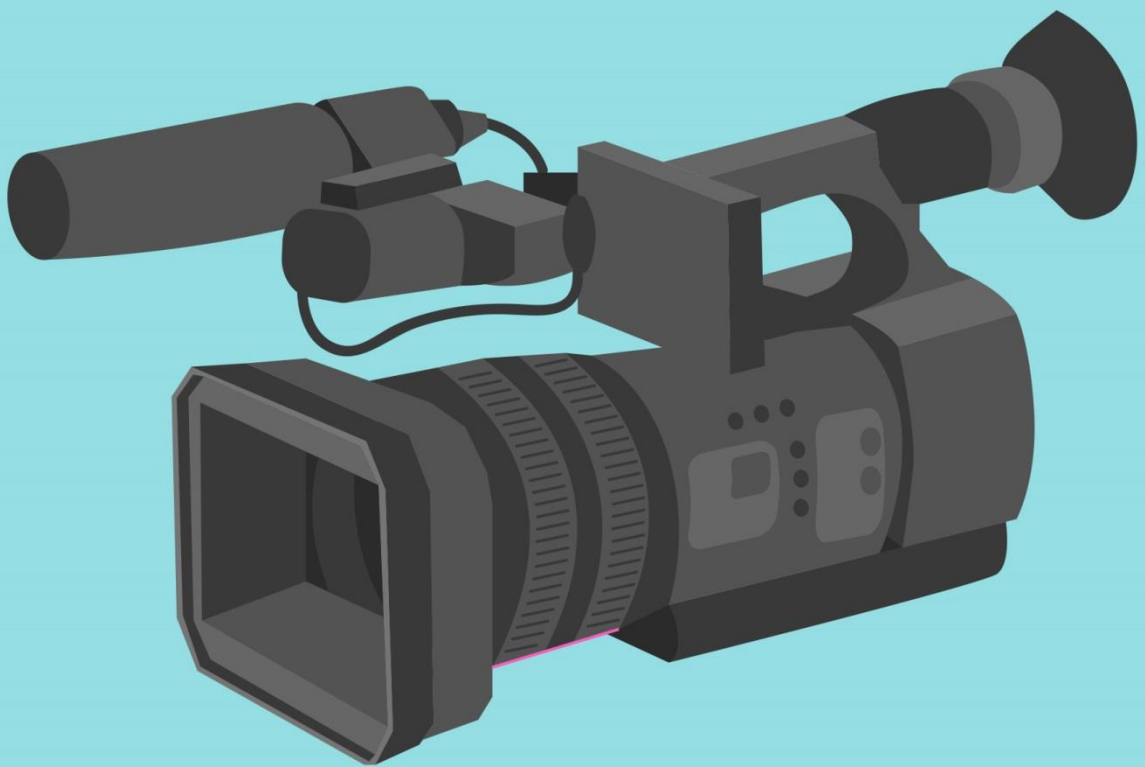


**PROCEDURAL RIGHTS OBSERVED BY THE CAMERA –  
AUDIOVISUAL RECORDING OF INTERROGATIONS IN THE EU**

**(PROCAM)**

**COUNTRY REPORT - HUNGARY**





Hungarian Helsinki Committee

# Procedural rights observed by the camera

## Audiovisual recording of interrogations in the EU



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## **1. Introduction**

### 1.1. The aim of the project and the research method

This country report is based on a research carried out in Hungary in the framework of an empirical research project conducted in five European Union (EU) countries. This international project "*Procedural rights observed by the camera – Audiovisual recording of interrogations in the EU (ProCam)*"; supported by the European Commission, aims at mapping the link between audiovisual recording of interrogations and the enforcement of the rights of defendants, with special regard to the rights of vulnerable defendants and the rights enshrined in Directive 2013/48/EU on access to a lawyer, along with an EU-wide identification of good practice of recording interrogations of vulnerable persons and understanding concerns about audiovisual recording of interrogations.

The research in the respective countries was conducted by local project partners, with the coordination of the Hungarian Helsinki Committee. The project partners are the following:

- Hungarian Helsinki Committee (Hungary),
- Associazione Antigone (Italy),
- Fair Trials (France),
- Human Rights House Zagreb (Croatia),
- Liga lidských práv (Czech Republic).

The project included an analysis of the legal framework and the statistical data, and an empirical research. Results are summarized in the present country report.

#### ***Analysis of the legal framework and the available statistical data***

As a first step, researchers analysed the applicable national legal rules with respect to the audiovisual recording of interrogations and of testimonies given at court hearings, along with the available statistical data pertaining to the practice of audiovisual recording. Results were summarized in desk reviews, with the overall purpose to provide, on the basis of the information available, a critical account of the criminal procedure with respect to the focus of the research, and to provide a contextual framework for interpreting the data gathered through the empirical research.

#### ***Empirical research***

In addition to analysing the legal provisions of Member States, we wished to assess compliance with the respective EU Directive on the basis of strong empirical evidence. The data collection phase of the research in Hungary concluded in November 2018, statistical data collection concluded in February 2019, and the current research report was drafted in March 2019. As part of the empirical research, we conducted semi-structured interviews with the participants of the criminal procedure: with representatives of the investigating authorities, with prosecutors, judges, defence counsels and defendants. The willingness of authorities and other stakeholders to cooperate with the researchers varied country by country, similarly to the availability of statistics. In Hungary, the National Police Headquarters, the National Judicial Office and the Chief Prosecutor's Office did not cooperate with the Hungarian Helsinki Committee (HHC) in the research, and, consequently, we were able to include the perspective of the authorities only to a limited extent in the country report: anonym interviews were conducted with two prosecutors and with a staff member of the National Tax and Custom Administration's Department of Criminal Affairs (Central Department of Investigations).

The EU Directives require Member States to transmit the text of measures adopted to implement the Directives to the European 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 measures 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 Directives are fully complied with in practice. Even if the provisions of the Directives are faithfully reflected in national legislation and regulations, 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. Therefore, the best way of obtaining reliable and comparable data on the practical implementation of the Directives, and on the ways in which they are experienced by criminal justice actors, is by fieldwork-based research. A failure by certain government representatives, officials and institutions 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 Directive which is in the focus of this research, and for the other Directives adopted under the EU procedural rights roadmap.

## 1.2. The Hungarian criminal procedure

As far as the fundamental principle of fair trial is 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 them, or their 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 of Parliament. (...)*

*(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, the Directives adopted in the framework of the European Union's Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings are implemented in Hungary by the Code of Criminal Procedure (which is an Act of Parliament) and its bylaws (governmental and ministerial decrees, etc.).<sup>1</sup>

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: CCP or new CCP) and its bylaws came into force. Below, we outline the criminal procedure as governed by this new CCP.

Under the 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 may be preceded by a preparatory procedure, and then the proceedings continues with the investigation (with its two main components being the investigative evaluation and the evidential evaluation) and the court phase. The aim of the preparatory procedure is to establish whether there is a suspicion of a criminal offence.<sup>2</sup> The investigative evaluation, which is, as a main rule, confidential, aims at collecting information needed to substantiate suspicion and at identifying the perpetrator. During the evidential evaluation, the prosecutor, if necessary, collects further evidentiary means, and decides on the basis of examining the evidence whether to terminate the

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<sup>1</sup> In Hungary, the scope of the 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.

<sup>2</sup> CCP, Article 340(1)

investigation (i.e. terminate the procedure) or to file an indictment.<sup>3</sup> The investigation is carried out by the investigating authority (in most cases by the police,<sup>4</sup> but in some cases by the National Tax and Custom Administration) or by the prosecutor.<sup>5</sup> During the investigation the defendant is heard,<sup>6</sup> who is identified as "suspect" in this phase of the proceedings. 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", <sup>7</sup> 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 if subject to certain procedural acts, typically those affecting their personal liberty.<sup>8</sup>

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.<sup>9</sup> Under the new CCP, the possibility of a guilty plea is available before the filing of the indictment, with one of the preconditions being that the defendant pleads guilty in line with the subsequent bill of indictment. A guilty plea can be initiated both by the defence and by the prosecutor. The participation of the defence counsel in the proceedings aimed at concluding a guilty plea is mandatory.<sup>10</sup> The guilty plea cannot extend to the facts of the case or the qualification of the criminal offence under the Criminal Code, and is focused primarily on the nature and degree of the sanction, but parties may also agree on further conditions (e.g. restitution, compensation for damages, cooperation with the authorities).<sup>11</sup> The court reviews the legality of the guilty plea,<sup>12</sup> but cannot amend its content, and can only approve or refuse it based on the indictment.<sup>13</sup>

The investigation phase is followed by the court phase, to which another new institution was introduced by the new CCP: the preliminary hearing, aimed at preparing for the trial in substance,<sup>14</sup> which, if the defendant does not confess to committing the criminal offence, provides an opportunity for the defendant and the defence counsel to present their arguments about the indictment before the trial begins. They also have to identify the facts underlying their defence and their evidentiary means, and have to submit their motions aimed at excluding any evidence and conducting any evidentiary actions.<sup>15</sup> (Later in the procedure the defence will only have an opportunity to do so if the defendant or the defence counsel proves that a given piece of evidence came to their attention only after the preliminary hearing.) Thereafter, the court holds a hearing to which the person subject to the procedure (now identified as the "accused person") is summoned – however, according to the rules currently in force, their presence is not inevitable any more.<sup>16</sup> The evidentiary procedure at trial starts with the hearing of the accused person,<sup>17</sup> other evidentiary actions and their order are determined by the court.<sup>18</sup> 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.<sup>19</sup> Subsequently, the court delivers its judgment, in which it decides about innocence or guilt and the sanction to be applied, and further issues identified by the CCP (e.g. on claims for compensation, terminating parental custody rights, and costs of the procedure).<sup>20</sup> If the prosecution or the defence appeals the first instance judgment, it does not become final and binding:

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<sup>3</sup> CCP, Article 348(2)-(4)

<sup>4</sup> CCP, Article 34(1)

<sup>5</sup> CCP, Article 25(2)

<sup>6</sup> CCP, Article 385 (1)

<sup>7</sup> CCP, Article 388(1)

<sup>8</sup> CCP, Article 386(1)

<sup>9</sup> CCP, Articles 25(1) and 421(1)

<sup>10</sup> CCP, Article 407(4)

<sup>11</sup> CCP, Article 408(1). However, it shall be noted that the prosecution is not barred by any provision from unilaterally altering the facts and the accusation if that is supported by the evidence.

