

Practical problems of electronic contact in the criminal proceedings in Hungary

Introduction

The Act XC of 2017 on criminal proceedings (Criminal Procedure Code, hereinafter referred to as: CPC) has significantly altered criminal procedure in its structure and its content. The Act XIX of 1998 (hereinafter referred to as: old CPC) followed the earlier (socialist) criminal procedure laws (in contrast with basic concept), the traditional investigation - (intermediate procedure) – governed the criminal procedure within a judicial procedure system. Effective laws however allow for a lot more leeway for criminal procedures based on agreement, respectively confession by the defendant (acceptance of the facts) enable a number of simplifications. Through this, the progression of the criminal procedure (possible outcome) is a lot more complicated and diversified as in the earlier linear procedure:

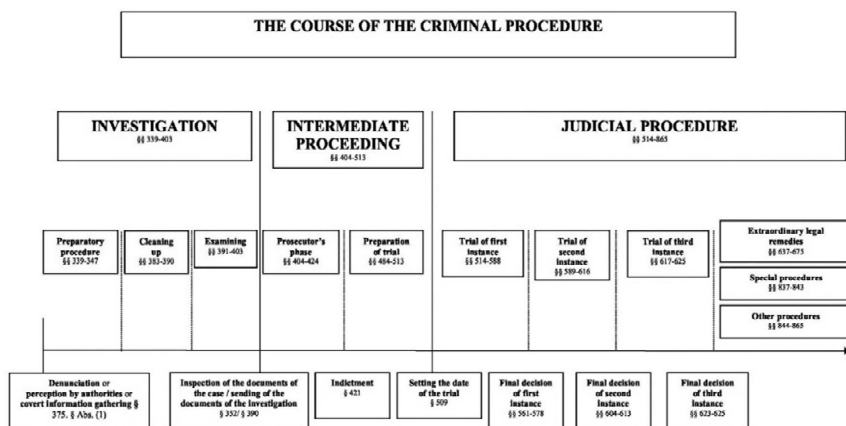


Figure 1: Progression of the criminal procedure

As can be seen from the illustration, the investigation in Hungary can consist of three stages:

- 1) preparatory procedure,
- 2) cleaning up and
- 3) examining¹.

The CPC makes electronic contact widely available (mandatory). This concerns primarily the defence counsel and that is the reason for its significance in the course of the examining².

Main rules of electronic contact

The Law on E-administration (Act CCXXII of 2015) § 17. Subsession 1 regularizes the conformity of declarations of electronic administration. There are two conditions:

- electronic identification of the declarant is done adequately (with electronic identification service, adequate electronic identification instruments (eIDAS) or by electronic identification service that is pronounced suitable by the body ensuring electronic administration) and
- it is ensured that the delivered electronic document complies with the document approved by the declarant.

¹ For more details, see Herke Csongor: Criminal procedure law. Pécs, 2018. p. 166.

² Electronic contact has become of particular importance since the advent of the COVID-19 virus. Garzuly, Éva (2020): A koronavírus hatása az elektronikus kapcsolattartásra. *Ügyészek Lapja*, 2020/2-3. 69-78

Electronic contact can have the following forms:

<p>Facultative electronic contact (§ 149.)</p>	<ul style="list-style-type: none"> – a non obligated participant or his/her representative that is not qualified as a legal representative undertake it – suitability of electronic declarations – contact must with authority via electronic way and vica versa – if the authorities deliver in paper, they will inform the addressee on the electronic possibility – motion presented without declaration: the authority shall warn the person electronically that contact shall be kept electronically in the future
<p>Mandatory electronic contact (§ 150.)</p>	<ul style="list-style-type: none"> – mandatory participants shall present all petitions electronically to the authority and the authority shall deliver electronically too – the person whose right to electronic contact is suspended is exempt from electronic administration
<p>Electronic contact with the expert (§ 151.)</p>	<ul style="list-style-type: none"> – usually concerns the expert whose electronic contact is mandatory – the expert that is not obligated can choose for electronic contact: <ul style="list-style-type: none"> a) by registering in the forensic expert database b) experts not in this database: registering with the authorities – the expert with mandatory electronic contact (and the one that chooses for this) can present his expert opinion (and other files) electronically to the authority/the

	<p>authority shall send all files electronically to the expert</p> <ul style="list-style-type: none"> – the expert that proceeds paper-based can be summoned to submit the expert opinion on a data carrier if this needs to be delivered electronically
<p>Electronic contact among the authorities and between other bodies (§ 152.)</p>	<ul style="list-style-type: none"> – the authorities are in electronic contact with each other/bodies ensuring electronic administration by law/bodies appointed by the government that perform public tasks

In case of electronic contact by the commissioned defence counsel and legal representative, the electronic or digitalised commission shall be enclosed to the first submitted motion (except if his commission is recorded in the disposal register)³. The authority can summon the above-mentioned to submit the original commission (in order to determine uniformity). The represented participant that has no mandatory electronic administration can submit a paper-based commission withdrawal (and declares whether there will further be a defence counsel or legal representative; if yes, the commission shall be enclosed too).

