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APPLICATION NO. 18030/11
MAGYAR HELSINKI BIZOTTSÁG AGAINST HUNGARY
WRITTEN SUBMISSION OF THE APPLICANT

I. FACTS OF THE CASE

1. Research into the Hungarian ex officio defence (criminal legal aid) system has shown that the system does not operate adequately in its present form, and one of the main reasons for the problems is that the investigation authority (generally the police) may freely choose any defence counsel from the list compiled by the competent bar association. This results in defendants not trusting the defence counsel chosen by the authorities, and data also confirm that at many police headquarters a large part of ex officio appointments are obtained by the same one or two attorneys or law offices, as a result of which the livelihood and practice of these attorneys is dependent on the authority making the appointments. All this endangers the independence of defence counsels and the effective protection of rights, and, in addition, the selection system operates on the basis of non-public and impenetrable considerations. The goal of the applicant HHC's project "Steps Towards a Transparent Appointment System in Criminal Legal Aid", launched in 2009 (see: http://helsinki.hu/en/steps-towards-a-transparent-appointment-system-in-criminal-legal-aid-2009-2011) was the reform of the system of ex officio defence, and, more closely, the analysis of the system of appointments on a national level and to change the practice of ex officio appointments.

2. One element of the project was that **the Applicant requested data from altogether 28 local police headquarters and county police headquarters, situated in seven Hungarian regions, concerning the names of defence counsels appointed and the number of cases in which each of them was appointed in 2008 in the police headquarters' area of jurisdiction.** The aim of the data request was to demonstrate and prove that it is a widespread practice that appointments are distributed disproportionately between the defence counsels who may be appointed, endangering the enforcement of the right of defendants to effective defence.

3. The applicant based its data request on Article 20 (1) of Act LXIII of 1992 on the Protection of Personal Data and the Public Nature of Public Interest Data (hereafter: Data Act 1992).

4. 17 police headquarters complied with the data request (without a lawsuit launched against them), while five further police headquarters disclosed the requested data after a lawsuit was launched against them. The HHC launched lawsuits against the police headquarters which refused to disclose the data; and won most of these cases, the courts obliging the police headquarters to disclose the data requested.

5. The Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters were also among the police headquarters refusing to disclose the data.

6. **In August 2009 the HHC turned to the Hajdú-Bihar County Police Headquarters with the request to provide information about the name of defence counsels appointed in its area of jurisdiction in 2008, and the number of appointments as divided by the attorneys at law**. **In its response the Hajdú-Bihar County Police Headquarters refused to disclose the data** with the reasoning that according to its standpoint, "the name of the defence counsels is not public interest data nor public data of public interest under Article 19 (4) of Act LXIII of 1992, since the defence counsel is not a member of a body performing state, municipal or public duties, thus his/her name is personal data, the forwarding of which is not possible under the law". The headquarters also referred to the disproportionate burden the provision of the data would impose on them.

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7. **The data request of the HHC was also rejected by the Debrecen Police Headquarters with a reasoning identical to that of the Hajdú-Bihar County Police Headquarters.**

8. **On 25 September 2009 the HHC brought an action** against both the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, asking the court to oblige the police headquarters to disclose the data.

The first instance court procedure

9. In its statement of claim the applicant HHC stated that ex officio defence counsels perform a public duty in the interest of the public and from the money of the public, thus their data qualify as public data of public interest. Furthermore, the organisation claimed that when under Act XIX of 1998 on the Criminal Procedure (hereafter: CCP) it is obligatory to appoint a defence counsel, the act of appointment unequivocally qualifies as public duty; and claimed that the decisions pertaining to the appointment of defence counsels are in the possession of the respondents, and that the respondent police headquarters dispose over the data on the person of defence counsels and the number of appointments in a materialized format.

10. In its **counter-claim submitted as a respondent, the Hajdú-Bihar County Police Headquarters** upheld its standpoint that the names of the defence counsels are personal data, but they are not public data of public interest; and that defence counsels do not carry out their tasks under the scope of duties and competence of the police headquarters, and are not members of the organisation. It also stated that collecting the personal data pertaining to the defence counsels and grouping them according to the aspects required by the plaintiff would – considering the high case number – entail a disproportionate workload for them. In its **counter-claim submitted as a respondent, dated 9 October 2009, the Debrecen Police Headquarters** asked for the termination of the lawsuit against it, referring to the lack of its legal standing.

11. **The Debrecen City Court** merged the lawsuits initiated against the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, and in its **decision 48.P.23.996/2009/5., dated 21 October 2009, obliged both respondents to disclose to the HHC within 60 days the data requested**, i.e. that "who did it appoint as a defence counsel – by name, in an identifiable way – in the year 2008, in its area of jurisdiction and in cases falling under its competence, and how many times each of the defence counsels were appointed". [In its decision the Debrecen City Court also referred to the fact that even though the Debrecen Police Headquarters is not a legal entity, under Article 21 (4) of the Data Act 1992 it has legal standing as the entity possessing the data.]

12. In its reasoning the first instance court stated that even though "the defence counsel does not qualify as a person performing public duty, and, furthermore, is not the employee or the agent of the respondents", "the public interest nature of defence shall be judged by taking into consideration the aim and role of the defence". In that regard, the court referred to Article 46 of the CCP, which establishes the cases when the participation of a defence counsel in the criminal procedure is obligatory, and to Article 48 of the CCP, which makes it the obligation of the investigation authority to appoint the defence counsel if the latter conditions prescribed by the law prevail, thus "it refers the duty to realize the constitutional fundamental right to defence also into the scope of duties of the investigation authority". The court reached the conclusion that "therefore, the measures taken in relation to mandatory defence qualify as such public interest activities the data related to which are in connection with an interest of outstanding importance from the viewpoint of the society, and not with expressing one's personality and the protection of equitable private interests".

13. Thus in the view of the court, in the case of obligatory defence "the name of defence counsels, and with regard to the given defence counsels the number of appointments, do not entail such equitable information

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of private nature with regard to which it would be necessary to disclose the data only upon the approval [of the persons concerned]". Furthermore, the court stated that "the ex officio appointed defence counsel of course does not carry out the work of the investigation authority, but at the same time mandatory defence means that in such cases the legislator vested the investigation authority in a given phase of the procedure with the task of securing the suspect's defence, and the ex officio appointed defence counsel carries out an activity related to that". Finally, the court established that because of the public interest nature of mandatory defence "the interest related to informing the society seems stronger than the incidental protection of privacy, which is not in danger anyway, since the role of the defence counsel is public as from the point of pressing charges". In its decision the Debrecen City Court "found that the name of ex officio appointed defence counsels, and in connection to that the number of cases in which the defence counsel was appointed, are public data of public interest, so the respondents, as data possessors, are obliged to disclose them".

Second instance court procedure

14. **The Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters submitted an appeal in November 2009** against the decision of the Debrecen City Court. In their appeal the respondents submitted that they continue to uphold their standpoint that the names of defence counsels are not public interest data and are not public data of public interest, since a defence counsel is not a member of a body performing state, municipal or public duties, thus his/her name is a personal data, and the conditions under the law of forwarding it are not complied with. Furthermore, the respondents upheld that providing the data would mean unreasonable workload.

15. As a result of the appeal, **the Hajdú-Bihar County Court, as second instance court, altered the first instance decision with its decision 2.Pf.22.46/2009/4., issued on 23 February 2010, and rejected the claims of the HHC as a plaintiff.**

16. According to the second instance court, Article 19 (4) of the Data Act 1992 "regulates exclusively the disclosure of the personal data of persons acting within the powers and competences of bodies performing public duties, related to these persons' powers". According to the further parts of the reasoning, under Article 2 Point 5. public data of public interest is "any data other than public interest data, whose disclosure or accessibility is prescribed by law in the interest of the public", but "in the laws referred to by the plaintiff there is no provision which would qualify the activity of ex officio appointed defence counsel a public duty in terms of the application of the data protection law".

