

# THE PROHIBITION OF REFORMATION IN PEIUS IN THE HUNGARIAN JURISPRUDENCE

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In the operative criminal procedure law the prohibition of reformatio in peius is effective during the procedure of second instance, the procedure of third instance, the retrial procedure, during the procedure of the extraordinary legal remedies, and even during the special procedures. In addition to the criminal procedure the prohibition of reformatio in peius is regulated within the law of misdemeanor, since the Section 92. (4) of the Act LXIX of 1999 on Misdemeanors provides that the court may take a more disadvantageous decision against the person subjected to the criminal procedure than it was stated in the provisions of the decision of the infringement authority just in case during the hearing new evidences are revealed and on the grounds of this the court establishes a new fact and due to such fact more serious crime must be classified or the penalty shall be significantly increased. By the same token the principle of ne ultra petitum is just as relevant in the civil procedure law: according to first sentence of the section 253 (3) of the Act III of 1952 (Code of Civil Procedure) the court of second instance may alter the decision of the court of first instance just within the confines of the appeal (joint appeal) and the cross-appeal. However, within such confines questions concerning the right enforced in the lawsuit as well as plea against such enforcement of right may be decided by the court of second instance even if the court of first instance did not discuss or make a decision on such questions<sup>1</sup>.

The prohibition of reformatio in peius benefits the accused during the process of the appeal and the extraordinary legal remedies regardless of the person who filed them. This may be the defendant himself, or the prosecutor who, according to Section 324 (2) of the Code of Criminal Procedure, may appeal in favor of the defendant, and according to Sections 409, 417, 431, 440 of the Code of Criminal Procedure the prosecutor may file for remedy against or in favor of the defendant as well. In addition, the counsel for the defense has absolute right to appeal in favor of the defendant, and has absolute right to file for remedy unless the defendant expressly forbade this. Furthermore, other persons may exercise their right to file a remedy against or in favor of the defendant, such as the legal representative of the defendant, the relative of legal age of the defendant, other interested parties etc.. So the prosecutor can file for remedy against and also in favor of the accused, the other entitled persons may exercise their right only in one way (either against or in favor of the accused).

The prohibition of reformatio in peius is irrelevant in the case of a remedy filed against the defendant. The prosecutor as the public prosecuting body of the state may proceed in both directions, while the private accuser and the substitute private accuser may file a remedy just against the defendant. The prohibition of reformatio in peius intends to enable the accused to exercise his right to legal remedy if his punishment is deemed to be too serious or illegitimate, but without risking that the judgment would be altered to a more serious one without the possibility of

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<sup>1</sup> But the court of second instance shall decide regardless of confines of the appeal (joint appeal) and the cross-appeal on the unpaid duties, as well as on the unpaid expenses which were advanced by the state. ( second sentence of Section 253 (3) of the Code of Civil Procedure)

revoking it due to groundlessness. The court empowered to take the decision is as a rule always subject to the prohibition of *reformatio in peius*, if the court took the new decision of the same action of the defendant on the ground of an appeal filed by the defendant, by the prosecutor or another person, who has the right to appeal, in favor of the defendant. The prohibition of *reformatio in peius* shall grant the freedom of the decision-making process: the judgment must be acknowledged or an appeal may be filed without the risk of adverse alteration. However, the new verdict does not have to be the same comparing to the appealed verdict concerning the declaration of guilt or the penalty.

The freedom of the decision-making of the accused is significant in the matter of usage and extent of prohibition of *reformatio in peius*. The prohibition of *reformatio in peius* is in this respect a “procedural protection-right”<sup>2</sup>, which should compensate the hindrance to file an appeal. The defendant would face a psychological dilemma in the lack of prohibition of *reformatio in peius*<sup>3</sup>, in which he would have to decide whether to accept the verdict (including the penalty set forth thereby), or he should fear that the appeal submitted by him would put him at disadvantage. The *reformatio in peius* may show a way out of this dilemma, because it may give a reason to trust that the submission of an appeal will not affect the situation adversely. MOLNÁR is right to call the prohibition of *reformatio in peius* as “the principle of fearless appeal”<sup>4</sup>.

