offence the defendant is suspected of is punishable with a sentence of imprisonment of five years or more, the suspect is detained, is a juvenile, etc.) Whether these so-called “mandatory defence” grounds are in place is established by the proceeding authority, and in these cases the defendant may not decide to participate in the procedure without a defence counsel: in these cases, if the defendant does not have an attorney, the authorities appoint one for them. In the Hungarian system, this equals the “merits test” in terms of the Recommendation on legal aid.

If it is foreseen that due to their financial situation the defendant will be unable to pay the costs of the procedure or parts of it, authorities may grant them cost reduction, entailing that the fee and the costs of the defence counsel are advanced and born by the state. In the Hungarian system, this equals the “means test” in terms of the Recommendation on legal aid. With regard to this, it may be raised that conditions for cost reduction are too rigid, and the question arises whether cost reduction is indeed available for all indigent defendants. In addition, research shows that defence counsels are appointed on the basis of the means test very rarely.

The current Hungarian legal framework meets the requirements of Article 3(2) of Directive 2013/48/EU as to the time from which the right of access to a lawyer is in place, since the right to defence and the right of access to a lawyer is granted to the future defendants even before the suspicion is communicated to them.

Earlier research results showed that in the investigation phase, provisions of the Old CCP related to the notification of and the presence of defence counsels at interrogations, or the lack of such provisions could lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU. The New CCP brought about positive change in relation to notifying the defence counsels about the interrogation of suspects as well: it sets forth that authorities shall wait for the defence counsel for at least two hours before they can commence with the interrogation. However, as a main rule, the presence of the defence counsel remains non-mandatory at the interrogations of suspects, even if defence is otherwise mandatory. On the other hand, it is a positive development that the New CCP made the presence of the defence counsel mandatory for example at the interrogations of juvenile defendants.

The New CCP introduced an important safeguard also with regard to the time available for consultation when setting out that authorities shall grant one hour for consultation as a minimum if the consultation could not take place earlier due to reasons beyond the defence counsel and the defendant. In addition, new rules make it possible in mandatory defence cases (for example for defendants who are detained or are unfamiliar with the Hungarian language) to consult with their defence counsel before the interrogation via phone, in accordance with Article 3(3)(a) of Directive 2013/48/EU and also Recital 23 of the Directive's Preamble.

In line with Article 3(3)b and 3(3) c, the New CCP sets out that defence counsels may, in addition to the interrogation of the suspect and confrontations, be present at certain further investigative acts, corresponding with Article 3(3)c of Directive 2013/48/EU. As far as the active participation of defence counsels at procedural acts are concerned, the new CCP sets out explicitly that the defence counsel may consult with the defendant also in the course of the procedural acts, and continues to make it possible for the defence counsel to actively participate at interrogations, including the posing of questions, making comments and putting forth motions.

The significant limitation of the defendants' procedural rights, such as the right of access to a lawyer could – in compliance with Article 12(2) of Directive 2013/48/EU – lead to the exclusion of their testimony as evidence.

As a response to the criticisms of the appointment system under the Old CCP, the New CCP introduced a significant change: it made the selection of the appointed defence counsel the task of the respective regional bar association instead of the proceeding authority, prescribing that selection should be random, but proportionate. On the other hand, it gives rise to concerns that there is still no system “to ensure the quality of legal aid lawyers” in place in Hungary, opposite as to what is required by § 17 of the Recommendation on legal aid. The lack of quality assurance is a problem also because many researches showed deficiencies with regard to the level of performance of appointed defence counsels as compared to retained defence counsels, e.g. in terms of their presence at investigative acts and their level of active involvement, thus, indigent defendants represented by appointed defence counsels are still often provided with less effective defence than those who can afford to retain a lawyer. Apart from the fact that appointments were made by the authorities, the causes underlying this difference include the fact that as compared to market rates, the fees of appointed defence counsels are still low. In addition to that, under the Old CCP it was a problem as well that appointed defence counsels were not compensated at all for certain activities that are necessary for carrying out defence work. New rules enhance the situation also in this regard, for example by introducing a “preparation fee”.

The assessment of the system of appointments in general is hindered by the fact that no statistical data are available as to the ex officio appointments broken down according to the grounds for appointment.