17. Furthermore, the Hajdú-Bihar County Court laid down that "the reimbursement of the ex officio appointed defence counsels' fee by the state cannot establish the public duty nature [of the ex officio appointed defence counsels' activities]"; and in the course of interpreting the CCP it found that "the police's task is law enforcement, and in certain cases the appointment of the defence counsel; the activities of the defence counsel differentiate from that both in person and in terms of tasks, since the defence counsel does not perform a State or municipal task defined by law, and the State has not delegated its above public duty to the defence counsel".

Judicial review procedure

18. **The applicant HHC submitted a request for judicial review in April 2010 to the Supreme Court**, asking the Supreme Court to repeal the decision of the second instance court, and to reach a decision approving the statement of claim.

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19. In the request for judicial review, the legal representative of the HHC explained that the proceeding court's statement saying that the ex officio appointed defence counsel is not a person performing public duties is unconstitutional. Based on Article 57 of Act XX of 1949 on the Constitution of the Republic of Hungary the right to defence is a constitutional fundamental right, and guaranteeing that is the State's public duty throughout the whole criminal procedure. The defence counsel performs a public duty throughout the whole criminal procedure in order to guarantee a constitutional fundamental right, irrespective of whether he/she acts on the basis of an appointment or a retainer, and it is absolutely irrelevant from this aspect who finances his/her activities.

20. In addition, it is also irrelevant how the subtasks related to performing this public duty are divided between the investigation authority and the defence counsel. In this regard the Applicant referred to the case-law of the Constitutional Court of the Republic of Hungary, along with the European Convention on Human Rights and the case-law of the European Court of Human Rights.

21. The Applicant argued that although the names of the ex officio defence counsels guaranteeing the right to defence and performing a so-called "other public duty specified under the law", and the number of appointments they attend to is personal data (since they may be linked to the defence counsels), but they qualify as public data of public interest. The legal representative of the HHC emphasized that the criteria "prescribed by law" as required by Article 2 Point 5 of Data Act 1992 is fulfilled by Article 19 (4) of Data Act 1992 itself when it sets out in a general manner that unless otherwise provided by law, every personal data of persons performing public duties shall, inasmuch as they are related to their duties, constitute public data of public interest. Thus, according to the request for judicial review, the second instance court was wrong when it failed to consider as public interest data the names of ex officio appointed defence counsels and the number of their appointments due to the lack of a separate legal provision which would define the activity of the defence counsel a public duty. The legal representative of the Applicant stated the following: if it is verified that the activity of ex officio appointed defence counsels is a public duty, "then it is also certain that the name of ex officio appointed defence counsels and the number of the cases undertaken by them are related to their task, since nothing is in a more direct connection with a given public duty than the fact as to who performs it and in what quantities".

22. In the request for judicial review the legal representative of the plaintiff submitted that the plaintiff's standpoint is also supported by the statement of the Hungarian Bar Association's president, submitted to the court in the course of the lawsuit earlier on; and also informed the Supreme Court that as of the date of submitting the request for judicial review, 18 police headquarters and five courts considered the data request made by the respondent as well-founded, the aim of the data request for that matter being the continuation of the scientific research aimed at improving the system of ex officio appointments, ongoing for years.

23. **In their counter-request submitted as respondents, the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters** asked the Supreme Court to uphold the second instance court decision on the basis that the activities of the defence counsel differentiate both in person and in terms of tasks from the public duty of the Police, defence counsels "not performing a state or municipal task defined by law, and the state has not delegated its public duty [to the defence counsels]".

24. **In its decision Pfv.IV.20.901/2010/4., dated 15 September 2010, the Supreme Court upheld the final decision of the Hajdú-Bihar County Court.** The Supreme Court examined whether defence counsels qualify as "other persons performing a public duty". The court elaborated that "it may be decided exclusively on the basis of the provisions of Data Act 1992 whether a given person qualifies as a person performing a public duty. Exclusively such persons qualify as persons performing public duty who have

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independent powers and competences – provided that they do not qualify as a body defined in Article 19 (1) of the Data Act 1992."

25. In the reasoning of its decision the Supreme Court acknowledges that guaranteeing the right to defence is the duty of the state. According to the reasoning, this duty is fulfilled by the court, the prosecutor's office and the investigation authority by guaranteeing the right to present arguments for the defence and by appointing the defence counsel in the instances described in Articles 46 and 48 of the CCP; and "by that they fulfil the public duty they are entrusted with; thus performing the public duty is terminated when the appointment of the defence counsel is done. After the appointment, although it also serves a public purpose, the activity of the defence counsel is a private activity. The defence counsel cannot be considered an 'other person performing public duty', since the defence counsel does not have powers and competences specified under the law. The fact that the different procedural laws establish rights and obligations for the person performing the defence in the course of the criminal procedure obviously cannot be considered as the law specifying powers and competences. The CCP sets out obligations exclusively for the authorities in relation to guaranteeing the right to defence." On the basis of the above arguments the Supreme Court came to the conclusion that the names of defence counsels and the number of their appointments per person are personal data, and even though the respondents qualify as data possessors with regard to these data, they cannot be obliged to disclose these personal data.

II. RESPONSES OF THE APPLICANT TO THE QUESTIONS RAISED BY THE COURT

1. HAVING REGARD TO THE COURT'S CASE-LAW, IS ARTICLE 10 OF THE CONVENTION APPLICABLE, IN THE CIRCUMSTANCES OF THE PRESENT CASE?

1.1. Right of access to information

26. The Applicant submits that, having regard to the European Court of Human Rights' case-law as also cited below, Article 10 of the European Convention on Human Rights is applicable in the circumstances of the present case due to the following reasons.

27. According to Article 10 of the Convention, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and *to receive and impart* information and ideas without interference by public authority and regardless of frontiers. Although Article 10 of the Convention does not include any reference to the right to "seek" information, and the text of the Convention expressly uses only the words "receive" and "impart", according to the case-law of the Court, Article 10 also covers the right to seek information. This was first acknowledged by the Court in the *Dammann v. Switzerland* case (Application no. 77551/01, Judgment of 25 April 2006).

28. In connection with the *Társaság a Szabadságjogokért v. Hungary* case (Application no. 37374/05, Judgment of 14 April 2009, § 35), the Court stated that its case-law had in the previous years advanced towards a broader interpretation of the notion of "freedom to receive information" and thereby towards the recognition of a right of access to (public) information. [see: *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006], while in the *Társaság a Szabadságjogokért v. Hungary* case the Court acknowledged that **Article 10 of the Convention protects the right of access to public interest data**. In its even more recent case *Youth Initiative for Human Rights v. Serbia* (Application no. 48135/06, Judgment of 25 June 2013), the Court recalled under § 20 that **"the notion of 'freedom to receive information' embraces a right of access to information"**; while in the case *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirt-*

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schaftlichen Grundbesitzes v. Austria (Application no. 39534/07, Judgment of 28 November 2013, § 34) it stated the following: "The Court has consistently recognised that **the public has a right to receive information of general interest**. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters."

29. Thus, as also recalled in the joint third party intervention of ARTICLE 19 and AIP, even though "in the past the Court did not recognize the right of access to information held by public authorities as being within the scope of Article 10", as in the case *Leander v. Sweden* (Application no. 9248/81, Judgment of 26 March 1987, § 74) or *Gaskin v. the United Kingdom* (Application no. 10454/83, Judgment of 7 July 1989, § 57), these cases "were decided in a substantially different era than from today", and in 2009, in the *Társaság a Szabadságjogokért v. Hungary* case the Court "clearly took the opinion that the right to access information held by public authorities is an issue to be considered within the ambit of Article 10".[1]

30. The above approach is **further strengthened by international documents and major international bodies,** showing "a widespread acceptance that the right of information is an essential part of free expression".[2] For example, as also referred to by the Court in the *Youth Initiative for Human Rights v. Serbia* (§ 13), the Human Rights Committee came to the same conclusion with regard to Article 19 of the International Covenant on Civil and Political Rights:

> "Article 19 of [the International Covenant on Civil and Political Rights] guarantees freedom of expression in similar terms to those used in Article 10 of the Convention. In July 2011 the Human Rights Committee, the body of independent experts set up to monitor the implementation of that treaty, reiterated in its General Comment No. 34 that Article 19 of the Covenant embraced a right of access to information held by public bodies (document CCPR/C/GC/34 of 12 September 2011, § 18). It further stated that such information included records held by a public body, regardless of the form in which the information was stored, its source and the date of production (ibid.). Lastly, the Human Rights Committee emphasised that when a State party imposed restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself; in other words, the relation between right and restriction and between norm and exception must not be reversed (see § 21 of that document)."