The problem of the prohibition of *reformatio in peius* raises many important questions. However, in the Hungarian legal bibliography just very few writers have discussed this subject. In the twentieth century only eight studies were published in our country, which examined specifically the question of prohibition of *reformatio in peius*, and still none of them is from the time after the regime change. This instrument of law is poorly endowed by the university textbooks and notes as well, just a few pages are devoted to the topic. The situation is different abroad, especially in German literature. In Germany not only several professional articles are issued in respect of certain questions of prohibition of *reformatio in peius*, but also various monographs have reviewed the prohibition of *reformatio in peius* to the full or just some of its segments (e.g. measures taken).

## The prohibition of *reformatio in peius* in the judicial practice

After analyzed the case-law it may be stated that the ad hoc decisions regarding the prohibition of *reformatio in peius* have been referring to the following issues:

- a) What is declared as an appeal against the defendant?
  - The legal classification of a criminal offense does not mean only the designation according to the provisions set forth in the Special Part of the Criminal Code (including the basic case, the qualified case and the privileged case), but also the formation of the perpetrators and the determination of the stage of the completion of the committed crime etc. Therefore, an appeal against the defendant should be any appeal filed on the grounds of the above written.

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<sup>2</sup> GRETHLEIN, Gerhard: Die Problematik des Verschlechterungsverbot im Hinblick auf die besonderen Maßnahmen des Jugendrechts. Neuwied am Rhein, 1963. 29. o.

<sup>3</sup> KRETSCHMANN, Hans-Jochen: Das Verbot der *reformatio in peius* im Jugendstrafrecht. Saarbrücken, 1968. 54. o.

<sup>4</sup> MOLNÁR László: A *reformatio in peius* tilalmának érvényesülése a Bp. 202. § a)-c) pontjára alapított hatályon kívül helyezést követő új eljárásban. Magyar Jog, 1956/4. 109. o.

- The appeal filed by the prosecutor in order to take measures (such as like confiscation of property or supervision by probation officer) does not lift the prohibition of reformation in peius.
- In the same way: the prohibition of reformatio in peius became effective despite the appeal against the defendant filed by the prosecutor, if the Attorney General acting at second instance upholds his transcript (the grounds of the appeal) only regarding to motions which does not lift the prohibition of reformation in peius (for example, in order to aggravate the degree of security of imprisonment)
- If the prosecutor makes a motion concerning the revocation of the sentence due to groundlessness (within the compass of the reserved appeal aiming the aggravation), the possibility of aggravation cannot be changed thereby (unless, the appeal against the defendant is expressly withdrawn).
- If the prosecutor files an appeal on account of partial acquittal, the prohibition of reformation in peius does not take effect in case the Court of Appeal establishes the guilt of the accused because of this crime.
- If the prosecutor is not present at the hearing and he makes a statement concerning the decision reported by the means of serving the operative parts, he files an appeal against such decision and the reasoning of the remedy is made after serving the justified judgment, this statement shall not be considered as an appeal against the defendant, not even in spite of the fact that the prosecutor upholds the appeal against the accused in the reasoning arrived to the court after the expiration date for filing an appeal.
- In case the prosecutor files an appeal in order to impose a general (covering all categories of public vehicles) prohibition of driving or prohibition of driving covering more than one category of public vehicles instead of prohibition of driving of one category (or not all from among several ones) shall be considered as an appeal against the accused. However, the principal and secondary penalty shall not be aggravated during the process of second instance just if the appeal filed (upheld) regarding the prohibition of driving a moped and not regarding the prohibition of driving a vehicle included in Category "A" (among the categories there is no class in severity).
- Appeals filed apart from but related to the imposition / aggravation of punishment (principal- and secondary penalty, criminal measures) shall never be considered as an appeal against the defendant (appeal for preliminary exemption or inclusion of fines imposed during a procedure of minor offence, etc.)
- An appeal of defense shall never lift the prohibition of reformation in peius, even if the appeal apparently seems to be filed against the defendant.

b) When may the defendant be declared guilty again despite the prohibition of reformatio in peius?

- To consider an act as a different (or additional) criminal offense than the court of first instance has established is not regarded as the establishment of guilt, but rather as the alteration of classification of the criminal offense, therefore this is not excluded by the prohibition of reformation in peius.
- Nevertheless, if the court of first instance has sentenced the defendant, but has not established the guilt of the defendant concerning other crimes as well according to the facts written in the statement of fact of the indictment (i.e. has not covered adequately the indictment), the court of second instance shall not find the defendant guilty in the kind of crimes written above in lack of an appeal against the defendant

- In case the unification of the cases did not happen during the procedure of first instance, the court of second instance may unify the cases, but if the prohibition of reformatio in peius takes effect the court of second instance shall quash the judgment of the court of first instance (and during the retrial there is no impediment to aggravation).

c) When may more disadvantageous provisions be taken against the defendant despite the prohibition of reformatio in peius?

