

**RIGHT TO THE (EFFECTIVE) DEFENCE IN THE (NEW)  
HUNGARIAN CODE OF CRIMINAL PROCEEDINGS\***

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**ABSTRACT:** *The aim of this paper is the analysis of the right to the effective defence in the (Hungarian) criminal proceedings. This right is a nominated element of the right to the fair trial in criminal proceedings. The right to defence is set forth in both the current Hungarian Act on Criminal Proceedings valid at the time of drawing this study (Act XIX of 1998) and the new Hungarian Act on Criminal Proceedings to enter into force on 1 July 2018 (Act XC of 2017). However, the new Act has rephrased provisions in which the phrase right to defence is worded as right to effective defence. In my study, I provide a brief overview of the definition and classification of the fundamental principles. It helps us to be able to find the correct position of right to defence taxonomically. After that, I take a look at how the right to defence is enforced in Hungarian criminal proceedings. I also look at the regulations in the New Act on Criminal Proceedings to see whether the legislator imposes additional obligations on the criminal authorities and/or the defence counsel in criminal proceedings by implementing the definition of right to effective defence. In my study, I review the EU Directives that have been implemented by the legislator into the current Act on Criminal Proceedings within the scope of enforcement of the right to (effective) defence as well as the extent of such implementation. I also look at how these EU Directives are regulated in the New Act on Criminal Proceedings.*

**KEYWORDS:** *criminal procedure; right to the fair trial; right to the effect defence; fundamental principles of criminal proceedings*

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## **1. INTRODUCTION**

The right of the defendant to defence is a nominated element of the *right to the fair trial* in criminal proceedings.

The *right to defence* is set forth in both the current Hungarian Act on Criminal Proceedings valid at the time of drawing this study (Act XIX of 1998; hereinafter referred to as the ‘Act on Criminal Proceedings’) and the new Hungarian Act on Criminal

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Proceedings to enter into force on 1 July 2018 (Act XC of 2017; hereinafter referred to as the 'New Act on Criminal Proceedings'). However, the new Act has rephrased provisions in which the phrase right to defence is worded as right to *effective defence*.

In the beginning of my study, I provide a brief overview of the definition and classification of the fundamental principles. It helps us to be able to find the correct position of right to defence taxonomically. After that, I take a look at how the right to defence is enforced in Hungarian criminal proceedings. I also look at the regulations in the New Act on Criminal Proceedings to see whether the legislator imposes additional obligations on the criminal authorities and/or the defence counsel in criminal proceedings by implementing the definition of right to effective defence. In my study, I review the EU Directives that have been implemented by the legislator into the current Act on Criminal Proceedings within the scope of enforcement of the right to (effective) defence as well as the extent of such implementation. I also look at how these EU Directives are regulated in the New Act on Criminal Proceedings.<sup>1</sup>

## 2. DEFINITION AND CLASSIFICATION OF FUNDAMENTAL PRINCIPLES THAT ARE APPLIED IN CRIMINAL PROCEEDINGS

The *fundamental principles of criminal proceedings* are principle-based theses that are applied across the entire proceedings, express the distinctive features of criminal proceedings, define the system of the proceedings and the legal situation of the authorities and the participants to the proceeding along with the general rules for their procedural actions, and also define the basic rules for conducting the criminal proceedings and making decisions on criminal law liability (Cséka et al., 2006. p. 47.; Tóth, 2006. p. 39.; Tremmel, 2001. p. 65.; Király, 2008. p. 107.). While the fundamental principles constitute *restrictions* on the part of the investigating authority, the prosecutor and the court, they constitute *rights* on the part of the defendant, the defence counsel or the aggrieved party, respectively.<sup>2</sup> From the commencement of the criminal proceeding throughout the adoption of the final court decision, the criminal proceedings shall be conducted without prejudice to any of the fundamental principles.

From a view of *historical evolution, on international level*, fundamental principles played their roles in the works of enlightened philosophers in the second half of the 18th century (Montesquieu, Voltaire, Beccaria) not as legal requirements but as social and political expectations. However, when they appeared in the French Code of Criminal Instruction of 1808 (originally titled 'Code d'Instruction Criminelle' in French), they were already considered as legal criteria. *In Hungary*, it was not until the reform era that the need for effective enforcement of fundamental principles in legal practices arose based on the works of László Szalay, Pál Nyáry and Lajos Kossuth. The system and provisions of the first written Hungarian Code of Criminal Proceeding (Act XXXIII of 1896 on

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<sup>1</sup> Due to size restrictions applicable to this study, it basically focuses on two Directives only.