31. In addition, in General Comment No. 34 the Human Rights Committee also set out the following (§ 18):

> „Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs [...] and the right of the general public to receive media output. [...]"

32. Unless access to information is included in the right to receive and impart information, States could easily render this right devoid of substance by denying access to important data of public interest. Access to information is a *sine qua non* for the effective and non-illusory freedom of expression, just as without access to a court, the right to a fair trial would be meaningless. As the Court stated in the *Golder v. UK case* (Application no. 4451/70, Judgment of 21 February 1975, § 35), while Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms, were provision "to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their

[1] Third party intervention submissions by ARTICLE 19 and Access to Information Programme in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, §§ 5-9
[2] See: Third party intervention submissions by ARTICLE 19 and Access to Information Programme in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, §§ 10-16; *Youth Initiative for Human Rights v. Serbia* , §§ 13-15.

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jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles [including the rule of law] and which the Court cannot overlook […].” The Applicant is of the view that the question whether Article 10 includes the right to seek information is analogous with the question whether Article 6 guarantees the right of access to a court, and therefore must be answered along the same lines.

33. The Court also stated earlier among others in the *Guerra and Others v. Italy* case (Application no. 116/1996/735/932, Judgment of 19 February 1998, 53. §) that the freedom to receive information cannot be construed as imposing on the Member States of the Convention positive obligations to collect and disseminate information of their own motion [see also: *Roche v. the United Kingdom* (Application no. 32555/96, 19 October 2005, § 172)]. The latter consideration established by the Court appears also in the case *Sdruženi Jihočeské Matky v. the Czech Republic*, in which the Court emphasized that the data requested by the applicant non-governmental organisation were at the disposal of the authorities in the form of documents, thus there was no need for separate data collection in order to comply with the data request, and there was no need for creating new data either. In addition, in the *Sdruženi Jihočeské Matky v. the Czech Republic* case the Court emphasized the circumstance that the applicant non-governmental organisation submitted a request to receive the data. According to the above judgment, when deciding upon the applicability of Article 10, thus whether the applicant expected the Member State to act proactively or not, it is relevant – if not of decisive importance – whether the applicant has submitted a data request or not. Thus, in terms of the applicability of Article 10 it is relevant whether the case concerns the refusal of a submitted data request or the omission of the state to disseminate information of its own motion.

34. The case underlying the present submission fulfils all of the above requirements, and, consequently, Article 10 of the Convention is applicable in the case. Firstly, **the Applicant did not expect the authorities to act proactively, but submitted a clear data request** to the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, containing a concrete question, which was however refused by the police departments. In addition, it is also clear that the data requested were at the disposal of the organs approached, in such a way that no further data collection would have been necessary to disclose them. This is on the one hand supported by the fact that the respondent police departments admitted already at the first instance court hearing that disclosing the data from the so-called “RoboCop” system (the IT system of the police) would be feasible even within the 15-day deadline established by Article 21 (2) of Act LXIII of 1992 on the Protection of Personal Data and on the Public Nature of Public Interest Data (hereafter referred to as “Data Act 1992”) for complying with data requests.

35. Secondly, it shall be highlighted that in the framework of its project “Steps Towards a Transparent Appointment System in Criminal Legal Aid” the HHC requested data from 28 police departments (including the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, being the concerned police units with regard to the present case), out of which 17 police departments provided the requested data instantly, while data regarding some further police departments were provided to the Applicant after it initiated civil lawsuits against all police headquarters which at first refused to provide the. It also has to be added that many police headquarters disclosed the data to the Applicant within the above 15-day deadline, making it apparent that the data are not only at the disposal of the police bodies and are processed by them, but also that complying with the data request does not require lengthy or large efforts, or efforts entailing disproportionate workload on behalf of the state authorities.

36. Furthermore, the Applicant would like to stress that according to the “Observations of the Government of Hungary on the Admissibility and Merits of Application No. 18030/11, introduced by Magyar Helsinki Bizottság” (hereafter referred to as “Observations of the Government”), **the Government of Hungary does not contest** that there has been an interference with the Applicant’s right to freedom of expression in

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the present case (see § 7 of the Observations of the Government), i.e. the Applicant's right to receive information within the meaning of Article 10(1) of the Convention.

37. On the basis of the above, the Applicant is on the view that the refusal to disclose the requested data and that the proceeding courts (with the exception of the first instance court) did not oblige the police headquarters to disclose the data, restricted its right of access to public interest data, and that the restriction concerns the right included in Article 10 of the Convention.

1.2. Freedom of research and the freedom to hold opinions

38. Freedom of expression includes the freedom to hold opinions, which in the present case may be interpreted both in relation to the Applicant and the general public. With regard to the Applicant, in the present case it is a fundamental precondition for it to hold an opinion to have access to the facts on the basis of which it can hold an opinion about the operation of the system of ex officio appointments. Thus, rejecting access to data impedes the realization of the freedom to hold opinions and freedom of expression. This interpretation is supported by the Court's judgment reached in the *Kenedi v. Hungary* case (Application no. 31475/05, Judgment of 26 May 2009), in which the Court stated that in the given case the access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant historian's right to freedom of expression (§ 43). Based on the logic of the latter argumentation, it may be stated with regard to the present case that the information requested (i.e. the information pertaining to the name of ex officio appointed defence counsels and the appointments received by them per year) are essential for the Applicant to form a well-founded opinion regarding the issue, based on real research results. Hence, ensuring the freedom of research in the present case serves as a precondition of the freedom of expression and the freedom to hold opinions.

39. Thus, Article 10 of the Convention is applicable in the circumstances of the present case also because it concerns an interference with the Applicant's freedom of research and the freedom to hold opinions.

40. The issue of interfering with the Applicant's freedom of research and the freedom to hold opinions is not addressed separately in the upcoming parts of the present submission. However, the conclusions with regard to the violation of the right of access to information shall apply also to these freedoms.

2. IN THE EVENT THAT QUESTION 1 IS TO BE ANSWERED IN THE AFFIRMATIVE, DOES THE APPLICANT ORGANISATION'S COMPLAINT ABOUT THE DENIAL OF ACCESS TO THE RELEVANT INFORMATION

(A)RAISE AN ISSUE OF FAILURE OF THE RESPONDENT STATE TO FULFIL ITS POSITIVE OBLIGATIONS UNDER ARTICLE 10 OF THE CONVENTION?
(B) OR SHOULD IT BE ANALYSED AS AN ISSUE OF FAILURE TO COMPLY WITH THE RESPONDENT STATE'S NEGATIVE OBLIGATION NOT TO INTERFERE UNJUSTIFIABLY WITH THE RIGHTS PROTECTED BY THAT ARTICLE?

41. In the view of the Applicant, its complaint about the denial of access to the relevant information should be analysed as **an issue of failure to comply with the respondent State's negative obligation** not to interfere unjustifiably with the rights protected by Article 10.

42. The fact that the provision of the requested data would have required the authorities to take certain actions (the collection of the existing data and the presentation of these data to the Applicant) does not render the

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issue to fall into the realm of positive obligations. The Applicant wished to exercise its freedom of expression by seeking information (with the purpose of imparting it with regard to an issue of weigthy public interest). By denying access to the information, the police (acting on behalf of the Hungarian State) prevented the Applicant from exercising a fundamental freedom, which therefore amounts to an unjustifiable interference with the right protected by Article 10. Therefore, the issue shall be analysed as the Hungarian State's failure to comply with the it negative obligations.

