András Kádár I Balázs Tóth I István Vavró

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Recommendations for the Reform of the Hungarian Ex Officio Appointment System in Criminal Matters

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NHC

Hungarian Helsinki Committee

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Without Defense: Recommendations for the Reform of the Hungarian Ex Officio Appointment System in Criminal Matters

Written by
András Kádár (Sections 1.–4., 5.1.–5.6. and 6.)
Balázs Tóth (Section 5.8.)
István Vavró (Section 5.7.)

Translation by
András Kádár

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1. The Structural Deficiencies of the Hungarian Ex Officio Appointed Defense Counsel System

1.1. Legal framework: international and constitutional law

Access to justice for indigent criminal defendants[1] is a crucial safeguard in criminal procedural law. Ensuring free and effective defense for indigent defendants is a state responsibility, which stems from international law and also derives from the Hungarian Constitution.

In addition to Article 14 of the International Covenant on Civil and Political Rights,[2] Article 6(3)(c) of the European Convention on Human Rights[3] also provides that everyone charged with a criminal offense has the right to "defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The European Court of Human Rights ("ECHR") has expanded the above provision with the criteria of effectiveness, when in the case of *Artico v. Italy*[4] it ruled that the state does not fulfill its obligations under the Convention simply by

1 The term "defendant" (in Hungarian: terhelt) will be used to refer to the subject of the criminal procedure irrespective of the actual phase of the procedure: i.e. to both the suspect, the accused and the convict.

2 Promulgated in Hungary by Law Decree 8 of 1976

3 Promulgated by Hungary by Act XXXI of 1993

4 6694/74, Judgment of 13/05/1980

providing an ex officio defense counsel, as the defense counsel's performance has to be effective as well. Although in *Kamasinski v. Austria*[5] the Court elaborated this position by stating that the state cannot be held responsible for all the failings of the system of ex officio appointed defense counsels, the Court also made it clear that if the ex officio defense 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 of *Czekalla v. Portugal*[6] has demonstrated the costs that the state must bear if it found the Court to be in violation of the above provision. In Czekalla, the applicant's ex officio appointed defense 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. The Court found a violation of Article 6(3)(c) and ordered Portugal to pay EUR 3,000 as damages and EUR 11,000 as costs and expenses to the applicant.

The criterion of effectiveness is not only contained in the ECHR's case-law but in European Union law as well. Article 4 of the European Commission's Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union[7] (submitted on 3 May 2004) ("Proposal") bears the title "Obligation to ensure effectiveness of legal advice" and provides that "Member States shall ensure that a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective." The Explanatory Memorandum of the Proposal stresses that "[s]ince the suspect is not always in a position to assess the effectiveness of his legal representation, the onus must be on the Member States to establish a system for checking this."

Quality assurance of the system evidently requires evaluation and assessment. According to Article 15 of the Proposal, Member States shall facilitate the collection of the information necessary for the evaluation and monitoring of the system. In this regard, the Proposal contains a wide range of duties for Member States to collect data. As per Article 16, in order that evaluation and monitoring of the provisions of the Framework Decision may be carried out, Member States shall ensure that

5 9783/82, Judgment of 19/12/1989

6 38830/97, Judgment of 10/10/2002

7 A framework decision shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

data such as relevant statistics are kept and made available, including on whether legal advice (the services of an ex officio defense counsel) was given and in what percentage of cases it was given free or partly free.

We need not turn only to international legal instruments or community law in order to show that the Hungarian government is obliged to establish and maintain an effective ex officio appointment system. This responsibility also stems from such constitutional principles and rights as the rule of law,[8] equality before the courts[9] as well as the right to defense.[10]

In Decision No. 6/1998 (III.11.), the Constitutional Court ruled that effectiveness of the right to defense is a *conditio sine qua non* of the constitutionality of the criminal justice system: "The Constitutional Court has already dealt with the issue of the right to defense and any restrictions thereof […] in its Decision no. 25/1991 (V.18.) ("Decision"). In that Decision, *the Constitutional Court was not satisfied that the right to defense be formally guaranteed; instead, it demanded effective implementation of the right to defense as well* as expanded this right to encompass the right of the defendant and counsel to appropriate preparation and to exercise their rights. […] The Constitutional Court has already recognized in another case how significant the effectiveness of the right to defense is. Thus in Decision no. 1320/B/1993. the Constitutional Court has already held that restricting the right of the defendant to make decisions about his case is constitutional in the interest of ensuring that the defense counsel may exercise his rights in the course of carrying out his duties,"[11]

1.2. The functioning of the Hungarian ex officio appointment system

The basic criteria regarding the functioning of an ex officio appointment system were described in the foregoing section. This section will first introduce the legal framework of the Hungarian ex officio appointment system, and then review – based

8 Act XX of 1949 on the Constitution of the republic of Hungary (Constitution), Art. 2 Par. (1)

9 Constitution, Art. 57 Par. (1)

10 Constitution, Art. 57 Par. (3)

11 Italics by the author

on empirical studies and the experiences of participants in criminal procedures – whether the present solution in Hungary meets these criteria and whether the system is able to ensure effective defense for defendants.

1.2.1. Brief description of the ex officio appointment system

The Hungarian ex officio appointment system is primarily based on the principle of "the interests of justice," while indigence only plays a secondary role. Act XIX of 1998 on the criminal procedure ("CCP") differentiates between the investigation and the judicial phase regarding the cases and content of mandatory defense. The most important rules in the investigation phase are set out below.

The participation of defense counsel is mandatory (i) if the criminal offense the defendant is suspected or accused of is punishable by a sentence of imprisonment of five years or more; or if the defendant is (ii) detained; (iii) deaf, blind or suffering from a mental disorder (regardless of his/her mental capacity); (iv) unfamiliar with the Hungarian language or the language of the procedure; (v) unable to defend him/herself in person for any other reason;[12] (vi) a juvenile;[13] (vii) benefiting for personal cost exemption and requests a defense counsel to be appointed.[14] In the latter case, the state will cover the appointed defense counsel's fees and documented costs, while in all other cases these costs are only advanced by the state.

The authority entitled to appoint a defense counsel (i.e. the investigating authority or the prosecutor in the investigation phase) will appoint a defense counsel if defense is mandatory but the defendant has not retained a lawyer.[15] In general, it is irrelevant whether the defendant has no defense counsel because he/she is indigent or because he/she does not wish to retain a defense counsel for any other reason. Indigence only plays a role in case of personal cost exemption. The basic principle of the Hungarian system holds that in the interest of justice, a defense counsel should participate in the procedure in all cases where the defendant is "vulnerable" for some reason, i.e. either due to his situation (e.g. detention) or a personal characteristic (e.g. minor age, lack of language) he is restricted in his abilities to defend himself.

12 CCP, Art. 46

13 CCP, Art. 450

14 CCP, Art. 48. Par. (2) and Art. 74. Par (3) a)

15 CCP, Art. 48. Par. (1)

Furthermore, the CCP also provides that the appointing authority may consider whether the principle of a fair trial requires the appointment of a defense counsel: the court, the prosecutor or the investigating authority may appoint a defense counsel at the defendant's request or ex officio if this is necessary in the interest of the defendant.[16]

Immediately after the suspicion has been communicated, the defendant has to be informed of his right to choose or to request the appointment of a defense counsel. If the participation of the defense counsel is mandatory in the procedure, the defendant also has to be informed that unless he retains a defense counsel in 3 days, the prosecutor or the investigating authority will appoint a counsel for him. If the defendant declares that he does not wish to retain a defense counsel, the prosecutor or the investigating authority will appoint a defense counsel immediately.[17] If defense is mandatory because the defendant is detained, the defense counsel has to be appointed before his first interrogation at the latest.[18]

A further safeguard is that following the appointment of the defense counsel, the defendant has to be informed of the counsel's name; if the defendant is detained, the appointing authority also has to inform the facility where detention is carried out about the name of the ex officio defense counsel.[19]

A further significant factor in the Hungarian ex officio appointment system is that the mandatory nature of the defense counsel's participation in the investigation phase does not require the presence of the defense counsel at individual procedural actions. While the CCP prescribes that the defense counsel should contact the defendant without delay and to use all lawful means and methods of defense at the appropriate times in the defendant's interests[20] (which of course include participation of the defense counsel at all investigative actions open to him/her), if the defense counsel fails to fulfill these obligations, he/she will commit an ethical misdemeanor at most, but will not prevent the investigative authority from interrogating the defendant or confronting him/her with any witnesses testifying against him/her.

The situation is different in the judicial phase: if defense is mandatory, no hearings may be held without the defense counsel's presence.

16 CCP, Art. 48 Par. (3)

17 CCP Art. 179 Par. (3)

18 CCP, Art. 48 Par. (1)

19 CCP, Art. 48 Par. (1) and (8)

20 CCP, Art. 50 Par. (1)

The scenarios of mandatory defense are wider in scope in the judicial phase. In addition to the grounds listed above, the presence of the counsel is mandatory at the hearing if (i) the case is before the county court acting as court of first instance; (ii) if an auxiliary private prosecutor presses charges;[21] (iii) if the prosecutor takes part at the hearing and the defendant who had not retained a defense counsel previously requests the appointment of an ex officio defense counsel.[22]

If the prosecutor takes part at the hearing, the presiding judge may appoint a defense counsel at his/her discretion if the defendant does not make such a request but the judge deems the participation of counsel necessary for some reason.[23]

Defense is also mandatory in certain special procedures, such as 'taking before the court'[24] (a fast-track simplified procedure for minor offenses) as well as procedures carried out *in absentia*.[25]

Ex officio appointed defense counsels are entitled to a fee for appearing when summoned or notified before the court, the prosecutor and the investigating authority, for examining the files and for consultations with the detained defendant in the detention facility, as well as reimbursement of documented expenses.[26] Decree no. 7/2002 (III. 30.) of the Minister of Justice on the fees and expenses of ex officio appointed patron lawyers and defense counsels contains detailed rules on the fees, while the law on the annual budget sets fee levels.[27]

As of 1 July 2006 slight changes were introduced and the regulation includes additional safeguards. Taking up contact between the defendant and the ex officio defense counsel is facilitated by a new provision in terms of which, following the appointment of an ex officio defense counsel, the defendant has to be informed of the appointed defense counsel's contact information in addition to his/her name, and the decision on appointment shall contain information on the detention facility where the defendant is held, as well as scheduled date and place of the interrogation.

21 CCP, Art. 242 Par. (1)

22 CCP, Art. 242 Par. (2)

23 CCP, Art. 242 Par. (2)

24 CCP, Art. 518

25 CCP, Art. 527

26 CCP, Art. 48 Par. (9)

27 See: Act CXXVII of 2006 on the 2007 Budget of the Republic of Hungary, Art. 58 Par. (4): "The hourly fee set forth in Art. 131 Par (2) of Act XI of 1998 on Attorneys, shall be HUF 3,000 (EUR 12) in the year 2007."

1.2.2. Empirical studies on the functioning of the ex officio appointment system

A review of empirical studies on the functioning of the Hungarian ex officio appointment system or of the general experiences of the system's actors corroborates that Hungary, in fact, fails to comply with its international and constitutional obligations described in Section 1.1.

It is a problem that dates back to the times before the political transition, as it is shown by a study conducted by the Metropolitan Chief Public Prosecutor's Office in 1988 on the basis of 130 one-defendant cases selected randomly.[28] In 70 out of the 130 cases defense was provided by an ex officio appointed lawyer. In the majority of these cases (63) defense was mandatory due to the pre-trial detention of the defendant. Out of the 70 appointed lawyers, 55 did practically nothing during the investigation – it was impossible to even find out their names – and out of the remaining 15, eleven only attended the presentation of the case files. As only six did so at the same time with the defendant, and only one of all the lawyers took part in the preceding interrogation of the defendant, it seemed justified to presume that less than 10 percent of the ex officio appointed counsels had met their clients in the investigation phase. As opposed to this, in 80 percent of the cases in which defense was provided by a retained lawyer, the counsel attended the interrogations, and more than third of the retained lawyers put forth different motions.

As it was shown by the study carried out by the Ombudsperson in 1996, the political transition did not solve the problem of detained defendants with ex officio appointed lawyers. According to the research results, in Zala County "ex officio appointed defense counsels were only present on an exceptional basis at investigative actions apart from the judicial hearings preceding pre-trial detention."[29] Ex officio appointed defense counsels only took part in a mere 18.7 percent of witness testimonies. Out of 18 cases examined in Borsod–Abaúj–Zemplén County, the appointed defense counsel was present at procedural actions in only 3 cases. In Pest County, 5 out of 12 detainees were unfamiliar with their appointed defense

[28] Mihály Tóth: Nyomozás és védelem (A fal lehet üveg is) (Investigation and defense – the wall may be made of glass). In: *Magyar Jog* (*Hungarian Law Review*), 1989/3, pp. 350–355.

[29] See: A kirendelt védővel rendelkező fogvatartott személyek védelemhez való jogának érvényesülése a büntetőeljárás nyomozási szakaszában. (The realization of the right to defense of detained persons with appointed defense counsels in the investigative phase of the criminal procedure), Budapest, Office of the Ombudspersons, 1996 (hereinafter: Ombudsman Report 1996). p. 7.

counsels.[30] The Ombudsperson's report concluded sadly "in our justice system, the procedures of appointed defense counsels are unable to provide protection against abuses and mistakes of the authorities."[31]

In the course of a study carried out in 1996–1997, the Hungarian Helsinki Committee ("HHC") found that out of 340 detained defendants, only 198 (58.1 percent) had ex officio appointed defense counsels. While 45 percent of detainees with retained defense counsels could contact their lawyers prior to the first interrogation, this rate was only 15 percent among detainees with appointed defense counsels. At the time of the HHC's interviews, 43.7 percent of detainees with appointed defense counsels had not even met their lawyers. In contrast, this rate was only 8.1 percent among detainees with retained defense counsels.[32]

Professor Csaba Fenyvesi carried out an empirical study in 1998–1999 on the activities of defense counsels in criminal proceedings. The study was based on an analysis of 1,273 case files as well as interviews with judges, prosecutors, attorneys, police officers, pre-trial detainees and persons convicted of a criminal offense. Below are quotes showing various actor's opinions on the ex officio appointment system:

- Judges: "The majority of [judges] saw a significant difference between the activities of the two types of defense counsels [i.e. retained and ex officio appointed defense counsels] with retained counsels performing better."[33]
- Prosecutors: "They definitely perceive retained counsels as better, more active and better prepared. [...] One-third of them think that the system of appointed defense counsels is adequate."[34]
- Attorneys: "They completely agree [...] that the work of retained counsels is higher quality than that of ex officio appointed defense counsels. [...] Consequently the majority do not consider the system of appointed defense counsels itself as good."[35]

30 Ombudsman Report, pp. 17. and 22.

31 Ombudsman Report, p. 32.

32 Punished before Sentence: Detention and Police Cells is Hungary. Constitutional and Legal Policy Institute – Hungarian Helsinki Committee, Budapest, 1998. (hereafter: Punished before Sentence). p. 86.

33 Csaba Fenyvesi: A védőügyvéd: a védő büntetőeljárási szerepéről és jogállásáról (The defense counsel: about the defense counsel's role and status in the criminal procedure) Dialóg Campus Kiadó, 2002, Budapest–Pécs, (hereafter: Fenyvesi), p. 118.

34 Fenyvesi, p. 120.

35 Fenyvesi, p. 122.

- Police officers: "Similarly, police officers (85%) noted a difference in the work of retained and appointed defense counsels, the former being substantially more active, and better representing their clients' interests."[36]

The questionnaire-based study with 500 pre-trial detainees, carried out in 2003 in the course of the HHC's Police Jail and Prison Monitoring Program, showed that while 40 percent of retained defense counsels had contacted their client before the first interrogation, this rate was only 24 percent among ex officio appointed defense counsels. As reasons beyond the control of the defense counsel can also partly explain this (e.g. delayed notifications sent by the authorities), other data are more revealing. In cases where the first hearing had not been held (i.e. the appointed defense counsel was not obliged to appear in court), the rate of detainees who had had retained defense counsels but had not met their lawyer until the time of the HHC's interview was only 5 percent. This rate was 31 percent among detainees with ex officio appointed defense counsels. Thus, almost every third indigent detainee was lacking effective assistance from his/her defense counsel in the investigative phase of the criminal proceedings carried out against him/her. The HHC met a respondent who had not been contacted by his appointed defense counsel even once during the one year of pre-trial detention.[37]

The questionnaire-based study revealed further flaws in the functioning of ex officio appointment system, particularly concerning the activities of defense counsels. In contrast to 70 percent of defendants who had retained counsels, less than one-third of defendants with appointed defense counsels stated that the defense counsel had participated at a procedural action in the investigative phase. Moreover, even presence at a procedural action is no guarantee that the defense counsel would perform substantive activities: several respondents stated that the appointed defense counsels had not said a word during the interrogation or hearing. Once respondent told the HHC that when he had questioned his appointed defense counsel about the lawyer's passivity in the courtroom, the lawyer replied "I would not start getting into an argument with the judge."[38]

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36 Fenyvesi, p. 126.

