

CSABA FENYVESI *

The Characteristic Features of Investigation under the Act on Criminal Procedure in Hungary

Abstract. The present study purports to introduce, elucidate and examine reform ideas and institutions pertaining to criminal investigation in the purview of Act XIX of 1998 on Criminal Procedure, which came into force in Hungary on 1 July, 2003 through the explication of the regulation of the different phases and moments of the completion of the investigation and its closure. Besides clearly introducing the general objectives and scope of investigations, as well as the rights and obligations of the concerned parties, the study focuses on the prescribed procedural obligations of the authorities at each stage of the investigation as pursuant to Act XIX of 1998, with reference to the changes incurred in view of the former regulation. After meticulously highlighting the intention of the lawmaker implied by the effected changes and evaluating these, thereby also providing a basis for international comparison, it concludes that the basic objectives of the new, “reform” criminal procedures law included the shift of emphasis from the phase of the investigation to that of the judicial proceedings. The possibility of the achievement of this objective will be tested by the future practice of law applying organs.

Keywords: completion of the criminal investigation, investigative authority, forensic science, prosecutor, defence, accused, suspect, exploration, well-founded suspicion, interrogation, arraignment

Following several revisions, Act XIX of 1998 on Criminal Procedure (hereinafter: ACP), which includes reform ideas and institutions, came into force in Hungary on 1 July, 2003. The amendments also affected the completion of the investigation, which the present study purports to introduce, elucidate and examine.

Conduct (Completion) of the Investigation

On the Conduct (Completion) of the Investigation in General

It is predominantly forensic science that deals with the completion of the investigation. The successful exploration of criminal offences depends primarily on the applied criminal technique and tactics, whereas ACP promotes thorough

* Lecturer, University of Pécs, Faculty of Law, H-7622 Pécs, 48-as tér 1.
E-mail: fenyvesi@ajk.pte.hu

and expeditious exploration essentially through framework rules, which provide for the basic requirements, the methods and temporal scope of the investigation, for the attendance of those concerned and of official witnesses, as well as for safeguarding its order. Furthermore, these framework rules pertain significantly to two major official acts (measures or decisions) taken in the course of the investigation, i.e., to the announcement of well-founded suspicion concurrently with the interrogation of the accused, and to the suspension of the investigation.

A meritorious explication of the completion of the investigation would equal a brief summary of criminalistics. This has already been accomplished by the author and his colleagues in the criminalistic studies textbook compiled within the framework of the Pécs Criminalistic Workshop.¹¹

Essentially, the law of criminal procedure provides merely framework rules, therefore, the successful completion of the investigation hinges predominantly on professional, i.e., criminalistic training and disposition. The process of revelation, which includes disclosure and justification, cannot be formulated in legal norms, compliance with which could automatically guarantee the effectiveness of investigation.

Investigations are intellectual and practical activities involving specific data and versions conducted in order that past events can be adequately revealed. Within their scope

- primarily interrogations of witnesses and the suspect are carried out,
- in case of so-called crimes with scenes inspections of the scenes, in case of crimes not connected to scenes house-searches are deemed most significant,
- the role of experts specified in different branches of (mostly natural) sciences and professional knowledge is growing most rapidly. Their involvement secures that traditional exploration and investigation is expanded by the possibility of multidisciplinary decoding and application of information,
- the most intricate area is the so-called secret collection and obtainment of information, as well as the effective use of its results,
- the most timely problem is the elaboration and reinforcement of integrated criminal investigation, which is also effective against organised crime.

Whether investigations have basic principles is an interesting question. Investigation is part of the criminal procedure, therefore, the general principles

¹¹ Tremmel, F.–Fenyvesi, Cs.–Herke, Cs.: *Kriminalisztika Tankönyv és Atlasz* (Criminalistics Textbook and Atlas), Budapest–Pécs, 2005.

of the ACP are essentially and eventually normative in the course of the investigation, whereas, contradiction and publicity, i.e., verbalism or directness, which we consider important, however, was not specified under the act, can prevail rather fragmentarily. At the same time, the requirements of expeditiousness and meticulousness, as well as of flexibility have been emphasised.

In the course of completion of the investigation, the criminal offence and the person of the perpetrator shall be disclosed, moreover, the means of evidence shall be specified and secured. The facts of the case shall be explored to such an extent that the prosecutor can decide whether to arraign (Para. 2 of Section 164). We must supplement this by stating that in our view, the interest of the exploration of the real facts of the case, which, according to the principle of material defence, also includes extenuating facts and mitigating circumstances (Para. 1 of Section 28), requires that all legal and expedient measures are taken without delay, therefore, the investigation can also be conducted with respect to a misdemeanour related to the criminal offence. Thus, the breadth of exploration shall be adequate for making a decision on arraignment, that is, it has to substantiate a decision on arraignment and further decisions made by the prosecutor. According to the intention of the lawmaker, the main task of the investigation is not the obtainment and collection of lawful evidence, but assuring that the authority entitled to make a public arraignment is adequately informed concerning whether an arraignment can be made in the given case. In this context, the *dominus litis* legal standing of the prosecutor is undoubtedly reinforced by the fact that Paragraph 2 of Section 28 of ACP positively provides that “the prosecutor conducts or has an investigation conducted in order to establish whether the conditions of the arraignment obtain”.

