

## RIGHT TO THE EFFECT DEFENCE IN THE CRIMINAL PROCEEDINGS

The right to defence is an *essential fundamental right* which ensures that the rights of a person subjected to criminal proceeding (i.e. the defendant) are neither unreasonably derogated nor restricted more than they are absolutely needed to be restricted [1, p. 176].

In Hungary, the right to defence is specified in the current criminal proceedings act (Act XIX of 1998 *on Criminal Proceedings*; hereinafter referred to as the 'Act on Criminal Proceedings') as one of the fundamental rights. The right to defence may be exercised by the defendant either by person or with help of a defence counsel. The exercise of this right shall be mandatory only in cases when the Act on Criminal Proceedings prescribes the involvement of defence counsel (via either appointment or hiring) in the criminal proceeding. These cases are called *cases of obligatory defence*. Cases of obligatory defence include, but are not limited to, the case *when the defendant is being detained* (e.g. subjected to preliminary arrest). However, Hungarian legislation seems to be special in that obligatory defence, as applied in the *investigatory phase*, does not mean that the defence counsel is required to be present at the investigatory or other procedural actions. It 'only' means that the hiring or appointment of a defence counsel shall take place. Therefore, there is no legal obstacle to conduct sessions associated with coercive measures (e.g. preliminary arrest) without the presence of a defence counsel who had been notified of such sessions. However, with regards to *detained defendants*, it is a prerequisite that the defence counsel *be notified of the date/time and venue of the initial questioning of the defendant* in a documented manner and *in such a due time* that gives the appointed defence counsel an opportunity to exercise his/her rights specified in the Act on Criminal Proceedings and attend the questioning of the defendant. Failure to give such a notification shall result in the defendant's testimony not being suitable for use as a means of evidence. [Hungarian Constitutional Court Resolution 8/2013 of 1 March 2013; in Hungarian (cited for easier retrieval in Hungarian bibliography): 8/2013. (III. 1.) AB határozat].

*Access to documents pertaining to the criminal case* is a matter closely related to the right to (effective) defence. While the defence has unrestricted access to the documents that pertain to the criminal case *in the judicial phase* [Section 193 (1) of the Act on Criminal Proceedings], different rules apply to the investigatory phase. In Hungary, access to documents *in the investigatory phase* had been excessively restricted until 31 December 2013. That is, the

unrestricted access of the defence counsel had applied only to the expert's opinion and the minutes taken of such investigatory actions at which the defendant and the defence counsel had been given the opportunity to participate. [Virtually, the only actions which the Act on Criminal Proceedings allows the defence counsel to attend are the questioning of the defendant, questioning of a witness as proposed by the defence counsel or the defendant, or a confrontation held with the participation of such a witness. Refer to Sections 184 (2) and 186 (1) of the Act on Criminal Proceedings.] The defence counsel had been allowed to access other procedural documents only if this did not injure the interests of the investigation [refer to Section 186 (2) of the Act on Criminal Proceedings]. Change in the rules for access to documents in the investigatory phase was brought in 2014 by the pressure to comply with Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012. As a result, the Act on Criminal Proceedings has been amended twice since then. The change was also timely because the European Court of Human Rights (ECHR) has adopted multiple decisions in Hungarian cases with regards to this matter in which the ECHR unambiguously established the violation of the European Convention of Human Rights on the grounds of the foregoing. [For example: 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. 59/196/08), Judgment of 23 April 2013; Hagyó v. Hungary (Application no. 52624/10), Judgment of 23 April 2013.] One of the changes: if the subject matter of the motion is the ordering of preliminary arrest, 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. Another change: if the subject matter of the motion is the extension of duration of preliminary arrest, 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 preliminary arrest [refer to Section 211 (1a) of the Act on Criminal Proceedings]. However, it is to be noted that the aforementioned amendments of the Act on Criminal Proceedings do not fully comply with the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012. That is, the Act on Criminal Proceedings, even after the amendments, allows the authority to withhold such documents from the defence counsel that make the existence of one or more of the prerequisites for preliminary arrest doubtful. This, in turn, injures the principle of equality of arms (which shall also be enforced in the procedure before the investigating judge).

In Hungary, a new criminal proceedings act (Act XC of 2017 *on Criminal Proceedings*; hereinafter referred to as the 'New Act on Criminal Proceedings') will become effective as of 1 July 2018. The new code is going to reform the

current legislation in multiple aspects including, but not limited to, the matter of right to defence. By defining the rule of *effective defence* [refer to Section 3 (1) of the New Act on Criminal Proceedings], the primary intention of the new legislation is to require more effective procedure from *appointed defence counsels*. (It is to be highlighted here that the new legislation is going to subject the appointment of the defence counsel to the adoption of a resolution by the criminal authority acting in the particular case and assign the task of appointment of the defence counsel to the regional chamber of attorneys competent in the seat of the acting court / prosecutor's office / investigatory authority. The legislator expects that this regulation will induce more effective contribution from the appointed defence counsels.) The code prescribes that defence counsel shall be appointed if a summons is created after the occurrence of a situation that serves as the ground for the appointment and that the appointment shall take place at the same time when the summons is created. If the ground for the appointment occurs at a procedural action, then the defence counsel shall be appointed immediately [refer to Sections 46 (4) (a) and 46 (4) (b) of the new Act on Criminal Proceedings]. The legislator has adjusted Section 387 (2) of the New Act on Criminal Proceedings to this provision. According to that Section, the questioning of the suspect shall be postponed in the investigatory phase if so required to ensure the attendance of the defence counsel. It is going to eliminate such transitional period (allowed by the current Hungarian system) when the defence counsel is obligatory by law, but the defendant stands without a defence counsel. However, it is to be noted that even though the right to defence has been circumvallated with guarantees, the principle of equality of arms still seems to be distorted in such a provision in the new code that if the case is not a case of obligatory defence and the appointment of the defence counsel is proposed 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 proposal 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 [Section 46 (6) of the New Act on Criminal Proceedings]. [Supported through the New National Excellence Program of the Ministry of Human Capacities].

### *References*

1. Fenyvesi Cs. The Defence Attorney. About the Role and Legal Status of the Defence Counsel in Criminal Proceedings / Dialóg-Campus, Budapest-Pécs - 2002. P. 496