5.2. Recommendations

Recommendations for the legislator

- In order to comply with Article 3(3) of Directive 2010/64/EU, legal provisions should provide defendants or their legal counsels the possibility to submit a reasoned request for the translation of documents beyond documents served (and so, translated) on the basis that they regard those essential for the given case.
- In order to achieve compliance with the requirements of Articles 2(8) and 3(8) of Directive 2010/64/EU, prescribing that interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, we recommend the following:
  - Review the provision in the New CCP saying that if it is not possible to appoint a person having the qualification stipulated in a separate legal regulation as interpreter or translator, “any other person having sufficient

knowledge of a certain language could be appointed as an ad hoc interpreter". In relation to that, consider prescribing on a legal level the aspects to be taken into consideration when establishing that a person has "sufficient knowledge of a certain language" (e.g. language exams, certified experience, citizenship, etc.), or prescribing that the authorities shall establish such rules in an internal binding rule or in another format (e.g. in a manual or guideline).
  - A quality assurance system with regard to interpreters and translators should be introduced on a legal level, or it should be prescribed that the police and the courts shall introduce such a quality assurance system.
- Steps must be taken to ensure that cost reduction be granted to all indigent defendants irrespective of whether defence is otherwise mandatory in their cases. We recommend reviewing the conditions for granting cost reduction, and performing an impact assessment as to whether the current conditions for cost reduction – taking into account also the income and financial situation of the defendant population – are adequate for achieving the aim of the institution.

Recommendations for the police, the prison service and the courts

- In accordance with Article 2(4) of Directive 2010/64/EU, the police should determine a mechanism or procedure "to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter".
- In order to achieve compliance with the requirements of Article 2(8) and 3(8) of Directive 2010/64/EU, prescribing that interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, we recommend the following for the police and the courts:
  - Identify the aspects to be taken into consideration when establishing that a person to be appointed as an ad hoc interpreter has "sufficient knowledge of a certain language" in an internal binding rule or another format (even in lieu of a legal provision prescribing this).
  - A quality assurance system with regard to interpreters and translators should be introduced (even in lieu of a legal provision prescribing this).
- The template for the questioning of the suspect in the central template-collection of the RobotZsaru NEO system and those written information notes (Letters of Rights) that defendants are provided with in police jails and penitentiary institutions shall be reviewed, with a view to ensure that defendants are informed about their rights included in Articles 3 and 4 of Directive 2012/13/EU in an adequate and accessible manner.

- Both the police and the prison service should facilitate for example by holding trainings that their staff members have the necessary knowledge and skills to be able to communicate with defendants in a simple and accessible language, having regard to the condition and personal characteristics of the person participating in the criminal proceeding, in accordance with the requirements of Directive 2012/13/EU.
- Based on earlier research, it seems necessary to provide premises in each and every police station where the full confidentiality of communications between defendants and their defence counsels can be guaranteed, while the requirements of safety and security can also be met.
- The police should take steps to increase the number of suspect and witness interrogations audio- and video recorded, which may, among other things, serve as an important safeguard for ensuring that procedural rights are respected.

Recommendations for the legislator and the bar associations

- In light of the research results, we recommend that the legislator and the bar associations take steps with a view to ensuring that appointed defence counsels provide their clients with quality legal aid. To this end, we recommend the following:
  - In accordance with § 19 of the Recommendation on legal aid, a system of accreditation for legal aid lawyers should be put in place and maintained.
  - In accordance with § 17 of the Recommendation on legal aid, a general system to ensure the quality of the services provided by legal aid lawyers should be in place, based on the regular monitoring and evaluation of the appointment system.[117]

Recommendations for the legislator and for all participants of the criminal procedure

- With a view to ensuring that the practice of ex officio appointments could be adequately assessed, the concerned state authorities should be obliged to collect relevant data about e.g. the number of and grounds for appointments in the different stages of the proceeding, the amounts paid to cover the fees and costs of appointed counsels, etc.
- As the country report shows, the New CCP and its by-laws bring along positive changes in several areas in terms of compliance with the Roadmap Directives. However, a lot will depend on the stakeholders participating in the criminal procedure and the practice developed by them in terms of whether the new legal provisions will live up to their promise or not. Therefore, it would be important in our view for both the legislator and the stakeholders participating in the criminal procedure to systematically assess the practice emerging under the New CCP.

Endnotes

1 *Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings*, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120

2 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

3 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

4 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed jupon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

5 See ECtHR, *Eckle v. Germany*, (Application no. 8130/78, Judgment of 15 July 1982), para. 73, when the formulation was first adopted.

6 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

7 Directive (EU) 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

8 Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspect or accused in criminal proceedings (2013/C 378/02), available at https://tinyurl.com/y8pc6hlz

9 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

10 In Hungary, the scope of Roadmap Directives also extends to the so-called petty offence (misdemeanour) proceedings in some cases, but these are not covered by the current country report.