<sup>12</sup> CCP, Articles 733–734

<sup>13</sup> CCP, Article 424(2)

<sup>14</sup> CCP, Article 499(1)

<sup>15</sup> CCP, Article 506(4)

<sup>16</sup> CCP, Articles 136, 428-431, and 510(1)

<sup>17</sup> CCP, Article 522(1)

<sup>18</sup> CCP, Article 519(2)

<sup>19</sup> CCP, Article 541(1)

<sup>20</sup> CCP, Articles 549 and 561

the case is referred to the court of second instance. Second instance decisions may be subject to further appeal only in certain cases identified by the CCP;<sup>21</sup> and under special circumstances, with limitations, the final judgment may be subject to extraordinary remedy procedures.<sup>22</sup>

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.<sup>23</sup> 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).<sup>24</sup> "Criminal surveillance", introduced as an overarching category by the new CCP, includes for example house arrest, geographical ban, ban on visits to certain public places or events, and the obligation to regularly check in with the respective police organ, and other rules of conduct may also be prescribed. No contact orders and criminal surveillance measures may be accompanied by the requirement of posting bail and may be supervised by an electronic monitoring device.<sup>25</sup>

72-hour detention is the temporary deprivation of the suspect's liberty without a judicial decision, which can be ordered if there is a well-grounded suspicion that the concerned person has committed a criminal offence punishable with imprisonment, provided that a coercive measure requiring a judicial decision (criminal surveillance, no contact order, pre-trial detention) is likely, or if the perpetrator was caught in the act or their identity could not be established (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 a coercive measure requiring a judicial decision – the suspect shall be released.<sup>26</sup> 72-hour detention is implemented in police jails.<sup>27</sup>

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 phase (until the submission of the bill of indictment, it is ordered by the so-called "investigation judge"<sup>28</sup> upon the prosecutor's motion, 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 – cases, there is an absolute upper limit).<sup>29</sup> Pre-trial detention as a main rule shall be implemented in a penitentiary institution.<sup>30</sup>

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 e.g. a person who is suspected of having committed an offence. (Thus, persons taken into police custody are not regarded as defendants – suspects – until the suspicion is formally communicated to them.) The police may maintain the deprivation of

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<sup>21</sup> CCP, Article 615

<sup>22</sup> CCP, Part 19. For example, there is possibility for a retrial if new evidence emerges, and there is also a possibility to request a judicial review from the highest Hungarian judicial forum, the Curia.

<sup>23</sup> CCP, Article 38(2)

<sup>24</sup> CCP, Article 272

<sup>25</sup> CCP, Articles 281–282

<sup>26</sup> CCP, Article 274

<sup>27</sup> Act CCXL of 2013 on the Implementation of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement, Article 427(2)

<sup>28</sup> The functions of the court are fulfilled before the submission of the bill of indictment by the investigation judge.

<sup>29</sup> For more details, see: New CCP, Article 297–300.

<sup>30</sup> Act CCXL of 2013 on the Implementation of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement, Article 388



liberty until it is absolutely necessary, but for no 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.<sup>31</sup> The time spent in police custody shall be taken into account when the time spent in the 72-hour detention is calculated.<sup>32</sup>

## 2. Legal framework

### 2.1. Obligation to audiovisually record interrogations in criminal procedures

The rules of documentation with regard to the criminal procedure are included in the CCP and its bylaws (governmental and ministerial decrees). In the old CCP, with the exception of the hearing of witnesses under the age of 14, the audio or audiovisual recording of the interrogations was only a possibility, and if the costs of the recording were not paid in advance by the person requesting the recording, the decision on whether to record the interrogation or not fully remained in the discretion of either the investigating authority or the prosecutor.<sup>33</sup> In addition, the old CCP and its bylaws failed to prescribe the legal requirements of audiovisual recordings in detail. The legality of the recordings made before 1 July 2018 should be assessed by applying the rules of the old CCP, but otherwise the new CCP is applicable in every ongoing criminal procedure.

The new CCP revised and extended the legal rules for audiovisual recordings. According to the current Hungarian legislative framework, the requirement to audiovisually record the interrogations and hearings of suspects and accused persons is still discretionary in most of the cases. There is a very limited obligation to audiovisually (or audio) record interrogations of specified suspects and accused persons.

### 2.2. Scope of the obligation to audiovisually record interrogations

#### 2.2.1. Persons concerned by the mandatory and discretionary audiovisual recording of interrogations

According to the point 13 of the Preamble of the Commission's Recommendation of 27.11.2013 C(2013) 8178 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, "vulnerable persons are not always able to understand the content of police interviews to which they are subject. In order to avoid any contestation of the content of an interview and thereby undue repetition of questioning, these interviews should be audio-visually recorded". In the Section 3 point 13. the Recommendations suggests that "Any questioning of vulnerable persons during the pre-trial investigation phase should be audio-visually recorded."

The CCP specifies those groups of persons involved in any of the procedural acts in the case of whom audiovisual recording is discretionary or mandatory.

Audiovisual recording is discretionary in the case of persons interrogated who **require special treatment**. The general rule is that the court, the prosecutor and the investigating authority decide on a case-by-case basis whether a victim or a witness requires special treatment. The following criteria serve as a basis for that decision:

Persons qualify as requiring special treatment if on the basis of their personal characteristics or on the basis of the nature and circumstances of the criminal offence they are impeded from

- a) understanding or being understood;
- b) exercising their rights or fulfilling their obligations; or
- c) participating in the criminal procedure effectively.

<sup>31</sup> Act XXXIV of 1994 on the Police, Article 33(3)

<sup>32</sup> CCP, Article 274(5). The defendant's detention preceding the ordering of the 72-hour detention shall be included in the length of the 72-hour detention.

<sup>33</sup> Old CCP, Article 167

A need for special treatment is established particularly on the basis of

- a) the age of the person concerned;
- b) the mental, physical or medical condition of the person concerned;
- c) the flagrantly violent nature of the underlying offence; or
- d) the relationship between the person concerned and another person participating in the criminal procedure.

If a person participating in the criminal procedure requires special treatment, the CCP provides for them the opportunity to participate at procedural acts via a telecommunication device.<sup>34</sup> In that case the remote hearing (conducted via an audio or video link) has to be recorded.

In the case of certain sub-categories of persons requiring special treatment, established by the CCP, audiovisual recording is mandatory. Although mandatory recording due to special treatment mostly concerns victims and witnesses in the criminal procedure, **the CCP also sets out that in the case of procedural acts involving a minor under 14 years of age (irrespective of whether they participate in the procedure as defendants, witnesses, or victims), the court, the prosecutor and the investigating authority are obliged to audiovisually record the procedural act.**<sup>35</sup> The law prescribes to audiovisually record the procedural act **if possible** if the subject of the procedural act (a victim, witness, or suspect) is a minor (a person under 18<sup>36</sup>), except **where the minor is a victim of a criminal offence of a sexual nature, in which case the audiovisual recording is mandatory.**<sup>37</sup> **In all other cases where a procedural act involves a person requiring special treatment, the CCP only provides for the possibility to make an audiovisual recording of the procedural acts.**<sup>38</sup>

A further binding rule, the order of the National Police Chief extends the **obligation to audiovisually record procedural acts to a further category: to all procedural acts that involve an illiterate person.**<sup>39</sup>

According to the CCP, persons with disabilities,<sup>40</sup> and victims of criminal offences of a sexual nature shall qualify as persons requiring special treatment automatically, and so their interrogations should also be conducted according to the rules pertaining to persons requiring special treatment as described above.<sup>41</sup>

Beyond the above-mentioned cases of persons who require special treatment, continuous audio or audiovisual recording **may be ordered** by the investigating authority, the prosecution or the court also **ex officio, based on certain features of the case.**<sup>42</sup> (For a more detailed description of the characteristics of cases where the authorities are likely to order audiovisual recording, see Chapter 4.2. of the present country report.)