Thus, according to the conception of the ACP, the nature and function of the investigation is mainly exploratory. Investigations should be expeditious and in accord with exploration, the basic task of the investigative authority, primarily the police. Therefore, the act promotes the centuries-long “common-place” of criminology, that successful exploration has a crime-preventive effect. Consecutively, following the expeditious exploration, the prosecutor can prove the facts of the indictment in a contradictory environment at an independent, impartial court that regards due process of law and all the basic principles. Thereby, the shift of emphasis to the phase of judicial proceedings as the substantial scene of holding one criminally responsible, which is expedient in a state under the rule of law, is realised.

Unfortunately, the practical experience so far does not reflect this tendency. A definite indication of this is that neither the volume of investigation by the investigative authority, nor the rather impressive number of investigators has

decreased. Furthermore, the number of prosecutors, who can be considered crucial figures of the reform, has not increased, either.

The completion of the investigation, however, involves not a sheer obtainment of evidence, but a more comprehensive and complex collection of data, since evidence itself frequently needs to be found, almost “discovered”. Furthermore, the investigative authority shall take the procedural steps and the related coercive measures necessary for holding the perpetrators responsible.

As pursuant to Section 178 of ACP, following the commencement of the investigation, “other data-collection activities” by the investigative authority may include “sounding” in a criminalistic sense, which implies disclosure, registration and collection of data with penal and forensic relevance. To accomplish this, the authority can use data management bases as resources (e.g., road traffic, real estate registration, criminal records, records of the co-ordination centre against organised crime, criminal records and records of the co-ordination centre against organised crime), may “infiltrate” these according to the method of “screening” investigation developed by forensic science. The authority may request documents and data from any entity, therefore, it may apply to state, civil, business and self-government organs, foundations and public bodies. Furthermore, it may request an investigation and damage adjustment from the party entitled, may inspect the scene, may consult an expert counsellor and check the data obtained. With the help of the photos obtained, it may select a person or an object, as well as request information about the person or object represented and may carry out secret collection of information that is not subject to the permission of the court. With the prosecutor’s permission, the authority may even involve a cover investigator as pursuant to Paragraph 2 of Section 178, and may request data that cannot be denied (if the nature of the case substantiates that, but not in general) from the tax authorities, media bodies, medical institutions, from bodies managing data that qualify as banking secrets, securities secrets, counter secrets and other business secrets as well as from the prosecution and penal data centres as pursuant to Paragraphs 2–3 of Section 178/A. If the prosecutor intends to use the result of the foregoing data collection activity of the investigative authority as evidence, then the report about this as documentary evidence shall be attached to the documents of the investigation.

Besides the above, the prosecutor and the investigative authority, concurrently with taking the minutes, may consult an expert counsellor during the specific investigative steps, if special expert knowledge is necessary for finding, obtainment, collection or registration of the means of evidence or for the provision of information. The polygraph, the psycho-physiological means or method of interrogation well-known in criminalistics has been specified as

special expertise, if it is used with respect to the accused (Paras. 1–2 of Section 182).

In our view, the legal formulation of sounding constitutes a great step forward in the legal application of the latest achievements of modern criminalistics, criminal technique and tactics and in the effective combination of the operative and the open, lawful investigative activity in general.

The completion of the investigation, which involves a multi-level series of tasks, is not boundless, it has temporal constraints. The investigation shall be conducted within the shortest possible time from the time it was ordered and shall be concluded within two months. If the complexity of the case or some insurmountable obstacle makes it necessary, the deadline of the investigation can be extended

- by the head of the local prosecutor's office by two months,
- by the county prosecutor for as long as one year from its commencement,
- by the public prosecutor beyond one year.

Guarantees are provided against the unreasonable prolongation of the case, that is, the decision on the extension of the term of the investigation shall be mailed to the accused and the defence counsel, who may resort to legal remedy against it. We note here that according to the general rules, the decision on the extension should also be mailed to the aggrieved party, since it contains provisions regarding him, as well.

However, if the investigation is conducted against a particular person, the extension, including the term of the continuation of the investigation, may encompass at most two years from the announcement of incrimination (Para. 2 of Section 176). This temporal constraint indeed urges the investigative authority: the lawmaker endeavoured to limit the prolongation of procedures and of accusation by powerfully pressing the investigative authority. Certain law applying organs consider the above regulation in contradiction with the statutes of limitations, since according to their assumption, thus, holding responsible on the merits might fail in connection with certain criminal offences, especially in case of protracted investigations requiring especially complex, wide-scale examination. According to our view, this needs to be surmounted by criminal-tactical means, namely, the investigative authority will decide on the time of the announcement of incrimination, in case of people who are not in detention. In other words, the multitude of evidence needs to be collected in advance and the well-founded suspicion will be announced afterwards. In case of the accused in detention, charges shall be announced within 24 hours due to detention, primarily to preliminary arrest, therefore, it is a legal requirement to proceed in an anticipatory manner. That is, more energy, attention and apparatus need to be devoted to these cases.

When the prosecutor conducts an investigation, the deadline of the investigation can be extended

- by the head of the prosecutor's office by two months,
- by the superior prosecutor by one year from the date it was ordered (Para. 3 of Section 176).

The supervision of the investigative authority, which works independently, is supported by the institution of the so-called prosecutor's stepped-up supervision (hereinafter: PSS), which is exercised by the prosecutor, if

- the factual or legal judgement of the case, or proving that a criminal offence obtains is complex,
- he has experienced a significant violation of the law, default, or a circumstance threatening the success of the investigation in the course of the investigation,
- six months have passed since the coercive measures limiting the personal freedom of the suspect were ordered,
- one year has passed since the commencement of the investigation against a particular person (Para. 2 of Section 176),
- the investigation is conducted by reason of a criminal offence that is punishable with imprisonment of over ten years,
- the court has pronounced a witness in the case especially protected,
- the court has given permission that a cover investigator is employed in the case,
- he deems it necessary for whatever other reason [Points a-h of Section 37 of Public Prosecutor's Directive No. 11/2003 (hereinafter: PPD)].