37 András Kádár: Presumption of Guilt: Injurious Treatment and the Activity of Defense Counsels in Criminal Proceedings against Pre-trial Detainees. Hungarian Helsinki Committee, 2004, Budapest. (Hereafter: Presumption of Guilt), pp. 127–129.

38 Presumption of Guilt, p. 145.

The profound crisis and the severe lack of trust in the system of ex officio appointed defense counsels are corroborated by statements to the effect that a number of appointed defense counsels are only willing to perform substantive defense work if the defendant pays fees "into the pocket" in addition to the fees received from the state budget.[39] Other defendants presumed that ex officio appointed defense counsels are in fact working for the investigation authorities that had appointed them, and are only interested in persuading defendants to confess their crime.[40]

The dysfunctional nature of the system may be best illustrated by a survey carried out by the Crime Investigation Department of the National Police Headquarters. The survey involved the 23 regional investigation units of the National Police (the county headquarters, the Budapest headquarters, the National Investigation Office, the Highway Police and the Airport Security Service) and was based on targeted data collection carried out during June and July 2006 (hereafter: NPH survey).[41]

According to the NPH survey, in relation to ex officio appointments performed due to the detention of the defendant, "on a national level, the number of cases when the appointed counsel does not attend the interrogation of his/her client significantly exceeds the number of those when the counsel is present. The percentages vary between 4.54% (Komárom County) and 77 % (Csongrád County), so it is not possible to trace tendencies. However, it can be stated that in 14 [out of the 23] regional investigation units, the percentage is below 50%, and only in 9 does it reach or exceed 50%."[42] The results of the survey are summarized in Table 1.

39 Presumption of Guilt, p. 132.

40 Presumption of Guilt, p. 146.

41 The results of the survey are presented by: Zsolt Szabó–Sándor Szomor: Fegyveregyenlőség (Equality of Arms) (hereafter: Equality of Arms). In: Rendészeti szemle (Law Enforcement Review), issue 2007/3., pp. 19–41.

42 Equality of Arms, p. 35.

Table 1: The participation of the ex officio appointed counsel in the first interrogation of detained defendants in the % of all appointments based on detention[43]

Regional investigation unit	*Participation in the % of all appointments based on detention*
Budapest Police Headquarters	7,45
Baranya County Police Headquarters	25
Bács–Kiskun County Police Headquarters	16,36
Békés County Police Headquarters	44
Borsod–Abaúj–Zemplén County Police Headquarters	50
Csongrád County Police Headquarters	77
Fejér County Police Headquarters	29,29
Győr–Moson–Sopron County Police Headquarters	70
Hajdú–Bihar County Police Headquarters	11,42
Heves County Police Headquarters	23
Jász–Nagykun–Szolnok County Police Headquarters	11,76
Komárom–Esztergom County Police Headquarters	4,54
Nógrád County Police Headquarters	50
Pest County Police Headquarters	no data
Somogy County Police Headquarters	34,78
Szabolcs–Szatmár–Bereg County Police Headquarters	30
Tolna County Police Headquarters	62,5
Vas County Police Headquarters	12,5
Veszprém County Police Headquarters	31,25
Zala County Police Headquarters	50
National Investigation Office	22,22
Highway Police	70
Airport Security Service	no data

[43] Equality of Arms, p. 36.

According to the NPH survey, with regard to the quality of the lawyers' work, "the general experience [of the police] is [...] that the level of efficiency of appointed counsels is generally below that of retained counsels, and the work they perform is of poorer quality. Retained lawyers appear at procedural acts and put forth motions more frequently than their appointed colleagues."[44] Although there are certain headquarters that do not see any difference between the two types of counsels, others "for instance, the Pest County Headquarters, reported that ex officio appointed counsels often do not show up at the time indicated to them via fax, normal mail or telephone. They often refer to other obligations to be excused on such occasions. The Szabolcs–Szatmár–Bereg County Headquarters reported that the headquarters located at the county seat do not sense such differences, whereas the local stations are of the view that in the investigation phase appointed counsels practically do not perform any work."[45]

1.3. On the causes of the Hungarian ex officio appointment system's dysfunctions

The causes of the above outlined problems are multi-layered. The most obvious and most frequently mentioned criticism concerns the fees of ex officio appointed counsels. One of the problems is that the legal provisions allow the payment of fees for only certain activities. As it was already mentioned, ex officio appointed defense counsels are entitled to a fee for appearing when summoned or notified before the court, the prosecutor and the investigating authority, for examining case files and for consultations with the detained defendant in the detention facility. For other activities, such as the writing of petitions or consulting with a client who is not detained, no payment is allowed.

The ex officio appointed counsel is also entitled to be reimbursed for expenses emerging in connection with the case. In terms of Decree 7/2002. (III.30.) of the Minister of Justice, the counsel has to put forth a motion requesting such a reimbursement. The costs that may be reimbursed include postal expenses, telephone, travel, parking and accommodation costs, as well as the costs of copying (in fact,

[44] Equality of Arms, p. 38.

[45] Equality of Arms, p. 39.

travel costs can only be reimbursed if the attorney participates in a procedural act that takes place outside the settlement where he/she lives or where his/her office is seated). The amount to be reimbursed is established by the court (or the authority conducting the actual phase of the procedure: the investigating authority or the prosecutor) based on a detailed statement submitted by the attorney. If the attorney fails to submit such a detailed account and the documentation substantiating the costs, the court establishes the amount of reimbursement on the basis of the available data.

With regard to the fees, the most sensitive issue is of course the amount of the hourly fee. In terms of the regulation in effect,[46] the hourly fee is HUF 3,000 (EUR 12), with the exception of consultation with a detained defendant for which the counsel receives half of this amount per hour. If he/she requests, the defense counsel shall be paid the hourly appointment fee for every 100 pages of case documentation studied, however, the total amount paid for this activity may not exceed the fees payable for 30 hours.

According to the attorneys, this amount (which is way below the level of market prices) is the main reason why in the investigation phase (when the defense counsel's presence is not mandatory) the majority of counsels fails to perform their tasks, although – due to the characteristics of the Hungarian criminal procedure – the investigation is of key importance from the point of view of the eventual establishment of criminal liability, and the omissions committed during the investigation are very difficult to remedy in the subsequent phases.

In a 2005 article, dr. János Bánáti, President of the Hungarian Bar Association stated the view that at least a fee of HUF 5,000 (EUR 20) per hour would be necessary to make sure that taking ex officio appointment cases would be worth for a lawyer.[47] In the same article, dr. Bánáti listed other factors that hinder the contact between the lawyer and the client. One of these is the fact that the penitentiary institutions where the defendants are detained are sometimes 100 kilometers away from the place where the procedure is conducted and where the counsel's office is located. Since in some penitentiaries there is only one room for consultation between the lawyers and their clients, it may happen that the counsel traveling substantial distances and waiting for

[46] Act CXXVII of 2006 on the 2007 Budget of the Republic of Hungary, Art. 58 Par. (4)

[47] János Bánáti: Szabadságkorlátozások (Forms of detention) In: Fundamentum – issue 2005/2 (hereafter: Bánáti), p. 51.

hours will have to leave without being able to talk to his/her client. Furthermore, in Hungary, at the moment, it is not possible for the counsel to initiate a telephone call into the penitentiary to be able to consult the defendant this way.[48]

We are, however, of the opinion that besides the low fees and the undeniable infrastructural deficiencies, the incoherence and scattered nature of the functions and responsibilities related to the running of the system (which are also acknowledged by the president of the Hungarian Bar Association) play a role in the dysfunctional operation of the Hungarian ex officio appointment system.

In order to provide indigent defendants with efficient defense, four functions need to be performed efficiently: 1) the appointment of defense counsels in cases when defense is mandatory or otherwise necessary (management function); 2) the monitoring of the performance of ex officio appointed counsels (individual quality assurance); 3) the monitoring and evaluation of the system as a whole (general quality assurance), 4) the planning and implementation of the system's budget (budgetary function). The performance of these functions can only be truly satisfactory if either the same entity is responsible for all of them, or they are distributed between entities which are interested in its smooth operation.

Below we wish to examine what problems arise in connection with the performance of each function, with special focus on the actual practice of the management function.

1.3.1. The management function

From the point of view of both the individual defendant and the system as a whole, the management function is of crucial importance. The appointment of the defense counsel, or in other words, the selection of the individual attorney who will provide defense, is the most important function within the system: it is both the basis and the purpose of all the other functions.

Under Article 35 of Act XIX of 1998 on Attorneys (Attorneys Act), the bar association keeps a register of those attorneys who can be appointed as defense counsels. "The Attorneys Act [...] does not contain guidelines as to how the register should be put together, it simply obliges the bars to create a register that ensures

[48] Bánáti, pp. 50–51.

the undisturbed course of the criminal proceeding. The bars use this 'freedom', and apply different methods in compiling the register. The most frequently used method is that all members of the given bar association are included in the list. Some bars mark in the list those who expressly ask to be appointed by the authorities. In larger bar associations and in the county seats – where the number of lawyers is relatively high – it is possible to compile the list of protector attorneys and ex officio appointed counsels on the basis of voluntary enrolment."[49]

However, in terms of the CCP,[50] from this register, the actual attorney is selected by the authority conducting the actual phase of the procedure (the investigating authority, the prosecutor or the court). This means that in the investigation phase, the defense counsel is selected by the investigating authority, i.e. an entity which – due to its procedural role – is not interested in efficient defense work. For the investigator it is undoubtedly easier to deal with a defense counsel who is not too agile, who does not bombard him/her with questions, remarks and motions, or may not even show up. If we put aside the traditions of the Hungarian penal system for a moment, and try to look at the situation with a fresh insight, it is in fact absolutely incomprehensible why it is the "prosecution" that picks the "defense."

The research results presented under Section 1.2.2. clearly show that this structural problem has far reaching practical consequences. And this is not only the defendants' opinion: the experiences of other participants of the criminal procedure support the statement. In his comments to the report summarizing the results of the HHC's 2003 questionnaire-based survey, dr. István Lakatos, the Head of the Penitentiary and Rights Protection Unit of the Tolna County Chief Prosecutor's Office, wrote the following: "The mentioned problems of establishing contacts with the ex officio appointed defense counsel make the exercise of the right to defense according to the experiences of penitentiary supervision prosecutors. In this regard neither the new CCP nor the amended legal framework has brought along positive changes. Remand prisoners often ask to be heard by the prosecutor, because they

[49] Bánáti, p. 52. The solutions applied by the bars are sometimes criticized. In the Closing Conference of the Model Legal Aid Board Program (held on 30 November–1 December 2006), one of the participating attorneys claimed that by making it possible for some attorneys to "buy themselves out" from the list, it places a great burden on those who choose to be included, as due to the great number of appointments, they are not able to appear at all procedural acts in all cases. On the same occasion, dr. Árpád Erdei, university professor and constitutional judge pointed out that the possibility for opting out is to be welcome, since if lawyers not specialized in criminal law provide defense, that will definitely be a mere formality.

[50] CCP, Art. 48 Par. (1)

believe that the prosecutor will be able to help them to establish contacts with the counsel, or often simply to be provided with information on their procedural rights and the way to assert them, although the provision of this information would be the task of the defense counsel. We often have to phone the ex officio appointed counsels to make sure that they visit their clients in the jail or in the penitentiary institution.

The investigating authority may make sure that no defense counsel is present at the first interrogation not only by appointing a passive attorney, but also by manipulating the time of notifying the counsel.

As it was outlined above, the CCP contains some provisions aimed at guaranteeing that the ex officio appointed defense counsel be present at the first interrogation, however, in the practice, these are not always implemented properly. The defendant has to be informed of his/her right to choose or to request the appointment of a defense counsel. If the participation of the defense counsel is mandatory in the procedure, and the defendant declares that he/she does not wish to retain a defense counsel, the prosecutor or the investigating authority will appoint a defense counsel immediately. In practice these warnings are communicated after the interrogation has been started, and it is not prescribed that the interrogation shall be suspended until the immediately appointed counsel arrives. One of the remand prisoners interviewed in the HHC's 2003 questionnaire-based survey said that when after the warning he had expressed his wish to call his lawyer, the detective told him that they were not obliged to guarantee that the counsel be present, and that after the interrogation he could call the lawyer.[51]

With regard to defendants in an especially vulnerable position, the CCP contains some additional safeguards, when it sets out that if defense is mandatory because the defendant is detained, the defense counsel has to be appointed before his first interrogation at the latest. This provision is obviously aimed at making sure that the defense counsel has a fair chance to appear at the interrogation. However, the survey showed that the investigating authority often notifies the defense counsel at a time, which formally meets the legal requirement (i.e. precedes the beginning of the interrogation), but practically makes it impossible for the lawyer to make it. A surprising evidence that this practice does exist and that prosecutors (who are vested with the task of supervising the lawfulness of investigations) do not find it

[51] Presumption of Guilt, p. 126.

problematic was provided by the comments dr. László Hegedűs, prosecutor of the Vas County Chief Prosecutor's Office made concerning the report summarizing the results of the HHC's 2003 questionnaire-based survey.

Although the interviewees' names were not displayed in the report, one of the Vas county defendants who claimed to have been psychologically pressured by the investigators, could be identified from the circumstances of the case. The HHC received an indignant letter from the Vas County Chief Prosecutor's Office, in which the author criticized the HHC for discrediting officials based on one-sided accounts which had not been properly checked. In order to refute the accusation of psychological pressure, dr. László Hegedűs gave a detailed description of how the police conducted the investigation in the particular case. His account of the events ran as follows: the defendant (let us call him B) was arrested at 6.40 p.m. on 5 February, "a defense counsel was appointed for him, who was notified at 00.10 a.m. on 6 February that B. would be interrogated on the same day. The investigating authority interrogated B at 00.23 a.m. on 6 February. B refused to testify. The interrogation ended at 01.18 a.m., the defense counsel did not participate in the procedural act."

The prosecutor's account of the events actually seems to support the defendant's claims of psychological pressure. B was arrested at 18.40 p.m., at a time when – if notified right away – there still would have been a real chance for the appointed defense counsel to attend the interrogation (even if that was scheduled for late at night). However, it seems from the prosecutor's letter that the counsel was notified about the late night interrogation on an absurdly short notice: less than 15 minutes before the beginning.

This manner of handling the case constitutes a severe breach of the right to defense, although it formally meets the legal requirements (as the appointment and notification of the counsel took place before the start of the interrogation). Obviously it is possible that the success of the interrogation requires the immediate interrogation of the defendant, and therefore the investigating authority cannot afford to allow the defense counsel to arrive to the premises; however, in this particular case this could not be the reason, since more than 5 hours passed between B's arrest and his interrogation. In terms of Article 179 of the CCP, the detained defendant shall be interrogated within 24 hours from the beginning of the detention, which means that the investigators would have had almost 18 hours to interrogate B. If they had scheduled the interrogation for the morning of 6 February, or notified the appointed counsel shortly after the arrest, the attorney would have had a chance to take part

in the procedural act, in which case the suspicion of psychological pressure may not have been raised at all.

The results of the NPH survey also show that there are regions where the timing of notifications leaves much room for improvement. "In so-called urgent cases, when for instance the perpetrator is taken to the police station after being caught red-handed, 16 out of the 23 regional investigation departments leave at least an hour between the appointment and notification of the counsel and the beginning of the interrogation. In the case of 11 units this time may be up to many hours – depending on the distance between the police station and the lawyer's office as well as the time of the day. All units follow the same practice in the sense that they notify the defense counsel via fax or phone and if the counsel indicated that he/she wishes to attend the interrogation, its commencement is scheduled flexibly so that the counsel have time to arrive. Only Somogy County reported that the average time passing between notifications and the beginning of interrogation is 30 minutes, which – taking into account the size and structure of the county – may not always be sufficient for the lawyer to attend. The Tolna County Police Headquarters reported that in the period examined it had happened in Dombóvár on one occasion that the counsel was notified right before the beginning of the interrogation, which obviously excludes the possibility of attending the hearing."[52]

At a professional meeting, dr. Ágnes Frech, Head of the Criminal Board of the Metropolitan Court, expressed her opinion that in such cases (i.e. when the time between the notification of the counsel and the interrogation is not long enough), the testimony made at the interrogation shall not be taken into consideration as lawful evidence, since such evidence is obtained by the investigating authority by severely restricting the defendant's procedural rights, which constitutes a breach of Article 78 Paragraph (4) of the CCP. She also added that if there was an adequate feedback between the judicial decisions and the practice of the investigating authority, the lawful action of the latter could be enforced. This feedback could be provided by the prosecutor, but as the above case from Vas County illustrates, prosecutorial control is not always a guarantee for lawful action.