3. IN THE EVENT THAT THE MATTER SHOULD BE APPROACHED FROM THE ANGLE OF POSITIVE OBLIGATIONS UNDER ARTICLE 10 (AS SUGGESTED IN) 2(A) ABOVE), DID THE AUTHORITIES OF THE RESPONDENT STATE STRIKE A FAIR BALANCE BETWEEN ANY INTERESTS, NOTABLY PUBLIC INTERESTS, IN THE APPLICANT ORGANISATION OBTAINING ACCESS TO THE INFORMATION CONCERNED AND ANY INTERESTS IN REFUSING THIS? IN THIS CONNECTION,

(A) WHAT IS THE NATURE OF THE INFORMATION REQUESTED BY THE APPLICANT ORGANISATION UNDER THE DOMESTIC LEGISLATION AND PRACTICE? THE PARTIES ARE INVITED TO SUBMIT RELEVANT DOMESTIC CASE-LAW.
(B) WHAT WEIGHT SHOULD BE ATTACHED TO THE PUBLIC WATCHDOG ROLE PLAYED BY THE APPLICANT ORGANISATION IN THE PRESENT CONTEXT?
(C) DOES THE RESPONDENT STATE ENJOY A WIDE MARGIN OF APPRECIATION IN THESE CIRCUMSTANCES?

43. Since, as stated above, in the Applicant's view, the denial of access to information should be analysed as a failure to comply with the respondent State's negative obligation, Question 3 is not considered to be necessary to address separately in the present submission. However, most of the issues covered by Question 3 are addressed under the responses provided to Question 4 below, including the nature of the information requested in terms of the domestic legislation and practice and the weight of the Applicant's public watchdog role.

44. In this regard the Applicant also refers to the *SH and Others v. Austria* decision (Application no. 57813/00, Judgment of 3 November 2011, § 87), in which the Court stated that the boundaries between the State's positive and negative obligations do not always "lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests."

4. IN THE EVENT THAT THE DISPUTED DENIAL OF ACCESS SHOULD BE VIEWED AS AN INTERFERENCE WITH A RIGHT PROTECTED BY PARAGRAPH 1 OF ARTICLE 10 (AS PROPOSED IN 2(B) ABOVE), DID THE MEASURE COMPLY WITH THE CONDITIONS SET OUT IN ITS SECOND PARAGRAPH, NAMELY THAT IT BE "PRESCRIBED BY LAW", PURSUE ONE OR MORE OF THE LEGITIMATE AIMS ENUMERATED THEREIN AND BE "NECESSARY IN A DEMOCRATIC SOCIETY" FOR THE PURSUANCE OF ANY SUCH AIMS (I.E. PROPORTIONATE TO THE LEGITIMATE AIM(S) PURSUED).

45. The Applicant is of the view that the interference underlying the present case did not comply with the conditions set out in Article 10(2) of the Convention: on the one hand, the interference did not comply with the condition of being "prescribed by law", and it cannot be considered "necessary in a democratic society".

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4.1. Whether the interference was prescribed by law

46. The Applicant submits that the Hungarian authorities' actions in the underlying case were not in compliance with the relevant domestic legal provisions, namely the Data Act 1992, thus, the interference with the Applicant's rights under Article 10 of the Convention was not prescribed by law, as explained in detail below.

4.1.1. Domestic law applied and the nature of the data requested

47. As presented in the statement of facts, in the underlying case, the Applicant submitted data requests to police headquarters, asking them to provide information about the name of ex officio appointed (legal aid) defence counsels appointed in their area of jurisdiction in 2008, and the number of appointments as divided by attorneys. The data request was based on the following provisions of Data Act 1992 as then in force.

> *Relevant provisions of Data Act 1992*
>
> ***Article 2***
> *[...]*
> *4. Public interest data ("közérdekű adat"): any information or knowledge not constituting personal data, recorded in any manner or form, related to the activities of or managed by a body or person performing state or municipal tasks or other public duties specified under the law shall constitute public interest data, regardless of the manner of their management or of whether or not they constitute autonomous data or from part of a compilation;*
> *5. Public data of public interest ("közérdekből nyilvános adat"): any data other than public interest data, whose disclosure or accessibility is prescribed by law in the interest of the public;*
> *[...]*
> ***Article 19***
> *(1) Bodies or persons performing state or municipal tasks or other public duties specified under the law (hereafter referred to collectively as "bodies") are obliged to promote and ensure the accurate and prompt informing of the general public concerning matters within its sphere of duties, in particular concerning the state and municipal budgets and their implementation, the management of state and municipal assets, the utilisation of public funds and contracts concluded to that end, and concerning the granting of special or exclusive rights to market operators, private organisations and private persons.*
> *[...]*
> *(4) Unless otherwise provided by law, the personal data of persons acting within the powers and competences of bodies defined in Section (1) and the personal data of other persons performing public duties shall, inasmuch as they are related to those duties, constitute public data of public interest. Access to such data shall be governed by those provisions of this Act which regulate access to public interest data.*
> *[...]*
> ***Article 20***
> *(1) Anyone may submit a request for public interest data orally, in writing or electronically.*
> *[...]*

48. As seen from the quotations above, Article 2 Point 5. of the Data Act 1992 defines the notion of "public data of public interest" *("közérdekből nyilvános adat")*,[3] stating that this notion covers "any data other than

[3] The Government uses this translation, as therefore so does the Applicant, however it shall be noted that „data that is public out of public interest" is a more accurate translation of the term.

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public interest data *("közérdekű adat"),* whose disclosure or accessibility is prescribed by law in the interest of the public". Under Article 19 (4) of Data Act 1992, "public data of public interest" shall be accessible for the public under the same conditions as "public interest data". Furthermore, Article 19 (4) sets out that unless provided otherwise by law, the personal data of persons acting within the powers and competences of bodies defined in Article 19 (1) *and* the personal data of other persons performing public duties shall, inasmuch as they are related to those duties, constitute public data of public interest.

49. In its data requests the Applicant claimed that the data pertaining to **the number of defence counsel appointments qualifies as "public interest data" under Article 2 Point 4 of the Data Act 1992,** and **in connection to that the name of ex officio appointed defence counsels qualifies as "public data of public interest" under Article 2 Point 5 and the first sentence of Article 19 (4) of the Data Act 1992, thus that ex officio appointed defence counsels qualify as "other persons performing a public duty".** Thus, the Applicant was of the view that the defence counsels' personal data related to their duty/task as ex officio appointed defence counsels is public data of public interest, the access to which is governed by the provisions of the Data Act 1992 regulating access to public interest data.

50. It is true that the Applicant's data request covered personal data, and under the Hungarian law personal data are protected (cf. right to informational self-determination), but as every data protection act, Data Act 1992 also allows for the restriction of this latter right. Article 3 (1) of Data Act 1992 stipulates that the data subject's consent is not necessary for the lawful processing personal data including making the data accessible to any person) if the processing is ordered by an Act of Parliament (and in some cases ordered by a local government decree). The same article of Data Act 1992 sets out more on the publicity of personal data for the purposes of serving public interests: Article 3 (4) states that on grounds of public interest, an Act of Parliament may prescribe an explicitly defined range of personal data to be made public. In all other cases data may not be made public without the consent of the data subject. The Data Act 1992 itself contains rules that order the publicity of some personal data, for example under Article 19 (4) outlined above. Consequently, **when the applicant requests personal data of persons performing public duties, if those data are related to these public duties, the right to the protection of personal data cannot be referred to as the legal ground of denying the request**.