Furthermore, **audiovisual recording or continuous audio recording shall be ordered upon the motion of the defendant, the defence counsel, or the victim – provided that they advance the costs of the recording.**<sup>43</sup> According to Decree 12/2018. (VI. 12.) of the Minister of Justice on the Rules on Certain Criminal Procedure Acts and Persons Participating in the Criminal Procedure (hereafter: MoJ Decree 12/2018.), authorities have to grant requests to audiovisually

<sup>34</sup> CCP, Article 85(1)(k)

<sup>35</sup> CCP, Article 88(1)(d)

<sup>36</sup> According to Act C of 2012 on the Criminal Code, the minimum age of criminal responsibility is 14, but in the case of certain criminal offences (homicide, voluntary manslaughter, battery, terrorist offence, robbery, and plundering) minors have criminal responsibility if they were over the age of 12 at the time the criminal offence was committed, and if they had the capacity to understand the nature and consequences of their acts.

<sup>37</sup> CCP, Articles 87(1), 89(4)(b) and 82(c)

<sup>38</sup> CCP, Article 85(1)(j)

<sup>39</sup> Order no. 41/2018. (VII. 11.) of the National Police Chief on the Rules of the Application of Technical Devices for Audiovisual Recording as Established by the Code of Criminal Procedure, Section 11(c)

<sup>40</sup> As defined by Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities, and any person who may qualify as a person with disability.

<sup>41</sup> CCP, Article 82(b)–(c)

<sup>42</sup> CCP, Article 358(3)

<sup>43</sup> CCP, Article 358(4)

record interrogations if the prospective costs of the recording are paid at least five days in advance of the procedural act by the person putting forth the motion; or if the costs are paid less than five days before the procedural act but the technical conditions for an audiovisual recording are met.<sup>44</sup> The cost of an audiovisual recording is 5,000 HUF (approx. 15 EUR) per every started hour, but at least 10,000 HUF. The cost of an audio recording is 2,000 HUF (approx. 6 EUR), regardless of the length of the procedural act.<sup>45</sup> The authorities have to inform the person concerned about the foreseeable costs of the recording, as well as about the way of and the deadline for making the payment.<sup>46</sup> The payment has to be made by using the bank account of the police or the prosecution,<sup>47</sup>. According to the CCP, if an audiovisual or audio recording is made, the authorities are not obliged to produce a verbatim transcript about that, but they have to prepare written minutes (records) about the procedural act in parallel to the recording.<sup>48</sup> The CCP prescribes a list of the information that the minutes have to include.<sup>49</sup>

According to the Article 9 of the 2013/48/EU Directive any waiver concerning the right to access to a lawyer, can be made in writing or orally. However it shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned. In case the recording procedure is audiovisual recording, the recording should include the waiver. However, the Hungarian legislation does not contain explicitly whether the waiver concerning the right to access to a lawyer should be part of the recording.

### *2.2.2. Location and settings of audiovisually recorded interrogations*

Rules prescribing audiovisual recording cover interrogations that take place in police stations, in prosecutor's offices, and in courts. MoJ Decree 12/2018. specifies the rules and technical requirements pertaining to audio and audiovisual recording of interrogations. Another decree of the Minister of Justice on establishing, operating and monitoring the use of special interrogation rooms (hereafter: MoJ Decree 13/2018.)<sup>50</sup> prescribes the requirements for special interrogation rooms on police premises where audiovisually recorded interrogations of defendants who fall under the category of persons requiring special treatment shall be executed. These interrogation rooms also have to fulfil certain other requirements, related to the physical and emotional needs of the interrogated persons, to reinforce their procedural rights. MoJ Decree 12/2018. prescribes that the camera has to be installed and the procedural act has to be conducted in a way that all the events, circumstances and statements that are relevant in relation to the procedural act are perceivable, and the person subject to the procedural act is recognizable. The camera might be moved exclusively upon the order of the person who leads the procedural act. There is a recommendation for a second camera, which provides a view of a specific person being present at the procedural act, part of the space or an object, or the case files. The exact time of the recording has to be indicated on the recording continuously. The importance of the sound quality is also emphasized: "an adequate number of microphones has to be installed, to ensure that the voices of all participants are continuously recorded. If possible, an individual microphone has to be provided for the leader of the procedural act, and for the person who is present at the procedural act, making a confession or a statement."<sup>51</sup>

The CCP provides for a special instance of audiovisual recording when a hearing is conducted remotely, via a telecommunication device, which is an opportunity to ensure communication between the place where the procedural act takes place and another venue. A remote hearing may be ordered by the court, the prosecution or the investigating authority ex officio, or upon the motion of the person who is obliged to participate personally or has a right to participate in the criminal proceedings.<sup>52</sup> The remote hearing can be conducted via an audio link or via an audiovisual link, but

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<sup>44</sup> MoJ Decree 12/2018., Article 61(1)

<sup>45</sup> MoJ Decree 12/2018., Article 62(3)

<sup>46</sup> MoJ Decree 12/2018., Article 62(1)

<sup>47</sup> MoJ Decree 12/2018., Article 62(4)

<sup>48</sup> CCP, Article 358(2)

<sup>49</sup> CCP, Articles 359(1) and 445(1)

<sup>50</sup> Decree 13/2018. (VI. 12.) of the Minister of Justice on Establishing, Operating and Monitoring the Use of Special Interrogation Rooms in Police Units for Conducting Procedural Acts that Involve a Person Requiring Special Treatment

<sup>51</sup> MoJ Decree 12/2018., Article 56

<sup>52</sup> CCP, Article 121(1)

an audio link may be used only for the purposes of taking witness testimony or ensuring the presence of an interpreter, or, in the course of the investigation, to hear an expert's opinion and to interrogate the defendant.<sup>53</sup> The CCP also prescribes further rules for conducting remote hearings via a telecommunication device. For example, the law sets out that a written minutes of the remote hearing has to be produced, which has to contain the following: it has to include the fact and the method of the remote hearing; it has to identify the person whose presence is ensured via the telecommunication device; it has to record the address where the person concerned stays during the remote hearing; and it has to list the names and roles of any other participants who are present at the same venue as the person interviewed.<sup>54</sup> The law also prescribes that the remote hearing has to be recorded.<sup>55</sup>

### *2.2.3. Further types of audiovisually recorded procedural acts*

Additional audiovisual recording occurs during procedural acts other than interrogations. **The CCP prescribes that, if possible, certain types of evidentiary actions should be audiovisually recorded**, including the inspection of scenes and objects, the reconstruction of events, and identity parades.<sup>56</sup> As some of our interviewees confirmed, audiovisual recording is frequently used during other forms of evidentiary actions as well, such as on-site interrogations (see Chapter 4.2.2.).

To ensure the audiovisual recording of police measures, some police cars are equipped with audiovisual recording devices, and some police officers are equipped with body cameras. The recordings made by these devices are part of the case file and may be used as evidence in court. A further function of these mobile devices is to make "safety records" of police measures, to prevent ill-treatment on the one hand and to prevent false accusations against the police on the other hand. The legal rules on and the practical use of these devices are also of importance when talking about audiovisual recording during the criminal procedure, however, a detailed analysis of these exceeds the framework of the present country report. Nevertheless, the wider usage of police car cameras and body cameras could also prevent the unlawful questioning and the manipulation or pressuring of defendants on the crime scene, prior to starting the formal interrogation. If the recording is streamed online simultaneously, that makes it even more effective, and modern cameras can be programmed to be activated when the police officer uses a firearm.

### *2.2.4. Technical excuses and absence of audiovisual recording*

According to the CCP, the audio or audiovisual recording shall be continuous during the procedural act, unless the procedural act is interrupted for a particular reason.<sup>57</sup> Only the interrogator may interrupt the audiovisual recording; it is not possible for the person interrogated to request the interruption of the recording. MoJ Decree 12/2018. foresees the case of a technical malfunction, when the audiovisual recording is disabled for technical reasons. In case of any technical problems, "measures shall forthwith be taken" to solve the issue,<sup>58</sup> and the procedural act cannot be started before the problem is solved. If the technical problem occurs during the procedural act, the act must be suspended and cannot be continued until the technical problem is solved.<sup>59</sup>

According to the MoJ Decree 12/2018., if the technical problem cannot be solved, and the audiovisual recording is not mandatory by law, the procedural act may be continued with continuous audio recording instead. If the procedural act does not tolerate any delay, the procedural act may be started or continued even without any kind of recording.<sup>60</sup>

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<sup>53</sup> CCP, Article 120(1)

<sup>54</sup> CCP, Article 125(1)

<sup>55</sup> CCP, Article 125(2)

<sup>56</sup> CCP, Article 213(4)

<sup>57</sup> CCP, Article 358(5)

<sup>58</sup> MoJ Decree 12/2018., Article 57(2)

<sup>59</sup> MoJ Decree 12/2018., Article 57(2)

<sup>60</sup> MoJ Decree 12/2018., Article 57(4)