In case of paper-based documents and electronic contact exists, the participant himself shall ensure of digitalisation and of safe-guarding of the paper-based documents. If this does not take place, the authority shall digitalise this within 10 working days. However, if a paper-based document needs to be presented, it does not need to be submitted electronically.

In connection with electronic contact, the forwarding of documents at the disposal in electronic form to the e-mail address shall be mentioned. The participant can motion for this, if the document is available at the

³ The electronic contact can directly affect (and infringe) the right to the defense. On the principle of the right to a defense, see Fantoly, Zsanett (2018): Alapelvek az új büntetőeljárási törvényben. In: Ünnepi kötet dr. Nagy Ferenc egyetemi tanár 70. születésnapjára. Szeged. 237-252

authority. In this case, the document shall be forwarded in electronic form, electronic document or electronic copy of a paper-based document (§ 159.).

Practical problems related to electronic contact

With regards to electronic contact the following main problems have arisen:

- a) lack of a uniform system,
- b) shortage of criminal administrative data forms,
- c) inflexibility of the E-paper system,
- d) problems of the mixed paper based and electronic proceedings in the case of electronic contact,
- e) documents sent with improper format,
- f) problems related to the authorization of the defender⁴.

ad a) The first and most fundamental problem with the electronic contact is the lack of a uniform system. Electronic contact with the Courts (in connection with civil and financial cases) occurs through the “ÁNYK” system (ÁNYK=General Form Filling Framework). Specifically, the participant mandated for electronic contact (or the participant undertaking it) must download the ÁNYK program (if he has not downloaded it yet), subsequently he must download the forms applicable to the given submission from the <https://birosag.hu/eljarasok-nyomtatvanyai/bunteto-elektronikus> page.

As I have mentioned, one of the main problems with electronic contact in criminal cases is that the method of electronic document submission is not uniform. Specifically, the herein mentioned ÁNYK system may only be used for electronic contact with the Courts, while electronic contact with

⁴ Similar problems arise in the civil procedures. Juhász, László (2016): A felek, jogi képviselők és a bíróság közötti elektronikus kapcsolattartásra vonatkozó szabályok kérdései. *Gazdaság és Jog*, 2016/11-12. 3-13

the police, the Prosecutor's Office and other authorities (local government bodies, tax authorities⁵, etc.) occurs through the <https://epapir.gov.hu/> page (on so-called electronic paper or abbreviated on E-papir=E-paper). As in the case of ÁNYK, here the electronic identification according to effective legal regulations also happens through the Point of Contact (though, in the case of ÁNYK the documents may be sent with an electronic ID or phone identification with the use of the so-called 'Token'). The difference is that in the case of a document sent through the ÁNYK system the identification is not required for the preparation of the document, only for its electronic signature marking and sending it through the Point of Contact, while in the case of E-paper the Point of Contact identification is required for logging in. The main items appearing on the E-paper are filled in subsequently.

ad b) Even though, in criminal cases mandatory electronic contact was introduced as of 1st of January of 2018 (the new CPC only took effect on 1st of July of 2018, thus there was half a year available to eliminate practical problems), initially there was a severe shortage of forms related to criminal cases. Therefore, among attorneys it became the accepted practice that they used the B23-19-02 form named „Form for other submissions” (and still use it today), because on this form practically any petition may be submitted (e.g. for postponement), including motions (e.g. legal remedy).

These forms were basically developed in an ad hoc manner, it would be difficult to explain why these specific motions and petitions were given a separate form. Anyhow, the use of the “Other” form is still available, and I have no knowledge of a case when a motion was rejected for format reasons in a criminal proceeding because the defender failed to use a special form, rather used the „Other” form.

ad c) The E-paper system is relatively inflexible. Generally, documents are best sent with the marking of the Point of Contact ID, after marking this, it is best to mark which authority we are sending the document to (as well as the Law Office/Private organization) (not to the tax authority as a

⁵ For the electronic contact with the tax authorities, see Nemes-Somogyi, Krisztina (2018): Gyors és korszerű ellenőrzés: elektronikus kapcsolattartás az adóhatósági ellenőrzésekben. Számvitel, Adó, Könyvvizsgálat, 2018/1. 8-10

general investigative authority, and not marking the name and tax number of the attorney), since interestingly countless documents can only be sent to certain authorities. Thus, if we first mark it by case groups into the one named “Submissions related to criminal cases (report, motion, complaint, notification, petition)”, a case group that may be considered rather generic, then the document will only be sent to the Police Prosecutor’s Office. Similarly, if we narrow down the subject to the logical “Criminal” group, the only the Tax Authority as a general investigative authority appears.