<sup>2</sup> At this point, it is to be noted that fundamental principles shall not be confused with *procedural guarantees*. Guarantees are such rules of the criminal proceeding law that safeguard the legitimate conduct of the proceeding and, in order to accomplish the objectives and tasks of the proceeding, establish the procedural actions of the authorities and the participants and define the rights and obligations of the parties (accuser, defendant, defence counsel), the principles, means and methods of evidence, and the rules for resolutions and fault correction (Erdei, 2011. p. 152.).

Criminal Proceedings) were based on previously accepted and consistently enforced fundamental principles. It also applies to all subsequent Hungarian Criminal Codes established ever since (Fantoly – Gácsi, 2013. p. 52.).

*Based on their subject*, the fundamental principles for criminal proceedings may be classified into two categories: organizational fundamental principles and operational fundamental principles.

*Organizational fundamental principles* are rather static fundamental principles and are contained in the Fundamental Law and various (e.g. judicial, prosecutorial, etc.) organizational legislations. Organizational fundamental principles in Hungarian criminal proceedings:

- justice shall be brought exclusively by courts;
- equality before the law;
- the system of single-jurisdiction and multi-jurisdiction;
- participation of a laic element (in Hungary: lay judges) in judicature;<sup>3</sup>
- the principle of judicial independence.

On the other hand, *operational fundamental principles* are rather dynamic and are contained, in an itemised manner, in the Act on Criminal Proceedings. Operational fundamental principles<sup>4</sup>:

- presumption of innocence;
- protection of fundamental rights;
- right to defence;
- the foundation and obstacles of criminal proceedings;
- the principle of allocation of procedural tasks (the principle of contradiction);
- the principle of accusation;
- fundamental principles that apply to evidencing (including the principle of burden of proof, the prohibition of self-incrimination, the principle of in dubio pro reo, and the independent judgement of criminal law liability);
- right to use native language (also called mother tongue).<sup>5</sup>

At this point, I shall note that, in my opinion, the *principle of contradiction* embraces criminal proceedings as alpha and omega. Therefore, I prefer the current Act on Criminal Proceedings declaring this principle in Art. 1 over the New Act on Criminal Proceedings placing it in Art. 5. Even though I am on the view that fundamental principles should not be prioritised as one being more important than another one, the only exception to this could be the principle of contradiction (Gácsi, 2017. p. 128.).

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<sup>3</sup> The New Act on Criminal Proceedings will bring a significant change in this point. The presence of lay judges will be restricted to criminal proceedings against juvenile defendants and military criminal proceedings. In every other proceeding, whether traditional or separate, the acting judicial council will consist of official judges without the presence of lay judges.

<sup>4</sup> The above list already follows the system of the New Act on Criminal Proceedings. At this point, it is to be noted that the legislator omitted the right to legal remedy from the regulation of operational fundamental principles in the New Act on Criminal Proceedings, which I find an unfavourable measure.

<sup>5</sup> The majority of Hungarian bibliography also consider the following as operational fundamental principles: the principle of free evaluation of evidence, and the principles of publicity, directness and verballity, respectively. However, these fundamental principles can only be found dispersedly or cannot be found at all in the Act on Criminal Proceedings.

The legislator, too, considered the *right to a fair procedure* important and has thereby placed it in the Preamble Section of the New Act on Criminal Proceedings as a principle-based rule that shall have an impact on the entire criminal proceedings.

Overall, the foregoing indicates that the *right to defence* can be considered as one of the operational fundamental principles.