In those cases where the recording is mandatory, but the procedural act could not be recorded due to technical problems, or the recording does not meet the respective requirements, the non-recorded parts of the procedural act shall be repeated to the extent necessary.<sup>61</sup>

### 2.3. Availability of audiovisual recordings to the person concerned

According to the CCP, in the case of the audio or audiovisual recording of interrogations, the recording is considered part of the case file submitted to the prosecutor.<sup>62</sup> The CCP prescribes that access to all case materials – including audio and audiovisual recordings – shall be ensured **upon request by the defendant and the defence counsel after the interrogation of the defendant.**<sup>63</sup> The court, the prosecution or the investigating authority provides access to any case material by allowing its examination; by providing information or disclosure about the contents of the material, in case there is a motion requesting so, or an approval has been given; by allowing the party to copy or photograph the material for their own use; by serving the material, the material's copy or resumé prepared by the court, the prosecution or the investigating authority; or in any other manner regulated in an act of law.<sup>64</sup> MoJ Decree 12/2018. sets forth **electronic access as one of the "other manners" referred to by the CCP:** according to the MoJ Decree, the court, the prosecution and the investigating authority may also provide access to the materials of the case through ensuring electronic access to the case materials – including through an online platform to be developed for this specific purpose – if the required technical preconditions are in place.<sup>65</sup> **Electronic access applies also to audiovisual recordings of interrogations.** Although the CCP sets forth that access to the case materials has to be provided only upon a request by the defendant and the defence counsel, it also prescribes that all participants being present at the interrogation recorded have to be informed about when and where they can watch or listen to the recording, within eight days after the completion of the procedural act.<sup>66</sup> Restricting access to case materials 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: a complaint may be submitted against the decision within eight days and if the access is still denied, further judicial review may be requested in other eight days.<sup>67</sup>

## 3. Statistical information

### 3.1. The number and the audiovisual recording of police interrogations

In order to get the most accurate picture about the practice, we intended to supplement the information gathered from the interviews through submitting data requests to the National Police Headquarters about the audiovisual recording of interrogations. According to their response, in 2017, police interrogated suspects 166,825 times, and interrogated witnesses and victims 460,116 times. The number of interrogations audiovisually recorded and the data on the categories of persons initiating the audiovisual recording was not disclosed by the National Police Headquarters: according to their response, prior to 1 July 2018 this information was not recorded in their case management system, and because of that providing the data would require them to review the case files one by one, which would entail disproportionately excessive costs for them. Between 1 July 2018 and 30 September 2018, the police conducted 100,417 interrogations nationally, and they established in 1,776 of those instances, thus, in around 2% of the cases, that the person interrogated requires special treatment. As discussed above, according to the CCP, the proceeding authority "may" audiovisually record the procedural acts involving persons requiring special treatment, however, the law makes audiovisual recording obligatory only with regard to certain groups of persons requiring

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<sup>61</sup> MoJ Decree 12/2018., Article 57(5)

<sup>62</sup> CCP, Article 360(5)

<sup>63</sup> CCP, Article 100

<sup>64</sup> CCP, Article 100(4)

<sup>65</sup> MoJ Decree 12/2018., Article 27(1)

<sup>66</sup> CCP, Article 360(7)

<sup>67</sup> CCP, Articles 369 and 374

special treatment.<sup>68</sup> Accordingly, it may be presumed that some of these interrogations were recorded audiovisually. Even though there are no data available as to the number of audiovisually recorded interrogations, the above statistical data is telling in the sense that it shows that the need for special treatment is established in only a handful of criminal procedures launched under the new CCP, and, accordingly, the proceeding authorities order the audiovisual recording of interrogations only in a rather low proportion of the interrogations.

### 3.2. Devices used for the audiovisual recording of interrogations

In order to comply with legal provisions of the new CCP, which entered into force on 1 July 2018, investigating authorities established interrogation rooms suitable for audiovisual recording. These new interrogation rooms comply with the requirements prescribed by the law for the special interrogation rooms used for the interrogation of suspects or witnesses under 14 years of age<sup>69</sup> and of victims requiring special treatment;<sup>70</sup> with the requirements pertaining to establishing, operating and monitoring the use of special interrogation rooms in police units for conducting procedural acts that involve a person requiring special treatment; and with the requirements concerning the interrogation rooms established for the purposes of remote hearings via a telecommunication device.<sup>71</sup>

On 1 September 2018, there were altogether 4,184 rooms in police units in the country which were regularly or at least occasionally used for the purposes of an interrogation. On 1 September 2017, there were 25 interrogation rooms in the country where audiovisual recording was possible in accordance with the CCP, while on 1 September 2018 this number was 202. Thus, prior to the new CCP coming into force, only less than 1% of the rooms used for interrogations were equipped with a so-called "*permanently installed camera*". However, after the new CCP came into force, and in line with the provisions of MoJ Decree 13/2018.,<sup>72</sup> the number of rooms used for interrogations where a camera is installed in a way that it can be operated in line with the legal requirements, i.e. the number of interrogations rooms where interrogations can be audiovisually recorded in accordance with the legal requirements set forth by the CCP, has significantly increased. The table below shows that while before the change in the legal framework, many counties entirely lacked interrogation rooms suitable for audiovisual recording in compliance with the legal requirements, the situation in the counties which were disadvantaged in this regard has improved, and as of 1 September 2018, all counties had at least five interrogation rooms where interrogations could be recorded in accordance with the legal provisions.<sup>73</sup>

*Number of interrogation rooms where audiovisual recording is possible in compliance with the requirements of the CCP, on 1 September 2017 and on 1 September 2018, broken down by counties*

| <b>Police unit</b>                              | <b>1 September 2017</b> | <b>1 September 2018</b> |
|---|-------------------------|-------------------------|
| Airport Police                                  | 0                       | 1                       |
| Riot Police                                     | 0                       | 6                       |
| Somogy County Police Headquarters               | 0                       | 8                       |
| Nógrád County Police Headquarters               | 0                       | 7                       |
| Vas County Police Headquarters                  | 0                       | 7                       |
| Zala County Police Headquarters                 | 0                       | 5                       |
| Fejér County Police Headquarters                | 0                       | 7                       |
| Baranya County Police Headquarters              | 1                       | 7                       |
| Bács-Kiskun County Police Headquarters          | 1                       | 9                       |
| Békés County Police Headquarters                | 1                       | 9                       |
| Borsod-Abaúj-Zemplén County Police Headquarters | 1                       | 12                      |

<sup>68</sup> CCP, Articles 87–89

<sup>69</sup> Decree 34/2015. (XI. 10.) of the Minister of Justice on Establishing and Monitoring Rooms in Police Units for Interviewing Defendants and Witnesses under 14 Years of Age and Victims Requiring Special Treatment

<sup>70</sup> MoJ Decree 13/2018.

<sup>71</sup> MoJ Decree 12/2018., Article 45–54

<sup>72</sup> MoJ Decree 13/2018., Article 2(2): "The Budapest Police Headquarters and the county police headquarters shall ensure that at least one special room is established in their jurisdiction and that it is suitable for continuous use."

<sup>73</sup> Response of the National Police Headquarters to the HHC's freedom of information request, 8 February 2019, no. 29000-197/5- 34/2019.

|   |   |    |
|---|---|----|
| Csongrád County Police Headquarters               | 1 | 8  |
| Hajdú-Bihar County Police Headquarters            | 1 | 9  |
| Heves County Police Headquarters                  | 1 | 7  |
| Jász-Nagykun-Szolnok County Police Headquarters   | 1 | 9  |
| Komárom-Esztergom County Police Headquarters      | 1 | 9  |
| Szabolcs-Szatmár-Bereg County Police Headquarters | 1 | 10 |
| Veszprém County Police Headquarters               | 1 | 9  |
| Budapest Police Headquarters                      | 2 | 31 |
| Győr-Moson-Sopron County Police Headquarters      | 2 | 8  |
| Pest County Police Headquarters                   | 4 | 18 |
| Tolna County Police Headquarters                  | 6 | 6  |

After the new CCP came into force, 186 "remote hearing rooms" were established, which allow presence at procedural acts via a telecommunication device, and at the same time are suitable for the audiovisual recording of interrogations of defendants and witnesses present personally in line with the legal provisions. However, the differences between the counties in terms of the number of permanently installed cameras remain significant, which results in territorial differences in terms of ensuring procedural rights. The average number of permanently installed cameras is 9. The county with the lowest number of installed cameras is Zala, with five permanently installed cameras. In addition, the conditions of audiovisual recording has been ensured via hand-held cameras in rooms which were used for interrogations also earlier. For that purpose, the National Police Headquarters purchased and distributed altogether 512 sets of cameras in 2018. The information available to the HHC was limited in terms of the types of cameras used at interrogations. The National Tax and Custom Administration's Department of Criminal Affairs (Central Department of Investigations), where the HHC conducted one of its research interviews, and the National Tax and Custom Administration's Central Hungary Department of Criminal Affairs currently use mobile devices. There, the fixed systems will be installed in 2019. The devices used are the following: ANGEKIS HD videoconferencing camera, MARSHALL CV345CS camera.