Of course, in the case of both the ÁNYK system and the E-paper system, the document can be submitted in a printed format, but you can also attach a pdf format document to your submission. Sometimes sending in the submission itself takes a longer time, connection and sending through the Point of Contact is difficult (this is particularly true for the ÁNYK system).

ad d) In practice numerous other problems have arisen since the introduction of electronic contact. To this day it is rather frequent that the defender who is not mandated for electronic contact (this generally occurs if the case commenced before 1st of January of 2018) receives a paper format response to his electronic submission (even though by sending in his submission electronically he became an electronically communicating participant, despite not being mandated for it). In practice it has also happened that after a suspect was caught committing a criminal act, a public defender for the suspect was ordered at the questioning. The suspect authorized a defense attorney on the next day, who then submitted his authorization electronically and at the same time made a justified complaint against the suspect’s arrest. Thus, according to the CPC, after this the legal ordering of the public defender was cancelled together with the other authorization. But the Prosecutor’s Office sent its resolution rejecting the complaint in paper format to the previous (public) defender, at the same time the Prosecutor’s Office notified the public defender that his status was cancelled because of the authorization.

ad e) In the same way, it may be problematic if the individual participating authorities fail to send the documents in the proper format to the participants (primarily the defense). Specifically, while the defender may only

submit the documents and its attachments in pdf format, the authorities can also attach files in formats that are generally applied in the Robocop as well as in Court/Prosecutor's Office systems. For example in case number B.273/2017 the Kaposvár District Court sent a file with .dosszie extension to the defense, and failed to send the proper file within the deadline even upon request. It is questionable how the right to legal remedy is exercised in such cases, since in my opinion the delivery of an illegible file cannot be considered a validly served delivery with legal effect.

ad f) Finally we must mention a problem that points to illegal practice by the authority. As it is described in the brief information on www.birosag.hu, if the suspect (or another participant of the proceeding) wishes to authorize an attorney as defender (legal representative), according to the E-Administration Act, he may do this in the Motions' Registry. The declaration pertaining to the defender's authorization only becomes valid and effective with the acceptance of the authorization and the recording of the acceptance declaration in the Motions' Registry. The acceptance declaration in the Motions' Registry must be reported to the proceeding court, prosecutor and the investigative authority, and it is only valid and effective as of the reporting. However, the practice of these types of authorizations is not widespread yet⁶.

The cases are much more frequent where the defender (legal representative) proceeding based on the authorization, if using electronic contact, adds the authorization available as an electronic document or one digitized by him as an attachment of his first submission. In the case of a digitized authorization, the court (Prosecutor's Office, investigative authority) re-

⁶ Similar problems have arisen with regard to legal representation in the civil procedures. Gelencsér, Dániel: Eljárásjogi problémák az elektronikus kapcsolattartással összefüggésben: rövid összefoglalás. Kúriai Döntések. Bírósági Határozatok, 2017/9. 1338-1344

quests the defender (legal representative) to present the original authorization for the purpose of determining if they are identical, if a reasonable question arises in this regard⁷.

In the latter case (meaning the electronically submitted authorization) is less problematic if the defender joins the proceeding in its late phase. At the same time, it is very frequent that the suspect wishes to authorize a defender at the first questioning. In many cases the authorities request the electronically submitted authorization at this time, which may be very difficult. Specifically, at this time, if the suspect who is detained by the investigative authority (because he was caught committing a crime) wishes to give an authorization to the defender, then the thereby signed authorization must be scanned by the defender, must be uploaded electronically, and he may only participate in the proceeding after this. And if the defender is so well-equipped that he can actually do all this (takes a photo of the authorization with his phone, then with an application on his phone converts the photo to pdf format, and also with his phone uploads it to the E-paper system), there comes a surprise: the investigator states that electronic documents cannot be directly handled by an investigator, they are handled by the system administrator, who is absent at the moment/happens to be on vacation/is otherwise engaged, thus cannot check if the authorization has really been uploaded. This means that the defender would also have to print the acknowledgement regarding the uploading of the authorization into the system. Thus, a modern defender must arrive to a questioning equipped with a scanner, mobile internet and a printer, and must hope that these devices are not held up by the porters for security reasons.

But, fortunately the CPC solved the problem, specifically pursuant to Article 155 Subsession 4 it is not mandatory to use the rules of electronic contact during a proceeding when the defender is personally present, in the

⁷ For the civil procedures see Wellmann, György – Orosz, Árpád: A Kúria Polgári Kollégiuma tanácselnöki értekezletének állásfoglalásai az elektronikus kapcsolattartással összefüggésben felmerült eljárásjogi problémákról. Kúriai Döntések. Bírósági Határozatok, 2017/9. 1337

case of a submissions or pieces of evidence, including the immediate submission of the original authorization given onsite or during the proceeding. Thus, if the investigative authority in such a case demands immediate electronic submission, it is sufficient to cite this provision. And if the defender was authorized earlier, but this is the first proceeding that he participates in (and forgot to upload his authorization electronically), there is the possibility that his client may not be mandated for electronic contact (in the majority of cases he is not), thus the defender can hand the authorization to the client and the client can hand it to the authority, because a paper based submission must be accepted from the client.