Within the framework of the PSS announced to the investigative authority in writing, the prosecutor examines the documents requested for submission, gives instructions with deadlines for the execution of investigative activities, defines the scope of the investigation, specifies the evidence to be obtained with deadlines, the demonstration procedures and the investigative activities to be conducted, gives directions with respect to the conclusion of the investigation, if the facts have already been disclosed in a manner that is suitable for the decision of the case on the merits (Section 38 of PPD No. 11/2003).

Safeguarding order is also necessary for the completion of the investigation. For this purpose, the investigative authority

- may remove those from the scene, whose presence impedes the procedure,
- may impose a disciplinary penalty on anyone disturbing the order of the procedure,
- may obligate anyone to stay on the scene of the investigation so as to promote the investigation and may impose a disciplinary penalty on anyone who violates this obligation (Para. 3 of Section 185).

The ACP guarantees a specifically limited publicity as an exception in the course of the completion of the investigation on the one hand for those concerned, on the other hand by the potential involvement of official witnesses.

As pursuant to Sections 184–186, attendance of the specific investigative activities by those concerned is permitted. Accordingly, the defence (counsel) (as well as by or in lieu of him, the candidate) can be present

- at the interrogation of the suspect defended by him,
- at the confrontation held with the participation of the suspect defended by him (as a special form of interrogation),
- at the interrogation of the witness motioned by the defence counsel or the suspect defended by him, where he may ask questions directly of the person interrogated at the end of the interrogation.

However, exercising this right may not impede the interrogation of the suspect or the witness.

The issue of the admissibility of the attendance of the interrogation of the witness by the defence counsel has led to heated debates in the special literature of the last ten years. According to Ákos Borai, the regulation with general effect pertaining to all witnesses (characteristic of the 90s) significantly decreases and threatens the effectiveness of criminal investigation, since it guarantees too extensive scope of rights for the defence counsel in the preparatory phase. The author of the present study reinforced this by adding that it is an unparalleled solution even by international standards, since for instance in France, a country with considerable background in criminal procedures law, the attendance of the first interrogation of the suspect by defence counsels (but not the interrogation of witnesses) has been permitted since 1st January, 2001. That is not required either by the European Court of Human Rights from the member states, or by the Hungarian Constitutional Court. According to Mihály Tóth, the lawmaker did not endeavour that either, however, the admissibility of the defence counsel's presence during the interrogation was interpolated and introduced into the former regulation during the debate of the bill. The arguments of the other side, mainly of practising lawyers, have been that this entitlement can be deduced from the necessity of balance, and at the same time it promotes the work of the investigative authorities, since it admits direct questions and motions on the part of the defence, thus works against the prolongation of the procedure.

The lawmaker has chosen an in-between solution: the defence counsel can be present only at the interrogation of witnesses motioned by the defence. This shall be connected to a real act, that is, in case of a witness not interrogated yet, the motion must be admitted regardless of by whom, when and how the witness was summoned previously. We cannot identify with the view that

attaches primacy to the preliminary measure of the authority, such as the issuance or mailing of a writ of summons, since this cannot be checked given the deficiencies of official registration and the possibility of the issuance of short-notice writs of summons and would substantiate continuous disputes and legal remedies for the subjects of the defence, which does not serve the interest of fair criminal procedures.

Another factor that might substantiate disputes is how precise and customised the motion should be. Our view is criminalistically grounded in this issue, as well: if the person can be identified without being named specifically, e.g., the bookkeeper of the limited liability company, then this shall be a valid motion for the interrogation of the witness, which establishes the defence's entitlement to participation during the interrogation of the witness.

Based on incorrect interpretation of the law, there emerged a view in practice that the defence counsel cannot be present at a confrontation, where a witness not proposed by him is "posed opposed to" the defendant. This contradicts the basic principle of defence, since confrontation is a special form of interrogation, at which the defendant is entitled to his defence counsel and his presence shall be guaranteed by all means in a state under the rule of law. This is also substantiated by Paragraph 3 of Section 184 of ACP, which permits that the suspect in custody meets his defence counsel before his interrogation.

Not only the defence counsel, but the aggrieved party and the accused are also permitted to attend

- the interrogation of experts,
- the inspection of the crime scene,
- the attempt at demonstration,
- the introduction for recognition,
- the inspection of the scene in a criminalistic sense, which the act defines as interrogation on the scene.

The notification of the listed concerned parties may be neglected, if the delay would entail risks. Otherwise, those present at the investigative activities may make comments, put forward motions and ask questions of the experts.

What qualifies as an entitlement on one side is an obligation on the other side, therefore, the investigative authority shall notify those, who are entitled to attend, which in certain cases might be a rather high number of persons. Since in cases with several defence counsels only the so-called head defence counsel shall be notified, the situation has become somewhat simpler.