*The mobile devices used at the National Tax and Custom Administration's Department of Criminal Affairs (Central Department of Investigations) and its Central Hungary Department of Criminal Affairs for the audiovisual recording of interrogations*

### 3.3. The cost of audiovisual recordings

The average architectural cost of newly establishing a remote hearing room was 1,001,210 HUF (approx. 3,100 EUR), while the technical installation costs amounted to net 8,548,134 HUF (approx. 2,670 EUR). Purchasing one camera set for an already existing interrogation room cost net 165,020 HUF (approx. 515 EUR). Accordingly, the National Police Headquarters spent a considerable sum, nearly 1.8 billion HUF (approx. 5,624,000 EUR) on establishing rooms and purchasing equipment allowing for the audiovisual recording of interrogations in a wider scope, nationwide. Furthermore,

they spent an additional 84,490,240 HUF (approx. 264,000 EUR) on purchasing devices which make audiovisual recording possible in already existing interrogation rooms.<sup>74</sup>

## 4. The practice of the audiovisual recording of interrogations

### 4.1. Research method

Empirical data was collected through research interviews. According to the original plans, interviews were to be conducted with experts from the National Police Headquarters, the Chief Prosecutor's Office, and the National Judicial Office, along with attorneys representing defendants in criminal procedures. However, the National Police Headquarters, the Chief Prosecutor's Office and the National Judicial Office refused to cooperate with the HHC in the research and refused to authorize the interviews. Finally, the HHC conducted research interviews with eight defence counsels, two prosecutors, and a staff member of the National Tax and Custom Administration's Department of Criminal Affairs (Central Department of Investigations), between August and December of 2018. The interviewees have been working in their profession for 20 years in average, and the interviewee with the longest experience has been working in the field for 42 years. All of the interviewees participated in the research in a well-prepared and constructive manner.

The HHC used standardized questionnaires for the interviews, but interviewees were able to elaborate on their experiences in detail. Research questions pertained to interrogations of suspects and trial hearings conducted in the preceding year. In the framework of the research it was also examined to what extent the new and more precise rules of the audiovisual recording of interrogations as included in the new CCP changed the practice of the audiovisual recording of interrogations. Interviewees were asked primarily about their experiences as to the interrogations audiovisually recorded as per the new CCP in force since 1 July 2018, and their experiences with regard to such interrogations were of course limited, but they were also asked about their relevant experiences from the period preceding the new CCP. It was made clear in all the instances which period the responses refer to.

### 4.2. The recording of interrogations and the ordering of audiovisual recording

#### 4.2.1. *The methods of recording the interrogations*

Both defence counsels and prosecutors were of the view that **the written minutes of police interrogations are usually prepared in a summary fashion, and verbatim transcripts are rare**. If the interrogation is recorded audiovisually, a verbatim transcript has to be specifically requested from the authority. According to the experiences of the respondents, taking minutes verbatim is more common at the courts than at the police. In cases of special importance, an audio recording is prepared upon the ex officio decision of the judge or upon the request of the defence counsel, on the basis of which a verbatim transcript may be prepared. Typically, verbatim minutes are also being edited. In the view of the majority of the defence counsels interviewed, this is not a problem, provided that the minutes record what was said with adequate precision. **According to the experiences of prosecutors and defence counsels, the quality of minutes varies greatly. Some defence counsels emphasized that they often have to request that the summary minutes are supplemented, because they are not thorough enough.** The interviewee representing the investigating authorities told the HHC that some of the officers have typewriting experience and usually prepare verbatim minutes simultaneously to the interrogation. At the same time this detective also confirmed that the general practice at the investigating authorities is to prepare summary minutes. It is a general problem both with regard to the police and the courts that typically, **questions are not included in the minutes, and only the responses given by the subject of the procedural act are recorded, even though recording the questions would be an important precondition for being able to review the lawfulness of the interrogation.** One of the prosecutors participating in the research identified it as a problem that **the deficiencies with regard to the quality of summary minutes are very rarely discovered since there is no**

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<sup>74</sup> Response of the National Police Headquarters to the HHC's freedom of information request, 8 February 2019, no. 29000-197/5- 34/2019.



**audiovisual recording or verbatim transcript available about the interrogation to which the summary minutes could be compared to.**

#### *4.2.2. Ordering the audiovisual recording of interrogations*

Under the old CCP, authorities used audiovisual recording only in complex cases, to record long and detailed confessions, and audiovisual recording was made only in an insignificant proportion of the cases. As discussed in Chapter 2.1. of the present country report, the rules of the old CCP did not include as detailed provisions as the current rules regarding the decision-making on audiovisual recording and on how the recording should be done. The lack of rules on how the recording should be made raised questions with regard to the enforcement of procedural rights, and left more room for potential official misconduct, as also demonstrated by the case below.

#### **Case study 1 – The role of audiovisual recordings in protecting the lawfulness of the confession**

One of the defence counsels participating in the research shared details of a criminal case, which received wide media attention, and in which an audio recording made by the defendant's relative at the trial showed that the proceeding judge suspended the (written) recording of the trial while the accused was making a confession. As a result, long minutes of the substantive confession were missing from the written record. Complex medical questions played a significant role in the case, and special emphasis had to be put on how and when certain medical interventions were made – an aspect which the accused covered in detail in the confession. However, as a result of suspending the written recording, significant parts of the evidence were missing from the record. Even though the conduct of the judge was unlawful, the defence did not complain about it for tactical reasons, but motioned for supplementing the minutes of the trial by attaching the private audio recording, which request was complied with. The judge in question was not called to account officially, but he left the judicial profession voluntarily later. In another, similar criminal case of the same defendant the investigating authority made an audiovisual recording about the confession ex officio – it cannot be excluded that this was done with a view to the misconduct earlier. This case demonstrates the importance of regulating the making of the audiovisual recordings in detail, with a view to prevent official misconduct, and also shows that audiovisual recordings also serve the protection of the proceeding authorities.

Experiences of the respondents vary as to how often interrogations are recorded audiovisually. **Audiovisual recording is more common at the courts, and is done mostly upon the motion of the defence counsel, in order to record confessions.** Defence counsels were unanimously of the view that at police stations, **not more than 5% of all the interrogations is recorded audiovisually.** Defence counsels interviewed had experiences with regard to the audiovisual recording of procedural acts involving defendants and witnesses. They were unanimously of the view that since the new CCP entered into force, **the police and the courts order the audiovisual recording of interrogations and hearings only if that is mandatory under the CCP, i.e. if the procedural act involves a minor less than 14 years old,<sup>75</sup> or if the procedural act is conducted via a telecommunication device.<sup>76</sup>**

In the instances when the law allows for audiovisual recording, or sets out that an audiovisual recording should be made if possible, i.e. **if the need for special treatment is established or the person to be interrogated is less than 18 years old, the proceeding authorities usually do not order the audiovisual recording.** Decisions establishing that a person requires special treatment are also rare: "*what is typical is aiming to spend as little energy on cases as possible and aiming for simplicity*" (defence counsel, Budapest). **There are two groups requiring special treatment in relation to whom authorities are better prepared and sometimes establish that these persons require special treatment: minors under 18 years old and persons who**

<sup>75</sup> CCP, Article 88(1)d)

<sup>76</sup> CCP, Article 125(2)

**are officially mentally disabled.** Other interviewees were of the view that it depends on the type of the underlying case and the attitudes of the police headquarters how they proceed with regard to the institution of special treatment. Some police units tasked with the protection of children and youth establish the need for special treatment more often, while other units never establish it. Some interviewees were of the view that district and countryside police headquarters are less well-prepared in this regard. In the view of the defence counsels interviewed, **it would be necessary for the prosecution and the courts to exert control and actively intervene in this regard in order to achieve that the need for special treatment is established more often.** Defence counsels mentioned as a problem that nor the police, neither the prosecution or the courts consider it their responsibility to establish the need for special treatment.

According to the experiences of some defence counsels, the investigating authority **orders audiovisual recording** not as much with a view to the special treatment needs of the persons involved, but rather **on the basis of the number of defendants and the nature of the underlying criminal offence. Thus, audiovisual recording is more common with regard to complex criminal offences, involving many persons and severe prospective punishments.** Furthermore, according to the experiences of the prosecutors, even though it is optional under the CCP, **a significant proportion of the reconstructions of events are audiovisually recorded upon the motion of the prosecution.** Prosecutors also shared, and it was corroborated also by some defence counsels, that **a high proportion of on-site investigations is also recorded audiovisually.** Defence counsels deem the role of the camera especially important with regard to on-site interrogations, since it may record important circumstances in relation to the confession. One of the defence counsels shared the case below, where the audiovisual recording of the on-site interrogation helped to uncover the influencing techniques used by the authorities and to resolve the contradictions between the confessions of the suspects.