11 New CCP, Article 348(2)-(4)

12 New CCP, Article 34(1)

13 New CCP, Article 25(2)

14 New CCP, Article 386(1)

15 New CCP, Article 25(1); CCP, Article 421(1)

16 New CCP, Article 408(1)

17 New CCP, Article 424(2)

18 New CCP, Article 510(1)

19 New CCP, Article 522(1)

20 New CCP, Article 519(2)

21 New CCP, Article 541(1)

22 New CCP, Articles 549, 561

23 New CCP, Article 615

24 New CCP, Article 38(2)

25 New CCP, Article 272

26 New CCP, Article 281

27 New CCP, Article 274

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

29 The functions of the court are fulfilled before the submission of the bill of indictment by the investigation judge.

30 For more details see: New CCP, Article 297–300

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

32 Act XXXIV of 1994 on the Police, Article 33(3)

33 New CCP, Article 274(5)

34 http://eujusticia.net/

35 http://hrmi.lt/en/

36 For the research report, see: *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.

37 For the research report, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

38 http://www.bghelsinki.org/en/

39 For the research report, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

40 Old CCP, Article 9

41 Old CCP, Article 114(2)

42 Old CCP, Article 9(3)

43 Old CCP, Articles 219(3) and 262(6); New CCP, Articles 423(2) and 455(6)

44 Old CCP, Articles 166(2)(d) and 250(2)(f); New CCP, Articles 359(1)(d) and 445(1)(e)

45 Article 47(2). Similar provisions were in place while the Old CCP was in force: for instance, under Article 120(2) of Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organisations under the Minister of Interior, the records had to indicate the name and address of the interpreter, as well as the language of interpretation.

46 Old CCP, Article 339(2)

47 New CCP, Article 120

48 Old CCP, Article 114(3)

49 Article 19(3)

50 Decree 24/1986. (VI. 26.) of the Council of Ministers on Professional Translation and Interpretation, Article 2

51 Decree 24/1986. (VI. 26.) of the Council of Ministers on Professional Translation and Interpretation, Article 5

52 Decree No. 7/1986. (VI. 26.) of the Ministry of Justice on the implementation of Decree 24/1986. (VI. 26.) of the Council of Ministers on Professional Translation and Interpretation

53 Decree 24/1986. (VI. 26.) of the Council of Ministers on Professional Translation and Interpretation, Article 3

54 See: https://birosag.hu/sites/default/files/allomanyok/statisztika2/a_jogeros_hatarozattal_befejezett_buntetoeljarasok_fiatalkoru_terheltjeinek_szama_es_megoszlasa_allampolgarsag_es_nemek_szerint_2016._ev_-_orszagos.pdf.

55 Júlia Iván – András Kristóf Kádár – Zsófia Moldova – Nóra Novoszádek – Balázs Tóth: *A gyanú árnyékában. Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről [In the shadow of doubt. A critical assessment of the right to effective defence]*. Hungarian Helsinki Committee, Budapest, 2009, p. 57. Available at: https://helsinki.hu/wp-content/uploads/A-gyanu-arnyekaban-final.pdf.

56 Júlia Iván – András Kristóf Kádár – Zsófia Moldova – Nóra Novoszádek – Balázs Tóth: *A gyanú árnyékában. Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről [In the shadow of doubt. A critical assessment of the right to effective defence].* Hungarian Helsinki Committee, Budapest, 2009, pp. 57–58. This problem was also raised by former judge Ágnes

Frech, the head of a working group of the National Judicial Office at a 2017 conference organised by the HHC. (See: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*, Hungarian Helsinki Committee, Budapest, 2017, p. 28. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.)

57 Cf. New CCP, Articles 199(2) and 201(1).

58 Old CCP, Article 62

59 For more details, see: *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, pp. 11–12. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf.

60 Old CCP, Article 62/A

61 For more details, see: *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, pp. 20–22. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf.

62 See: *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. 20. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf.

63 See: https://www.helsinki.hu/en/research-report-on-the-accessiblity-of-letters-of-rights-in-hungary/.

64 For the report of the testing see: Mátyás Bencze – Júlia Koltai – Zsófia Moldova: *Accessible Letters of Rights in Europe Research Report on the Accessibility of Letters of Rights in Hungary*. Hungarian Helsinki Committee, 2016. Available at: https://www.helsinki.hu/wp-content/uploads/research_report_mid_term_FINAL.pdf.

65 For a detailed discussion see: *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, pp. 15–16. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf.

66 New CCP, Article 363(1)(c)

67 New CCP, Article 451(7), Article 561(3)(a)

68 *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, pp. 17–18. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf.

69 Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-trial Detention: Monitoring Alternatives and Judicial Decision-making*. Hungarian Helsinki Committee, October 2015, Section IV. 2. Available at: https://www.helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf.

70 See for instance: *Yagci and Sargin v. Turkey* (Application nos. 16419/90 and 16426/90, Judgment of 8 June 1995), para. 52; *Smirnova v. Russia* (Application nos. 46133/99 and 48183/99, Judgment of 24 July 2003), para. 63.