### 3. THE RIGHT TO (EFFECTIVE) DEFENCE

#### 3.1. Basic features of the right to defence

This right granted to the defendant and the defence counsel is an *accumulation of such criminal proceeding rights* based on which the defendant, in the proceeding initiated against them, may learn information about the suspicion and, later on, about the subject of the accusation, express their position in connection therewith, bring their reasons against it, file comments and motions concerning the activity of the authorities, and seek assistance from their defence counsel (Fantoly – Gácsi, 2013. p. 67.). At this point, it is worth noting that the *objective* and purpose of *defence* are not to help guilty persons avoid liability or to make the works of law enforcement authorities more difficult. What makes defence necessary (and sometimes indispensable) is the perception that, without defence, it is much harder to learn justice and the risk for making mistakes (justizmord, also known as judicial murder in the English language) is much larger (Hack, 2010). The roles of the defence include exploring the exempting circumstances, finding and presenting evidence associated therewith and, ultimately, assisting in bringing justice (Király, 2008. p. 132.).

The right to defence *has two sides*: while it constitutes a certain right on the part of the defendant, it constitutes an obligation on the part of the authorities [refer to Art. 5 para. (1) and Art. 5 para. (3) of the Act on Criminal Proceedings and Art. 3 para. (1) and Art. 3 para. (3) of the New Act on Criminal Proceedings]. As a general rule, *the defendant shall have the right to defend themselves at liberty* [refer to Art. 5 para. (2) of the Act on Criminal Proceedings and Art. 3 para. (5) of the New Act on Criminal Proceedings]. However, this right may be restricted or the defendant be deprived of their freedom for reasons and in compliance with the procedure set forth in the Act on Criminal Proceedings [refer to Art. 5 para. (2) of the Act on Criminal Proceedings; the New Act on Criminal Proceedings does not expressly prescribe this provision].

#### 3.2. Methods of defence

The *method of defence* can be either personal defence (defence on the merits) or defence by defence counsel (formal defence). The former means that it is the defendant who, themselves, argues the legal grounds for their criminal law liability and endeavours to exempt their past actions and the liability associated therewith. For the latter, a defence counsel is involved in the criminal proceeding either via authorisation (hired defence counsel) or via appointment. *In cases of obligatory defence*, the participation of a defence counsel is statutory in criminal proceedings (refer to Art. 46 of the Act on Criminal Proceedings and Art. 44 of the New Act on Criminal Proceedings). At this point, it is worth highlighting that in Hungarian criminal proceedings the obligatory nature of defence, as far as the investigatory phase is concerned, does not mean that the attendance of defence counsel at each investigatory action is statutory. (An exception to that provision is when the investigating judge holds a session via closed-purpose telecommunication network. In this case, the session must be attended by the defence

counsel. Also, no session can be held without the presence of the defence counsel prior to the submission of the indictment (written accusation) in proceedings involving coercive measures when the defendant is juvenile.) In my opinion, the fact that the attendance of the defence counsel is not statutory at the investigatory actions (even in cases of obligatory defence) goes against the enforcement of the right to effective defence in the Hungarian system. However, the situation is different in the judicial phase as the trial cannot be conducted without the presence of the defence counsel in cases of obligatory defence.

As a general rule, the defendant shall be allowed to exercise their rights specified in the Act on Criminal Proceedings from the date and time of their first questioning (this is the time when the defendant is informed of the suspicion and formally becomes a suspect). Nevertheless, the defendant's *right to defence* shall be granted from the date and time of the first criminal proceeding action taken against the defendant by the investigating authority due to the crime.<sup>6</sup> [Therefore, a perpetrator caught in the act of committing an intent crime shall be granted the right to defence from the time they are captured or arrested (prior to detention). On the other hand, it is a significant deficiency that the Hungarian legislation continues to exclude such persons from the aforementioned right to defence (the right to defence shall be granted to the defendant from the time the defendant is captured or arrested) who are arrested because "they can be suspected of committing a crime". It is hard to explain why this group of persons is differentiated from such persons who are arrested because they were caught in the act of committing an intent crime.]

*The defence counsel may act in any phase of the proceeding* in the interest of the defendant. However, for the defence counsel, exercising the rights to defence is not only an entitlement but also an obligation. Consequently, the rights of the defence counsel shall not be construed as the rights of the defendant assigned to the defence counsel. Instead, these are independent procedural rights that may be exercised by the defence counsel (unless excepted by law) even against the defendant's will but, certainly, only in the interest of the defendant.