51. Before presenting the arguments as to why ex officio appointed defence counsels qualify as "other persons performing public duties", two remarks shall be made as to the language used. Firstly, it shall be noted that the Observations of the Government cite Article 19 (4) improperly twice (both under § 11 and § 14 on page 3), leaving out the category of "other persons performing public duties" from the paragraph, although the argumentation provided by the Observations of the Government shows that this omission is most probably solely an administrative mistake.

52. Secondly, it shall be noted that the English translation of Article 19 (4) of Data Act 1992 as used in the Observations of the Government, and, subsequently, by the Applicant in its counter-observation and in the English translation of the application, may give rise to misunderstandings. The original Hungarian text requires connection to public duties and not to public powers, therefore, the following correction must be made: "Unless otherwise provided by law, the personal data of persons acting within the powers and competences of bodies defined in Section (1) and the personal data of other persons performing public duties shall, inasmuch as they are related to those [~~powers~~] duties, constitute public data of public interest. Access to such data shall be governed by those provisions of this Act which regulate access to public interest data."[4] (This is important because in the Observations of the Government it is argued in § 13 and § 14 that

[4] The Hungarian text read as follows: "(4) Ha törvény másként nem rendelkezik, közérdekből nyilvános adat az (1) bekezdésben meghatározott szervek feladat- és hatáskörében eljáró személy feladatkörével összefüggő személyes adata, továbbá egyéb, közfeladatot ellátó személy e feladatkörével összefüggő személyes adata. Ezen adatok megismerésére e törvénynek a közérdekű adatok megismerésére vonatkozó rendelkezéseit kell alkalmazni."

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ex officio appointed defence counsels are not vested with independent powers and competences and therefore do not qualify as "other persons performing public duties", even though the text of the law does not require them to have independent powers and competences, it only requires that the concerned – otherwise personal – data shall be related to the public duty they perform in order to be processable as public data of public interest.)

4.1.2. Ex officio defence counsels as "other persons performing public duties"

53. In terms of the domestic law, the present case centres on the question whether ex officio defence counsels shall qualify as "other persons performing public duties". The Applicant argues that **ex officio defence counsels shall be regarded as "other persons performing public duties",** based on the following reasons.

54. It is a misinterpretation of the law that "other persons performing public duties" (whose data are public) are only persons "vested with independent powers and competences". (See § 14 of the Observations of the Government's observations. As far as the recommendation of the Data Protection Commissioner No. 1234/H/2006 referred to here by the Observations of the Government is concerned, the Applicant submits that in its view the interpretation provided by the recommendation is arbitrary and does not flow from the text or the regulatory concept of Data Act 1992, and recalls that the opinion of the Data Protection Commissioner is non-binding.) The notion of public duties is different from the notion of public powers and competences. Persons vested with powers and competences are persons performing public duties, but not all persons performing public duties are also persons vested with public powers and competences.

55. In the Hungarian legal system **there is no positive definition for the notion of public duties**, however, many provisions, including Article 19 (4) of Data Act 1992, use this notion. There is no law that enumerates or defines public duties. However, some laws declare certain duties to be a public duty, but these duties do not cover the whole notion. In each and every case, the character of the duty in question needs to be examined. There is no doubt that the duties of state organs (e.g. the Parliament, the Government, the courts, the authorities) are public duties, even if they are not performed directly by these organs but they are delegated to private entities (e. g. private elementary schools perform the public duty that originally lies on the state). The Hungarian Constitutional Court in its Decision 16/1998. (V. 8.) AB stated that public duty is a duty that "otherwise should be performed by the state or local governments", and there is a court decision (BDT 2005. 1216. I.) stating that "the notion of public duties may not be narrowed to the performance of public power. The body managing the state's property is performing a public duty, and therefore it is under the scope of [Data Act 1992]."

56. The right to defence – in line with the international obligations of Hungary – is a constitutional fundamental right both on the basis of Article 57 (3) of the Constitution of the Republic of Hungary (in force at the time of the underlying case was decided on) and Article XXVIII (3) of the Fundamental Law of Hungary (the constitution currently in force). The right to defence shall be understood as a right to effective defence and the state is under the obligation to ensure that the right to effective defence prevails throughout the whole criminal procedure – therefore, this is the public duty of the state. Thus, **defence counsels,** irrespective of whether they are retained or appointed ex officio, **perform a public function, a public duty in the course of the criminal procedure, inasmuch as their function of providing defence is intertwined with the state's obligation to guarantee a constitutional fundamental right**. This is especially so in the case of ex officio appointed defence counsels, who are appointed under the Hungarian law to represent "vulnerable" defendants, that is, detainees, juveniles, and/or indigent persons, etc., in the case of whom the state bears even greater responsibility in terms of ensuring the right to defence. (The duty-nature of the provision of defence this way is reflected by the fact that defendants falling under most of these categories

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do not have the right to waive defence – defence is mandatory in their case irrespective of their will, and the State will appoint one for them if they cannot or choose not to retain a lawyer.)

57. In the Applicant's view it follows from the regulatory concept of the Data Act 1992 that the category of "other persons performing public duties" shall cover those who do not fall under Article 19 (1) of the Data Act 1992, but their function and tasks are connected to fulfilling a certain state task or obligation. In this regard it is relevant that **ex officio appointed defence counsels contribute to ensuring the fundamental right to defence and the right to fair trial in the course of the criminal procedure, thus, to ensuring a right the state is obliged to guarantee**. Ensuring the right to defence and creating an adequate legal framework for it, is undoubtedly a task of the state, therefore, ex officio defence counsels participate in carrying out the task of the state.

58. Rules governing the situation of ex officio defence counsels also support the Applicant's arguments in stating that ex officio defence counsels carry out a public function. The Applicant submits in this respect that according to Article 34 (3) of Act XI of 1998 on Attorneys the authorities may exempt the ex officio appointed defence counsel from under the appointment if such circumstances occur (usually on behalf of the defence counsel) which hinder the attorney in complying with the tasks flowing from the appointment or if the defendant submits a well-founded request to exempt the ex officio appointed defence counsel. Similar rules are included in Article 48 (4)-(5) of Act XIX of 1998 on the Criminal Procedure Code. Therefore, it is clear that **the activities of ex officio appointed defence counsels are not of "private nature" also because – in contrast to the retained attorneys – neither the ex officio defence counsel, nor the defendant has a right to terminate the legal relationship between them**, but they have to request the termination from the state authorities instead, which decide on the exemption of the ex officio appointed defence counsel within their own discretion. The above legal construction also supports the view that **the state has certain tasks and powers with regard to ex officio appointed defence counsels also after they are appointed, thus, the state's obligation to ensure defence to indigent, vulnerable, etc. defendants does not end with the appointment.**

59. Another feature supporting that ex officio appointed defence counsels qualify as "other persons performing public duties" is that the authorities' appointment decision serves as a power of attorney for an ex officio appointed defence counsel under Article 22 of Act XI of 1998 on Attorneys. Last but not least, it shall be recalled that the **ex officio appointed defence counsel's fee and expenses shall be either advanced by the state** (in these cases, if found guilty by the court, these costs shall be repaid by the defendant), **or,** if the defendant was otherwise granted personal cost exemption based on his/her financial and income situation, **they shall be covered by the state entirely**.[5] According to Article 131 (2) of Act XI of 1998 on Attorneys, the **hourly fee of ex officio appointed defence counsels shall be established by the Parliament** in the Act of Parliament on the annual central budget in such a manner that it shall not be less than the fee established for the previous year. The ex officio appointed defence counsels' fees and expenses are paid through the courts or the police departments.

60. Furthermore, the Applicant submits in this respect that when it becomes necessary to appoint an ex officio defence counsel for any reason prescribed by the Hungarian legal provisions, there is an explicit and concrete obligation (task) emerging on behalf of the state in terms of ensuring the right to defence for the affected defendant, since it is the state authorities' obligation to appoint a defence counsel. Thus, the task shall be fulfilled by the state by appointing a defence counsel for the respective defendant. It has to be stressed in this respect that **the data requested by the Applicant in the underlying case concerned *exactly* the data on the act of appointment by the authorities and the outcome of this act – thus**

[5] The defendant is granted a personal cost exemption if due to his/her financial situation it can be expected that he/she will not be able to pay the criminal costs (which includes the defence counsel's expenses and fee), and a defence counsel is appointed for him/her on this basis. [See: Act XIX of 1998 on the Code of Criminal Procedure, Article 74 (3).]