The investigative activity may also be attended by a person completing his professional practice as a full-time undergraduate student at the faculty of legal sciences of any university, provided that it is permitted by the prosecutor and the investigative authority and that the suspect, the witness or the aggrieved

party present have given their written consent (Para. 5 of Section 184). With regard to the equality of university degrees, limiting attendance to full-time undergraduate law students is unreasonable, since getting acquainted with the procedures has the same significance for postgraduate and distance-learning students. A conciliatory solution for that is, and we emphasise that in other cases, as well, that even though the main rule for the attendance of investigative activities is that besides the prosecutor, a member of the investigative authority and the recorder only those can be present, whose presence is permitted by law, the secondary or auxiliary rule is that it is the official conducting the investigative activity that decides who may be present apart from those who are obligated or entitled to. The decision of the official is not unlawful, if besides complying with the regulation of attendance, he allows the participation of other persons expressly for investigative or criminal-tactical purpose, and if thereby he does not jeopardise the efficiency of the procedure. Such persons may be a teacher, a psychologist or a defence counsel, etc.

The interrogation of a foreign citizen as an accused or witness may be attended by the consular officer of the respective state, who, with the exception of the case of *periculum in mora*, shall be notified in the beginning and subsequently, if he requests that. In a similar way, as pursuant to a provision promulgated under the act, a member of the authority of the respective foreign state shall be notified of any procedure conducted *vis-a-vis* a foreign citizen as suspect or of any criminal offence committed to the *gravamen* of a foreign citizen. The provision that a member of the investigative authority of a foreign country may be present at an investigative activity as pursuant to a separate statute or international agreement, also refers to the internationalisation of criminal investigation. We also add that according to our view, this provision is applicable not just to the authorities of states, but to interstate authorities, e.g., the Interpol, Europol, as well (Paras. 5–6–8 of Section 184).

The right to attendance is closely related to the right to view documents, since the attendants who were present (and those who could be present by law) can view the documents drawn up in their presence. Besides, the suspect, the defence counsel and the aggrieved party may view the expert opinion and, if that does not infringe the interest of the investigation, other documents, as well.

According to the defence counsels' general experience, apart from a few cases related to road traffic, there has been practically no case in practice, when viewing the documents by the defence "would not have infringed the interest of the investigation", in other words, the officials of the investigative authority do not risk handing over even the not ominous documents for viewing. Consideration on the merits in this area hardly obtains, if it does, that is by all means a sign of high professional standards.

The right to view documents, thus indirectly the right to attendance is related to the right to copying documents, as the accused and the defence counsel are entitled to receive copies of the documents they can view according to the requirements of data protection. Unfortunately, the effective legal regulation seems unconstitutional according to the detailed arguments of the author of the present essay,² since as pursuant to separate legal regulation [Joint IM–BM–PM Decree No. 10/2003 (V. 6.)] the copies to be provided for the defence are subject to a duty fee equivalent to 100 HUF/page to be paid in the form of fee stamps. This violates the constitutional regulation of defence and the principle of the presumption of innocence, furthermore, unreasonably encumbers the preparation of the defence and efficient pleading that meets European standards. This regulation is unlawful, even if exemption from payment of charges in the criminal procedure (obtainment of copies of documents free of charge) is possible similarly to the exemption in the civil procedure, since this affects only a very limited circle, i.e. homeless accused and accused with a per capita income below the prevailing widow's pension, which was equivalent to 22,800 HUF in 2004, whereas the requirement of efficient defence prevails in the case of every accused. As a recent and correct achievement, the reimbursement of the duty fee by the state has been admitted in case of the acquitted accused since 1 July, 2003 as pursuant to a separate legal regulation [Joint IM–BM–PM Decree No. 26/2003 (VII. 1.)]

A further problem is that, unfortunately, the court cannot proceed *ex officio*, only at the respective request of the defence, although it can decide on the acquittal of the accused without the motion of the defence.

According to the framework rule under Section 183, the investigative authority designates an official witness at

- the inspection of the scene,
- the attempt at demonstration,
- the introduction for recognition and in four further cases, namely,
- seizure,
- house-search,
- body-search,
- the introduction of the minutes taken at the interrogation of an illiterate person

² The author submitted a motion of complaint to the Constitutional Court by reason of the unconstitutionality of the liability to pay fees for copies, however, the motion has not been dealt with yet. See further details, Fenyvesi, Cs.: *A védőügyvéd* (The Defence Lawyer). Budapest–Pécs, 2002. 106, 199.

either *ex officio* or upon the motion of the accused, the defence counsel or of the person concerned with the inspection of the scene, or of the person affected by the seizure, house-search or body search, or of the illiterate person, unless there is an insurmountable obstacle.

The cases listed above are essentially unrepeatable procedural activities, therefore, the involvement and presence of official witnesses attending voluntarily (nobody can be forced to co-operate) has a warranting significance. The task of the official witness is to certify the conduct and result of the investigative activity, at which he was present. Therefore, the official witness shall be informed about his rights and obligations before the investigative activity commences: he may make comments about the investigative activity, which shall be included in the minutes. Those who are concerned with the procedure or are unable to apprehend and certify what they sense, or those who are officials of the investigative authority or do not undertake to co-operate may not be official witnesses. Other members or employees of the authority can only act as official witnesses, if there is an insurmountable obstacle to designating another person.

The ACP does not exclude the possibility of engaging official witnesses at other investigative activities. In our opinion, the decisive reason for the involvement of official witnesses in further cases may also be the unrepeatable character of (irreversibility) of the investigative activity, such as the interrogation of a dying aggrieved party, setting a trap or interrogation on the scene. An amendment adopted in 1999 annulled the solution, which proved rather bureaucratic in practice, according to which two official witnesses had to be engaged *ex officio* in the above mentioned cases. The present situation is exactly the opposite, since the involvement of official witnesses is obligatory only at the initiative or request of the parties listed, and even then, of only one witness. Obviously, there are no obstacles to designating two or more official witnesses, if the conditions above prevail, for instance, if the house-search is held in a real-estate with several rooms or several flats.