The new Article 179 Paragraph (4) of the CCP may play an important role in raising the authorities' awareness concerning the unlawfulness of only formally meeting the conditions of ex officio appointment. This provision claims that the

[52] Equality of Arms, p. 35.

investigating authority shall schedule the time of the interrogation in a way that enables the defendant to exercise his/her right to defense.

The above examples show that the appointment practice of investigating authorities is far from unproblematic, and in most cases it does not enhance the full implementation of the right to defense. Due to the procedural tasks and the obvious interests of the investigating authorities this cannot be realistically expected either.

The situation stems from a structural problem, the solution of which requires the radical reform of the system. The function of appointment has to be placed with another organization in a way that the investigating authority only indicates the need for a lawyer, and the actual appointment (selection and notification) of the defense counsel is performed by an entity that is not interested in the outcome of the procedure in any way.

1.3.2. Individual and general quality assurance

By individual quality assurance we mean the examination of a particular defense counsel's performance in a particular case. The main problem in this regard is that while in the case of a retained lawyer the client exercises control over the attorney's performance (if he/she is not satisfied, he/she can terminate the retainer and retain someone else), such a direct control mechanism does not exist in the case of ex officio appointment. A special tripartite relationship is established, in which the lawyer's fee is not paid by the client, whereas the entity that pays the counsel's work does not have an insight into and – due to the principle of the attorneys' independence – may not have an influence on the lawyer's work.

Individual quality assurance should be performed by the bar associations, in an indirect manner, through their disciplinary tasks. It is primarily the bar association's right and duty to call its members to account for not abiding by professional rules set by the laws and the professional code of ethics.[53]

According to the CCP, the defense counsel shall be obliged to contact the defendant without delay,[54] while Section 8/4 of the Code of Conduct prescribes that following the receipt of the appointing decision, the counsel shall immediately

[53] Attorneys Act, Art. 37

[54] CCP, Art. 50 Par. (1) (a)

report to the appointing authority, request information about the case and contact the client in pre-trial detention personally.[55] But, as noted above, most appointed counsels often fail to abide by this obligation. However, disciplinary proceedings are very rarely initiated on this account, which – again – has structural reasons.

In the investigative phase, the investigating authority and the defendant are primarily in the position to judge the performance of the counsel. Neither the one nor the other can realistically be expected to file a complaint with the bar association. The former is not really interested in effective defense work, whereas the latter is in a very vulnerable situation (especially when detained).

Those defendants who cannot afford to retain a lawyer usually come from indigent, uneducated segments of society, with a limited capacity to assert their interests. Furthermore, they do not have a guaranteed right to request the appointment of a new defense counsel. According to the Attorneys Act, the authority may (but is not obliged to) withdraw the appointment if the defendant makes the request on reasonable grounds.[56] The CCP practically repeats this provision when it prescribes: "there is no remedy against the appointment of the defense counsel, but the defendant may – in a reasoned motion – request the appointment of another defense counsel. The request is decided upon by the court or prosecutor or investigating authority before which the procedure is in progress."[57] Thus, it may happen that the defendant requests a new defense counsel, the authority rejects the request, and the defendant is forced to continue the procedure with a counsel against whom he/she has filed a complaint. It is not surprising that practically no defendants risk this possibility.

Due to these circumstances, effective individual quality assurance is lacking from the Hungarian system, although – as it was shown in Section 1.1. – this may have detrimental financial effects on the Hungarian state if someone files a complaint with the ECHR in connection with the negligence of his/her ex officio appointed defense counsel.

General quality assurance means the constant monitoring of the system, the systemic collection and analysis of data regarding its operation, and the regular assessment of its functioning. Although this function could make it possible to assess

[55] Regulation 8/1999 (III.22.) of the Hungarian Bar Association on the Ethical Rules and Principles of the Legal Profession

[56] Attorneys Act, Art. 34 Par. (3)

[57] CCP, Art.§ 48 Par (5)

whether the ex officio appointment system fulfills the role it is supposed to (i.e. to guarantee the right to fair trial and defense to those defendants who are vulnerable for some reason), there is no entity in Hungary that would perform this function. Neither the bar associations, nor the Ministry of Justice, nor the National Justice Council have coherent data about the number, ratio and results of cases taken by ex officio appointed defense counsels. Neither of the above entities have commissioned surveys aimed at the examination of the system's efficiency, and neither operate institutionalized mechanisms to monitor and assess the system's functioning.

The coming into force of the framework decision outlined under Section 1.1. will make a reform of this function inevitable. As it was mentioned, the framework decision obliged the member states to collect information (including statistical data) making it possible to monitor and evaluate the criminal legal aid system.

1.3.3. Budgetary function

No consistent structure exists with regard to functions related to the budget of the ex officio appointment system either. As it was mentioned above, the Minister of Justice determines the detailed rules on the fees, while the law on the annual budget sets fee levels. Those organs which decide on the system's budget lack the tools to monitor the quality of the service they pay for, while the entity which performs the most functions related to the operation of the system (the bar association) has only a limited say with regard to budgetary issues.[58] In addition, different organizations make the actual payments to each procedural phase, therefore there are no aggregated annual data on the amounts paid on fees and expenses of ex officio appointed defense counsels in the whole criminal system (including the investigation, the prosecutorial and the judicial phase). In addition, in the course of the organization of the Model Legal Aid Board Program's (hereafter: Program) closing conference held on 30 November and 1 December 2006 (hereafter: Closing Conference), it also became clear that, not even the individual organizations playing a role in the criminal procedure keep a transparent and updated record regarding the payments they make to ex officio

[58] The President of the Hungarian Bar Association is a member of the National Justice Council, which prepares and submits to the Government the draft budget of the judicial chapter (this budgetary chapter contains the bulk of the money to be spent on legal aid).

appointed defense counsels, and the breaking down of costs to fees and reimbursing expenses (travel, copying, and so on) are close to impossible.

As dr. János Bánáti pointed out at the Closing Conference, even if these costs were known, it would be insufficient in itself, since the State only pays the costs of indigent (and acquitted) defendants, in all other cases the defendant is obliged to pay back the advanced fees and costs as part of the criminal costs. No separate information is available of what percentage of the costs advanced this way is paid back, so the actual total budget of the system is impossible to estimate and plan.

Furthermore, the acting participants of the system sometimes arbitrarily overrule the budgetary provisions formulated by those organs, which are – from the point of view of the criminal procedure – outsiders but are vested with the task of determining the financial framework of the system. For instance, based on an agreement between the Budapest Bar Association and the Budapest Police Headquarters, ex officio appointed counsels receive more than HUF 3,000 per hour, because when filling out the payment form, the police officers automatically add a 30% lump sum for expenses. Hence, the hourly fee of appointed defense counsels is actually HUF 3,900 (plus VAT), even if the counsel had no expenses in the particular case. A lump sum for the expenses is a flexible solution, which is advantageous for the attorneys, however, it is not fully in line with Decree 7/2002. (III.30.) of the Ministry of Justice, which (as it was outlined above) prescribes that the lawyer shall submit a detailed statement on his/her expenses, and the authority shall establish the reimbursable expenses on the basis of this statement. The only exception allowed by the Decree is that if the attorney fails to submit such a detailed account and the documentation substantiating the costs, the authority establishes the amount of reimbursement on the basis of the available data.

This provision means a legal gap through which the lump sum solution can be "smuggled" into the system, however it is obvious that the fundamental idea is to reimburse expenses on the basis of a detailed statement. Despite this fact, the practice based on an agreement of two actors of the system (the bar and the police) prevails over the provisions of the Decree and functions relatively smoothly.

2. A Brief Description of the Model Legal Aid Board Program

The experiences concerning the Hungarian ex officio appointment system show that its fundamental purpose (i.e. the provision of effective defense in cases when it is deemed important in the interest of justice and/or due to special circumstances of the defendant) is not fulfilled in most cases. And if a dysfunction becomes "normal" practice, it means that the problems are of a systemic nature, and not caused by individual negligence.

This realization led the HHC to launch its Model Legal Aid Board Program with the financial support of the Netherlands Ministry of Foreign Affairs and the European Commission in cooperation with the Netherlands Helsinki Committee. The aim of the Program is to design and test a model, which – in the long run – could replace the ex officio appointment system and eliminate its systemic shortcomings.

2.1 Cooperation between the police and HHC

The Program was based on the Agreement of Cooperation signed by Major General Péter Gergényi on behalf of the Budapest Police Headquarters (BPH) and Ferenc Kőszeg on behalf of the Hungarian Helsinki Committee (HHC) on 13 July 2004. Originally the 6–7th District Police Headquarters, the 8th District Police Headquarters and the Department of Inquiry of the BPH took part in the Program, however, later it became necessary to extend the scope of the Program to the 13th District Police Headquarters and the Department of Investigation of the BPH (more details below).

The basic concept of the Program was that within a certain period (until the number of the cases taken up into the Program reaches 120) in each case when in terms of the CCP defense would be otherwise mandatory and the defendant does not retain a attorney, police organs participating in the Program shall inform the defendant about the Program, hand over written information about the Program, and ask the defendant whether he/she wishes to be provided with a free defense counsel by the HHC.

If the defendant wishes to participate in the Program and consents to the forwarding of his/her personal data to the round-the-clock dispatcher service set up by the HHC, the investigator shall fax a notification to the service, which – based on a pre-set duty schedule – sends an attorney contracted with the HHC to the police premises. The fax shall contain information about the following: against whom and for what criminal offense the criminal procedure was launched, and at which member of the police organ's staff the Attorney shall present him/herself. In the fax statement it shall also be indicated if the defendant is juvenile, blind, deaf, mute, mentally disabled, or does not speak Hungarian. Furthermore, the fax shall indicate what language the defendant speaks or if sign-language interpretation is needed. In the fax the police organ shall also indicate the time of the DS's notification and the scheduled time of the interrogation.

Upon arrival to the police, the attorney helps the defendant to fill out the means test, and if the defendant meets the indigence criteria set up by the Program, the attorney takes up the defendant's case. From the point of view of criminal procedural law, being involved in the Program means that the defendant formally retains the HHC's lawyer, who therefore officially qualifies as a retained and not as an ex officio appointed lawyer. The specialty of the retainer given by the defendant is that the lawyer's fee is paid by the HHC and not the client, in return for which the client (the defendant) exempts the counsel from his/her obligation of confidentiality vis a vis the HHC and the board monitoring the work of the attorneys (hereafter: Board).

The notification of the dispatcher service, the arrival of the attorney, the filling out of the means test and other documents (retainer, power of attorney, the defendant's application to the HHC) undoubtedly take up a lot of time. In order to spare the investigating authority from not being able to abide by its obligations stemming from the CCP (e.g. the obligation to appoint a defense counsel in due time), the lawyers participating in the Program undertook that if the defendant turns out to be not indigent or refuses to participate in the Program the investigating authority can appoint them on the premises to be ex officio defense counsels.

The above described scheme (the so-called "urgent notification") was applied in cases when the defendant was at the police station (in most cases because he/she was detained) and the investigator was preparing to hold the first interrogation within a short period of time. In terms of the Agreement of Cooperation, in such cases the notification had to be performed immediately but at least three hours before the commencement of the interrogation, whereas the dispatcher service was obliged to inform the investigator within 45 minutes about which attorney was sent to the premises. If the dispatcher service informed the police that it could not find an available attorney (this happened in only four cases during the five months of the Program), the investigator appointed a defense counsel in accordance with the general rules of ex officio appointment.

Under the Agreement of Cooperation, there were only two cases in which the investigator was allowed to forbear from notifying the dispatcher service: if the inmate said that he/she did not wish to Participate in the Program (and therefore gave no permission for the forwarding of his/her data), and if immediate interrogation was necessary for of the success of the criminal procedure. In such cases the officer was obliged to appoint an ex officio attorney in accordance with the general rules, but also to inform the dispatcher service – within 24 hours – about the interrogation and the reason for the omission of preliminary notification ("Information about the omission of notification" – hereafter: subsequent notice).

Furthermore, by providing the defendant with the Program's information leaflet, the police was obliged to inform the defendant that if he/she is indigent, he/she has the possibility to apply for admission into the Program. (Obviously this was so only with regard to cases when the urgency of the interrogation was the reason for not notifying the dispatcher service.)

A second type of cases was when the defendant was not detained, so the police issued a summoning order for the purpose of carrying out the first interrogation of the defendant. If – according to information at the Police's disposal – the appointment of an ex officio defense counsel was likely to be mandatory based on another reason (e.g. from the already available data, the investigator knew that the person to be summoned was juvenile or a foreigner), the police organ – when posting the summons – had to notify the dispatcher service – without disclosing the name or any other personal data of the defendant – about the scheduled time of the procedural action and about which member of the police organ's staff the attorney shall present him/herself at ("preliminary notification").

The dispatcher service then informed the police organ about which attorney of the Program would appear at the interrogation. If in such cases in the period between the notification of the dispatcher service and the procedural act the police were informed that the defendant had retained an attorney, the police had to inform the dispatcher service that the attorney provided in the framework of the Program does not have to appear at the procedural act. If the scheduled time of the procedural act changed for any reason, the police organ also had the obligation to notify the dispatcher service in due time.

In the case of preliminary notifications the same rule applied: if the attorney sent by the HHC appears at the procedural act but the retainer is not signed (e.g. because the defendant does not meet the criteria of indigence), the police organ may ex officio appoint the attorney, which the attorney must accept.

In theory there was a third possibility, namely that a circumstance making defense mandatory emerges only after the first interrogation (e.g. the pre-trial detention of the defendant is ordered only later in the procedure). In such cases the police was supposed to appoint an ex officio attorney in accordance with the general rules but also to notify the dispatcher service – within 24 hours – about the interrogation ("Information about the omission of notification"). Furthermore, by providing the defendant with the Program's information leaflet, the Police was supposed to inform the defendant that if he/she is indigent, he/she has the possibility to apply for admission into the Program. There was no example of this third type of notification throughout the project.

2.2. Cooperation between the HHC and the attorneys

The attorneys participating in the Program (originally 43 of them) were selected through a tender. In the Framework Agreement of Cooperation concluded with the HHC, the attorneys undertook to be on duty on previously set days of the week (duty day) so that, based on a notification from the dispatcher service run by the HHC, they would be able to immediately proceed to the police premises designated by the dispatcher service, assess the indigence of the defendant, inform him/her about the details of the program, conclude a retainer with indigent defendants and provide them with defense (formally as retained counsels). They also undertook the obligation that if the defendant is not indigent, they will act as ex officio appointed counsels, in the event that the case officer chooses to appoint them on the premises.

Since one of the main objectives of the Program was to model how the performance of defense counsels may be monitored by a professional body for the purposes of quality assurance, the attorneys participating in the Program also undertook to submit on a case-by-case basis monthly reports to the Program's Board consisting of representatives of the Budapest Bar Association, The Ministry of Justice, the HHC, university professors and acknowledged practicing attorneys.

Attorneys are obliged to attach to the report the copies of those minutes and other important case documents that are necessary for the monitoring of Attorney's performance. Furthermore, Attorney shall indicate how many hours he/she spent on the cases (e.g. consultation with defendant, writing petitions, etc.). As it was mentioned above, one of the conditions of a defendant's participation in the Program was that he/she had to exempt the defense counsel from the obligation of confidentiality vis a vis HHC personnel and the Board.

Furthermore, attorneys shall also attach invoices verifying expenses that emerged in connection with the cases. They also undertook to visit their detained clients as often as necessary but at least once per month.

Based on the attorney's report and the attached documents, the Board decides whether to allow the payment of the fees and the reimbursement of the costs as requested by the lawyer. Taking into consideration the additional tasks undertaken by the attorneys, the Board raised the hourly fee from HUF 5,000 (EUR 20) to HUF 7,500 (EUR 30). The maximum amount payable for one case is HUF 200,000 (EUR 800). Under exceptional circumstances – taking into account the complexity of the particular case – the Board may increase this limit.

Among the activities that can be paid in the Program, there are some which are not payable under the rules pertaining to ex officio defense counsels (e.g. the preparation of petitions, travel during the night, preparation for a trial and so on), at the same time however, with regard to certain activities the Board maximized the number of payable hours: for example, no more than one hour can be requested for waiting before a procedural act. The Board qualified postal and copying costs as well as the costs of travel outside the seat of the lawyer's office as acceptable, with the addition that under exceptional circumstances, and on the basis of a justified request, the Board may on an individual basis allow divergence from the general rules pertaining to fees and costs. The HHC undertook to provide an interpreter to make consultation between the lawyers and foreign defendants possible, so no costs emerged on the attorneys' side in this regard.