- the secondary penalty is always considered as a lighter punishment than the principal penalty, even if the truth is that it means heavier detriment for the defendant;
- If the prohibition of reformatio in peius is effective the court of second instance shall not impose such secondary penalty which was not imposed by the court of first instance, neither in case it reduces the extent of the principal penalty, nor if it ignores another secondary penalty imposed by the court of first instance.
- The prohibition of reformatio in peius does not exclude the possibility that the court of second instance may ignore the preliminary exemption in the lack of an appeal against the accused filed by the prosecutor;
- The prohibition of reformatio in peius does not exclude the possibility that legal measures, which were not imposed by the court of first instance, may be imposed by the court of second instance;
- The prohibition of reformatio in peius shall not be considered as violated if the provisions of the probation of the defendant is aggravated in spite of the prohibition of reformatio in peius.;
- The prohibition of reformatio in peius does not inhibit the aggravation of the degree of security of imprisonment of the defendant;
- It shall be possible to pass a judgment on the civil claim when the prohibition of reformatio in peius is effective, even in case the court of first instance has directed the enforcement of the civil claim to be managed by other legal means and this provision has not been appealed by anyone.

d) The case law regarding the prohibition of reformatio in peius prevailing in the retrial process:

- The numerous ad hoc decisions record merely the fact, that the prohibition of reformatio in peius is also applies during the procedure of retrial if none of the exceptions occurs (e.g. triple novelty – i.e. a new evidence comes up, according to this new fact shall be established and as a result of this heavier punishment shall be imposed)
- The prohibition of reformatio in peius shall be lifted during the procedure of retrial if any new fact based on any new evidence is established during the procedure of second instance of the main case.
- If the defendant fails to fulfill his obligation of support since the sentence of first instance has passed, this should be qualified as a new evidence in case of the crime of omission of support and in such cases the prohibition of reformatio in peius is not effective during the procedure of retrial.

e) The ad hoc decisions related to the separate procedures, the extraordinary legal remedies and special procedures are primarily carrying out the clarification of the text of the law:

- The prohibition of reformatio in peius is not violated in case the court condemns the defendant to labor in the public interest in the decision given according to the hearing

instead of to a fine imposed without a hearing because of significantly aggravating penalty should be imposed on the basis of the establishment of new facts.

- However, if the defendant files a request for holding a hearing regarding to the summons made without a hearing, and during the trial no new facts emerges according to which new facts should be established and significantly aggravating penalty should be imposed, the secondary penalty shall not be aggravated (e.g. assignation a longer duration of prohibition from driving vehicles).
- In case a request for holding a hearing is filed at the procedure of first instance and the judgment of first instance is appealed against the defendant, the sentence may be aggravated during the procedure of second instance irrespective of who has filed the request for holding a hearing.
- The prohibition of reformatio in peius does not hinder the imposition of reduction to a lower rank instead of prohibition from participating in public affairs. In this case no new secondary penalty has been imposed, it rather means only that the court of second instance imposed just a part of the legal disadvantages of prohibition from participating in public affairs, so it reduces the punishment.
- The prohibition of reformatio in peius is effective during the procedure of retrial in case the judgment has been revoked because a motion for revision has been filed on the basis of absolute procedural contravention.
- The prohibition of reformatio in peius which became effective during the main case is not effective during several of the special procedures (e.g. posterior consolidation of sentences)
- But at the same time the exceptions of the prohibition of reformatio in peius, which are effective during the retrial, are not effective during the special procedures.

The consequences of the violation of prohibition of reformatio in peius were subjected to many disputes before the operative Act XIX of 1998 on Criminal Proceedings came into force, because the former Act on Criminal Proceedings (Act I of 1973) did not consider the violation of prohibition of reformatio in peius as a ground for revision. The jurisprudence treated - correctly - the violation of prohibition of reformatio in peius as a relative procedural contravention (cp. Article II. of Criminal Conceptual Resolution no. 189 of 2000). The violation of prohibition of reformatio in peius became an absolute procedural contravention when the operative Act on Criminal Proceedings came into force on 1<sup>st</sup> of July 2003, regarding to its consequences. This alteration can be definitely approved by us.