The Announcement of Well-founded Suspicion and the Interrogation of the Suspect

The announcement of well-founded suspicion is quite a significant stage in the completion of the investigation, since up to this moment the investigation has been conducted by reason of an act (*in rem*), but from this stage against a particular person (*in personam*), as well. From this moment, the legal standing of the accused is established, etc.

As we have mentioned with reference to the two-year period, significant tactical alternatives obtain in the timing of the announcement of the well-founded suspicion. We need to avoid by all means that it takes place too early or too late. In the former case, the accused can influence the direction of the investigation easier (can even take it to an impasse or drag it out for two years without substantial investigative results), whereas in the latter case, the danger increases that several investigative activities prove superfluous, since the accused either confesses or defends himself along a completely different version from the presumed one, etc. Further tactical alternatives are the scheduling of the announcement of the well-founded suspicion of several criminal offences and allowing that time lapses between the announcement of suspicion and the detailed interrogation.

Beyond the general regulation, the specific rules pertaining to the announcement of well-founded suspicion and to the interrogation of the accused are specified under Sections 179 and 180 of ACP:

Para. 1. of Section 179: If, on the basis of the data obtained, a specific person can be well-foundedly suspected of the commission of a criminal offence, the prosecutor or, unless the prosecutor directs otherwise, the investigative authority shall interrogate the suspect as pursuant to Sections 117–118. The suspect in custody shall be interrogated within 24 hours. The deadline shall be calculated from the moment the suspect was brought before the investigative authority.

Para. 2: At the commencement of the interrogation, the suspect shall be informed about the substance of the incrimination with reference to the pertinent regulations.

Para. 3: The suspect shall be warned that he may choose a defence counsel or request that a defence counsel be appointed. If the participation of a defence counsel in the procedure is obligatory, the attention of the suspect shall be called to the fact that if he does not authorise a defence counsel within three days, the prosecutor or the investigative authority will appoint one. If the suspect declares that he does not intend to authorise a defence counsel, the prosecutor or the investigative authority will appoint one promptly.

Para. 1 of Section 180: No question that implies the answer or includes a fact not yet proven or implies a promise incompatible with the law shall be asked of the accused.

Para. 2: Without the consent of the suspect, the testimony may not be examined by means of a polygraph.

The following questions arise in connection with the quoted sections:

- a)* What does the announcement of the well-founded suspicion have to contain?
- b)* What does it not have to contain and what must it not contain?
- c)* What does the suspect have to be warned about and how?
- d)* From when and until when may or must the suspect be interrogated?
- e)* How is the testimony recorded?

ad a) The announcement of suspicion shall contain the most significant elements of the historical facts of the case and behaviour imputed to the accused (place, time, aggrieved party, method of commission) and its classification under the Penal Code of Hungary.

ad b) It does not have to contain either the legal facts of the case or the minor details of the historical facts of the case, since these may have special relevance from an interrogation-tactical aspect, and absolutely no reference to evidence has to be made. Well-founded suspicion can obtain without lawful evidence at disposal and it is exactly the concealment of missing or already obtained evidence that may have further interrogation-tactical potential.

ad c) Not only the Miranda-warning included under Paragraph 2 of Section 117 is obligatory, but the instruction about the choice of the defence counsel and the right of objection (legal remedy), as well. These warnings and the suspect's statements shall be included in the minutes, while the Miranda-warning shall be signed by the suspect separately in the course of the investigation. The suspect does not have to be warned separately that he is not obligated to tell the truth. Furthermore, it would be completely incorrect to warn him that he has the right to lie.

If the investigative authority wishes to use a polygraph as a means of interrogation, then the accused shall make an according statement included in the minutes. Without his consent, the testimony may not be examined by means of a polygraph.

ad d) The earliest the suspect at large may be interrogated is right subsequently to the announcement of the well-founded suspicion, and the latest before the announcement of the conclusion of the investigation. Only the suspect in custody shall be interrogated within 24 hours.

ad e) The testimony of the suspect (accused) shall be recorded in a report or the minutes. The report shall be signed by the proceeding official of the authority, whereas every page of the minutes shall be signed by the suspect (and the witness). If the suspect declines to sign, this circumstance as well as the indication of its reason shall be recorded in the minutes.

Even though framing the testimony of the suspect in a report is permitted under Section 168 of ACP to expedite exploration, in our view, this is not an

auspicious solution apart from exceptional cases. Inclusion of the testimony in the minutes is more expedient, reassuring and definitely advisable from a criminal-tactical viewpoint.

Neither the minutes, nor the report or the actual interrogation may involve a question asked of the accused that

- implies the answer,
- includes the statement of a fact not yet proven,
- implies a promise that is incompatible with the law.

In the first case, unjustifiable influence by the authority would not lead to a voluntary, personal testimony of the accused, whereas in the third one, a certain testimony or statement is expected from the accused in return for favours (e.g., the termination of confinement or mitigation of the circumstances of confinement, more favourable judgement of the act, etc.), therefore, both can be positively rejected. Our standpoint is not this positive in the second case, which represents a form of tactical “bluff”, instances of which are enumerated and supported by criminalistic literature in great numbers. It is difficult to set the borderline of the legality of tactical bluff, which was attempted under the ACP. In practice, legality may be supervised to a certain extent by precisely including the investigator’s questions in the minutes. If, subsequently, the question is classified as inadmissible, then the answer to it shall be regarded as unlawful evidence, and the same pertains to the other two groups of questions, as well.