### **3.3. The failure of the defence counsel appointment system in Hungary**

In Hungary, *attorneys-at-law (hereinafter referred to as: 'attorneys')* are organised in *chambers*. The chamber of attorneys is a public body that operates independently of the State of Hungary. The body of the Hungarian chamber of attorneys consists of the national chamber [Hungarian Chamber of Attorneys (original title in Hungarian: Magyar Ügyvédi Kamara)] and regional chambers of attorneys. There is no separate 'division' for defence counsels within the chambers of attorneys, nor is there any institutionalised defence counsel specialisation within the attorney profession. The chamber has dual functionality as far as criminal law defence is concerned. Not only do the regional chambers of attorneys maintain a list of attorneys who may be appointed as appointed defence counsel, they are also normally assigned the task of maintaining the registry for the chamber of attorneys.

In Hungary, *currently*, the defence counsel is appointed by the acting authority in each case. The acting authority also has sole discretion in who to appoint, with the defendants having no say in that. After the appointment takes place, the defendant shall be notified of

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<sup>6</sup> Art. 4 para. (1) and Art. 4 para. (2) of the Hungarian BM-IM Joint Decree 23/2003 of 24 June 2003

the defence counsel who has been appointed to them. The current system of appointment has been long and heavily criticised: the defence counsel appointment system is not functioning properly in its current form. One of the corner-stones in this issue is that the investigating authority has the discretion to choose an attorney from the list of attorneys who may be appointed as appointed defence counsel with such list compiled and maintained by the competent chamber of attorneys. The issue here is that it leads to the consequence of the defendants not trusting the defence counsel chosen by the authority. There are also underlying data showing that, with many police offices, the majority of appointments are awarded to one or two attorneys or attorney offices meaning that the financial existence and practice of these attorneys depend on the appointing authorities. All this, in turn, endangers the independence of the defence counsel and the efficiency of legal protection.<sup>7</sup> Besides, the selection system is operated based on non-public and non-transparent aspects (Kádár et. al. 2012. pp. 7-9.).<sup>8</sup> The other corner-stone in the failure of the defence counsel appointment system in Hungary is the disproportionately low hourly rate of appointed defence counsels.<sup>9</sup> Even though their hourly rate has been increased to HUF 5,000 (excl. VAT) as of 1 January 2015,<sup>10</sup> it is still disproportionately less than the money earned by hired defence counsels. Therefore, many times, the appointed defence counsels do not have interest in attending the procedural actions. The latter is an issue with pronounced presence in the investigatory phase. Consequently, it also has an adverse impact on effective defence in criminal proceedings.

The *New Act on Criminal Proceedings* will bring significant change to the *process of appointment* as the appointment of the attorney to act in the capacity of appointed defence counsel will be the task of the regional chamber of attorneys competent in the place of registered office of the acting court, the prosecution or the investigating authority, respectively [refer to Art. 46 para. (1) of the New Act on Criminal Proceedings] with condition that the regional chamber of attorneys shall operate such an IT system for the appointment of the defence counsels that, if possible, ensures the opportunity for immediate appointment and the effective availability of the appointed defence counsels [refer to Art. 46 para. (3) of the New Act on Criminal Proceedings]. However, if the regional chamber of attorneys fails to appoint a defence counsel within one (1) hour of receipt of the appointment resolution, then the acting authority shall ensure the attendance of a defence counsel as follows: the appointment of the attorney to act in the capacity of appointed defence counsel shall be the task of (i) the investigating authority or the prosecution, respectively, when such appointment takes place prior to the accusation; or (ii) the court, when such appointment takes place after the accusation (refer to Art. 47 and Art. 49 of the New Act on Criminal Proceedings). Nevertheless, *the principle of equality of arms still seems to be distorted* in such a provision in the New Act on Criminal Proceedings that if the case is not a case of obligatory defence and the appointment of the

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

<sup>8</sup> Opinion of the Commissioner for Fundamental Rights in the case A/B-3107/2012.

<sup>9</sup> Digging deeper in the system of Hungarian criminal proceedings, one may encounter even more serious issues with the fee payable for document inspection, including unclear (contradictory) legal provisions and not-at-all unified legal practices built thereon (Fejes, 2017. pp. 649-652.).