71 See for instance: *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).

72 András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

73 Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-trial Detention: Monitoring Alternatives and Judicial Decision-making*. Hungarian Helsinki Committee, October 2015. Available at: https://www.helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf.

74 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Sections 4.1. and 5.1. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

75 Detailed explanatory memorandum of Draft Bill T/13972. on the Criminal Procedure, p. 370.

76 Detailed explanatory memorandum of Draft Bill T/13972. on the Criminal Procedure, p. 433.

77 See: *Az új büntetőeljárási törvény kodifikációjának előkészítő munkaanyaga: A büntetőeljárásban részt vevő személyek és az eljárási cselekményekre vonatkozó általános szabályok [Preparatory Study for the Codification of the New Code on Criminal Procedure: Participants of the Criminal Procedure and the General Provisions Concerning Procedural Acts],* p. 100.

78 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Sections 4.2. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

79 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Sections 4.4. and 5.2. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

80 Article 21(4) of Instruction 11/2003. (ÜK. 7.) of the Chief Public Prosecutor on the Preparation of the Indictment, the Overview of the Legality of Investigations and the Pressing of Charges; Memorandum of the Chief Public Prosecutor, Points 402.1.) h)–i)

81 Memorandum of the Chief Public Prosecutor, Point 402.1.) h)

82 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Section 4.5. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

83 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Section 4.3. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

84 Article 469(2) Simultaneously with submitting any motion, the prosecution shall send it to the suspect and the defence counsel as well.

85 Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán [Reflections on the Criticisms Concerning the Domestic Practice of Pre-trial Detention]. *Magyar Jog*, 2015/5., pp. 289–293.

86 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Section 4.6. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

87 Article 466(1) The court holds a hearing if the motion concerns

a) the ordering of a coercive measure concerning personal liberty and requiring a judicial decision,

b) the prolongation of pre-trial detention, and the motion for prolongation relies on new evidence,

c) the pre-trial detention is prolonged for a period that exceeds six months from the first ordering of the detention,

d) observation of the suspect's mental state […].

88 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary*. Hungarian Helsinki Committee, Budapest, 2017, Sections 4.7. and 5.3. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

89 The participation of the defence counsel is mandatory for example in the review procedures [New CCP, Article 655(3)], in criminal procedures conducted against juveniles [New CCP, Article 682(1)], or in criminal procedures conducted against defendants in absentia [New CCP, Article 747(6)].

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

91 Legal Aid Act, Article 5(2)

92 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 66–68. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

93 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 64–66. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

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

95 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 23–24. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

96 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018,

pp. 58–59. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

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

98 New CCP, Articles 47 and 49

99 New Attorneys Act, Article 37(3)–(4)

100 New Attorneys Act, Article 36(3)

101 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 50–56. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

102 Defendants qualify as juveniles if they were at least 12 years of age but younger than 18 when the offence was committed [Act C of 2012 on the Criminal Code, Article 105(1)].

103 New CCP, Article 682(2)

104 New CCP, Article 39(1) The defendant shall have the right to […] *b)* being provided adequate time and possibility by the court, the prosecution and the investigating authority to prepare for the defence […].

105 New CCP, Article 39(1) The defendant shall have the right to […] *e)* consult with their defence counsel without supervision […].

106 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 61–62. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

107 New CCP, Article 42(2) The defence counsel […] has the right to *a)* participate at procedural acts at which the defendant may be present or the presence of the defendant is mandatory […].

108 New CCP, Article 682(2)

109 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 58–59. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

110 See: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 51. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

111 This is also in contradiction with the aim of Article 7 of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, which sets out the following: “1. Member States shall take necessary measures, including with regard to funding, to ensure that: (a) there is an effective legal aid system that is of an adequate quality; and (b) legal aid

services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession."

112 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 53–56. and 71–73. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

113 In more detail, see: András Kristóf Kádár – Nóra Novoszádek: *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary.* Hungarian Helsinki Committee, Budapest, March 2018, pp. 59–60. and 71–72. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

114 Decree 32/2017. (XII. 27.) of the Minister of Justice on the Fees of Patron Attorneys, Trustees and Ex Officio Appointed Defence Counsels, Article 7(2)–(3)

115 Decree 32/2017. (XII. 27.) of the Minister of Justice on the Fees of Patron Attorneys, Trustees and Ex Officio Appointed Defence Counsels, Article 7(5)

116 Decree 32/2017. (XII. 27.) of the Minister of Justice on the Fees of Patron Attorneys, Trustees and Ex Officio Appointed Defence Counsels, Article 7/A.

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



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