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of an act through which the state performs its task to "secure" the right to defence also according to § 14 of **the Observations of the Government**. Accordingly, even if it is assumed – as suggested by the Observations of the Government – that the state's obligation to ensure effective defence ends with appointing a defence counsel and that the subsequent activities of the ex officio defence counsels amount to private activities, **it still remains indisputable that the data requested by the Applicant (i.e. the number of appointments in a given year per given attorneys at the respective police departments) are directly linked to the fulfilment of a state task or obligation, thus should qualify as public data.**

61. **The case-law of the European Court of Human Rights also supports the conclusion that the activities of ex officio defence counsels qualify as fulfilling a public function**. In the case *Artico v. Italy* (Application no. 6694/74, Judgment of 13 May 1980) the Court ruled that the state does not fulfil its obligations under the Convention simply by providing an ex officio defence counsel, as the defence counsel's performance has to be effective as well. In addition, even though in *Kamasinski v. Austria* (Application no. 9783/82, Judgment of 19 December 1989) the Court stated that the state cannot be held responsible for all the failings of the system of ex officio appointed defence counsels, the Court also made it clear that if the ex officio defence counsel had obviously failed to perform his duties, or his omission had been duly brought to the attention of the authorities, the state can be held to be in breach of the Convention. The Court's ruling in the case *Czekalla v. Portugal* (Application no. 38830/97, Judgment of 10 October 2002) has demonstrated the costs that the state must bear if it is found to be in violation of the above provision. In *Czekalla v. Portugal*, the applicant's ex officio appointed defence counsel failed to submit an appeal that met all formal requirements against the judgment convicting the applicant; hence the Portuguese second instance court rejected the appeal without an examination of its merits. Due to the failure of the ex officio appointed defence counsel the Court found a violation of Article 6(3)(c) of the Convention.

62. The above rulings of the Court underpin the argument that the activities of ex officio defence counsels are in strong connection with the obligation of the state to guarantee the right to effective defence. Thus, **the obligation on behalf of the state does not end by the act of appointment but continues to exist also after the appointment is made,** and state authorities shall take steps if they detect that the ex officio defence counsel fails to perform his/her duties adequately. This supervisory function of the state authorities indicates that the work of ex officio defence counsels may not be regarded as a "private activity", but shall be considered as flowing from a public function (a public duty). The decision of the Hungarian Supreme Court in the case underlying the present submission clearly contradicts the above approach of the Court.

63. Based on the above, the function of the ex officio appointed defence counsels shall be considered to be a public duty (financed – or in some cases advanced – from public funds), and if this is the case, then the person to whom the state delegates its duty through the appointment is a person performing a public duty. Accordingly, his or her name and the fact that he or she was appointed, and how many times he or she was appointed **does not constitute personal data** protected by the right to informational self-determination. Consequently, the Hungarian courts denied the Applicant access to the requested information on the basis of a legal provision that clearly could not have been applied in the case, therefore, the "prescribed by law" requirement is not complied with in the underlying case.

64. In addition, the Applicant recalls that Article 137 (2) e) of Act IV of 1978 on the **Criminal Code** (the "old" Criminal Code) and Article 459 (12) e) of Act C of 2012 on the Criminal Code (the "new" Criminal Code, in force since 1 July 2013) both **set out that defence counsels and legal representatives shall qualify as persons performing a public duty**, which – at the minimum – shall be regarded as an indication or guideline on what the notion of "other persons performing public duties" in the Data Act 1992 may cover.

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65. It shall also be noted that **the names of attorneys are not protected in the public digital database,** containing the digital versions of the full texts of court decisions. According to Article 166 (2) b) of Act CLXI of 2011 on the Organization and Administration of Courts, it is not necessary to erase the names of attorneys acting as representatives or defence counsels from the text of the court decisions before their publication on the internet, regardless of the fact whether they have acted as retained or ex officio appointed counsels, similarly to other persons' names who perform public duties (such as the judges, lay judges, prosecutors and other participants of the proceedings performing public functions). While as a main rule, the identification data of the persons mentioned in the decisions published shall be erased in order to protect their privacy, the attorneys' privacy is not protected if they act as a representative or a defence counsel.

66. Furthermore, the Applicant would like to recall that when it requested data on the number of appointments per attorneys and the name of those attorneys from 28 police departments in the framework of its project "Steps Towards a Transparent Appointment System in Criminal Legal Aid", 17 police departments provided the requested data instantly, while data regarding some further police departments were provided to the Applicant after it initiated civil lawsuits against all police headquarters who refused to submit the data on the count of unlawful denial of access to data. In the remaining six lawsuits all but one first instance courts ruled in favour of the Applicant and obliged the respondent police departments to submit the requested information. Second instance decisions differed: two were in favour of and two were against the Applicant. (In addition, the first instance court deciding on the data request submitted to the Budapest Chief Police Department and its District Police Departments, which did not fall under the scope of the above project of the Applicant, also decided in favour of the Applicant, while the second instance court in that case decided against the Applicant.) Thus, **a significant number of police units and lower lever courts were of the opinion that the Applicant had the right to access the data requested under the Hungarian legal provisions**. Furthermore, it has to be added that **all three cases that ended up before the Supreme Court, and, subsequently, before the European Court of Human Rights** (one as Application no. 18030/11, underlying the present submission, and two as Application no. 62676/11, also pending before the Court), **were decided at the Supreme Court by the very same judicial council.**

67. According to the standpoint of the Applicant, taking into account the arguments above the interference with the Applicant's right under Article 10 of the Convention – i.e. that the proceeding authorities restricted the right of access to information even though they would not have had a possibility to do so under the Hungarian law – was not "prescribed by law".

4.2. Legitimate aim

68. According to Article 10(2) of the Convention, the exercise of the freedoms enshrined in Article 10(1), since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

69. Both the argumentation of the police headquarters and that of the second instance court and the Supreme Court show that they considered the restriction of the right of access to public data necessary in order to protect the personal data of the ex officio appointed defence counsels. Thus, in terms of the text of Article 10(2) of the Convention, "the protection of the rights of others" – more precisely, the protection of the right to respect for one's private life, guaranteed in Article 8 of the Convention – may be identified as the aim of the interference.

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4.3. Whether the interference was necessary in a democratic society

70. The Applicant submits that – even if the Court regards the interference with its right under Article 10 of the Convention to have been prescribed by law – it was not necessary in a democratic society and was disproportionate to the legitimate aim pursued. Thus, the Applicant's right of access to information under Article 10 of the Convention was still violated.

4.3.1. Serving the public interest

71. Empirical studies show that indigent defendants do not have access to quality legal aid in Hungarian criminal investigations: legal aid (ex officio appointed) lawyers, whose activities are financed by the state, often do not contact their clients, fail to attend interrogations and remain passive even when present. In the Applicant's view one of the key reasons for that is that during the investigation the legal aid lawyer is selected by the police, which – by its nature – are disinterested in efficient defence work. Under the law, the police have total discretion in selecting lawyers from the lists compiled by the bar associations. Empirical studies and data show that some attorneys base their entire practice on appointments, hence are financially dependent on the appointing officer. This situation is prone to a form of corruption, as the lawyer's financial interest may have a negative impact on the quality of his/her work, posing a severe threat to effective defence. Since no entity monitors the appointment practice, and no data are made available on the issue, related police practices lack any transparency.[6]

72. The Applicant's aim with the data requests underlying the present case was **to demonstrate and prove that it is a widespread practice in Hungary that ex officio appointments are distributed disproportionately** between the defence counsels who may be appointed, endangering the enforcement of the defendants' right to effective defence, i.e. to demonstrate that the practice of having "in-house" lawyers at police stations is widespread. ("In-house lawyers" receive the majority of ex officio appointments by the police, they base their practice on appointments.) The Applicant's aim was to support with numbers based on its own data collection the presumption (established on the basis of previous research results) that at many police headquarters a large part of ex officio appointments are obtained by the same one or two attorneys or law offices, as a result of which the livelihood and practice of these attorney is dependent on the authority making the appointments. All this endangers the independence of defence counsels and the effective protection of rights, and, in addition, the selection system operates on the basis of non-public and impenetrable considerations.