These prohibitions are valid for the interrogation of witnesses, as well, in that case even the questions that imply “guidance” are precluded under Section 181. This regulation suggests that in the case of the accused, guidance is admissible, whereas in the case of the witness, it is not. We cannot identify with this conclusion, since influencing, guiding, hinting and promising questions are not admissible in either case.

The Closure of the Investigation

Decisions Made upon the Closure of the Investigation

As we have expounded with respect to the preliminaries of the conduct (completion) of the investigation before its commencement, when a memorandum on the refusal of the denunciation or on ordering the investigation is drawn up, in a similar way, essentially two types of decisions on the merits can be made after the completion of the investigation as its closure, namely, on the one hand a negative decision on the merits that terminates the investigation, on the

other hand a positive decision on the merits that concludes the investigation (proposal for arraignment).

The reasons and methods of decisions on the termination of the investigation are mostly the same as those of the decisions on the refusal of the denunciation, therefore, we are going to summarise the important points by focusing on the differences. However, we'll have to deal with the introduction of the documents and the conclusion of the investigation in detail.

If we examine the text of the ACP from a decision-centred viewpoint, we'll find that the refusal of the denunciation at the commencement of the investigation is dealt with in detail, whereas the order of the investigation only in brief. As opposed, in connection with closing the investigation, the rules concerning termination have been summarised in a comparatively shorter manner, while the conclusion of the investigation has been rendered quite a detailed specification.

Termination of the Investigation

According to *Paragraph 1 of Section 190*, the prosecutor may terminate the investigation with a decision

- a) *if the act is not a criminal offence,*
- b) *if the commission of a criminal offence cannot be established on the basis of the data of the investigation and no result can be expected from the continuation of the procedure,*
- c) *if it was not the suspect that committed the criminal offence or, if on the basis of the data of the investigation it cannot be established that the criminal offence was committed by the suspect,*
- d) *if a reason that excludes culpability can be established with the exception, if the issuance of an order of compulsory therapy seems necessary,*
- e) *due to the death of the suspect, limitation or pardon,*
- f) *for other reason that abolishes culpability prescribed by law,*
- g) *in the event of the absence of a request for prosecution, postulate or denunciation, and these cannot be attached,*
- h) *if the act has been finally adjudged including the case under Section 6 of the Penal Code,*
- i) *if two years have passed since the commencement of the investigation against a particular person (Para. 2 of Section 176).*

Besides an almost complete coincidence with the grounds for the refusal of denunciation under Sections 174–175, the difference at the locutions that imply a so-called deficit of evidence is manifest. As pursuant to ACP, the

refusal of denunciation is substantiated by the absence of a criminal offence and of suspicion, whereas in the event of the termination of the investigation quite a significant differentiation is made with respect to the grounds. On the one hand, a new element in connection with the absence of a criminal offence is that according to the result of the investigation, it is not the suspect that committed the criminal offence. In that case, mostly a “relative” decision on the termination of the investigation is made, since it is only the investigation *vis-a-vis* the accused that is terminated, whereas the investigation in the basic case is continued and may be concluded.

On the other hand, unlike the case of the absence of suspicion, which upon the refusal of the denunciation may pertain to the criminal offence, not to the person of the perpetrator, in the event of the termination of the investigation the absence of evidence and its three instances, types may be substantively established. All three instances mean primarily that there is no evidence or there is little evidence to establish that

- *a criminal offence has been committed, or even if the commission of the criminal offence has been proven,*
- *who it was committed by, or if the well-founded suspicion has been announced,*
- *it was committed by the suspect.*

With the increase in criminality (in the last ten years 450–600 thousand criminal offences have been reported annually), the number of decisions terminating the investigation has reached a figure of several hundred thousands in Hungary (a proportion of 60–70 p.c.), as well. Most of these cases are terminated on grounds specified in the second instance. In these cases with an unknown perpetrator the phrase that the investigation has reached an “impasse” is adequate.

We must call the attention to the fact that the prosecutor, as the person directing the investigation, has a general entitlement to terminate the investigation, whereas in simpler cases, the investigative authority exceptionally also has this entitlement as pursuant to Paragraph 2 of Section 190:

The investigative authority has an entitlement to terminate the investigation in cases defined under Points a), e), g) and h) of Paragraph 1 as well as if culpability is excluded by incompetent age [Point a) of Section 22 of the Penal Code]. The decision that terminates the investigation shall be forwarded promptly to the prosecutor by the investigative authority.

The termination of the investigation does not hinder that the investigative authority continues the procedure is the same case. Therefore, these negative investigative decisions on the merits are not final, whereas the ACP attaches

some binding force to the termination of the investigation, since it provides that the continuation of the procedure is admissible on the following grounds:

Para. 2 of Section 191: The continuation of the procedure can be ordered by the prosecutor, and if the investigation was terminated by the prosecutor, by the head prosecutor. If the suspect was reprimanded according to Section 71 of the Penal Code, the decision terminating the investigation shall be annulled by the prosecutor or the head prosecutor.

Para. 3: If no complaint was made against the termination of the investigation, or the head prosecutor did not order that the investigation be continued, subsequently this can be ordered only by the court against the person that the investigation had been terminated before.

Para. 4: If the court has turned down the motion for the continuation of the investigation, the submission of a repeated motion for the continuation of the investigation on unchanged grounds is inadmissible.