<sup>10</sup> Art. 63 para. (4) of the Hungarian Act C of 2014 on the 2015 Central Budget of Hungary

defence counsel is motioned for by the defendant, such appointment is permitted in the investigatory phase only if the defendant is in a financial situation that does not give him or her the opportunity to authorise (hire) a defence counsel, whereas, after the accusation, this right to make motion is a statutorily provided right irrespective of the financial situation of the defendant which means that, after the accusation, the appointment of the defence counsel is obligatory [refer to Art 46 para. (6) of the New Act on Criminal Proceedings].

### **3.4. Is the right to defence an unrestricted right?**

In Hungarian criminal proceedings, the *right to defence* is unrestricted to the extent that the defendant cannot be obligated to even tell the truth in course of defending themselves.

The restriction lies in the provisions of false accusation (Art. 268 to Art. 270 of the Criminal Code), warning to false testimony (Art. 276 of the Criminal Code) and coercion in authority proceedings (Art. 278 of the Criminal Code), as the defendant is not allowed to accuse, unfounded, any other person of committing a crime.<sup>11</sup>

### **3.5. Material defence**

In Hungarian criminal proceedings, there exists a version of the right to defence that is construed more broadly: it is called material defence. The essence of this legal facility lies in that the court, the prosecutor and the investigating authority shall be obliged to, *ex officio*, consider both the circumstances exempt for the defendant and the circumstances mitigating the criminal liability in all phases of the proceedings [refer to the second sentence in Art. 28 para. (1) of the Act on Criminal Proceedings and to Art. 3 para. (6) of the New Act on Criminal Proceedings].

### **3.6. Implementation of the Directives associated with the Stockholm Programme in Hungary and their effect on the right to defence**

As mentioned in the beginning of this study, I had to focus on the implementation of only two Directives due to size restrictions. The time limit for implementation 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*, was 2 June 2014, while the time limit for implementation 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*, was 27 November 2016. In Hungary, one of the most important consequences of the implementation of the aforementioned Directives has been the *significant change to the rules for access to case documents*. It has been an important consequence as the defendant's right to access to documents had been rather restricted up until 1 January 2014.

#### *3.6.1. The effect of Directive 2012/13/EU of the European Parliament and of the Council on Hungarian criminal proceedings*

For the defendants subjected to pre-trial detention, it was a significant change when the Act on Criminal Proceedings was amended *due to ensuring compliance with Art. 7 para. (1) 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*. Therefore, as of 1 January

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<sup>11</sup> Hungarian Act C of 2012 on the Criminal Code (the 'Criminal Code')

2014, the Act on Criminal Proceedings prescribes that if the prosecutor initiates the ordering of pre-trial detention, then the motion sent to the suspect and the defence counsel shall be accompanied with the copies of such investigatory documents that serve as the basis for the motion [refer to the first sentence in Art. 211 para. (1a) of the Act on Criminal Proceedings].

As of 1 July 2015, the Act on Criminal Proceedings also prescribes that if the subject matter of the motion is the extension of duration of pre-trial detention, then the motion sent to the suspect and the defence counsel shall be accompanied with the copies of such investigatory documents that serve as the basis for the motion and were created after the date and time of adoption of the most recent decision adopted in the subject matter of the pre-trial detention [refer to the second sentence in Art. 211 para. (1a) of the Act on Criminal Proceedings].

Another reason why it has been a significant change is that the European Court of Human Rights (ECHR) has passed multiple decisions with Hungarian relevance in the past few years in which the ECHR established that access to documents (and thus to evidences serving as legal ground for pre-trial detention) in the investigatory phase of criminal proceedings had been restricted by former Hungarian legal provisions to such extent that violated the principle of equality of arms and thus Art. 5 para. (4) of the European Convention on Human Rights.<sup>12</sup>

### 3.6.2. *The effect of Directive 2013/48/EU of the European Parliament and of the Council on Hungarian criminal proceedings*

The Act on Criminal Proceedings was amended, effective as of 28 October 2016 to ensure compliance with Art. 8 para (2) of *Directive 2013/48/EU*. This amendment introduced the facility of seeking legal remedy in case of the authorities not notifying the defendant and the defence counsel of certain procedural actions [refer to Art. 195 para. (6) of the Act on Criminal Proceedings].