**Case study 2 – On how the audiovisual recording of an on-site interrogation counterbalances undue influence by the authorities, and refutes or confirms the credibility of confessions**

In a case where the one-site investigations of several defendants, who were in a conflict of interest with each other, were audiovisually recorded, the recording proved that **the investigating authority used guiding questions.** If only written minutes would have been prepared, questions posed by the authorities would not have been included in that, and it is likely that the minutes would have been drafted in a way that the guiding nature of the questions would not have been revealed. In addition, the audiovisual recording resolved the contradictions between the confessions. On site, the following question was asked from the defendant by the authorities: *"From which direction did you approach the railroad crossing?"*, even though no railroad crossing had been mentioned in the case before, and they only talked about an industrial area. The fact whether the defendants have been at the railroad crossing or not was significant because authorities found an object associated with committing the criminal offence there. The investigating authority also gave the following instruction: *"Show me a place in this street where defendant X.Y. could have hidden the gloves."* After watching the audiovisual recording, it became clear from the questions and the responses that the person interrogated did not know where they are, did not determine the direction of where they were going, and did not mention any glove either. The person interrogated began his response to the above question by saying that *"I do not know where we are"*. By contrast, the written minutes, using a common term, stated that *the authorities reached the street where X.Y. hid the gloves on the basis of the directions provided by the suspect.* **The audiovisual recording proved that the defendant told the truth when he claimed at the trial that he did not give the directions for that particular street, and that he never said that X.Y. threw away a glove.** Furthermore, the case shows that the differences between the meaning of synonymic words may also have significance: while according to the audiovisual recording it was said that X.Y. *"threw away"* something, the written minutes said that X.Y. *"hid"* an object. The audiovisual recordings also revealed important circumstances in relation to the contradiction between the confessions. It was a problem in the case that the suspects could not have reached the scene of the criminal offence from where they were caught on camera earlier in the timeframe available. Only one suspect said that they were present at the scene of the crime,

while the other suspects denied this. The suspect pleading guilty said that they reached the scene by car. However, the audiovisual recording about the on-site interrogation made it clear that the suspects could not have reached the scene of the crime in the given timeframe by car due to construction works: parts of the respective street were closed down, and pipes laid across the road prevented crossing. Thus, the on-site interrogation recorded affirmed that the suspect who made a plea deal was distorting the facts. This could not have been uncovered on the basis of written minutes.

According to the experiences of the defence counsels and the prosecutors participating in the research, **the quality of the equipment used for audiovisual recordings used to vary greatly, and typically, the devices used were outdated.** One of the prosecutors said **that it still occurs today that at the trial an old cassette recorder is used for audio recording.** The new CCP and its bylaws brought significant change in the practice of audiovisual recording. Earlier, it was not regulated in detail what the recordings shall capture. Typically, only one camera was used, focusing on the person interrogated. In contrast, the new CCP and its bylaws regulate the making of an audiovisual recording in detail.<sup>77</sup> According to the limited experiences of defence counsels from after the period the new CCP came into force, **the camera is usually operated by the person conducting the interrogation, or by a criminal technician, who is also a member of the investigating authority.** Audiovisual recording is more typical, but if only an audio recording is made, then the audio recorder is operated by the person conducting the interrogation. At the police and the prosecutor's office, it is more common that the camera is operated by the interrogator, while at the courts involving a criminal technician is the general practice. The CCP and its bylaws do not contain precise rules on when the audiovisual recording shall commence and end. The law only says that **the recording shall be continuous, and shall record the given procedural act without interruption.**<sup>78</sup> The prosecution and the investigating authority may interrupt any procedural act for a short time "for important reasons", and for the period of that both the continuous audio recording and the audiovisual recording may be interrupted. The defence counsels, the member of the investigating authority and the prosecutors interviewed were unanimously of the view that **if an audiovisual recording is made, everything is recorded, including the part where the defendants are informed about their rights.** Experiences show that **audiovisual recordings show all the persons present at the interrogation,** in line with the respective legal provisions included in MoJ Decree 12/2018. Even though MoJ Decree 12/2018. provides for the use of a second, hand-held camera only discretionally, according to the experiences of the defence counsels, the prosecutors and the member of the investigating authority, if an audiovisual recording is made then it is usually the practice to use a second, mobile camera as well, which typically records only the person interrogated. The interviewees were content with the technical preparedness of the persons making the recordings. **The level of the technical facilities and the quality of the recordings varies greatly.** MoJ Decree 12/2018. prescribes that an adequate number of microphones shall be installed to continuously record the voices of all participants, and, if possible, separate microphones shall be provided for the person leading the procedural act and the person making the confession.<sup>79</sup> However, **according to the experiences of the interviewees, there is usually only one microphone, and there are often problems with the volume and the understandability of the audio.** Recordings are usually of mediocre quality. It even occurred in a case of an interviewee that the audio was such a poor quality that certain parts could not be understood at all. This may be a problem also if for example an expert is appointed in the case, who provides an opinion based on the audiovisual recording.

#### *4.2.3. Providing information about the right to motion the audiovisual recording*

The information sheet about the rights of the defendant as included in the central case management system of the police (called RoboCop NEO), which is read out loud by the member of the investigating authority at the beginning of the interrogation, does not contain any information about the possibility of audiovisual recording. The HHC recommended in the course of the drafting process of the new CCP

<sup>77</sup> MoJ Decree 12/2018., Articles 55–56

<sup>78</sup> CCP, Article 358(5)

<sup>79</sup> MoJ Decree 12/2018., Article 56(6)

that the law should prescribe that persons interrogated shall be informed that suspects, defence counsels and victims may put forth a motion for audiovisual recording.<sup>80</sup> However, providing this information was not made obligatory by the CCP. **According to the experiences of the defence counsels, defendants are typically not informed by the authorities that they can put forth a motion for audiovisual recording if they advance the costs, and so defendants may receive information about this only from their defence counsel.** This statement is strengthened by the following case study shared by one of the attorneys interviewed, which centres on a suspect who was a minor.

### **Case study 3 – The lack of providing information on the right to audiovisual recording**

The defendant, who was a minor (17 years old), was suspected with a drug offence after caught in the act at a music festival. No special treatment was ordered in the case. His first, *on-site interrogation*, which was conducted after he was caught in the act and was arrested, was conducted in the absence of his legal representative and his defence counsel, who were not even informed about the interrogation. The content of this interrogation was only included in a police report. According to the suspect, who was, accordingly, alone at the interrogation, the police did not inform him that he may motion the audiovisual recording of the interrogation. The police report only included the fact that the interview was not audiovisually recorded. At his later interrogation as a suspect, where his retained defence counsel and his legal representative were already present, the police did not inform him either that an audiovisual recording may be made if the need for special treatment is established, only that the suspect could have motioned this, provided that the defence advances the costs. (See the rules in Chapter 2.2.1. on the advancement of costs.)

### **Case study 4 – Audiovisual recording at the hearing of a child**

One of the defence counsels participating in the research acted as a guardian of a child being interviewed as a witness. The interview was conducted in a special interrogation room designed for interviewing children, at the police headquarters of a county seat. Before starting the recording, the member of the investigating authority explained to the child why the camera is necessary. The camera was operated and started by this officer, who was also the one preparing the summary minutes. The minutes included the time when the recording was started and terminated. Before starting the recording, the officer only provided general information, and all relevant information on procedural rights was provided after the audiovisual recording has been started.

Several interviewees encountered instances when they **motioned for an audiovisual recording of the trial as provided for by the law, but the court was not able to ensure the technical background for the recording in the few days available, and so the trial hearing was postponed.** An interviewee also reported a case where **after a similar motion the trial hearing was held without it being audiovisually recorded, and then the second instance court failed to assess this circumstance and failed to repeal the first instance judgment,** even though according to the understanding of the defence counsel it constituted a procedural violation not to make an audiovisual recording in spite of the defence counsel's related motion.

#### 4.3. Access to the audiovisual recording

Prosecutors and judges may access the audiovisual recordings through the online platform established on the basis to the CCP, called Central Media Storage. According to their experiences, they receive the recordings together with the case file. They sometimes experience technical difficulties in relation to the Central Media Storage, but these are typically solved promptly. **Prosecutors reported that if**

<sup>80</sup> *Comments of the Hungarian Helsinki Committee in Relation to Certain Preparatory Studies for the Codification of the New Code on Criminal Procedure [A Magyar Helsinki Bizottság megjegyzései az új büntetőeljárási törvény kodifikációjának egyes előkészítő munkanyagaihoz]*, 22 December 2015, [https://www.helsinki.hu/wp-content/uploads/MHB\\_velemenye\\_Be\\_kodifikacio\\_234\\_munkanyag.pdf](https://www.helsinki.hu/wp-content/uploads/MHB_velemenye_Be_kodifikacio_234_munkanyag.pdf), p. 8.

**there is a recording available, then they usually watch it. Their reason for that is that the questions posed by the police are only included in the audiovisual recording – as we discussed before, the questions usually are not included in the written minutes of the interrogation. Furthermore, audiovisual recordings often reveal important, non-verbal information as well. According to the experiences of the defence counsels, judges watch the recordings only in exceptional cases, when there is a disagreement between the investigating authority and the defence, upon the motion of the defence.**

Rules on access by persons subject to the procedure and by defence counsels are included in the CCP and MoJ Decree 12/2018.<sup>81</sup> **Defence counsels unanimously reported that the only record they receive automatically is the written, summary minutes. They have to submit a separate request to access the copies of the audiovisual recordings every time,** and they still receive the recordings on a CD, a DVD, or on another electronic storage device – just as it was the case under the old CCP. Some defence counsels reported that **acquiring copies of the recordings is often an onerous process, and copies are produced with delay.** If the recording was made due to the ex officio decision of the proceeding authority, the defence counsel can access the recording for free. Defence counsels mentioned as a further problem that the technical devices of the police and of the courts are not always compatible. The courts' system is not always able to play the recordings made at the police stations, and the technical staff has to be involved to convert the recordings, which is time-consuming as well. Defence counsels also reported that the judicial review of decisions by the investigating authority restricting the defence's access to certain case materials is rather slow in practice, and it can take even two or three months for the investigation judges to reach a decision.