Para. 5: With the exception of the cases under Paragraph 5 of Section 82, the investigation or its continuation may be ordered by the competent prosecutor in the case of those against whom the denunciation was refused as pursuant to Paragraph 1 of Section 175, or the investigation was terminated as pursuant to Paragraph 1 of Section 192.

In the event of the continuation of the procedure following the termination of the investigation, the investigative deadlines shall be valid again mostly by disregarding the decision on termination. For the continuation of the procedure, the annulment of the decision on the termination of the investigation is only necessary in cases, when the investigation was terminated with the reprimand of the accused. The reason for this is that the decision that terminates the investigation with a reprimand states that the accused has committed a criminal offence and such decisions may have further consequences under labour law and civil law. Furthermore, we must note that the investigative judge is implied by the judge that orders the continuation of the investigation.

The most common reason for termination is the absence of evidence specified under Point c), but the investigation can be continued unconditionally, in case new evidence emerges. Therefore, in practice, the majority of decisions on the termination of the investigation are implicit decisions suspending the investigation (since the investigation is “terminated” until new evidence emerges).

The general rules of the termination of the investigation also prescribe that the criminal expenses are defrayed by the state, whereas the suspect is obligated to bear costs that are incurred by his default (Para. 3 of Section 191).

The accused, the defence counsel, the aggrieved party, the denunciator and the party that submitted a request for prosecution shall be informed simultane-

ously about the decision. These parties are entitled to legal remedy. If the superior authority adjudging the complaint of the aggrieved party dismisses it, the aggrieved party may proceed as a secondary accuser at court.

A special form of the termination of the investigation is the so-called termination combined with an “investigative bargain” and the one with a cover investigator. The ACP contains several pertinent provisions under Section 192:

Para. 1: In case a well-founded suspicion of the commission of a criminal offence obtains, the prosecutor or the investigative authority with the prosecutor’s permission may terminate the investigation, if the person who can be suspected of the commission of the criminal offence with well-founded reason co-operates by contributing to the proving of the case or another criminal case to such an extent that the interest of national security or criminal investigation related to co-operation is more significant than the one related to the necessity of the enforcement of criminal law by the state.

Para. 2: In case a well-founded suspicion of the commission of a criminal offence obtains, the prosecutor shall terminate the investigation with a decision, if the cover investigator, who can be suspected of the commission of a criminal offence with well-founded reason (Para. 2 of Section 178), has committed the offence during the accomplishment of his official task in the interest of the criminal investigation, and the interest of the criminal investigation is more significant than the one related to the necessity of the enforcement of criminal law by the state.

Para. 3: The investigation may not be terminated as pursuant to Paragraphs 1–2, if the person defined under Paragraph 1 or the cover investigator can be suspected with well-founded reason of the commission of a criminal offence involving the wilful taking of another person’s life.

Para. 4: In case the investigation is terminated as pursuant to Paragraphs 1–2, Paragraphs 3–5 of Section 175 shall be applied accordingly. In this instance, the termination of the investigation shall not hinder the subsequent continuation of the procedure in the same case (Section 191).

As the quoted law manifests, the lawmaker considered these two unique cases of opportunism very carefully. In the former case, the proceeding authority essentially concludes a specific agreement with the perpetrator, as a result of which due punishment is not enforced by the state, whereas in the latter one, a member of the authority, while concealing his identity and goal, commits a criminal offence in view of the higher interest of criminal investigation and thus shall be exempt from criminal liability. The careful consideration by the lawmaker encompassed both the organisational safeguards (e.g., a bargain is admissible on condition that the prosecutor appointed by the public prosecutor has guaranteed a preliminary approval), and the rightful interest of the

aggrieved party (i.e., compensation, etc.), and last but not least, aspects of data protection and confidentiality (requisites of an incomplete decision, etc.).

We consider the regulation on the one hand a fault of drafting, since the mechanical repetition of ten or so lines of the text would be a fault in itself (pleonasm, cf. Paras. 1–2 of Section 175 and Paras. 1–2 of Section 191), on the other hand, in our view, the imperative investigative activities should be carried out with respect to all criminal offences. By reason of this or of the completion of procedural activities that include the registration or securing of evidence and traces already at disposal, in this context only the termination of the investigation already commenced is applicable, whereas the refusal of the denunciation is not.

The Conclusion of the Investigation

In a narrower sense, the conclusion of the investigation is in effect not a formal decision, just a verbal statement registered in the minutes or in a written notification about the fact of the conclusion of the investigation. In a broader sense, however, the conclusion of the investigation, that is, the positive closure of the investigation is an investigative phase constituted by several moments, such as notification about the introduction of documents, the introduction of documents with motions and interim decisions, forwarding the documents of the investigation to the prosecutor.

The investigative situation is similar to that of the announcement of well-founded suspicion, when no separate, formal decision on the declaration as suspect (accused) is made, either, but it is only the occurrence of this as a verbal statement that shall be recorded in the minutes of the interrogation. That is, in both cases informal, verbal statements are made, however, the announcement of the well-founded suspicion is usually followed by other moments (detailed interrogation, etc.), whereas the announcement of the conclusion is usually preceded by other moments (introduction of documents, supplementation of the investigation, etc.).

Section 193 contains the following provisions concerning the introduction of the documents of the investigation:

Para. 1: Following the completion of the investigation, the prosecutor or, unless the prosecutor directs otherwise, the investigative authority shall hand over the bound documents of the investigation to the accused and the defence counsel in a room designated for this purpose. The suspect and the defence counsel shall be facilitated to get acquainted with all the documents (except for the classified material) that substantiate the potential arraignment.