Originally the retainer of the attorneys participating in the Program was valid for the first instance procedure (and to advice on potential appeal against the first instance decision), because it was not sure that the financial and temporal limits of the Program will allow that defense be provided until the second instance decision in all cases. Later, upon the explicit request of the attorneys, the HHC modified the conditions: attorneys can carry on with the cases until the span of the program which ends in June 2007.

2.3. The relation between the HHC and the defendants

As it was outlined above, there is a special, tripartite relationship between the HHC, the defense counsel and the defendant, which serves to model the connection between the defendant, the ex officio defense counsel and the state organs providing the remuneration of the counsel.

Although – as it was mentioned – the Hungarian ex officio appointment system is not based on indigence, the Program made the provision of defense conditional upon this factor, which has many reasons. The HHC is of the view that the indigence threshold of personal exemption of costs in criminal procedures is low, and therefore – among other things – the Program was aimed at mapping up where the financial limit beyond which the defendants (or their families) can afford to retain a lawyer is, where the threshold which should serve as the basis of personal exemption is.

Furthermore – in the light of the relevant international standards – it seemed reasonable that only those should be provided with the advantage of completely free and professionally controlled defense who could not afford to retain a lawyer anyway. To make sure that special individual circumstances can be taken into account, the attorneys had the possibility to request a permission from the Board to take up the case of defendants who did not meet the Program's indigence criteria provided that there was some special circumstance that seemed to make this necessary.

The limit was HUF 50,000 (EUR 200) per person per household (this was the official poverty line for 2003) and assets not exceeding the worth of HUF 300,000 (EUR 1,200).

At the same time, due to the fact that the Program also serves to prepare a potential reform of the ex officio appointment system, the HHC also took into

account the Hungarian provisions on mandatory defense. Therefore, we applied a rule that if a defendant is admitted to the Program during the time of the 72-hour detention,[59] but his/her pre-trial detention[60] is not ordered by the court (and detention is the only reason for mandatory defense in his/her case), the attorney should terminate the retainer and dismiss the defendant from the program (as with the termination of the detention, defense is not mandatory any more). This rule was, however, applied in a flexible manner.

As it was outlined above, the attorneys assessed the defendant's financial situation before the first interrogation, and based on this assessment they decided whether to admit the defendant into the Program or not. If the decision was positive, they concluded a retainer, parallel to which the defendant also signed an application addressed to the HHC. This application confirmed that the defendant exempted the attorney from his/her obligation of confidentiality, but it also contained the acknowledgment that if it is proven that the defendant had made a false declaration on his/her financial situation, the HHC would reclaim the attorney's fee and reimbursed expenses that emerged during the criminal procedure. So far this provision has not been applied in the program.

[59] The longest deprivation of liberty possible without a judicial decision. It may be ordered by the investigating authority or the prosecutor upon a reasonable suspicion that the defendant has committed a criminal offense subject to imprisonment, provided that a probable cause exists to believe that the defendant's pre-trial detention will be ordered.

[60] In the case of an offense punishable with imprisonment the defendant may be subjected to pre-trial detention if (i) he/she has escaped or hidden from the court, the prosecutor or the investigative authority; he/she has attempted to escape, or during the procedure another criminal procedure is launched against him/her for an offense punishable with imprisonment; (ii) taking into account the risk of his/her escape or hiding, or for any other reason, there are well-founded grounds to presume that his/her presence at the procedures may not be secured otherwise; (iii) there are well-founded grounds to presume that if not taken into pre-trial detention, he/she would – through influencing or intimidating the witnesses, eliminating, forging or hiding material evidence or documents – frustrate, hinder or threaten the procedure; (iv) there are well-founded grounds to presume that if not taken into pre-trial detention, he/she would accomplish the attempted or prepared offense or would commit another offense punishable with imprisonment. Pre-trial detention is ordered by a judge upon the motion of the prosecutor. Its longest possible term is three years, and needs to be prolonged and reviewed at intervals defined by the law.

2.4. Procedural elements to be modeled by the Program

To summarize, the Program strived to examine the possible solutions for the structural problems outlined in Section 1. in the following ways.

By setting up and operating the dispatcher service, the HHC wished to examine how, with what degree of efficiency and for what costs it would be possible to establish a system in which the investigating authority only indicates the necessity of appointment, but the selection and notification of the lawyer is performed by another organ.

The program also wished to test how the efficiency of the defense is impacted if it is guaranteed that the defense counsel is present at all procedural acts where this is allowed by the CCP.

With regard to the quality of defense work we also wished to see how a professional board may monitor the activity of individual lawyers, under what conditions and within what framework can such a body perform a kind of quality assurance function, and whether such professional monitoring is acceptable for the lawyers participating in the Program.

In connection with the fees of counsels we attempted to assess what remuneration can be regarded as fair, how much on average a criminal case costs with such a remuneration, what costs need to be taken into consideration, and whether the system of hourly fees can be maintained even if instead of the authorities in charge of the criminal procedure, a central authority makes the payments.

3. The Program's Practical Operation

3.1. Cooperation with the police

The objective of the Program is to create a model that promotes the equality of opportunities in the field of criminal law and is capable of eliminating the systemic shortcomings of the ex officio appointment system. When we were considering the possible methods of taking up cases, one of the options was to call on ex officio appointed lawyers to join the Program and conclude an agreement with them that they would continue the cases they started as ex officio appointed lawyers as retained lawyers in the framework of the Program for more generous remuneration. This however could not have served as a real model, since the cases would have been taken into the Program on a rather arbitrary basis (it could have been quite accidental whether a certain lawyer is informed about this possibility or not), and almost all the cases would have been included in the Program only after the first interrogation, which is often of crucial importance. This is why (in spite of all the foreseeable difficulties) we decided to attempt to include all the mandatory defense cases which are commenced within a particular time period by particular police organs. This could have guaranteed a close to representative sample if in all (or almost all) the mandatory defense cases initiated by the police organs participating in the Program the HHC's attorneys had provided defense.

In the preparation phase of the Program – back in 2003 – we requested information about the annual number of ex officio appointment by certain Budapest police organs. We were informed by the police that in 2002 the aggregate number of such appointments by three organs (the 6–7th District Police Headquarters, the 8th District Police Headquarters and the Department of Inquiry of the BPH) was 905, which on average means 75 appointments per month. We thought that if these three police organs participate in the Program, 120 cases could be taken within two

months. However, to be on the safe side, in the grant application submitted to the Dutch Ministry of Foreign Affairs we requested an amount that would enable us to operate the round-the-clock dispatcher service for three months.

In his letter of 10 March 2003, Commander of the National Police Headquarters, dr. László Salgó gave his permission to the Program, based on which the HHC started discussions with the officials of the BPH. The draft of the agreement of cooperation was also commented on by the Chief Public Prosecutor and the President of the Budapest Bar Association. Based on the discussion, in October 2003 the agreement was ready to be signed. The signing however had to be postponed, because officially the HHC was notified about the success of its grant application only in March 2004.

In the meantime there was a change in the leadership of the BPH, so the discussions had to be restarted. The new draft proposed by the BPH ran as follows: In each case when in terms of point a) of Article 46 of the CCP legal defense is mandatory and the defendant does not retain an attorney, Police organs participating in the Program shall – if possible – notify the HHC's dispatcher service within the shortest possible time."

This provision would have made the BPH's obligation to notify the HHC accidental. The stipulation "if possible" would have made it completely impossible to figure out why or why not the HHC was notified in a particular case. Since this formulation would have made the police's obligation non-enforceable, we suggested further negotiations, and finally a compromise was reached. We returned to the agreement of the previous year with two important differences. The first one was that before the investigator notifies the dispatcher service, he/she asks for the defendant's permission. The other amendment authorized the investigator to forbear from notifying the dispatcher service "if immediate interrogation is essential for the interest of the success of the criminal procedure."

Since it seemed quite unlikely that a properly informed defendant would reject the opportunity to be defended by a free lawyer who is 100 percent sure to be present at the interrogation, we thought that a safeguard against abuses may only be necessary with regard to the second option, so Point 7 of the agreement of cooperation was formulated as follows: "In the event that [...] the dispatcher service was not notified due to the urgency of the interrogation of the detained defendant, the police shall appoint an ex officio attorney in accordance with the general rules. In such cases the police shall notify the dispatcher service – within 24 hours – about the interrogation. Furthermore, by providing the defendant with the Program's

information leaflet, the Police shall inform the defendant that if he/she is indigent, he/she has the possibility to apply for admission into the Program."

The phase of taking up cases started on 1 September 2004, and after the first 6 weeks it seemed logical to examine whether the cases admitted into the Program indeed constitute a representative sample, whether they cover an adequately large portion of the procedures launched by the participating police organs, and if not, what the possible causes are and how these causes can potentially be eliminated. To this end, before the meeting scheduled for 18 October 2004, we requested the officials of the participating police organs to provide us with data on the following: on count of what criminal offenses were procedures launched in the period starting with 1 September; in how many cases investigators appointed as ex officio counsels attorneys do not participate in the Program; in how many cases did this happen due to the fact that the defendant did not wish to take part in the Program.

To our great surprise the answers showed that at the 8th District Police Headquarters between 1 September and 18 October altogether 34 defendants refused to take part in the Program, thus rejecting free legal aid that could have been provided within a very short period of time. In the same period, the personnel of the headquarters sent only 19 (urgent or preliminary) notifications, 4 information sheets on the omission of notification due to the urgency of the interrogation and 1 due to the defendant's wish not to take part in the Program. In 3 other cases the defendant could not be admitted into the program due to other reasons (in one instance for example the reason was that the attorney sent to the premises had to find out on the spot that the defendant had had a retained lawyer for two years).

The large number of defendants refusing participation seemed all the more strange because within the same time span nobody at the 6–7th District Police Headquarters chose not to take part in the Program (at the same time this police organ sent 45 notifications to the dispatcher service, and only 1 information sheet on the omission of notification). In the HHC's view this striking difference would have been difficult to explain with objective factors, as neither the crime structure nor the perpetrators' social background differs significantly in the two neighboring districts.

In the framework of the HHC's Police Jail Monitoring Program, we visited the jail of the 8th District Police Headquarters on 27 October. In the course of the visit it became clear that the personnel keep a separate record of those defendants who are informed about the Program. The book contains the time of the interrogation and the defendant's name. On the top of the sheet, the following could be read: "I was informed about the Model Legal Aid Board Program. I wish to take part in it.

I consent to the forwarding of my data to the HHC". The defendant expressed his/her consent or the lack of it by writing "yes" or "no" into this column, and verified the statement by putting his/her signature into the next one. Upon our request, the guards on duty provided us with a copy of the sheets.

From the record it seemed that between 1 September and 26 October, out of the 53 defendants, 39 (73%!) said "no," 13 said "yes," and in 1 case the "yes" was crossed out. Out of those who said no, 14 were still detained at the time of our visit: 7 of them had been transferred to the Gyorskocsi street Central Holding Facility of the BPH, 1 juvenile had been transferred to a reformatory institution, and 2 persons to respective penitentiaries. Four of the defendant refusing to participate were still at the 8th District Police Headquarters, We talked to them and a few days later we managed to talk to two other concerned defendants at the Gyorskocsi street jail. All of them claimed that they had not been properly informed about the program. As one of them put it: if I had been informed that within one and a half hours the HHC's lawyer would be here and would participate in my interrogation, I definitely would not have said no. Out of the six persons, only one had met his ex officio appointed lawyer (and only at the second interrogation). When four of them asked to be included into the Program, with the exception of one person (whose case started before 1 September) the Board accepted this request.

Although the agreement of cooperation only stipulated the obligation of subsequent information on the omission of notification for cases when the dispatcher service was not notified because of the urgency of the interrogation, based on this experience we requested the competent officials of the participating police organs to instruct the personnel to provide information also if the reason for the lack of urgent notification is the unwillingness of the defendant to participate. Furthermore, regarding the general problem and certain individual cases, we turned to Péter Gergényi, Commander of the BPH and signatory of the agreement of cooperation. He had the cases examined but concluded that our complaint was unfounded as "the 8th District Police Headquarters' practice concerning the information of the defendants is appropriate, the organ is not at fault in this regard."

Acknowledging that with regard to some of the individual complaints, the BPH's findings were indeed acceptable, not all the results of the examination seemed convincing to the HHC.

For example, one of the interviewed defendants (T. R.) said after we had showed him the police register that he indeed remembered having signed something in this booklet at the time of his interrogation, but as far as he recalled he had had

to make a statement about whether he was willing to testify even in the absence of a defense counsel. He could not accurately recall the events because he was drunk during the interrogation. He admitted that he had not been forced to sign the sheet, but he had no clue what he had actually signed. He claimed that our visit was the first time he had heard about the Program. He knew that an ex officio defense counsel had been appointed, but since his arrest on 22 September 2004, the counsel had not contacted him, and he had no idea about the name and availability of the counsel (the interview was conducted more than a month later, on 27 October).

With regard to this individual complaint, the BPH's answer was the following: "T. R. was informed about the Program by the head of guards at the time of his arrest on 22 September 2004, at 00.20 a.m., in the jail of the headquarters. Another member of the personnel was also present. His statement concerning the Program was recorded in the aforementioned booklet [see above]. This was done completely independently from his first interrogation. T. R.'s account of being drunk during the interrogation is also highly questionable, considering the fact that his interrogation took place 14 hours after his arrest, and also that 26 days after his first interrogation he confirmed the testimony he made there."

However, the entries in the booklet recording the provision of information to defendants about the Program refute the BPH's version concerning the chronology of the events. Next to T. R.'s name only the date when he was informed is indicated, but not the exact time. But the entries in the booklet follow each other in a chronological order, and next to the name of B. J., who was informed about the Program before T. R., the exact time is also indicated. B. J. was – according to the police's own record – informed about the Program on 22 September, at 12.30 p.m., which means that the next person, T. R. could only have been informed later than that. This undoubtedly refutes the BPH's statement that T. R. was informed about the Program upon his arrest or not much later than that.

In this particular case, there are two directly contradictory statements – one by the defendant and one by the police –, which usually makes it very difficult to find out the truth. It seems however that in this case there is an objective piece of evidence (and it is exactly the own documentation of the police) that refutes the police's version and substantiates what the defendant said.

Furthermore, the booklet also proves that the police organ did not abide by the provisions of the agreement of cooperation. In terms of Point 5 (c) of the agreement, "the police organs shall endeavor to ensure that the notification of dispatcher service take place at least three hours before the first interrogation."

According to the Commander's letter, T. R.'s interrogation was performed 14 hours after his arrest, i.e. around 14.20. Based on the booklet it can be established that he was informed about the Program later than 12.30, i.e. less than 2 hours before the interrogation was started. Although the agreement says that the police organ shall only endeavor to send a timely notification, the reason for this is that due to the features of investigation work, it is not always possible to wait for three hours before the interrogation starts. However, since T. R. had been detained for 14 hours before his interrogation started, this reason for exemption obviously did not prevail. If T. R. had happened to opt for participating in the Program, the police organ could not have met its duty to perform the dispatcher service's notification three hours in advance.

We called Péter Gergényi's attention to these circumstances in another letter, however, we never received any concrete reply concerning these observations.

By the end of October it had become obvious that we would fall short of the originally planned 120 cases around the end of November. This was partly due to the rule that defendants released after 72 hours were excluded from the program, but partly because the HHC received much less than the previously indicated 75 notifications per month. Therefore it became necessary to involve two other police organs, for which the Commander of the BPH gave his permission. We picked the 13th District Police Headquarters (due to its size and criminological characteristics), and the Department of Investigation of the BPH. The reason for choosing the latter was that some officials from the Department of Inquiry called our attention to the fact that since the Department of Investigation investigates the cases of unidentified perpetrators, if they manage to identify and arrest the defendant, they also often perform the first interrogation before handing over the case to the Department of Inquiry or another police organ. If therefore we insist that the defense counsel should be able to be present from the first interrogation, it is inevitable to involve the Department of Investigation as well.

Eventually, the phase of taking up cases had to be prolonged until 31 January 2005. With the purpose of evaluating the results we requested further data from the participating police organs. We wanted to see that in the project period (1 September 2004–31 January 2005) out of all the cases in which defense was mandatory, how many retained lawyers, how many HHC lawyers and how many ex officio appointed lawyers provided defense, and if defense was not provided by one of the HHC's lawyers, what was the reason for that. When receiving the police statistics, we had to realize that the Program's implementation was even more problematic than we thought.