**Access to audiovisual recordings by detained defendants often poses a problem.<sup>82</sup> Defence counsels may not bring with them any device to the consultation room in detention facilities which are capable of displaying the recordings. No such devices are available in the consultation room itself either.** In the penitentiary institutions there are only a few computers available for such purposes, and they are often outdated. As a result, penitentiary institutions are not able to handle electronic case files or are only able to handle them with great difficulty, and this applies also to audiovisual recordings. **This situation may violate the right to an effective defence, and the legal obligation to provide an opportunity to prepare for the defence.**

#### 4.4. Audiovisual recordings and the admissibility of evidence

According to the Article 167(5) of the CPP 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. However experiences of both the defence counsels and the prosecutors show, there is no consequence of the lack of audiovisual recording from the point of the admissibility of evidence. The information gained on the interrogation are used as evidence even if the recording was mandatory and the authorities failed to do a recording. The experiences of defence counsels vary as to whether judges take the recordings or the lack thereof into account upon a motion by the defence counsel when deciding on the admissibility of evidence or not. Interviewees mentioned examples for both approaches. In one of the cases the transcript of the interview of a victim affected by a criminal offence of a sexual nature, who was a minor, did not match the audiovisual recording. The judge watched the recording – upon the motion of the defence counsel –, and concluded that the interview did not comply with the rules of the CCP, and so excluded it as evidence from the procedure due to the difference between the two kinds of records. Another defence counsel reported a case in which authorities failed to establish the need for special treatment in the case of an illiterate defendant, and there was no appointed defence counsel present at his first interrogation. The defendant was not informed about the possibility to request an audiovisual recording, although, due to his social situation, he probably would not have been in the position to

<sup>81</sup> The respective rules are included in Article 100 of the CCP and Articles 15–27 of MoJ Decree 12/2018.

<sup>82</sup> This was also pointed out by an earlier research of 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. 53. Available at: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Article\\_7\\_research\\_report\\_2017\\_EN.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf).

advance the costs of the recording, and, without an accessible explanation, he presumably would not have understood either what role the recording could play in protecting his rights. This illiterate defendant confessed to committing the criminal offence at the first interrogation, and even though a defence counsel was present at the further procedural acts, without an audiovisual recording it was impossible to ascertain the circumstances under which the first interrogation was conducted, whether the defendant was fully informed about his rights, and whether he actually understood them. Since establishing the need for special treatment was discretionary in his case, the lack of an audiovisual recording had no consequence in terms of the admissibility of the confession of guilt. The practice described in this case violates Order no. 41/2018. (VII. 11.) of the National Police Chief on the Rules of the Application of Technical Devices for Audiovisual Recording as Established by the Code of Criminal Procedure. This order sets out that beyond the instances established by the CCP,<sup>83</sup> it is obligatory to make a continuous audiovisual recording also about the procedural acts involving illiterate persons.<sup>84</sup>

## 5. Attitudes regarding the audiovisual recording of interrogations

### 5.1. The necessity of audiovisual recording

**Defence counsels interviewed were divided as to the relevance of audiovisual recordings. Overall, they thought that it has more advantages than disadvantages. They agreed that audiovisual recording is crucial for procedural acts where there is no defence counsel present.** In these instances, the recording may help in ascertaining the lawfulness of the interrogation. Some were of the view that audiovisual recordings would show in almost 50% of the interrogations that the minutes do not precisely capture what was said. Sometimes the defence *"has to fight for each word in the minutes"* even if the defence counsel is present: *"Small differences may also have significance. E.g. whether it was said that 'I knocked him over' or that 'I pushed him'. It conveys a different message"* (defence counsel, Budapest). **In their view the audiovisual recording does not provide protection against the psychological influencing techniques used by the investigating authority outside the procedural acts.** In practice, it is not uncommon at all that there are pictures on the interrogation room's wall about the arrests made by the detective, or that officers ask questions from the defendants informally while they are escorted to the interrogation, or that the defendants are told that the authorities already have information about the criminal offence. That said, **the majority of the defence counsels agreed that the audiovisual recording itself may have a regulatory role: the fact that the written minutes can be checked against something is an incentive for producing more thorough and more precise minutes.** Furthermore, there are occasions when there is disagreement between the authority and the defence at the trial, when the defendant questions that something was actually said at an earlier interrogation in the way it is included in the minutes. This is often the result of the improper practice of authorities with regard to preparing the minutes. Audiovisual recordings may be of assistance also in these instances. In relation to that, defence counsels also said that judges often *"treat the minutes as gospel. If there is no recording, then they take it for granted that the minutes includes everything exactly as it was said"* (defence counsel, county seat).

**Many defence counsels were of the view that when a defence counsel is present, it is a sufficient guarantee of precise record-making that the defence counsel reads the minutes, and, if necessary, supplements it.** Under the CCP, defence counsels are entitled to do so: those who were present at a procedural act may request that the minutes are corrected or supplemented within eight days after the given procedural act.<sup>85</sup> One of the defence counsels said that he often dictates the minutes at the police station himself. This becomes necessary when the defendant does not communicate in a concise manner, and the police officer does not record precisely what was said.

<sup>83</sup> CCP, Articles 88(1)d), 89(4)b) and 125(2)

<sup>84</sup> Order no. 41/2018. (VII. 11.) of the National Police Chief on the Rules of the Application of Technical Devices for Audiovisual Recording as Established by the Code of Criminal Procedure, Section 11(c)

<sup>85</sup> CCP, Article 360(10)

**The majority of the defence counsels almost never request that an audiovisual recording is made. One of the reasons for that is that they regard their own presence as sufficient control, while another is that the cost of the audiovisual recording was not precisely established by the old CCP.**

**Five out of the eight defence counsels interviewed submitted that they had at least one case where they regretted that they did not request the audiovisual recording, concerning both defendants and witnesses.** For example, in one of the cases reported the confession was made at a trial hearing in a way that the person testifying was posed the same question multiple times, until he gave a response which was “accepted” by the court. The preceding questions and answers were not included in the minutes. Some are of the opinion that audiovisual recording may have a greater role in the case of complex criminal offences with many defendants, especially of economic nature. In the case of this type of criminal offence the recording may help capturing the context precisely in writing, and understanding the facts. As we noted earlier, in these cases the investigating authority also initiates audiovisual recording more often, and defence counsels put forth a motion for an audiovisual recording more often as well, especially in the trial phase.

**Almost 50% of the defence counsels interviewed were of the view that audiovisual recordings may make it more difficult for the defence to implement its strategy.** Firstly, it is possible that the defendant is in a state in the investigation phase due to which their communication is distracted and not coherent, and this can be counterbalanced by the minutes. Also, the audiovisual recording shows more of their state, which may not make a good impression in court. **It is often part of the defence strategy that the defence counsel shapes the minutes, and discusses with the representative of the investigating authority how and through what wording certain information is included in the minutes. In this way, certain elements are emphasized, while others are pushed into the background. An audiovisual recording narrows the defence’s wiggle room in this regard.**

*"If investigations would be conducted properly, the recordings would not mean additional protection. Proving guilt should happen primarily at the courts. However, this is not always the case – and it can be guaranteed by an audiovisual recording that proving guilt actually happens at the court. If the police exert undue influence, the video recording constitutes significant information. It means a guarantee for both sides, and it is also in the interests of the investigating authority. The professionalism of the investigation may be monitored [through the recording]." (prosecutor, Budapest)*

The first confession made by the suspect carries special weight in investigations: since it is harder for the suspect to prepare for it, authorities accept it as credible more than what is said in later statements. **To audiovisually record the first confession is important precisely because the stakes are the highest at that point with regard to manipulating the confession in any way. The significance of the audiovisual recording has further increased due to the conceptual change in the CCP as well, which prioritizes the interests attached to a fast, simpler and effective investigation phase.** The institutions designed to make the procedure faster (e.g. the agreement about the charges, i.e. the *guilty plea*) result that **in many instances no indictment is filed, and a smaller proportion of the cases reaches the trial phase, and so all the verbal and nonverbal momentums of the interrogation may get special significance.**