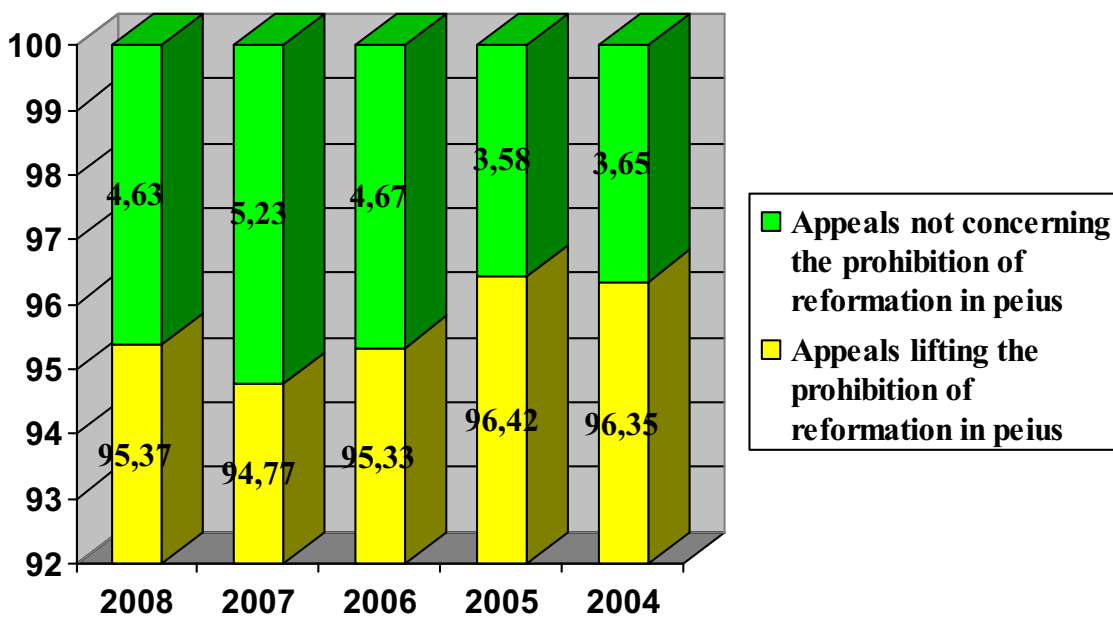
#### **The statistical analysis of the appeals filed by the prosecutor - in the light of the prohibition of reformatio in peius.**

The prosecutors filed appeal against 6.509 defendants according to the statistic statement of the Supreme Prosecutors' Office of 2008 (this data was 5.542 in 2007, 6.296 in 2006, 6.426 in 2005, 7.024 in 2004). The appeals were filed mostly against the defendant and just 1, 26% of the appeals were filed in favor of the defendant by the prosecutors (for acquittal, reduction of the sentence or abandonment of proceedings). The purpose of the appeals filed by the prosecutors against the defendant mostly, i.e. in 4.885 cases (75, 05%), was the aggravation of the sentence. By the way this rate is relatively invariable, since the rate of the appeals filed for aggravation happens to be between 74, 51% and 76, 14% with the regard to the data of the past five years:

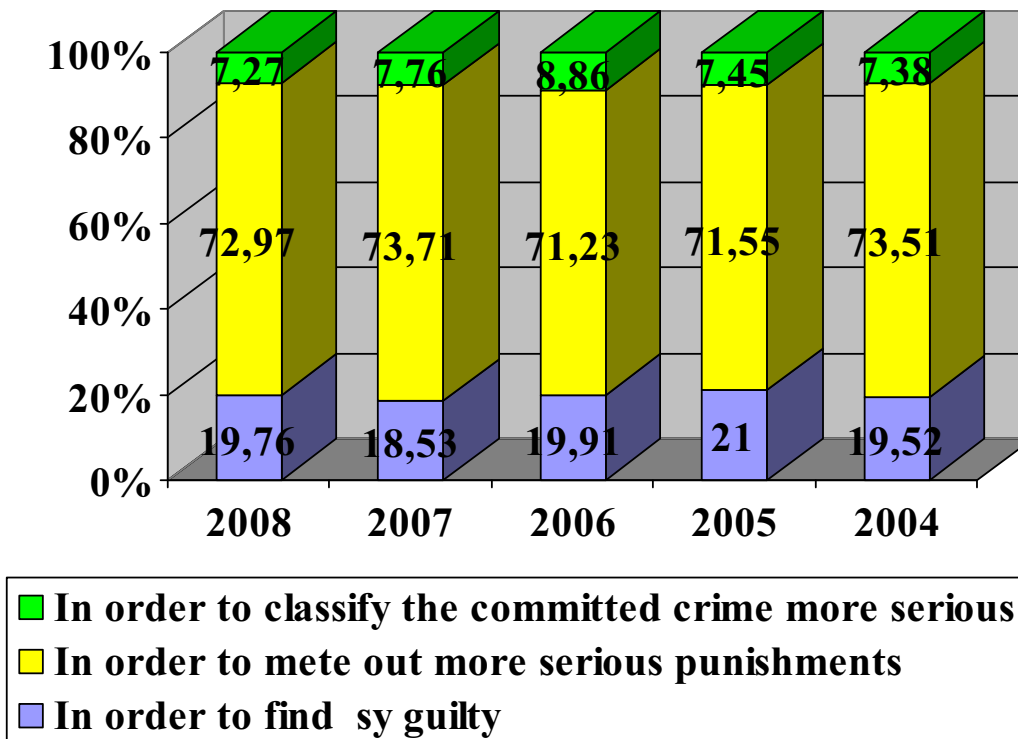
Prosecutors' offices	The no. of the defendants affected by the prosecutor's appeal	The grounds of the appeals filed by the prosecutor												
		Procedural misdemeanor	Ground - lessness	Appeal against the defendant			Appeal in favour of the defendant			Classification of the crime	Termination of child-custody	Decision on civil claim	Other provisions of the judgement	Lack of lawful prosecution-termination of the process
				'cause of acquittal	For increasing the punishment	'cause of termination	For acquittal	For reduce the punishment	For termination					
percentage														
Capital	2009	0,90	4,63	16,28	79,99	1,24	0,45	0,40	0,00	6,72	0,00	0,00	1,74	0,20
Baranya County	230	0,00	5,22	24,35	75,22	1,30	0,43	0,87	0,00	10,00	0,00	0,00	3,48	0,00
Bács-Kiskun County	246	2,85	6,50	22,36	76,83	0,81	0,00	0,00	0,00	5,69	0,00	0,00	2,03	0,00
Békés County	128	0,78	3,91	10,94	79,69	0,78	0,00	0,00	0,00	3,91	0,00	0,00	3,91	0,00
Borsod-A-Z County	364	1,37	7,14	19,51	76,10	1,37	0,00	2,47	0,00	6,32	0,00	0,00	0,82	0,00
Csongrád County	276	1,09	13,41	7,61	68,84	1,09	5,80	0,36	0,36	6,52	0,00	0,00	2,17	0,00
Fejér County	153	0,00	3,92	26,14	70,59	1,96	0,65	3,27	0,00	9,15	0,00	0,00	1,96	0,00
Győr-Ménfőcsanak County	105	0,90	5,71	16,19	75,24	0,00	0,00	0,95	0,00	3,81	0,00	0,00	2,86	0,00
Hajdú-Bihar County	422	0,95	19,43	24,17	68,96	0,47	0,24	1,90	0,00	10,43	0,00	0,47	1,66	0,00
Heves County	75	0,00	4,00	14,67	85,33	0,00	0,00	0,00	1,33	4,00	0,00	0,00	0,00	0,00
Jász-Nagykun-Szolnok County	241	0,00	7,88	7,88	82,16	0,41	0,41	0,83	0,00	2,07	0,00	0,00	1,24	0,00
Komárom-Esztergom County	261	1,53	3,07	8,43	76,63	1,53	1,53	0,00	0,00	11,49	0,00	3,45	5,36	0,00
Nógrád County	78	0,00	0,00	25,64	67,95	2,56	0,00	0,00	0,00	5,13	0,00	0,00	2,56	0,00
Pest County	443	2,03	9,03	24,38	65,91	2,93	0,23	0,23	0,00	12,42	0,45	0,00	2,03	0,00
Somogy County	238	0,00	7,14	14,29	78,57	0,00	0,84	0,42	0,00	7,98	0,00	0,00	1,26	0,00
Szabolcs-Szatmár-Bereg County	331	0,00	4,63	23,26	74,02	0,60	0,30	0,00	0,00	6,34	0,00	0,00	0,60	0,00
Tolna County	84	2,38	2,38	29,76	64,29	5,95	0,00	0,00	0,00	9,52	0,00	0,00	0,00	0,00
Vas County	70	1,43	14,29	18,57	75,71	0,00	0,00	1,43	0,00	12,86	1,43	0,00	0,00	0,00
Veszprém County	557	0,36	10,41	31,42	68,40	1,44	0,00	0,36	0,00	6,46	0,18	0,00	0,72	0,00
Zala County	46	6,52	30,43	15,22	47,83	0,00	0,00	4,35	0,00	8,70	0,00	0,00	4,35	0,00