According to information by the police, in the reference period the 8th District Police Headquarters launched 121 criminal procedures in which defense was mandatory. 27 defendants had a retained lawyer, so there were 94 cases that would have fallen under the scope of the Program. However only in 29 cases (31%) was an HHC lawyer retained, on 58 instances the defendant did not wish to participate in the Program and in the 7 remaining cases there was another (not specified) reason for not notifying the dispatcher service.

In the 6–7th District, the HHC lawyers provided defense in 26 and 23 cases in September and October respectively. These numbers were reassuring, considering the fact that in 2002 the average monthly number of ex officio appointment was 32 at this police headquarters. In the first two months, the dispatcher service received only one subsequent notification, so it seemed that the police officers in these two district apply the agreement of cooperation in truly good faith. The picture seemed less bright in the following months: in November only 13, while in January and December altogether only 12 notifications were sent from this organ, with no subsequent notifications at all. The statistics received from the 6–7th District were quite inaccurate (although we admit that we could not specify in advance what kind of data we would like to receive at the end of the phase for the taking up of cases), therefore, also relying on our own data, we could only estimate what percentage of defendants eligible to participate in the Program were actually admitted at this headquarters. Based on this estimate, it seems that out of the 109, whose case would otherwise have required the appointment of a defense counsel, 57 (52%) were defended by attorneys participating in the project. This is obviously a much better result than in the 8th District, however hardly more than half of the cases still not seem enough to constitute a representative sample.

In relation to the 6–7th District, the reason for the omission of notifications seemed peculiar. Data provided by the police revealed that in 37 cases the investigators working here had decided not to notify the dispatcher service due to the urgent nature of the interrogation. It is not clear why in this district there were so many cases in which interrogations were so urgent, whereas in the 8th District (which has similar criminological characteristics) there was no such case, and at the Department on Inquiry where more severe offenses are investigated, there were only 8 such instances. A possible explanation is that since most defendants at the latter two organs did not want to participate in the Program in the first place, the investigators of these organs did not have to make a decision on whether an interrogation is urgent or not, because they could appoint an ex officio defense counsel anyway.

It was however definitely a violation of the agreement of cooperation that the dispatcher service was not informed about these urgent interrogations, although as it was mentioned above, Point 7 of the agreement clearly prescribed that if the dispatcher service was not notified due to the urgency of the interrogation of the detained defendant, the police shall appoint an ex officio attorney in accordance with the general rules and notify the dispatcher service – within 24 hours – about the interrogation. Hence, the Headquarters' notification practice was clearly in breach of the agreement.

At the Department of Inquiry of the BPH the ratio of participating defendants was just as low as in the 8th District. Defense was mandatory in the case of 105 defendants. 27 of them had a retained counsel, while out of the 78 remaining defendants, 25 were defended by an HHC lawyer, as opposed to 53 persons for whom the investigating authority appointed an ex officio defense counsel. This means that the Program covered only 32% of the cases that would have fallen under its scope. Based on the preliminary discussions we thought that the highest number of urgent cases will be handled by the Department of Inquiry, but – as it was indicated above – this happened in only 8 cases. On the other hand, more than half of those defendants who were charged with severe crimes but were not able to retain a lawyer (45 persons, or 58%) chose not to participate in the Program. In the period of reference, the Department of Inquiry investigated 4 cases of accomplished and 8 cases of attempted homicide. Nine of the defendants had ex officio appointed defense counsels and we presume that two defendants retained a lawyer, since the dispatcher service received only one notification (and one subsequent notification referring to the urgency of the interrogation). It does not sound likely that 8 persons charged with homicide refused to have a defense counsel who is sure to be present at the interrogation. It seems more likely that the information they received was not adequate.

The request that we put forth in early November, after our experiences with the 8th District Police Headquarters (namely that we would like to be notified about defendants not wishing to take part in the Program, in spite of the fact that this is not foreseen by the agreement of cooperation) was practically ignored by all three police organs.

The participation of the 13th District greatly contributed to the fact that we could finally close down the phase of taking up cases at all. The statistics from this organ were rather inaccurate, but it is a fact that in 3 months as many defendants (32) were taken up into the Program in 3 months as from the 8th District in 5 months. Furthermore, the headquarters regularly sent subsequent notifications to

the dispatchers (also in cases when the reason was the defendant's unwillingness to participate).

In contrast to the 13th District Police Headquarters' positive example, the Department of Investigation of the BPH was conspicuously reluctant to participate. In three months, the Department sent only one notification to the dispatcher service, and no subsequent notification at all. Their statistics show that altogether 16 defendants refused to participate in the Program. Furthermore, they claim that in the period of reference, they had interrogated 99 defendants whose defense would have been mandatory. Out of this number, 24 had their own retained lawyers, and another six were defended by appointed lawyers not participating in the Program. The Department claimed that the HHC provided defense to three defendants, however in fact this only happened in one case. It is unclear what happened to the other 66 defendants interrogated by the Department of Investigation in cases requiring mandatory defense, it is however certain that from this police unit the HHC received only 1% (!) of all those cases that would have fallen under the scope of the Program.

When after the period for taking up the cases was finished, HHC President Ferenc Kőszeg summarized the above facts in a letter addressed to Peter Gergényi. The Commander of the BPH sent the following reply: "the investigating authority may not be held liable if the interviewed defendant did not wish to accept the services of the HHC's lawyer. The BPH may not force anyone to do so. I do not share your negative opinion concerning the Program's implementation, in my view the organs of the BPH complied with the provisions of the agreement of cooperation. Your conclusions are not based on facts, they stem from – as you yourself put it – 'personal disappointment'. Your assumption that the investigating authorities had a negative attitude, they were reluctant to implement its rules, put aside the more sever cases and provided inaccurate data are based on 'logical arguments' instead of facts. I do not agree with these assumptions, and since they do not rely on facts, I do not wish to react to them. The majority of the concrete individual cases described in your summarizing letter, have already been examined by the BPH's criminal unit."

Although we do not wish to argue at length with the statements of the Commander, it is worth noting that the striking result of the Department of Investigation (out of 99 defendants only one notification in three months) is a fact for the evaluation of which no sophisticated logical tricks are needed. It is also a hard fact that only about one third of all the defendants who should have fallen under the scope of the agreement signed by the Commander ended up with an HHC lawyer as their defense counsel. And Péter Gergényi must know that investigators themselves

use logical arguments when assessing the credibility of witness testimonies, and they also use the concept of plausibility, which is also related to the realm of logic. And it seems less than plausible that after being properly informed that his/her interrogation will not start until the arrival of an attorney (who works free of charge and whose performance is under close professional control), a defendant of average intelligence would go for the ex officio appointed counsel, about whom it is widely known (at least in the circles of criminals) that in most cases he/she will not appear until the trial phase. We would not have expected the police organs to force the defendants to choose the Program: fair information would have sufficed.

Our doubts were not fully settled by the investigations into our concrete complaints either. Above we described in detail the case of T. R., in which we received no reply to the questions we formulated after the BPH informed us about the results of its examination. After the closing down of the phase of taking up cases we continued to hear stories suggesting that defendants (or their families) were not properly informed. When we sent out the questionnaire aimed to survey the defendants' opinion about the Program (for the details see Section 5.3.), by mistake we also mailed it to a juvenile defendant whose parents retained another lawyer after the first interrogation at which the Program's attorney was present (and therefore the case was subsequently excluded from the Program). After receiving the questionnaire the defendant's mother called and told us that although her son was satisfied with the counsel the HHC sent to the premises, the investigator informed her that this lawyer was an ex officio appointed counsel, and suggested that she should retain a lawyer, since ex officio appointed counsels are well-known for not being too efficient. They did so, which meant a heavy financial burden for the family, and in addition they were not fully satisfied with the work of the retained lawyer. She realized her mistake when she went to the HHC's website and understood what the Program was all about after receiving our letter.

In connection with this subject we would also like to underline that according to the own statistics of the police, in the 8th District, only 32% of the ex officio defense counsels appointed for the defendants who refused to take part in the Program actually appeared at the first interrogations (21 attorneys out of 61). At the Department of Inquiry the ratio was even worse: 22% (12 lawyer our of 53). The majority of the defendants who were not willing to take part remained without professional help in a crucial phase of the criminal procedure.

It is possible that the cooperation of the police and the HHC in the framework of the program will remain the subject of debate for a long time. We know that the

Program put an extra burden on the personnel of the organs participating therein. Informing the defendants about the Program, filling out and faxing the forms – these are all time consuming tasks, not to mention that the obligation to wait for the lawyer must have made the organization of work more difficult and must have meant a delay compared to the usual practice (although we believe that 1 or 2 hours of waiting for the defense counsel should be normal practice in order to make sure that the lawyer has a real chance to arrive to the scene and perform his/her duties in accordance with the right to defense – see the relevant parts of Section 1.3.1.). We are grateful to those members of the personnel who performed these extra duties in good faith.

We also do not presume that the police organs intentionally sabotaged the Program. For the purposes of evaluating the Program, the HHC prepared a separate questionnaire for attorneys, police organs and defendants participating in it. The aim of the survey was to map up the Program's advantages and disadvantages compared to the ex officio appointment system, and also to see what modifications should be made to the model tested in the Program if it was to be introduced on a national scale (the questionnaires will hereinafter be referred to as attorneys' questionnaire, police questionnaire and defendants' questionnaire, for their detailed analysis see Section 5). In their replies to the attorneys' questionnaire, the participating lawyers gave mixed accounts of the authorities' willingness to cooperate. Seven out of 20 lawyers (35%) thought that the authorities took the HHC lawyers more seriously than their ex officio appointed colleagues, 4 attorneys (20%) experienced a directly negative attitude, 5 lawyers (25%) said that their experiences were mixed, and 4 (20%) believed that the authorities' behavior was not influenced by the fact that the lawyers act in the framework of the Program.

Most of those with a positive experience claimed that the authorities treated them as if they were "ordinary" retained lawyers.

> "With regard to the cases I took within the program, my experience was that I was taken more seriously, in spite of the fact that I am trying to act in the same manner in all the cases I am taking."

> "My experience was that the fact that the Program runs under the aegis of the Helsinki Committee, lends a certain moral weight to it. This imposed a certain degree of discipline on both the investigating authorities and the defendants."

> "The behavior and attitude of the police, the prosecutor and the courts is as if the lawyer was a retained counsel."

> "I always do my best as an ex officio appointed lawyer too, but the authorities have a different attitude towards retained lawyers. The causes of this phenomenon may be found in the degree of preparation, knowledge, reliability and assertiveness."
>
> "I think the police acts as if we were retained lawyers."
>
> "The attitude of the police and the prosecutor is different in these cases. They act with a greater degree of responsibility [...]."
>
> "My experience was that the Hungarian Helsinki Committee has a serious prestige among clients, the police and courts. To sum it up, I think that in the framework of the program, both the police and the participating attorneys performed their tasks quickly, thoroughly and in a professional manner."

On the other hand, there were attorneys who gave accounts of indeed bad experiences with the police.

> "I have heard police complaints that the Program is hindering their work because they have to wait for the defense counsel before the first procedural action."
>
> "The HHC lawyers were not welcome at the police. It happened that the first interrogation was intentionally scheduled for the night hours, which makes no sense, since the lawyer, the police officer and the defendant are equally tired. Since in terms of the CCP the defendant shall be interrogated within 24 hours from his/her arrest, it is not necessary to "torture" for hours during the night. [...] The police's attitude was different. They scheduled the time of the notification and the interrogation with the intention to make it as disadvantageous as possible. As an ex officio appointed lawyer I can always agree on the time of the interrogation with the case officer."
>
> "Unfortunately I sensed a certain aversion or discrimination from the police compared to the ex officio appointment system: police officers prefer to appoint cooperating lawyers who do not bother them with motions and questions. As opposed to that we are interested in solidly founding the defense already in the investigation phase, as testimonies withdrawn at the court hearing are not credible."
>
> "I sensed a definite aversion on the part of police officers vis a vis the HHC lawyers. They constantly made remarks concerning the system that we had to consult with the client before submitting the retainer. This was previously unknown to them and meant a delay in their work."

Some of the attorneys regarded the authorities' attitude as mixed. One of them said that "members of the authority seem to prefer the HHC lawyers to ex officio

appointed defense counsels. Consequently, they better perform their obligation to inform the participants of the procedure, making it easier to get fully prepared for the case." At the same time, the very same called attention to abuses as well: "I find it absolutely necessary to stipulate in the agreement of cooperation the intention to avoid abuses on the part of the authorities. I think of cases when during the weekend the lawyer is summoned for 14.00 o'clock but the interrogation starts only at 16.30." This is not the only such account.

> "In the beginning I experienced aversion, especially from the police and the prosecutor's office. Later on however I managed to establish a good relation with them, when they saw that I simply wanted to provide my client with fair defense."
>
> "My work as an ex officio appointed counsel is not different from my work in the framework of the HHC program, but the police officers seemed more helpful. I presume that this is due the orders of their superiors and the agreement of cooperation with the Hungarian Helsinki Committee. However, on a number of occasions in the course of the first interrogation, they clearly emphasized that they would have finished long ago if the had not had to wait for the lawyer. They regarded the participation of the defense counsel completely unnecessary. Some of them felt that the high-level agreement meant an unnecessary interference with their work."
>
> "Since the authorities are not used to that lawyers retained through an NGO perform this job, some distrust can be sensed, a feeling that the authorities' work is under additional monitoring."
>
> "I had mixed experience with the authorities, especially with the investigating authority. At some headquarters they were helpful, at others I sensed tension and confusion, and on certain occasions hostility. It was clear, however, that I was treated differently from an ordinary ex officio appointed defense counsel: the authority's attitude was similar to when I act as a retained lawyer."

Some attorneys drew our attention to the fact that the persons acting on behalf of the authorities did not always seem fully informed about the Program.

> "With regard to the police and the court may experience was that they were not properly informed about the program by their superiors. (E.g. It was written in the records that I was an ex officio appointed lawyer, the two systems were mixed up, they did not know that indigence is a precondition of eligibility, and did not know that if the client is not indigent they can still appoint me ex officio, and so on.)"

Taking the attorneys' opinions into consideration, it seems that the police leadership did not succeed in making sure that their subordinates fully comply with the provisions of the agreement of cooperation. This is contrary to the obligation to implement agreements in good faith and negatively influenced the representative nature of the Program's sample and thus endangered the Program's main purpose (the modeling of a new system). In addition we believe that if all persons acting on behalf of the police had fully (and not only formally) complied with the agreement of cooperation, the 120 cases would have been taken up in a much shorter period of time, and the whole Program would have caused less work and difficulties to the police than it eventually did.

3.2. Cooperation with the attorneys

While our cooperation with the attorneys may not be termed as entirely flawless, it was far less problematic than the relations between the HHC and the police.

Participating attorneys were selected for the Program through an open tender. The criteria for selection included being registered in the Budapest Bar's register for attorneys available for appointment as criminal defense lawyers as well as having experience in criminal law.

Each applicant had to state the duration of his/her criminal practice, average number of criminal cases handled per year, whether he/she has any special expertise within the field of criminal law, as well as knowledge of foreign languages. Furthermore, a short description of the infrastructural framework of each applicant was requested (whether a solo lawyer or a member of a law firm, how many attorneys are in the firm, whether he/she employs a trainee lawyer as well as computer equipment and internet access etc.).

It was considered an advantage if the applicant was also involved in educational or scientific activities or had published in substantive or procedural criminal law.

Eventually 43 attorneys were selected to take part in the program, but in the meantime a few attorneys dropped out. In terms of the framework contract between the HHC and the attorneys, the attorneys undertook to be on duty 24-hours on pre-agreed dates (duty day) in the interest of being able to contact the defendant without delay, at the place and time indicated by the dispatcher service, following notification. The framework contract stipulated that on duty days the attorney could only refuse taking a case for serious and later documented reasons. In exceptional

cases (if no one among the attorneys scheduled to be on duty on a particular day is available), the dispatcher service could notify an attorney beyond duty days as well – however in such cases the attorneys were not obliged to fulfill the request. 7–8 attorneys were on duty each day of the week and each attorney would be on duty 1 week per day on average (and twice every three weeks).

One attorney decided already on the second week into the Program that he is unable to be on duty under the above conditions and terminated the framework contract. Other attorneys chose the (less correct) solution to never be available for the dispatchers and thus had no cases in the Program.

Another attorney decided to quit the Program when, at the end of October 2005 he realized the administrative burden that the reporting requirements posed. He handed over the pending case to another colleague in accordance with the formal procedure, and although in accordance with the terms of the framework contract he had offered to reimburse half of the legal fees paid to him so far, the Board did not make such a request. It was agreed with another attorney that he would withdraw from the duty system but would carry on with cases he had undertaken until then under the general rules.