73. Through the data requests and the analysis of the data the Applicant aimed on the one hand at raising the attention of the public to the structural problems in relation to the ex officio appointment system, and to carry out a dialogue with the decision-makers in order to achieve that they take steps to ensure the adequate operation of the system of ex officio appointments, serving also the enforcement of the right to effective defence, guaranteed also in the Convention. Thus, the **data request of the Applicant concerned an issue of public interest**, i.e. **to provide background data for the public debate on the operation of the ex officio appointment system with a view to solve its structural deficiencies and to guarantee the right to truly effective defence**. Publishing the data requested by

[6] For a more detailed description of the Hungarian ex officio appointment system in English, see: *Briefing paper of the Hungarian Helsinki Committee for the Working Group on Arbitrary Detention – UN Commission of Human Rights,* 8 October2013, http://helsinki.hu/wp-content/uploads/HHC_briefing-paper_UNWGAD_8_Oct_2013.pdf, pp. 14-15; or: *Suggestions for questions to be included in the List of Issues Prior to Reporting on Hungary for consideration by the Human Rights Committee at its 115th session in October 2015,* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT_CCPR_ICS_HUN_21527_E.pdf, pp. 28-29.

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the Applicant a purpose of strong public interest: to allow for a fact-based public debate on the operation of the system of ex officio appointments, and that steps are taken to resolve the systemic problems, fostering in that way the enforcement of the right to effective defence, enshrined in Article 6 of the Convention.

74. It has to be added at this point the that analysis of the data gathered (also imparted to the public[7]) clearly demonstrated that the practice of appointing the same ex officio defence counsels in a disproportionately high percentage of cases is widespread, and that these lawyers deal with a significant, sometimes irrational amount of cases. E.g. at several police departments the same attorney was appointed in more than one third of all cases, one of the highest percentages in this regard being 82%, equalling to 295 criminal cases dealt with by the same defence counsel out of the total of 358 cases at that police department in 2008. The table below shows examples of the highest results in terms of appointments per year received by the same single attorney and the percentage of appointments the same attorney takes a year. [8]

Ex officio appointed defence counsel's cases per year	Police headquarters	% as compared to the total number of appointments
372	Kecskemét Police Headquarters	54%
295	Kiskőrös Police Headquarters	82%
276	Siófok Police Headquarters	70%
232	Tatabánya Police Headquarters	58%
205	Gödöllő Police Headquarters	45%

75. Thus, as shown by the above results, the data gathered proved the structural deficiencies higlighted by earlier researches. It would serve the public interest to follow-up and regularly monitor on the practice of appointments, but the Supreme Court decisions delivered in the present case and the cases underlying the very similar *Magyar Helsinki Bizottság v. Hungary (No. 2)* case (Application 62676/11), resulting from the same series of data requests and also pending before the Court, may in the future impede the Applicant and other stakeholders in doing so. It would be important for the Court to establish a violation of Article 10 of the Convention also **to contribute to future data transparency** in this regard, which, as put by Fair Trials in its third party intervention submitted in the *Magyar Helsinki Bizottság v. Hungary (No. 2)* case, is "a driver of good practice". In that regard, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems may also be quoted, which also favours data collection, affirming that "States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid";[9] and it shall be added that a general trend may be identified "towards enabling external commentators to monitor performance of justice systems through statistical data".[10]

76. The public interest nature of the data requested and the Applicant's related activities in general are reinforced by the fact that the issue concerned, i.e. legal aid, is in the words of Fair Trials "a sine qua non to

[7] For the full research report in Hungarian, see: András Kristóf Kádár – Nóra Novoszádek – Adrienn Selei: Ki *rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai. [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels.]* Magyar Helsinki Bizottság, Budapest, 2012, http://helsinki.hu/wp-content/uploads/MHB_Ki_rendelt_itt_vedot_2012.pdf.

[8] For more results in English, see: *Briefing paper of the Hungarian Helsinki Committee for the Working Group on Arbitrary Detention – UN Commission of Human Rights,* 8 October2013, http://helsinki.hu/wp-content/uploads/HHC_briefing-paper_UNWGAD_8_Oct_2013.pdf, pp. 14-15; *Suggestions for questions to be included in the List of Issues Prior to Reporting on Hungary for consideration by the Human Rights Committee at its 115th session in October 2015,* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT_CCPR_ICS_HUN_21527_E.pdf, pp. 28-29.

[9] *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,* Guideline 17, paragraph 73.

[10] In detail, see: Third party intervention of Fair Trials in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, §§ 27-30.

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a fair trial",[11] and "**the right to legal aid** is recognised by authoritative instruments **as a cornerstone of justice**".[12] For, example the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems are premised on the basis that "legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process".[13]

77. In addition, the Applicant's project in which the data requests were made and the data requests themselves addressed a problem encountered not only in Hungary: e.g. the "judgments of the Court themselves associate police appointments of lawyers with defence rights violations. For instance, in *Martin v. Estonia*,[14] a 19 year-old suspect 'waived' his right to be assisted by the family-appointed lawyer, mandated instead a publicly funded lawyer he maintained he had been pressured to mandate by the police, and while represented by the latter made admissions resulting in his conviction and imprisonment, resulting in a breach of Article 6(3)(c) of the Convention. In *Dvorski v. Croatia*,[15] a 21 year-old suspect appointed a lawyer (a former police officer) suggested by police after the family-appointed lawyer was denied access to him and made confessions which contributed to his conviction and imprisonment; this raised 'serious concerns' as to respect for Article 6(3)(c).[16]" In addition, for example the United Nations document "Early access to legal aid in criminal justice processes: a handbook for policy-makers and practitioners" also recognises the risk to independence linked to police appointments.[17] These documents further underpin that the underlying data request serves a public interest and data that was intended to be gathered is of public interest.

78. It shall be recalled at this point that, "as regards the level of protection, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, ECHR 2012). Accordingly, **a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest** [...]."[18] Thus, it may be argued that since the present case concerns a matter of public interest, the state's margin of appreciation is narrow.

4.3.2. The applicant as a social watchdog

79. In relation to the *Társaság a Szabadságjogokért v. Hungary* case the Court stated that one of the functions of the press is the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. The Court emphasized that it had repeatedly recognised civil society's important contribution to the discussion of public affairs, and explained that since the purpose of the applicant Társaság a Szabadságjogokért is an informed public debate, and is involved as a non-governmental organisation in human rights litigation with objectives including the protection of freedom of information, it may therefore be characterised, like the press, as a social "watchdog", thus shall be provided similar protection to that afforded to the press (27. §). Thus, according to the argumentation of the judgment, non-governmental organisations fulfil a similar function as the press when it exercises public

[11] See: Third party intervention of Fair Trials in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, §§ 10-15.
[12] See: Third party intervention of Fair Trials in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, §§ 10-15.
[13] *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Preamble, point 1.
[14] App. No 35985/09 (Judgment of 30 May 2013).
[15] App. No 25703/11 (Judgment of 28 November 2013).
[16] No breach of the fairness of the proceedings as a whole was found, but two judges dissented. The judgment was referred to the Grand Chamber on 14 April 2014.
[17] Third party intervention of Fair Trials in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, §§ 17-18
[18] *Morice v. France* (Application no. 29369/10, Judgment of 23 April 2015), § 125

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control (i.e. acts as a public watchdog), thus acts as the guardian of democratic society [see for example: *Lingens v. Austria* (Application no. 9815/82, Judgment of 8 July 1986)].