Para. 2: The suspect and the defence counsel shall be notified of the deadline of the introduction of documents and the suspect in custody shall be brought forward by the deadline at his request. The suspect and the defence counsel may propose that the investigation be supplemented, can make other motions and comments, and may request copies of the documents. The suspect shall be warned about this entitlement.

Para. 3: The motion of the suspect or the defence counsel shall be adjudged by the prosecutor or the investigative authority.

Para. 4: The suspect and the defence counsel shall be entitled to view the documents under Para. 1 following the deadline of the introduction of documents, as well.

Para. 5: If the procedural activity under Paragraph 1 was completed by the investigative authority, the documents shall be forwarded to the prosecutor within 15 days following its occurrence.

Para. 6: Following the completion of the procedural activity under Paragraph 1, the aggrieved party shall be notified that he can view the documents of the investigation and exercise other rights he is entitled to in the course of the investigation.

This procedural activity does not involve the presentation of the materials of the investigation by the authority, since the authority shall not present their contents, but shall hand them over and let the party entitled to get acquainted with the documents view them. In other words, it is not the presentation, but the introduction of the documents that takes places, and as we have seen, the quoted section of the ACP secures quite a broad scope of rights for the subjects of the defence. At the same time, the subjects of the defence are not obligated to exercise these rights, since at a subsequent stage, in the judicial proceedings they will be entitled to unlimited exercise of rights of attendance, viewing documents, making motions, etc. Therefore, it is reasonable to exclude the request for certification in connection with the default of notification about the introduction of the documents. Upon the introduction of documents, the bound original documents shall be handed over for study by the suspect and the defence counsel, which they can do under supervision and they shall not be impeded in doing so. Attention must be paid that the suspect does not modify or falsify the text of the documents, that he does not destroy or damage documents or means of evidence during the introduction. He shall be warned about that. The suspect and the defence counsel may take notes. The notes containing data that constitute state or service secrets are to be handled in a closed, separate envelope beside the documents.

The motions about the supplementation of the investigation must usually be adjudged instantly and detailed minutes shall be taken about the introduction of the documents. As Section 194 of ACP provides,

- (1) According to Paragraph 1 of Section 193, the minutes of the handing over of the documents of the investigation shall include*
- a) the list of the documents handed over to the suspect and the defence counsel, the time of the commencement and the end of the introduction,*
 - b) the motions and remarks of the suspect and the defence counsel,*
 - c) if the suspect or the defence counsel does not exercise their right guaranteed under Paragraph 1 of Section 193, then this fact.*

As the quoted section manifests, in the event a motion is made for the supplementation of the investigation, the procedure can take two directions: if the authority admits the motion (even following an objection), then a repeated introduction of the documents will take place related to the supplemented materials of the investigation. If, however, the motion has been turned down and that as a measure (without a decision) has been included in the minutes, the conclusion of the investigation shall be announced immediately. If an objection has been put forward against the measure turning down the motion, then upon its dismissing decision it shall be mailed to the prosecutor.

As a closing moment of the introduction of documents, the conclusion of the investigation shall be announced in a verbal form and recorded in the minutes. Upon this announcement, the criminal offence that according to the data of the investigation the suspect committed shall be named with reference to the pertinent section of the Penal Code.

If, however, the defence does not attend the introduction of the documents at all, instead of taking the minutes, this circumstance shall be registered in the documents. At the same time, the suspect and the defence counsel shall be notified about the conclusion of the investigation, as well as the documents shall be forwarded to the prosecutor with a motion for arraignment within 15 days of the conclusion of the investigation.

Therefore, no formal decision shall be made on the announcement of the conclusion of the investigation. As a unique measure that is reflected in the minutes of the introduction of documents or in the separate written notification in case of the complete default by the defence. The motion for arraignment does not imply a formal decision, either, as it includes merely reference to the forwarding of documents and the proposal itself, without the summary of the case.

The deficiencies of former regulations pertaining to the aggrieved party are remedied by the provision that gives opportunity for the aggrieved party (at

short-notice even in the case of the institution of proceedings) to view documents (after the defence has already viewed them, that is, within the specified mailing deadline of 15 days) and exercise his rights. The authority shall notify both the aggrieved party and the defence about its place and time. Non-appearance shall not hinder continuation, however, further written notification or information will not be mailed afterwards.

The aggrieved party may exercise his rights *via* his legal representative or, in the event of his death, the party proceeding as his heir shall be entitled to view documents. The surviving spouse of the deceased aggrieved party merely under this title or the person authorised by the spouse shall not be entitled to proceed so, since they do not have *locus standi* (Court Decisions No. 416/2001 and 483/2000).

Closing Ideas in Lieu of a Summary

The basic objectives of the new, “reform” criminal procedures law included the shift of emphasis from the phase of the investigation to that of the judicial proceedings. In view of that, the lawmaker endeavoured to render the investigation more flexible and expeditious, whereas did not waive thoroughness and the comprehensive requirements of exploration. It is difficult to satisfy this “double bind”³ in the shadow of the increasing and ingravescent criminality. In the following years, law applying organs and their practice will decide, whether the lawmaker’s intention has proved effective and whether practice can follow theory.

³ On the “double bind”, see further, Fenyvesi, Cs.–Herke, Cs.–Tremmel, F.: *Új magyar büntetőeljárás* (The New Hungarian Criminal Procedure). Pécs, 2004. 398.