With regards to this, *my starting point* is that, in the investigatory phase, the defence counsel may be present at the questioning of their defendant as suspect and at the following restricted range of procedural actions. The defence counsel may attend the questioning of a witness if this was motioned for by the defence counsel or the suspect they defend, as well as the confrontation held with the participation of such a witness. The defence counsel attending the questioning may ask questions from the suspect and the witness. The defence counsel must be notified of these procedural actions [refer to Art. 184 para. (2) of the Act on Criminal Proceedings]. Both the suspect and the defence counsel may attend the hearing of the expert, the inspection, reconstruction and presentation for identification, may make motions and comments, and may ask questions from the expert [refer to the first sentence in Art. 185 para. (1) of the Act on Criminal Proceedings]. The notification of the defence counsel and the suspect of such investigatory action may be omitted in exceptional cases, if justified by the urgent nature of the investigatory action. In addition, notification shall be omitted if there is no other way to ensure the safety of a person participating in the proceeding [refer to the second

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<sup>12</sup> Such cases with Hungarian relevance include *X.Y. v. Hungary* (Application no. 43888/08, Judgment of 19 March 2013); *A.B. v. Hungary* (Application no. 33292/09, Judgment of 16 April 2013); *Baszka v. Hungary* (Application no. 59196/08, Judgment of 23 April 2013); *Hagyó v. Hungary* (Application no. 52624/10, Judgment of 23 April 2013).



and third sentences in Art. 185 para. (1) of the Act on Criminal Proceedings]. The latter provision has been contained in the Act on Criminal Proceedings since 28 October 2016 when the legislator amended the said Act due to the implementation of Directive 2013/48/EU.

For the case of omission of the notification, the Act on Criminal Proceedings prescribes, as of 28 October 2016, that *the prosecutor or the investigating authority shall subsequently inform the suspect and their defence counsel of the omission of the notification*. If so motioned for by the suspect or their defence counsel within three (3) days from such information, the prosecutor or the investigating authority shall *subsequently adopt a decision on the omission of the notification* and disclose such decision to the party who submitted the motion [refer to Art. 185 para. (4) of the Act on Criminal Proceedings]. By adopting a decision on the omission of the notification, the defendant or their defence counsel shall now have the opportunity to make a protest against the decision. If the authority adopting the decision rejects the protest within three (3) days of receipt of such protest, then such authority shall be obliged to immediately escalate the protest to the body entitled to make judgement: protest against the prosecutor's decision shall be judged by the superior prosecutor, while protest against the investigating authority's decision shall be judged by the prosecutor. As of 28 October 2016, the Act on Criminal Proceedings prescribes that a *motion for review* may be filed against the resolution concerning the rejection of the protest against the resolution on the omission of the notification and such motion for review shall be judged by a court [refer to Art. 195 para. (6) of the Act on Criminal Proceedings]. According to the reasons stated in the legislation amending the Act on Criminal Proceedings with effect from 28 October 2016, all of these amendments were necessary due to the implementation of Directive 2013/48/EU as Art. 8 para. (2) of the said Directive prescribes that judicial review shall be provided for as a legal remedy against a resolution allowing for temporary derogations.

However, in my opinion, it is still in contradiction with Art. 8 para. (2) of Directive 2013/48/EU that the decision on the omission of the notification shall be adopted not prior to but after the omission of the notification as the referenced provision of the said Directive states that such “temporary derogations [...] may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority [...]”.

### 3.6.3. *Solution in the New Act on Criminal Proceedings with regards to the right to access to case documents*

As it can be seen from the foregoing, *access to documents* has always been a cardinal issue in the right to defence (Paczolay, 2012. pp. 393-394.).

Applying a broader perspective compared to Sections 3.6.1 and 3.6.2 above, it can be said that the New Act on Criminal Proceedings discontinues the practice of the current Act on Criminal Proceedings where access to documents is basically provided for by means of issuing copies (refer to Art. 70/B of the Act on Criminal Proceedings). In the New Act on Criminal Proceedings, issuing copies will not be a definitional element but rather a method (amongst other methods) of access to case documents [refer to Art. 100 para. (4) (c) and Art. 100 para. (4) (d) of the New Act on Criminal Proceedings]. Methods of access to case documents: (1) ensuring insight into the documents; (2) giving information; (3) own copy or recording made by the affected party; (4) delivery of extract

or copy; (5) other method [refer to Art. 100 para. (4) of the New Act on Criminal Proceedings].