Certain attorneys decided to withdraw from the Program due to cases unrelated to the Program. Therefore only 33 attorneys had effectively taken part in the entire Program.

While it occasionally happened that based on the reports and other documents submitted by attorneys the Board called the attention of a few attorneys to particular professional problems, serious concerns relating to the general quality of defense activities were not found with respect to any of the attorneys.

Concerns with respect to the majority of attorneys centered on failures or delays in reporting, which resulted in serious problems for the HHC in overseeing and planning the Program's budget. As the Dutch donor had determined a fixed amount for the legal fees, which was in turn transferred to the HHC in installments, the HHC had to ensure that there would not be overspending of the budget – neither for the full project duration nor for the given reporting period. The whole budget may become unbalanced if an attorney submits an invoice one year later than when the given activity had been carried out (and this indeed arose on more than one occasion). In order to prevent such situations, the HHC requested attorneys to notify developments in cases dealt with on a monthly basis even if there were no new billable actions in that particular month. This request however was met with great resistance from most attorneys. In fact, as attorneys who had previously been

failing to fully comply with all reporting requirements continued to not comply with monthly reporting obligations, the HHC reconsidered the system and adapted it to a quarterly system of reporting (see more on this below).

The Board did not experience attempts at overbilling compared to realistic amounts of time spent on work. It was only with one particular Program participant that the Board had found on several occasions unrealistic the length of time the attorney wished to charge to the Program; in these cases the Board instructed the HHC to pay less than the amount originally indicated by the attorney.

There was only a single case of an attorney whose conduct and cooperation presented truly serious problems. While the attorney was extremely active in the period of taking up cases (she included 7 defendants in the Program), she failed to fulfill reporting obligations from November 2004 in spite of repeated requests (by telephone, fax and letter) from the HHC staff member. On 3 February 2005 the HHC indicated that unless the attorney fulfils all reporting requirements within 5 working days, the framework contract would be terminated by the HHC. However she did not comply with this deadline. The Chair of the Board requested the HHC not to terminate the attorney's contract and he called her in person to remind her of her reporting obligations. The attorney promised to do so, however, the deadline to which they had agreed to over the telephone again passed without any results.

Hence on 22 March 2005 the HHC terminated the contract and demanded that (in accordance with Point 24 of the framework contract) she submit all documents of the criminal cases to the HHC and to consult with the new attorneys to which these cases had been handed over. Again, the attorney failed to comply with these requirements. As a last warning, the HHC called on her to cooperate on 20 April 2005 citing that the organization would initiate a disciplinary action at the Budapest Bar. Nevertheless the deadline set for performing her obligations passed again without results.

Finally on 5 May 2005 the HHC turned to the Budapest Bar as the Board had no knowledge about the developments of any of the cases that the attorney had undertaken in the course of the Program. We did not have any information whether she had been present at procedural actions, as foreseen under the framework contract, and the Board was unable to assess her performance without the proper documentation. This in turn meant that we did not know whether the defendants had been provided adequate and effective defense, thereby jeopardizing the ultimate goal of the Program itself.

Five months later, on 17 October 2005 the Budapest Bar held a disciplinary hearing (at which the attorney failed to appear). The disciplinary council established that a disciplinary offense had been committed and fined the attorney HUF 100,000 (EUR 400). The disciplinary council had found it an aggravating circumstance that the attorney had failed to fulfill her obligations over a protracted period, thereby damaging the trust of society in the Bar.

Although the disciplinary council's decision became final in December 2005, the HHC still was unable to gain information about the seven cases handled by the attorney who had been excluded from the Program. In order to contact the defendants concerned, the HHC turned to the police organs that were dealing with their cases. However, the investigating authority was unaware of the defendants' telephone numbers and none of the defendants had replied to the HHC's letters, so the cases fell out of the Program.

3.3. The current status of the Program

Since some cases that were originally included in the Program fell out of the system due to different reasons – e.g. retainer was given to another lawyer, the reason for mandatory defense ceased to be in place, etc. – altogether 121 cases remained in the Program. At the time of writing this study, 44 cases are still in progress, so 77 have come to some conclusion. Table 2 provides an overview of these cases.

(Considering that originally the Program was intended to cover cases until the delivery of the first instance court judgment, certain cases where a first instance judgment has already been delivered are also included here, although – due to an amendment of the Program's rules – the attorneys have been instructed to continue to provide defense counsel work under the Program in the second instance procedure as well.)

Table 2: The status of cases taken in the Program as of 12 June 2007

HHC case number	*Ground of mandatory defense*	*Criminal offense*	*Result*
0901/01	juvenile	2 counts of bribery	reprimand (final)
0901/04	mental disorder	damage to property	reprimand
0902/01	detained	robbery	suspended sentence of imprisonment (final)
0903/08	juvenile	seduction of a minor	investigation terminated due to lack of private motion
0907/01	detained	misdemeanor of theft	acquitted, as the act is only a petty offense
0909/01	does not speak Hungarian	assault against a person fulfilling a public duty	waiver of trial: fine (final)
0911/03	detained	aggravated assault	imprisonment in medium-security prison for 1 year and 3 months, 2 years ban on taking part in public affairs
0911/05	does not speak Hungarian	minor drug abuse and forgery of official documents	proceeding suspended
0911/06	does not speak Hungarian	minor drug abuse and forgery of official documents	proceeding suspended
0916/01	juvenile	abuse of prohibited pornographic recordings	prosecutorial reprimand
1002/03	detained	robbery	imprisonment in high-security prison for 5 years and a 5-year ban on taking part in public affairs (final)
1003/01	does not speak Hungarian	trading of stolen goods	proceedings terminated in the investigation phase due to lack of evidence
1005/01	detained	causing public danger	compulsory medical treatment
1006/02	juvenile	misdemeanor of theft	proceedings terminated in the prosecutorial phase due to lack of evidence
1009/03	juvenile	false accusation and forgery of official documents and abuse of documents	imprisonment in low-security juvenile prison for 7 months suspended for 2 years

HHC case number	*Ground of mandatory defense*	*Criminal offense*	*Result*
1010/01	detained	6 counts of robbery and 2 counts of abuse of official documents	imprisonment in medium-security prison for 4 years and 6 month and a 5-year ban on taking part in public affairs (final)
1012/01	does not speak Hungarian	attempted taking of a vehicle without permission	fined by the first instance court, decision abolished by court of second instance, repeated first instance proceeding suspended
1013/05	detained	offense of aggravated assault and 3 counts of misdemeanor of rowdiness	imprisonment in high-security prison for 2 years and 8 months, and a 3-year ban on taking part in public affairs (final)
1021/01	detained	homicide	imprisonment in high-security prison for 10 years and expulsion for 10 years (final)
1023/01	detained	attempted causing of bodily harm resulting in threat to life	suspended imprisonment
1024/01	juvenile	forgery of official documents	reprimand
1026/03	detained	offense of theft	imprisonment in medium-security prison for 1 year (final)
1030/02	juvenile	causing of bodily harm resulting in threat to life	imprisonment in low-security prison for 1 year and 6 months suspended for 3 years (final)
1102/01	juvenile	misdemeanor of theft	prosecutorial reprimand
1102/02	juvenile	misdemeanor of theft and robbery	imprisonment in low-security juvenile prison for 6 months (final)
1102/03	juvenile	misdemeanor of theft and abuse of document	proceeding terminated in investigation phase due to lack of evidence
1104/01	does not speak Hungarian	rowdiness	reprimand
1104/02	does not speak Hungarian	rowdiness	reprimand

HHC case number	*Ground of mandatory defense*	*Criminal offense*	*Result*
1105/01	detained	offense of theft	imprisonment in medium-security prison for 3 years 6 months and a 4-year ban on taking part in public affairs
1106/01	detained	causing public danger	proceedings terminated due to the death of defendant
1107/01	juvenile	misdemeanor of theft	reprimand
1108/01	detained	violation of ban on entry and stay	imprisonment in low-security prison for 6 months suspended for 1 year (final)
1111/03	does not speak Hungarian	aggravated assault	terminated (unknown perpetrator)
1113/01	juvenile	taking of a vehicle without permission	waiver of trial: probation for 1 year and 3 months under monitoring by probation officer (final)
1113/03	personal exemption of costs	attempt of violent assertion of claim, attempt of aggravated assault, 2 counts of abuse of official document and 3 counts of damage to property	imprisonment in medium-security prison for 1 year and 6 months and a 2-year ban on taking part in public affairs
1115/01	detained	robbery	imprisonment in medium-security prison for 2 years and 6 months and a 3-year ban on taking part in public affairs (final)
1116/03	detained	robbery	imprisonment in medium-security prison for 4 years and a 4-year ban on taking part in public affairs (final)
1116/04	juvenile	attempt of blackmail, promotion of prostitution	imprisonment in low-security juvenile prison for 11 months suspended for 3 years
1118/01	detained	robbery, aggravated assault, 2 counts of rowdiness, 4 counts of theft, 4 counts of forgery of official documents	imprisonment in medium-security prison for 5 years and a 5-year ban on taking part in public affairs (final)

HHC case number	*Ground of mandatory defense*	*Criminal offense*	*Result*
1118/02	does not speak Hungarian	misdemeanor of theft	reprimand
1122/03	detained	robbery	imprisonment in medium-security prison for 3 years and 6 months and a 4-year ban on taking part in public affairs
1123/01	juvenile	rowdiness	imprisonment in low-security juvenile prison for 6 months suspended for 1 year under monitoring by probation officer (final)
1123/03	detained	theft, abuse of document	terminated by the prosecutor
1125/01	detained	robbery	imprisonment in medium-security prison for 2 years and 2 months and a 2-year ban on taking part in public affairs
1127/01	does not speak Hungarian	damage to property	reprimand
1128/01	detained	robbery	imprisonment in medium-security prison for 6 years and a 6-year ban on taking part in public affairs (final)
1129/02	juvenile	misdemeanor of theft	prosecutorial reprimand
1201/03	juvenile	misdemeanor of theft	probation
1201/04	does not speak Hungarian	forgery of official documents	reprimand
1206/02	detained	seduction	imprisonment in medium-security prison for 3 years and 6 months and a 5-year ban on taking part in public affairs, compulsory treatment of alcoholism, ban on exercising parents rights (final)
1206/04	detained	robbery	acquittal
1207/01	detained and does not speak Hungarian	misdemeanor of theft	fast track procedure: imprisonment in low-security prison for 10 months, expulsion of 3 years (final)

HHC case number	*Ground of mandatory defense*	*Criminal offense*	*Result*
1209/02	detained	robbery	imprisonment in medium-security prison for 1 year and 10 months and a 3-year ban on taking part in public affairs (final)
1211/01	detained	assault resulting in threat to life	investigation terminated due to lack of evidence of a criminal act
1214/01	does not speak Hungarian	misdemeanor of theft	imprisonment in low-security prison for 10 months suspended for 1 year and expulsion of 2 years (final)
1218/02	juvenile	misdemeanor of theft	reprimand
1219/02	detained	aggravated assault	suspended imprisonment
1222/02	juvenile	theft	reprimand
1222/03	juvenile	theft	reprimand
0104/01	juvenile	robbery	imprisonment of 1 year and 2 months suspended for 3 years
0105/02	detained and mental disorder	rowdiness	proceedings terminated due to defendant's mental disorder
0106/01	detained	violation of ban on entry and stay	5 years expulsion
0107/02	detained	offense of theft	proceeding terminated in investigation phase because it could not be established that offense was committed by suspects
0112/01	detained and does not speak Hungarian	forgery of official documents, violation of ban on entry and stay	fast track procedure: expulsion and suspended imprisonment
0112/02	juvenile	forgery of official document	35 days of compulsory public benefit work
0116/01	detained	offense of theft	imprisonment in medium-security prison for 1 year and 2 months and a 2-year ban on taking part in public affairs

HHC case number	*Ground of mandatory defense*	*Criminal offense*	*Result*
0118/01	juvenile	rowdiness	probation
0118/02	juvenile	rowdiness	probation
0120/01	detained	theft	imprisonment in medium-security prison for 1 year and 4 months and a 2-year ban on taking part in public affairs (acquittal with regard to one accusation)
0120/02	detained	theft	imprisonment in medium-security prison for 1 year and 4 months and a 2-year ban on taking part in public affairs (acquittal with regard to one accusation) (final)
0126/01	juvenile	misdemeanor of theft	case terminated as criminal act is qualified as a petty offense
0129/01	detained	drug abuse	imprisonment in medium security prison for 3 years and 6 months and a 4-year ban on taking part in public affairs
0130/01	juvenile	trading of stolen goods	terminated in the investigation phase
0130/02	detained	trading of stolen goods	imprisonment in medium security prison for 1 year and 2 months and a 1-year ban on public affairs

4. The Program Results

4.1. Evidence of structural problems in the ex officio appointment system

Although it is aimed at preparing the reform of the ex officio appointment system, and its very goal is to test a system that in most respect differs from the ex officio appointment system, in the course of implementing the Program the HHC has gained experience that corroborate the existence of structural problems outlined under Section 1.3.

A discussion that took place in February 2005 between Dutch legal aid experts and representatives of five police units from Budapest participating in the Program underlined the need to ensure the independence of the function of appointment from the investigating authority. Senior level police officials strengthened the view that while in most cases (according to one head of department, in about 90–95 percent of the cases) ex officio appointed defense counsels failed to appear at procedural actions, the attorneys taking part in the HHC's Program had always taken part at the first interrogation. When the Dutch delegation asked if in view of this the police believe that the HHC's initiative is useful, one of the police officials stated outright that this question should be posed to defendants as the presence of the defense counsel is far more beneficial for this group.

The same conclusion may be drawn from the NPH survey mentioned under Section 1.2. The survey contains a peculiar contradiction. Although it has proved that all over the country, in the majority of cases, the ex officio appointed counsel does not attend the first interrogation of the suspect (the percentages being extremely low in Budapest and Komárom–Esztergom County: 7.45 and 4.54% respectively). The police units interviewed "almost unanimously claimed [...] that there is no need to change the time honored system of appointments. According to the majority of the respondents, if the lawyers were appointed by another entity,

that would complicate the procedure, increase the administrative burdens, have a negative influence on the timing of the investigation and would therefore lead to processes that are disadvantageous from the point of view of the right to defense. [...] The general stance [of the police] is that there is no reason to involve an organization independent from the police into the selection of lawyers."[61]

Another aspect of this issue is highlighted by the following example. On the very first day of the phase when cases were being taken up for the Program, a rather upset attorney paid a visit to the HHC. As it turned out, the attorney as well as several other colleagues based their law practice on frequent ex officio appointments from the Budapest 6–7th District Police Headquarters. Moreover, because attorneys often go to the police station in the evening as due to the geographic area covered by that station, a need for ex officio appointed defense counsels inevitably arises generally each night. However, in the Program, if a need for an appointed defense counsel arose, the proceeding police officer had to notify the HHC's dispatcher service, which in turn arranged for an attorney for indigent defendants. This effectively meant that during the period of taking up cases the well-established cooperation between the police station and the group of attorneys had to be suspended.

When the HHC staff member responded that the Committee had made an open call for tender for attorneys, thus she could have also applied for the Program, the attorney replied that she had seen the announcement in the Budapest Bar's newsletter but she had had no intention of submitting an application as she is fully satisfied with the income she gains from ex officio appointments.

This case directed attention to yet another dysfunction in the appointments by the investigating authorities: in the present system, attorneys who principally base their law practice on appointments may become financially dependant on the member of the police corps who takes decisions on appointments. This reinforces doubts in the present system's abilities to offer effective defense to defendants, which is a serious problem if we take into consideration the findings of the NPH survey: "in Budapest 12 district police stations regularly appoint the same counsels, most of whom are retired lawyers not running separate offices any more. They have the advantage that they can be reached at any time of the day and they undertake appointments. It also happens frequently that young lawyers at the beginning of their careers indicate their willingness to take appointments in order to form a

[61] Equality of Arms, p. 40.

clientele and get some routine. In Bács–Kiskun County there are some lawyers who 'reside' at police station and their practices are based on appointments, but this is not characteristic. In Komárom the situation is diverse, but there are lawyers who also base their practice on appointments."[62] There is again a peculiar contradiction between the NPH survey's result on the attendance of ex officio appointed counsels in first interrogations (just to remind: in 14 out of the 23 regional units, less than 50% of first interrogations were held in the presence of the appointed counsel) and the general opinion of the police, according to which "the investigating authorities favor those lawyers in the practice of appointments, with regard to whom they can be sure that the given lawyer will undertake the appointment and will appear at the police station."[63]

At the Closing Conference, dr. Ágnes Frech, Head of the Criminal Board of the Metropolitan Court stated that as the leader responsible for the distribution of cases among the judges, she can see that some investigating authorities always appoint one and the same lawyer, who is in fact very passive, never putting forth a motion, although the cases tried by her court are serious ones.