80. Subsequently, the Court reiterated the above arguments included in the *Társaság a Szabadságjogokért v. Hungary* case in more of its decisions, the conclusions of which support the arguments of the Applicant in the present case. For example in the case *Youth Initiative for Human Rights v. Serbia* the Court stated the following under § 20: "The Court has also held that when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press (*Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013). The applicant's activities thus warrant similar Convention protection to that afforded to the press (see *Társaság a Szabadságjogokért*, cited above, § 27)." Furthermore, the Court stated the following in the case *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*: **"The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social 'watchdogs'. In that connection their activities warrant similar Convention protection to that afforded to the press."** (§ 34)

81. Similarly to the above cases, it may be established also in the case of **the Applicant that it performs social control with regard to access to justice and the right to effective defence**, among others. As a human rights watchdog NGO, the Applicant has been performing for many years wide-ranging activities aimed at enforcing access to justice and the right to effective defence, such as participation in national and international research projects, strategic litigation, awareness-raising and advocacy activities, trainings, etc. The function of the Applicant being similar to that of the press is showed by the fact that it receives and imparts information of public interest to the public, and may influence and orient the public debate as an important civil expert of the field, as a source of information, and as an opinion-maker, thus **it practically behaves as the media in the fields falling under its scope of activities**. Because of all that the applicant fulfils **the role of a "social watchdog" with regard to the right to effective defence,** guaranteed also by Article 6 of the Convention, and facilitates that, as part of the right to freedom of expression enshrined in Article 10 of the Convention, the public may form an opinion on the matter, and that there is a possibility for a public debate, serving as a basis of a democratic society.

82. The arguments included in the above cases shall apply also in the present case: **since the Applicant as an NGO acted in its capacity as "social watchdog", its activities warrant similar Convention protection to that afforded to the press**. In addition, similarly to the case *Társaság a Szabadságjogokért v. Hungary,* the domestic procedure underlying the present submission concerned an interference with the exercise of the functions of a social watchdog, by virtue of the censorial power of an information monopoly. (See also section 4.3.3. of the submission below.)

83. Furthermore, the following statements of the Court, included in the decision reached in the *Youth Initiative for Human Rights v. Serbia* case (§ 24), shall also be applied in the present case, since the Applicant was involved in the same kinds of activities as the applicants in the *Társaság a Szabadságjogokért v. Hungary* and the *Youth Initiative for Human Rights v. Serbia* cases: "As the **applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate**, there has been an interference with its right to freedom of expression (see, by analogy, *Társaság a Szabadságjogokért*, [...], § 28, and *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009)."

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4.3.3. Information monopoly as a form of censorship

84. The role as a "social watchdog" also entails that the following test, emphasizing the similarity with the press, may also be applied in the present case with regard to access to information. In the *Társaság a Szabadságjogokért v. Hungary* case the Court stated that when the Constitutional Court refused to disclose the submission received by it to the Társaság a Szabadságjogokért, that essentially concerned an interference with the social control function – i.e. the function of a social watchdog – of the non-governmental organisation "by virtue of the censorial power of an information monopoly", rather than a denial of a general right of access to official documents (§ 36). According to the standpoint of the Court, "the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities" (§ 36).

85. Furthermore, in the case *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria the* referred again to the factor that the commission from which the applicant association requested data from held an "information monopoly" with respect of the data requested, just like the police departments in the present case, which circumstance was taken into account when establishing that the interference with the applicant association's right to freedom of expression could not be regarded as having been necessary in a democratic society.

86. Applying the above argumentation to the case underlying the present submission, it may stated that both the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters appear as having an information monopoly, since as state authorities and with regard to the criminal cases in their areas of jurisdiction and falling under their competence they disposed over data being inaccessible to the Applicant (or any other actor) without their cooperation. From the fact that **the police** as the concerned state authority did not disclose the information it disposed over, it flows on the basis of the judgments in the above cases that it **essentially exercised a "censorial" power by the virtue of its information monopoly with regard to the given information.**

4.3.4. The right to respect for private life

87. Whereas the protection of the right to respect for private life, guaranteed in Article 8 of the Convention, may be a legitimate aim of the interference, in the present case the restriction of access to public interest data is disproportionate as compared to the legitimate aim of protecting the right to respect for private life, thus the protection of personal data, eminently when considering the general purpose of the protection of personal data. Personal data shall be protected not in itself and not for itself: **the aim of the protection of personal data is to protect the private life/sphere, the privacy of the given person, and, accordingly, personal data shall be protected when that is necessary for the sake of the protection of privacy**. Thus, a distinction shall be made between the protection of the private sphere and that of personal data; and personal data shall not be protected in every case, but only if it is necessary for the purposes of the protection of privacy. The same approach appeared in the *Társaság a Szabadságjogokért v. Hungary* case when the Court stated that it "finds it quite implausible" that any reference to the private life of the Member of Parliament submitting a motion to the Constitutional Court, hence to a protected private sphere, could be discerned from his constitutional complaint itself (§ 37), thus it separated the protection of personal data (the motion and its content) from the protection of private life.

88. **In the present case the data requested was in no way related to the sphere or privacy of the ex officio defence counsels** but only to the tasks related to their public duties and function. Furthermore, the

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data requested did not even touch upon the actual activities of the defence counsel in the given cases, the quality of defence, or information falling under attorney-client privilege. It has to be added that e.g. since court hearings are as a main rule open to the public as also required by Article 6 of the Convention, a range of data concerning the activities of ex officio defence counsels, inasmuch as they are acting in that capacity, are by their nature public data, which do not qualify as protected personal data (see what is said above about the publication of court decisions: while the names of the parties and several other actors – e.g. witnesses – are deleted, the names of attorneys appear, even when they act on the basis of a retainer). All of these aspects strengthen the view that it is disproportionate to restrict access to data of strong public interest (indispensable for public debate on the implementation of the right to defence, i.e. a Convention right) with reference to the protection of the private life of ex officio appointed defence counsels.

89. Finally, the following may be stated as to the **lack of a balancing exercise** in the domestic procedure: "If a national authority categorises information as to appointments as private information, and not public interest information connected to the exercise of a state function requiring protection under Article 10, and does not therefore seek to balance the relevant interests at issue, it follows that the Court will not be in a position to identify 'relevant' or 'sufficient' reasons. That is to say, if a state is going to restrict access to this information so important for controlling fairness of a core part of the criminal justice system, it has to justify doing so by reference to the countervailing interests protected by Article 10(2); it may not meet that obligation if it applies the national freedom of information law in such a way as to exclude the information from its scope outright, such that no balancing act is carried out. Indeed, without such an analysis the national authority cannot consider compromise solutions – e.g. replacing names data with numbers to enable checks as to repetitive appointments while protecting lawyers' identities – in order to strike a fair balance."[19]

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90. In the Applicant's view, on the basis of the above it may be concluded that there is no such reason due to which the refusal to comply with the data request would have been necessary in a democratic society; and the operation of a democratic society and the materialization of social control would have been actually facilitated if the information requested would have been disclosed to the Applicant. Even if we accept that restricting access to data was necessary in order to protect the private life of ex officio appointed defence counsels, on the basis of the arguments presented above it may be stated that the restriction was not proportionate. The right to respect for private life of persons performing a public duty (and paid from public funds) cannot justify the withholding of the type of information of public interest requested in this case in.

91. Therefore, the Applicants claims that there has been an interference with its right to receive information within the meaning of Article 10(1) of the Convention and that the interference was not prescribed by law and was not necessary in a democratic society in terms of Article 10(2) of the Convention, thus its right under Article 10 of the Convention has been violated.

[19] Third party intervention of Fair Trials in the case *Magyar Helsinki Bizottság v. Hungary (No. 2)*, Application no. 62676/11, § 37