The other systemic change to access to case documents is that the concept of restricted access authorisable on a case-by-case basis as prescribed in the current Act on Criminal Proceedings will be replaced by the “concept of full access restrictable on a case-by-case basis” [refer to Art. 100 para. (9) of the New Act on Criminal Proceedings]. It means that access shall be restricted only for certain case documents and only on the basis of such rejection of the motion against which legal remedy may apply. For the investigatory phase, Art. 352 also correlates to this systemic change. Accordingly, in criminal proceedings, the opportunity of access to case documents shall be provided for on an ongoing basis with the scope of such access broadening in parallel to the progression of the proceeding.

In my opinion, these changes in the New Act on Criminal Proceedings completely strengthen the principle of equality of arms and thus the right to defence.

### **3.7. Other aspects of the right to defence in the New Act on Criminal Proceedings**

As mentioned above, the New Act on Criminal Proceedings highlights the defendant's right to defence as a *right to effective defence*. This principle may be partially derived from a more consistent enforcement of the principle of functional allocation (Herke, et. al. 2012. p. 66.).

Adding the grammatical qualifier ‘effective’ to the word ‘defence’ is primarily an *expectation indicated towards defence counsels*, as it cannot be concluded from the detailed rules of the New Act on Criminal Proceedings that either the court, the prosecutor or the investigating authority would have to assume additional obligations compared to the current Act on Criminal Proceedings.<sup>13</sup> The role of the defence counsel in criminal proceedings shall be the facilitation of the court's work in inspecting the facts in all correlations and from all perspectives. The defence counsel shall help to prevent the enforcement of such a unilateral aspect in judicature that takes into consideration no circumstances other than those that go against the defendant (Király, 1962. p. 121.). Therefore, in this point, *it is the defence counsel on whom the principle of equality of arms imposes additional tasks*. Even though it might look like an unusual solution (since, in legal practice, it is normally the defence side whose scope of legitimation is to be broadened by the principle of equality of arms), it is closely related to fair procedures.

The New Act on Criminal Proceedings inherits the solution of the current Act on Criminal Proceedings in the *rights and obligations of the defence counsel* with addition of a *new element*: in relation to the right to effective defence, the scope of obligations of the defence counsel will be broadened to include the *liability for ensuring timeliness*. This liability means that the defence counsel shall be obliged to perform their own duties in a way that does not block or hinder the timely conduct of the criminal proceeding [refer to Art. 42 para. (4) (f) of the New Act on Criminal Proceedings]. Based on this, the following may be considered as breach of obligation by the defence counsel: (i) deliberate omission by the defence counsel; (ii) unreasonable delay by the defence counsel in

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<sup>13</sup> Detailed Explanation for Art. 3 of the New Act on Criminal Proceedings (the document containing the explanation is originally titled ‘Indokolás’ in Hungarian)

performing their duties; or (iii) such exercising of their rights that results in delay in the conduct of the proceeding.<sup>14</sup>

#### 4. CLOSING THOUGHTS

Ensuring the right to defence is a cardinal matter in any and all criminal proceedings subject to rule of law. The reasons being are that it is the granting of this right, along with ensuring the institution of presumption of innocence, that makes the defendants the *subjects* of the criminal proceeding and that these are the rules that ensure that defendants will not only incur obligations but will also have rights in criminal proceedings.

The right to defence is a *nominated element of the right to a fair trial* based on the international, the EU and the Hungarian regulations. This study, I presented the provisions of the Act on Criminal Proceedings and the New Act on Criminal Proceedings (the latter to enter into force on 1 July 2018) concerning defence through this glass (e.g. through the right to a fair trial and sometimes through the principle of equality of arms) and covered the deficiencies that have remained in the Hungarian regulation as well as the rules that are welcome in the new Hungarian Act (reforming the defence counsel appointment system and granting the right to effective defence, for example).

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<sup>14</sup>Detailed Explanation for Art. 42 of the New Act on Criminal Proceedings