Furthermore, the passivity of ex officio appointed defense counsels as well as the lack of quality assurance in the system are pointed out by a response given to the HHC by the contact point at the Budapest 8th District Police Headquarters: "On several occasions we witnessed differences between the procedure, activity and professional preparedness of attorneys involved in the Program and ex officio appointed defense counsels. We even saw one example of a previously less active attorney who had been acting on ex officio appointments becoming more active due to his involvement in the Program."

As implied by responses given to the questionnaire targeting attorneys, the level of activity of defense counsels is not equal at all times between ex officio appointments and cases undertaken in the framework of the Program. 18 (86%) out of the 21 defense counsels responding to the question felt that they are not working any differently in the Program than as ex officio defense counsels; several responding defense counsels stressed that they do not distinguish between ex officio appointments and cases handled based on a retainer in their general law practice

62 Equality of Arms, p. 39.

63 Equality of Arms, p. 39.

either. However, two defense counsels replied that they are able to perform more effective work in the Program than in ex officio appointed cases.

> "In comparison to the system of ex officio appointments, I am performing more effective work in the Program, and can better prepare myself for the case due to reasons explained under point 1 [access to case file, opportunity to charge for preparing legal briefs]."

> "As regards to cases undertaken in the framework of the Program, the work of the defense counsel cannot be compared to that of the ex officio defense counsel. The attorneys take part in investigative procedural actions in an active manner."

The Program results in interesting experiences regarding budgetary functions as well. Due to the fragmented character of this function the actors in the ex officio appointment system themselves lack precise information about how much the ex officio appointed defense counsel may charge and to which organ. In September 2004 the Budapest 6–7th District Police Headquarters sent a notification to the HHC's dispatcher service that at midnight a British citizen who did not speak Hungarian was about to be interrogated. An attorney involved in the Program arrived at the police station and was appointed by the investigative authority as an ex officio defense counsels, since the defendant's financial situation excluded him from the Program. At the end of the procedural action, the police determined that the hourly fee of the ex officio appointed defense counsel was HUF 1,300 plus VAT although this rate did not comply with the rate prescribed by law, which was HUF 3,000 plus VAT per hour, more than twice the rate determined by the police. (Interestingly legislation previously in force also did not contain this particular hourly rate, therefore it is unclear why the police used this sum to calculate the fees.)

The attorney called the attention of the detective preparing the fee statement to this problem, who stated that fees are determined based on instruction from the district police captain. Given the early hour of the morning, the attorney decided against trying to persuade the detective about the correct fee levels, but she informed the HHC about the case due to the general problem it illustrated. The HHC turned to the relevant contact point at the Budapest 6–7th District Police Headquarters about the particular case, which was contrary to law as well as to seek remedies for the possibly unlawful police practice. No reply was received ever since.

The conclusions of the Program in this respect are supported by the results of the NPH survey. "In general it can be stated that the majority of the units comply

with the laws and establish the fee of the ex officio appointed counsel in accordance with the relevant provisions. At the same time Fejér County replied: 'the counsels appearing at procedural actions billed us fees between HUF 2,000 and HUF 3,000.' The Komárom investigation unit also presented a peculiar interpretation of the law: 'We pay the ex officio appointed counsels HUF 3,000 for the first hour and HUF 1,500 for every subsequent hour.' [...] The Szekszárd Police Station replied to the question on hourly fees that they are 'between HUF 1,000 and 9,000.' To the same question, the Highway Police answered that the fees are 'varied, between HUF 3,000 and 4,000 on average.' The listed examples show that there are problems in this regard at some of the police units."[64]

4.2. Further results of the Program

As "by-products" the Program also revealed problems of criminal proceedings that are only indirectly related to the structural inconsistencies of the ex officio appointment system. The most important such instance was that due to the Program a crucial issue of interpretation of law on the police practice of appointment of defense counsels that is closely connected to the right to defense was brought to light. The cooperation agreement concluded between the HHC and the BPH stipulated that the police will take steps to ensure that the HHC's dispatcher service would be notified at least three hours prior to the start of the interrogation. However, within a few days after the start of the period when cases were taken up in the Program, attorneys reported to the HHC that repeatedly the investigation authority would interrogate the suspect during the first eight hours of short-term arrest, which would be followed taking the detainee into a 72-hour detention, and the dispatcher service would only receive notification about the continued interrogation of the suspect who was already formally taken into 72-hour detention. Thus, defendants could only be provided with defense counsels by the time the substantial part of the interrogation had already taken place.

Presuming that there must be a misunderstanding, the HHC contacted the contact point at the police station concerned, who informed the organization that according to the police's interpretation a person who is held in short-term arrest,

64 Equality of Arms, p. 38.

then charged with a suspicion and interrogated, cannot be considered as held in detention, thus defense is not mandatory in such cases. Consequently, such persons are only covered by the Program from the moment when they are taken into a 72-hour detention, which in turn only takes places after the interrogation.

The legal situation and the problem signaled above are as follows. Although under Article 46 (b) of the CCP defense in mandatory if the defendant is detained, the CCP does not define the types of deprivation of liberty that constitute detention. Short-term arrest is regulated not by the CCP but Act XXXIV of 1994 on the Police ("the Police Act"), which provides that any person who may be suspected of a criminal offense may be taken into short-term arrest for not more than 8 hours or 12 hours in exceptional cases.[65] The Police Act provides that anyone who, based on an law or decision taken pursuant to law, is restricted in their right to freedom of movement and the free choice of their place of stay should be considered a detainee (person held in custody, pre-trial detention, public security detention, arrested and held in short-term arrest, or forcibly taken before an authority).[66] Nevertheless the legal position of the police on mandatory defense was that the terms and expressions used in the Police Act couldn't be applied to the CCP, as the latter only regulates (criminal) detention and not short-term arrest. Consequently persons held in short-term arrest cannot be considered as detainees, therefore they are not entitled to an ex officio defense counsel until the police has ordered their 72-hour detention.

The Hungarian Helsinki Committee could not accept the interpretation advanced by the police. Article 126 Paragraph (5) of the CCP makes it clear that even short-term arrest constitutes detention when the law states that if the defendant is subjected to detention prior to being taken into a 72-hour detention (thus including short-term arrest), such detention should be calculated in the length of custody. Hence any person held in short-term arrest should be considered as a detainee, and in case a criminal procedure is started against him/her, the appointment of defense counsel is mandatory.

Moreover, the police's interpretation renders meaningless Article 48 Paragraph (1) of the CCP that provides that if the defendant is detained, the defense counsel should be appointed not later than before the first interrogation. When the HHC referred to this provision, the police station replied that this provision applies to the first interrogation held once the person has been taken into a 72-hour detention.

[65] Art. 33

[66] Art. 97 Par. (1) (h)

In addition to the fact that this interpretation is difficult to argue logically, it is also extremely dangerous as (e.g. if the person held in short-term arrest makes statements confessing to the commission of a criminal offense at the interrogation conducted before he is taken into a 72-hour detention and is taken into a 72-hour detention nonetheless) there may not be a need to conduct a follow-up interrogation while he is detained. Therefore in this scenario the investigation could be closed so that the ex officio appointed defense counsel (appointed after the 72-hour detention had been ordered) does not have an opportunity to take part at the defendant's interrogation. Hence the rule set forth in Article 48 of the CCP cannot be enforced at all.

The HHC turned to the Chief Prosecutor's Office based on the aforementioned line of argumentation. The Chief Prosecutor's Office agreed with the HHC in general and issued a circular to county prosecutors to ensure and monitor lawful practice – however, the Chief Prosecutor's Office also put forward a problematic interpretation. According to this, if short-term arrest is followed by 72-hour detention, the length of short-term arrest should be calculated into the duration of the 72-hour detention. This means that the duration of short-term arrest also constitutes detention under the CCP, thus the participation of the defense counsel is mandatory already during the course of the short-term arrest. This interpretation is also contained in the Memorandum[67] on certain questions related to the application of the CCP, which in Point 43 states "if short-term arrest under the Police Act is immediately followed by 72-hour detention (i.e. when the length of short-term arrest is part of the length of the 72-hour detention), defense is mandatory from the start of short-term arrest."

This solution, however, again fails to fully clarify the problem as it can happen that the detective would not know prior to the first interrogation if the 72-hour detention of the suspect would later become necessary. If the detective interrogates the suspect without appointing a defense counsel, and then based on the results of the interrogation decides to take the suspect into a 72-hour detention, the interrogation will become illegal retroactively and the defendant's statements may not be used as evidence. On the contrary though if information comes to light during the interrogation that warrants the suspect's 72-hour detention, the police officer may not decide against ordering custody for the above reason. However, it cannot

[67] Instruction no. Ig. 770/2003. of the Chief prosecutor's Office

be reasonably expected that in case of all offenders who are taken into short-term arrest on the ground of a minor offense, then released after the interrogation, the police would be obliged to appoint defense counsels, as obviously both the capacity of detectives and defense counsels is scarce and neither do the interests of justice so require.

When in connection with another case the HHC called attention to the contradiction in the interpretation, the Chief Prosecutor's Office replied: "due to Article 126 Paragraph (5) of the CCP any detention preceding the 72-hour detention shall be taken into account when calculating the duration of 72-hour detention. Hence we conclude that detention that precedes 72-hour detention is in fact part of the 72-hour detention, which [...] makes the participation of the defense counsel mandatory. Undoubtedly, the aforementioned argumentation does not necessarily lead to the conclusion that if short-term arrest is not followed by 72-hour detention, then short-term arrest does not constitute detention as – even if for only a short period of time – the defendant is restricted in his/her right to effectively defend him/herself. It is left to judicial practice to establish the correct interpretation of Article 46 (a) [due to the amendment that took place in the meantime: Article 46 (b)] of the CCP."

Based on the position of the Chief Prosecutor's Office, the first interrogation of a defendant had to be repeated in the course of the Program. In that case a man was interrogated in the Budapest 6–7th District Police Headquarters as a suspect on 22 November at 19:37 p.m. and taken into custody at 20:00 p.m. based on the statements he had made during the interrogation. The HHC's dispatcher service was only notified at 22:07 p.m. Following the complaint by the HHC's attorney, the head of the police headquarters' criminal department found that as no defense counsel had been appointed before the detained defendant was interrogated, the interrogation was conducted in violation of the CCP's provisions and ordered the repeated interrogation of the suspect.

The already quoted NPH survey also touches upon the problem of what types of deprivation of liberty constitute detention in the sense of the CCP. The results of the survey show that the Hungarian police practice may not be regarded as unified in this respect. "At the units of the Budapest Police Headquarters for instance 'in those instances when during the short-term arrest or after the urgent investigative actions it became likely that the perpetrator will be taken into a 72-hour detention, a counsel was appointed before the first interrogation.' Basically the same practice is followed by Baranya, Bács, Békés, Borsod, Csongrád, Győr, Heves,

Jász–Nagykun–Szolnok, Nógrád, Pest, Somogy, Szabolcs, Zala and the Highway Police and some police stations of Veszprém County.

A different course is followed in Komárom County, where the defendant is interrogated during the short-term arrest, and only subsequently, a decision is made on his/her 72-hour detention and the appointment of a counsel. A counsel is appointed during the short-term arrest only if the offense the suspect is charged with is punishable with imprisonment of five years or more."[68]

Yet another approach is used in Vas ands Békés Counties. In Vas County, "the counsel is appointed and notified before the first interrogation, whereas in cases when after the interrogation it becomes clear that a 72-hour detention needs to be ordered but no counsel was appointed and notified beforehand, these interrogations must be repeated after the appointment of the counsel."[69] In Békés County "if the necessity of ordering the 72-hour detention arises after the interrogation, but no counsel was appointed, within 24 hours a counsel is appointed and notified, and the interrogation is repeated."[70]

There is a fourth type of practice followed by the National Investigation Office: "if the suspect is interrogated while in short-term arrest, no counsel is appointed since the law contains no such obligation. If during the interrogation we obtain information that makes a 72-hour detention necessary, we close the interrogation, order the detention, and appoint a counsel. After the appointment and notification of the counsel, we continue the interrogation with obligatory attendance by the counsel."[71]

This is the practice that the authors of the NPH survey find the best, however, this course of action eliminates the safeguards which the CCP provision making the appointment mandatory before the interrogation aims to guarantee. After making a statement during the short-term arrest, the defendant's position will definitely be weaker than it would have been if he/she had been assisted in his/her testimony by a lawyer.

The problem was solved by an amendment of the law, which takes the results of the program into account but will come into force only after the Program comes to a conclusion. Article 4 of Joint Decree 23/2003. (VI.24.) of the Minister of Interior

68 Equality of Arms, p. 33.

69 Equality of Arms, p. 34.

70 Equality of Arms, p. 34.

71 Equality of Arms, p. 33.

and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organizations under the Minister of Interior will be amended as of 1 July 2007. In terms of the amendment, "a person taken into short-term arrest [on the basis of the Police Act], shall be entitled to the right of defense from the beginning of the short-term arrest." Article 6 of the Decree is also amended: "the suspect's right to retain a lawyer shall be guaranteed from the beginning of the short-term arrest."

5. Conclusions Drawn from the Pogram

As we mentioned above, in order to provide an opportunity for all participants to form his/her opinion, we distributed questionnaire sheets to the participating attorneys, police bodies and to the defendants represented under the program as well. Below we will review the results of these, the conclusions of the round table held on 20 April 2006 (hereafter: Round Table), the opinions voiced at the Closing Conference, as well as the HHC's own conclusions. During the evaluation we focused on what difficulties may arise, and what solutions may be available for them if the Program was implemented on a countrywide level.

5.1 Replies to the attorneys' questionnaire

The questionnaire on the opinion of the lawyers was returned by 27 of the lawyers participating in the program. Hereby we will attempt to summarize their most important observations in such a way that occasionally we quote word by word from their answers. The questions are set in italic.

1. *In your opinion what are the advantages of the Program compared to the ex officio appointment system?*

24 (88%) out of the 27 attorneys answering the questionnaire thought that the program has certain advantages compared to the ex officio appointment system. Two lawyers have not experienced such an advantage, one respondent's view was that taking the shortness of time into consideration, no valid answer can be given to this question.

The respondents enumerated a number of advantages. The majority highlighted that the presence of the defense counsel is ensured during the investigation phase.

> "The duty service system has established the possibility in practice, to minimize the time period which the defendant has to spend without a defense counsel."
>
> "The program constituted a complete system (dispatcher service, etc.) which effectively ensured the opportunity to provide defense instantly, within one to two hours."
>
> "Contrary to the ex officio appointment system, here the defense counsel is present at every procedural action in all cases. However, I don't see a substantial difference form a practical point of view."
>
> "The defense counsel is effectively present throughout the whole procedure at every procedural action, which is an obvious guarantee for the defendant."
>
> "Its only advantage in the investigation phase is that the first interrogation does not take place until the attorney arrives."
>
> "I would highlight the following as an advantage of the Model Legal Aid Program: […] The […] effective assurance of the defense counsel's presence at all investigative, procedural actions."
>
> "The most important advantage is that the defense counsel is notified even about the first interrogation, so he/she has the opportunity to take part in that. Ex officio appointment […] at many times commences only in a later phase of the procedure. […] The legal service of the colleagues acting under appointment is in many cases formal, and they only appear at procedural actions when it is mandatory. […] It is my conviction that in criminal cases the active participation of the defense counsel in the investigation phase is at least as important as in the court phase. Acting in the framework of the program we undertook to participate in all possible procedural actions, thus the defense was more effective."
>
> "The defense counsel is present at the first interrogation of the defendant, which in the given case may change the outcome of the criminal procedure."
>
> "Its primal advantage is that the defendant was provided with an appropriately trained defense counsel in every case and every time. (We know that later, in the court stage the testimony made during the first interrogation is often of decisive significance.)"
>
> "In my opinion it has a significance from the defendant's point of view that the defense counsel arrives to the first investigative action."
>
> "The attorneys participating in the program consider it as an obligation to contact the case officer and the defendant without delay, and to participate in every interrogation and court hearing, and to use their legal means distinctly."

They mentioned it as an advantage that the defense counsel is not appointed by the investigating authority (which is not really interested in effective defense performance), but by an independent body, which may also serve as a solution for the problems arising from the defendants' distrust against the appointed lawyers.

> "The Program eliminates one conflict of interest. […] The defendants somehow feel it as a conflict of interest that the same Authority strives to prove their guilt, and at the same time it chooses and appoints a defense counsel at its own discretion. They consider it to be a contradiction."