## 5.2. The significance of audiovisual recordings in relation to the enforcement of procedural rights

According to some of the defence counsels interviewed, **if the attorney is not present at a procedural act and no audiovisual recording is made, the information about procedural rights is not always fully provided.** In their view, including in the audiovisual recording the part where defendants are informed about their rights facilitates the enforcement of the right to information. Even though the lack of accessible information is not remedied by an audiovisual recording in itself, **the recording makes it possible to monitor the quality of information provided:** it becomes possible to ascertain whether the information on the procedural rights was comprehensive or not, how it was provided, and, to some extent, whether the defendant understood

it or not. In addition, the recording may put pressure on the authorities also with regard to the obligation to provide information. According to the defence counsels, **since the audiovisual recording provides the possibility of review, it may also be an effective tool in relation to ensuring the right to translation and interpretation, particularly the right to use one's native language and quality control.** The low quality of interpretation – especially from rare languages – and the lack of quality control in the present system are recurring problems.<sup>86</sup>

Both the defence counsels and the prosecutors were of the view that all in all, the new CCP brought along positive changes in terms of the audiovisual recording of interrogations. At the same time however, they are **sceptical about the efficiency of the new rules.** The defence counsels and prosecutors interviewed agreed that **since the CCP prescribes audiovisual recording in most cases only discretionally, police and judges will order it ex officio only scarcely in cases where it is not mandatory.** This view is reinforced by their initial experiences at interrogations and trials under the new CCP. It is also a counterargument against the recordings that **watching them takes a disproportionately long time.** Reviewing a verbatim transcript would be faster, but while the old CCP prescribed verbatim transcripts for audiovisual recordings, **the new CCP does not provide for preparing a verbatim transcript parallel to the audiovisual recording.** Practical experiences also confirm that if the interrogation is audiovisually recorded, only a summary minutes is prepared in written format.

**Prosecutors reported that if there is an audiovisual recording available, they typically watch it.** According to the experiences of defence counsels, preceding the new CCP, judges watched the audiovisual recordings of interrogations only in exceptional cases, and **their current caseload does not allow them to review many hours of recordings on a regular basis.** In the attorneys' view, applying audiovisual recordings more widely could put significant burden both on the authorities and the defence counsels. At the same time, they are of the view that **well-founded judicial decision-making would be facilitated if an audiovisual recording would be made also in the instances where it is prescribed by the CCP only discretionally, and a verbatim minutes would be prepared in parallel to that.** They would deem it an adequate solution if the recordings would be available in an electronic system, so that the judge can watch them if necessary.

## 6. The possibilities of broadening the use of audiovisual recording

**Since on a county level, police have already established adequate interrogation rooms and created other technical conditions, what is primarily missing to widen the scope of the audiovisual recording of interrogations in the investigation phase is the legal mandate to do so.** The technical conditions could be created also at the courts where they are currently missing. Training the staff to use the devices is not a complex task, and its cost is not significant. In order to improve the current technical conditions, the justice-related budget should be re-grouped, and potentially increased. Taking into account the significant increase in funds for investigating authorities, that new interrogation rooms suitable for audiovisual recording were established and that devices were purchased, and the obvious challenges regarding other budgetary areas in 2019 and 2020, it is not likely that the technical conditions of audiovisual recording will be further improved in the near future. Also, **achieving the desired goal, i.e. that all interrogations and interviews are being audiovisually recorded, is not realistic in the near future.** An adequate amount time should pass after the coming into force of the new CCP for stakeholders being able to summarize the practical experiences under the new rules and to draw well-founded conclusions from that, even if it is hard to raise any arguments against audiovisual recording from the aspect of the protection of the right to fair trial other than budgetary considerations.

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<sup>86</sup> The right to interpretation and translation and the problem of the lack of quality control in Hungary was covered in detail by one of the HHC's earlier researches. See: András Kristóf Kádár – Nóra Novoszádek – Dóra Szegő: *Inside Police Custody 2 – Country report for Hungary.* Hungarian Helsinki Committee, Budapest, December 2018, Chapter 2.8. Available at: [https://www.helsinki.hu/wp-content/uploads/IPC\\_Country\\_Report\\_Hungary\\_Eng\\_fin.pdf](https://www.helsinki.hu/wp-content/uploads/IPC_Country_Report_Hungary_Eng_fin.pdf).



**However, applying audiovisual recordings more widely where technical conditions are ensured and where the law provides for it in a discretionary manner is a realistic short-term goal. The goal is to achieve that, beyond the cases where recording is mandatory, all the interrogations involving persons requiring special treatment and minors above 14 are recorded.** This could be accomplished with the resources currently available and would not require significant funds.

To achieve all this, it should be ensured that identifying persons requiring special treatment is done in an adequate manner, and that police officers, prosecutors and judges vested with this task have access to trainings providing them with the background knowledge necessary to identify persons requiring special treatment. In parallel to that, it should be made clear by the provisions of the CCP that the failure by the authorities to establish the need for special treatment in the case of a person who would need it constitutes a substantive violation of the law which has an effect on the merits of the case, and so it is an obstacle to pressing grounded charges. This would be an incentive for the prosecution and for the police to examine the potential need for special treatment more thoroughly, and to improve the quality of their examination.

The CCP should explicitly set out that if the law prescribes that the interrogation shall be audiovisually recorded, failing to do so shall result in the minutes about that procedural act being inadmissible and shall be excluded as evidence.

It is a strong argument for the necessity of the audiovisual recording of interrogations that if there is a recording, no doubts can be raised later on with regard to the validity of precisely documented, lawful procedural acts (or, at least, raising doubts has a very little chance of success). This reasoning may be convincing also for the investigating authorities and the prosecution.

A further goal is to widen the scope of audio recording at trial and at public court hearings, which would not require any particular financial resources, and serves the enforcement of both the procedural and the substantive justice.

## **7. Recommendations**

Generally, it may be stated that it violates the principle of the equality of arms if the audiovisual recording to be made upon the motion of the defendant is not free of charge. It was established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as early as 2013, in relation to the prevention of police ill-treatment, that the Hungarian situation is problematic in this regard.<sup>87</sup> It is easy to acknowledge that as a main rule, in practice an audiovisual recording is still made only if it is mandatory, if it is ordered by the investigating authority and the prosecution, or if the defendant advances the costs. With this in mind, taking into account the requirements of the Access to a Lawyer Directive and what we described in the preceding chapter, we put forth the following recommendations.

### 7.1. Recommendations to widen the scope of audiovisual recording

**In the view of the HHC it would be necessary to make audiovisual recording mandatory in a wider scope of cases, i.e. in the instances when it is currently only recommended by the CCP as to be prepared “if possible”.** Therefore, the HHC recommends the amendment of the law, along the following lines:

- The **audiovisual recording of interrogations of persons under 18 should be mandatory**, irrespective of the person’s role in the procedure, thus, in the case of both defendants and witnesses.

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<sup>87</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*, CPT/Inf (2014) 13, Strasbourg, 30 April 2014, § 14.

- The **audiovisual recording of the interrogation of every person requiring special treatment should be mandatory.**
- Audiovisual recording, or **at least audio recording should be mandatory for procedural acts involving an interpreter**, in order to ensure that if doubts arise as to the quality of interpretation, proceeding authorities are able to review it later on.
- In cases where audiovisual recording is mandatory, the law should explicitly set forth that **evidence acquired as a result of procedural acts conducted in violation of this obligation shall be inadmissible.** Even though the CCP includes a general rule on the admissibility of evidence,<sup>88</sup> as it was demonstrated, the assessment of failing to audiovisually record a procedural act is not uniform in practice.
- The audiovisual, but at least the audio recording of the trial hearings should be prescribed in parallel with producing written minutes, with the exception of closed judicial sittings.
- As an interim solution, until the national infrastructure for audiovisual recording is fully established, it could be considered to allow officials to use mobile phones capable of audiovisual recording in an adequate quality.

## 7.2. Recommendations to ensure equal access to the possibility of audiovisual recording

In order to ensure compliance with the principle of equal access, the HHC recommends the amendment of the law, along the following lines:

- **Authorities should be obliged to provide information** about the possibility to motion audiovisual recording **at the beginning of procedural acts, as part of providing information about the defendant's procedural rights and obligations.**
- The current system, based on the advancement of costs, puts indigent defendants, who would even be eligible for a total exemption from bearing the costs of the criminal procedure,<sup>89</sup> in an especially detrimental situation, since it may occur that indigence is officially established only after the (first) interrogation. Accordingly, **the requirement to advance the costs** when putting forth a motion for an audiovisual recording **should be abolished.**
- **Verbatim transcripts should be obligatory in parallel to audiovisual recordings**, taking into account that verbatim transcripts can be reviewed by the prosecution and the judges quicker, and that under the present circumstances detained defendants can access written minutes easier in penitentiary institutions than audiovisual recordings.

## 7.3. Recommendations regarding the access to recordings by defence counsels and defendants

Research results show that accessing electronic data is still haphazard, and is highly dependent on the circumstances. With a view to this, the HHC recommends the following:

- In the case of audiovisual recordings, it should be obligatory and automatic to provide defence counsels access to these in an electronic format or on a storage device. In relation to this, allowing defence counsels restricted access to the Central Media Storage (available for the police, the prosecution and the courts) should be considered.

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<sup>88</sup> CCP, Article 167(5)

<sup>89</sup> CCP, Article 75

- It should be made generally possible in penitentiary institutions for defendants to access audiovisual recordings together with the defence counsel, under adequate circumstances, in confidence, subject to the adequate security control.