County															
Chief Investigating Prosecutor's Office	1	0,00	0,00	0,00	100,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Budapest Military Prosecutor's Office	115	0,87	3,48	17,39	82,61	0,00	0,00	0,00	0,00	1,74	0,00	0,00	0,87	0,00	
Debrecen Military Prosecutor's Office	16	0,00	18,75	31,25	75,00	0,00	0,00	0,00	0,00	25,00	0,00	0,00	0,00	0,00	
Győr Military Prosecutor's Office	5	0,00	0,00	20,00	80,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	
Kaposvár Military Prosecutor's Office	8	0,00	37,50	50,00	100,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	
Szeged Military Prosecutor's Office	7	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	85,71	0,00	0,00	0,00	0,00	
<b>In the aggregate</b>	<b>6509</b>	<b>0,95</b>	<b>7,36</b>	<b>19,11</b>	<b>75,05</b>	<b>1,21</b>	<b>0,57</b>	<b>0,66</b>	<b>0,03</b>	<b>7,47</b>	<b>0,06</b>	<b>0,17</b>	<b>1,77</b>	<b>0,66</b>	
Year 2007	5542	1,35	7,06	18,17	75,73	0,87	0,63	0,83	0,04	7,98	0,07	0,18	2,33	0,04	
Year 2006	6296	1,19	8,13	20,17	74,51	0,65	0,78	0,67	0,06	9,28	0,05	0,22	1,78	0,02	
Year 2005	6426	1,91	8,89	20,96	74,54	0,92	0,82	0,39	0,03	7,77	0,09	0,08	1,96		
Year 2006	7024	1,34	7,22	19,33	76,14	0,88	0,54	0,85	0,07	7,22	0,14	0,06	1,49		

The table shows properly that great percentage of the appeals filed by the prosecutors lifted the prohibition of reformatio in peius and just a few appeals filed by the prosecutors did not concern it. The following diagram demonstrates the insignificant fluctuation of the amount of the appeals which does not concern the prohibition of reformatio in peius:



In terms of the prohibition of reformatio in peius the appeals filed against the defendant is significant. Obviously there were appeals filed by the prosecutor which were filed for more than one reason (since if we add the numbers of appeals filed for aggravating classification to the numbers of the appeals filed against the defendant, then the result of the numbers of the appeals would be more than the total number), notwithstanding it is still necessary to examine the rate of distribution of the appeals among the relevant reasons concerning the prohibition of reformatio in peius (reasons such as establishment of guilt, aggravation of penalty or difficulties with classification):





Apparently, only a difference of 1-2 % can be observed in the distribution of the reasons of the appeals filed against the defendant during the past five years. Appeals filed by the prosecutors against the defendant add up to three-quarters of the appeals filed in order to aggravate the sanction; the remainder of 25-30% is divided in the ratio of 2 to 1 between the appeals filed for establishment of guilt and aggravation of classification, in favor of the first one.

It can be laid down as a fact with regard to the statistics of the counties that prominent difference can hardly be found among the grounds of the appeals filed by the prosecutors. The fact that the rate of appeals filed by the Central Chief Investigating Prosecutors' Office against the defendant, for imposing aggravated penalty in particular is 100% confirms the thesis that statistic data may often be misleading. (Since this body of justice filed an appeal only against one defendant in 2008, therefore if it had been filed for whatever reason it would draw one-sided picture of the cause of the appeal filed by this office.) It is a more expressive data that the rate of appeals filed for the establishment of guilt of the defendant on the grounds of acquittal or terminating the procedure was far less than the average 20% in the following counties: Békés County (11, 72%), Csongrád County (8, 70%), Jász-Nagykun-Szolnok County (8, 29%) and Komárom-Esztergom County (9, 96%). The difference is reverse in Veszprém County where almost one-third part of the appeals was filed by the prosecutors on this ground (32, 86%). It is hard to say whether the prosecutors' offices or the courts are the cause of this (It is obvious that there is less chance for filing appeals for such reasons in case less acquittal or termination of the procedure occurs.) Remarkable disproportion concerning the average ratio of 3/4 arises regarding to the appeals filed for aggravating the penalty just in Zala County since here the purpose of the prosecutors' office to aggravate the penalty or the measures was only less than the half (47, 83%) of the cases when the appeals were filed by the prosecutors.

The appeals filed by the prosecutors' offices operating alongside the courts of first instance were mostly upheld by the (chief) prosecutors' offices operating alongside the courts of second instance. It happened just about in the one-sixth part of the cases that the (chief) prosecutors' office operating alongside the court of second instance withdrew the appeal of the prosecutor of first instance and the rate is almost the same in the case when it upheld the appeal, just revised. So the appeals were sustained in the two-third part of the cases without any modification, and this rate has not changed remarkably in the past five years:

<b>Year</b>	<b>Sustained appeals (%)</b>	<b>Revised appeals (%)</b>	<b>Withdrawn appeals (%)</b>
<i>2008</i>	4382 (67,40 %)	1047 (16,10 %)	1073 (16,50 %)
<i>2007</i>	3620 (65,37 %)	879 (15,88 %)	1038 (18,75 %)
<i>2006</i>	4236 (67,33 %)	915 (14,54 %)	1141 (18,13 %)
<i>2005</i>	4311 (67,09 %)	1020 (15,88 %)	1094 (17,03 %)
<i>2004</i>	4817 (68,57 %)	1006 (14,33 %)	1201 (17,10 %)

It is interesting that remarkable difference can be observed in Zala County regarding to the above written case after considering the distributions in the counties. While in other counties the total rate of the sustained or revised appeals amount to the four-fifth part of the cases – similarly to

the national average – until then this rate is in Zala County just 60, 87% (i.e. the Chief Prosecutors' Office of Zala County has withdrawn approximately the 40% of the appeals filed by the prosecutors of lower-grade against the definitive decision of first instance!). Likewise, the rate of the withdrawn appeals appears to be quite high in Baranya County (40, 87%) and Tolna County (34, 51%), whilst this number stayed significantly low comparing to the national average of 16, 50% in Borsod-Abaúj-Zemplén County (9, 34%) and Jász-Nagykun-Szolnok County (6, 22%).

Last but not least, the efficiency of the appeals filed by the prosecutors for aggravation of the penalty shall be examined. Generally the one-third part of such appeals seems to be efficient for many years (in 2008: 32,09 %; in 2007: 33,28 %; in 2006: 36,21 %; in 2005: 33,45 %; in 2004: 37,73 %). The efficiency of the appeals was greater comparing to the national average in 2008 in Békés County (47, 13%) and Heves County (44, 44%), and the efficiency was remarkable significant in Szabolcs-Szatmár-Bereg County (55, 79%) and in Zala County (53, 33%). The situation is similar regarding to the Chief Prosecutors' Office of Appeal, though the efficiency of the appeals filed for aggravating the penalty aggregate 1/4-1/5 at three courts of all the High Courts of Appeal (High Court of Appeal of Budapest, of Pécs and of Győr).

It is worth mentioning that the efficiency of the appeals filed by the prosecutors on the basis of groundlessness is much better than efficiency of the appeals filed for aggravating the penalty (44, 61% on national wide level). The efficiency exceeded the 50% at six of the ten County Courts entitled to pass a judgment on the appeals based on groundlessness (63, 33% in Csongrád County, 52, 63% in Jász-Nagykun-Szolnok County, 76, 47% in Komárom-Esztergom County, 73, 33% Pest County, 52, 63% in Szabolcs-Szatmár-Bereg County, 66, 67% in Vas County).

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