> "It should be mentioned as a fundamental advantage of the program that the selection and appointment of the defense counsels is done independently from the investigating authority. This can eliminate the unfortunate practice that the investigating authorities work with a steady group of defense counsels who either do not even appear at procedural actions, or if they do appear, they do not put much of an effort into defense […]. Naturally the present system operates under the principle that the defense counsel to be appointed during the investigation should not substantially "disturb" the work of the investigating authority in this otherwise most critical phase of the procedure. The program eliminates this malfunction of the system, for the appointing "authority" and the acting authority is separated from each other, thus the interest of the defense counsel is different from the one in the present system. The attorneys acting under the police's appointment in a countless number of cases have an indifferent attitude during the procedure because this is what is expected by the appointing authority, and only if they act accordingly, will they get further appointments. In the case modeled by the program the distinctness of the appointing and acting bodies in itself decreases the abovementioned danger […].

> Obviously if the appointing and the acting authority are separated form each other, the distrust which in many cases is present on the part of the defendants toward the defense counsels can fundamentally be decreased. How could a detainee, or a defendant suspected with a serious criminal offense trust in an attorney, who is appointed by the authority whose task in the given case is to prove that the given person committed a crime. This distrust can be intensified by the defendant sensing that there is a long-lasting, or even colloquial relation between the defense counsel and the acting detective? And these are serious problems that need to be solved. The program's answer seems to be pointing into the right direction."

Some respondents highlighted the effectiveness resulting from the uniformity and centralized character of the system.

> "The advantage of the Program is, that the duty service is operating according to a set schedule and order, therefore the appointment can be expected in advance. […] The higher degree of organization guaranteed by the Committee is by all means an advantage."
>
> "Another advantage of the program is that if the attorney is not available another attorney can be found quickly by the dispatchers. […] If the "single hand" system could be implemented […], the Program […] could relieve the investigation authorities and the courts, for it should not be their task to reconcile between the attorneys being unavailable at many times."
>
> "The agreement forced the […] police bodies to act instantly in all cases in accordance with the stipulations of the Code of Criminal Procedure.
>
> The above cannot always be stated about the general police practice conducted in appointment cases.
>
> Within the police there is no clear system that would regulate which police body appoints which attorney. No one is coordinating this, there is no method, control and supervision at all about who is appointed."

Some respondents mentioned the positive impacts of the monitoring of the attorneys' performance. (We shall come back to the controversial issue of the supervision of professional work in Section 4.)

> "[The] advantage of the Program is that the participating attorneys do their job more fairly, more thoroughly than the appointed defense counsels."
>
> "Compared to appointed lawyers it is a plus by all means, that in this system the defense counsel hands in written submissions as well, which is rare in the case of appointed lawyers. Due to the reporting obligation, the defense counsels are more prepared, the defense technique is more carefully planned […]"
>
> "Its main advantage is the monitoring of professional standards."
>
> "I would highlight the following as an advantage of the Model Legal Aid Program: […] Expectations concerning a higher degree of professionalism, and compliance with this expectation."

Many thought that the attorneys participating in the program were appreciated more by the authorities and/or the defendants than appointed counsels. As a possible reason for this, the respondents marked the formal procedural legal status of the HHC attorneys (they are acting as retained lawyers).

> "The police may take the defense counsel appointed under the program more seriously."

"Under the program the acting attorneys can perform defense like retained lawyers do, and in this framework their performance is more responsible and is of higher standards. The status of the attorneys participating in the program is higher, and the investigative bodies are more retained."

"It […] can be stated that the investigative bodies participating in the system tried to provide the defense with all the necessary help."

"There is a huge advantage of the program compared to the […] appointment system, for the attorney acting in the program's framework provides defense for his/her clients in a retained lawyer status, which obliges them to do his/her best."

"The advantage with regard to the client is that the defense counsel acts under a retainer, which makes the role of the defense counsel 'more serious' in the eyes of the authority, while at the same time the client feels too that […] he/she does not only have an appointed lawyer. Regarding the defense counsel, the same so-called 'seriousness factors' come into consideration related to the work with the authority."

The last group of advantages consists of the remarks on higher remuneration, and on those activities that are not covered in the appointed lawyers' remuneration system, but are paid under the program.

"Better pay allows more devoted work."

"Compared to the appointment system, under the Program the attorney receives remuneration not only for the work performed at the court hearing or the police interrogation, but receives fee for the time spent on studying the case files and preparing submissions as well as the stamp duty for copying of the case files, and even the travel expenses and mailing costs are also reimbursed. It is also an advantage of the program that the hourly fee of the attorney is higher than that of the appointed defense counsel. Due to the above the defense counsel may perform a more effective job under the program than in the appointment system."

"It was an additional advantage that due to their realistic financial appreciation the attorneys participating in the program fulfilled their tasks with the same attention as if they were retained defense counsels."

"I would highlight the following as an advantage of the Model Legal Aid Program: […] Keeping contacts with the clients beyond the procedural actions, and the fact that these consultations are remunerated even if they take place in the lawyer's office."

"There is one single advantage compared to the appointment system, that the rate of the fees is fairly more favorable."

> "The higher hourly fees and the reimbursement of night travels are also an evident advantage."
>
> "It is not negligible that the remuneration of the defense counsel is higher than the appointed lawyers' fee."
>
> "Obviously it is also an advantage of the program that it applies a remuneration for the defense counsels which is higher than the present one, and a fair reimbursement of costs, for this is also an aspect of fundamental importance. It is an old truth that if somebody is paid better, it is justified to expect high quality professional work from him/her. The rate of remuneration is an important issue in that regard. If the rate is suitable, then perhaps defense counsels will not strive to get more and more appointments, but maybe their time and energy can be saved for fair and high quality professional work as well.
>
> "The remuneration of the defense counsel is higher than that of the appointed lawyers."
>
> "Higher fees are paid."

2. *In your opinion, what are the disadvantages of the Program compared to the appointment system?*

3. *If in your view there are disadvantages of the Program, how would you eliminate them*?

19 out of the 27 respondents (70%) thought that the Program has certain disadvantages compared to the appointment system. Several of the problems indicated by the lawyers stem from the experimental nature of the Program, its financial and time limits. After short-listing these, we will review the attorneys' opinions regarding only those disadvantages (and possible solutions for eliminating them), which can arise in case of an eventual nationwide introduction of a system being similar to the one tested under the Program.

One of the problems originating from the time limit of the Program and mentioned by several lawyers is that the Program's scope does not extend to the second instance procedure. It is also a result of the experimental character of the Program that is not widely known among defendants and courts. If a system similar to the Program replaced the appointment system, this would obviously make the amendment of criminal procedural law necessary, in which case the mechanism for designating the defense counsel would be clear both for the authorities and for the

clients. This naturally would make the lengthy briefing of the clients before the first interrogation (mentioned as a problem by a number of respondents) unnecessary too.

The solution held to be awkward by many, that the surveying of the indigence of defendants was the task of the attorney, was also made necessary by the experimental nature of the Program. The traditions of the Hungarian criminal procedural law make legal aid provided by appointed defense counsels conditional on not the financial situation of the defendant, but on other specific characteristics (juvenile age, mental disorder, detention, severity of the punishment for the act committed, and so on), i.e. on the interest of justice, requiring that defense be provided to those defendants who are in a more defenseless situation than the average. Due to this reason, it is possible that even if the appointment system is reformed, the principle of indigence will not be an issue (and similarly to the present situation this aspect will only appear in the procedure in cases of personal cost exemption). Nevertheless, it seems certain that whatever system will be introduced in the future, surveying and checking indigence shall not be a task burdening the attorneys.

The requirement of "duplicating" the files is also a consequence of the experimental nature of the Program. In order to evaluate the Program's final results, an exhaustive review of each case will be necessary, however, due to the file archiving obligations of attorneys and due to the fact that when HHC draws the final conclusions of the Program some cases may still be in progress, it is unavoidable that the full documentation of the cases managed under the Program has to be at the disposal of the HHC. Forwarding files is also necessary for us to examine the possible methods for monitoring the quality of professional work; however, in a system operating on a national level it would indeed be unrealistic to expect the attorneys to forward all the documents of a particular case.

Beyond the above problems – mentioned by several respondents – there were some more specific objections raised only by few individuals. Such was the expectation (which again stemmed from the aims and experimental nature of the Program) that the participating attorneys should as much as possible avoid to have the work done by their trainee lawyers. Only one respondent raised as a problem the fact that some defendants, not fully understanding the functioning of the Program, thought that the defense counsel granted by the Program provides defense in all of their cases in progress. Another respondent raised the issue that keeping contact with detained defendants on a monthly basis means a disproportionate burden when the defendant is detained due to another case outside the seat of the attorney.

These three problems, which are at least partly independent from the experimental nature of the Program, and which many respondents referred to, are the operation of the duty system, the administrative workload burdening the attorneys, and the method of costs reimbursement. (When reviewing these issues, due to their relevance, we will also quote some of the answers given to questions no. 5. and 6.)

Many noted that undertaking the duty service is an obligation that poses a significant burden on the attorneys, in exchange for which some kind of remuneration would be reasonable, with special regard to the fact that on duty days complying with other obligations may be difficult. For the case of potential countrywide introduction of a similar system, several respondents noted that by creating appropriate groups and allocating duty days in a proportionate manner, it could be guaranteed that there is always an available attorney.

> "The duty service poses transportation problems at night, in wintertime."
>
> "It is possible that a duty system elaborated for every day of the year could be introduced as well. This schedule should be issued by the Bar once a year, and should be sent to the police, the prosecutor and the court. If someone had a conflicting obligation or was unable to fulfill the duty obligation due to any other acceptable reason, it should be reported to the Bar well in advance.
>
> I do not know how many colleagues are on the list of ex officio appointed counsels, thus I cannot even estimate how many times per year I should be on duty or how many cases I should take as an appointed defense counsel in such a system."
>
> "If the duty service system was introduced on a national level, many colleagues would have themselves removed from the appointed defense counsel list, for they would not be able to meet the requirement of constant availability on the duty day. But then a professional group dealing with only this activity could evolve."
>
> "It is possible to establish a duty service system, but care should be taken to make sure that those who undertake duty or actual, substantial defense work on bank holidays or even national holidays, should be adequately remunerated even if this means that remuneration of those attorneys who work only on business days will be lower. In order to keep the fairness of assignments […] proportional distribution of appointments should be maintained in the future as well."
>
> "A duty fee should be introduced for duty service periods."
>
> "From the defense counsel's point of view the small number of cases compared to the large number of duty days […] is a disadvantage. There is no extra remuneration to compensate duty service, although in the duty period no

other work can be done, so the income of those with only appointments would decrease."

"The national implementation of the system could be done by establishing groups of attorneys beside each police headquarters, the number of attorneys in each group could be determined in proportion with the number of the residents of the area, or by using the data of local statistics on appointments; the attorneys would conclude a contract with the Ministry of Justice like we did with the HHC. […] The duty service system could be established but with a duty fee […]."

"The appointment system should be amended in such a way that appointed defense counsels too should provide defense on a duty-basis on Saturdays, Sundays, and other bank holidays, primarily in the pre-trial detention procedure, where the judge and the prosecutor are also on duty. The defense counsel appointed in the particular case would provide defense in the rest of the procedure, this way defense counsels would be relieved from unnecessary workload. Later, if this model was successful, this could be extended to the actions of investigative authorities on Saturdays and Sundays as well as after working hours, in a way that is similar to the system of the program of the Helsinki Committee, namely that on certain days the counsel is waiting for the call of a given investigating authority based on a duty schedule."

"The duty service is a fundamental difficulty of the Program, because an attorney may undertake it on an occasional basis, but in the long run it cannot be solved, for in many cases the lawyer's work schedule is tight already, which may be upset by an unexpected call and the related obligation to appear, and due to this problem the acting attorney may face an impossible task. […]

Obviously, if the number of participating lawyers is higher the duty service system means a more tolerable workload. In my opinion, colleagues undertaking to be available for appointments may be assigned into larger groups, and the schedule for who can be alarmed could be set in advance on an annual or quarterly basis. Probably, on the level of the capital or individual counties it can be estimated how many appointed defense counsels are needed monthly or quarterly, thus the number of the participants in the groups could be determined accordingly. If a sufficient number of attorneys is assigned to each group and these persons will know in advance in which periods they can expect to be appointed, then probably there always will be a defense counsel available for the appointing body. Naturally, I could also imagine that some kind of remuneration would be payable for standing by, which also could ensure that there will be defense counsels who undertake this stricter duty obligation."

"Such a system is workable with a smaller number of defense counsels, but it requires a dispatcher service, which in case of a larger number of lawyers would mean a significant increase in costs. […] In the present system of the Program [this disadvantage] cannot be eliminated."

As it was outlined under Section 1., some respondents mentioned as an advantage that the hourly fees are higher than the remuneration of the appointed defense counsels, and also that certain activities that are not payable in the ex officio system (consultation with the defendant at large, drafting documents, night travel) are remunerated in the Program. At the same time several respondents regarded as a disadvantage the fact that certain costs were not payable in the Program. As a solution for this problem (also as a possible method for relieving the administrative burden that comes with the accounting based on hourly fees and itemized cost reporting) many raised the possibility of introducing a flat-rate for costs.

> "In order to decrease the administration that poses a disproportionately huge encumbrance on lawyers, […] the application of flat-rates already used in ex officio appointments may mean a solution."
>
> "Regarding the remuneration set within the framework of the Program, I think it should be improved too, as payment for waiting and consultations could not be requested in the system based on hourly fees."
>
> "That parking fees and mailing costs could not be reimbursed and very slow subsequent payment [constitute a disadvantage]."
>
> "I feel that my work was not in proportion with the ignominiously low amount that was paid after the numerous reports I had to submit."
>
> "We should not spend a way too disproportionate amount of time on accounting and keeping the records of minor costs. Instead a flat-rate should be added to the attorneys' hourly fee set in percentages, the rate of which could now probably be determined. This for sure will not be absolutely 'fair', but this is totally accepted and workable in the everyday practice of attorneys."
>
> "I cannot accept [the fact] […] that the several hours spent for acquiring copies is not regarded as a useful activity."
>
> "The maximized time limit for certain issues […] is a disadvantage."

The administrative workload required under the program, which really exceeds what is usual in attorneys' work is both the issue of payments and the problem of monitoring professional performance. Several respondents pointed out the reporting obligation itself, others its method, as one of the greatest disadvantages of the Program. Some suggestions were formed regarding how this obligation could be rationalized in the case of nationwide implementation.

"Maybe quarterly reporting would be realistic, because then there would be more time mainly in the court phase to get the documents."

"It would impose less encumbrance on the attorneys if reporting was done only in months when something actually happens in the case, or when actual legal work is performed in the interest of the defendant. […] The reporting obligation could embrace a longer period as well, e.g.: 1) From the start of the investigation to the presentation of the case files; 2) from the presentation of the case files to the submission of the bill of indictment; 3) from the scheduling of the first court hearing to the first instance verdict; 4) in the appeal procedure until the second instance verdict."

"Taking into account the average length of criminal procedures, a report prepared every 3 months or biannually would be sufficient. The institution of reporting is good in itself, however it can only play its real role if it covers larger time intervals, or if the attorneys participating in the program were obliged to prepare a report only if there is a substantial progress in the given case."

"Maybe the attorney should draft and submit a substantive report within x days following the closing of the given case (first instance judgment), and simultaneously he/she could submit his/her request for fees and reimbursement as well. This is what the Board could review altogether, and then it would decide whether it accepts the report and for what amount the colleague could issue an invoice.

If the dragging of the case caused a financial difficulty to the colleagues, it should be made possible for the lawyer to request the fee during the procedure but in such cases he/she should report in detail about his/her activities until the time of the submission of the request."

"I think the monthly reporting of events is unnecessary. I regard a longer period as viable."

"I think that it is by no means appropriate that different reports and statements must be prepared on a monthly basis. In my opinion it would be sufficient to report at the end of the case – i.e. the closing of the investigation –, and to break down participation to 30 minute-units is by no means necessary. Not to mention that the hourly fee is not paid for the time actually spent."

"A significant amount of paper and work could be saved if we accepted the system of payment voucher well-tried in the current appointment practice of the courts. On the voucher the number of hours spent, the amount of VAT and the fees for the hours are indicated. The voucher could be an attachment to the invoice. Obviously a unified form-sheet should be applied by the investigating bodies and the prison administration as well with regard to the personal visits. […] A uniform legal regulation would be necessary. […] If there are 3–4 new cases per attorney, a quarterly report may be reasonable."

"If the Program was introduced on a national level, it would be sufficient to submit reports only in those months when there were actual substantial developments in the case."

"[Reporting] would be sufficient after the closing of certain phases of each case."

"I think written reports in biannual intervals would be sufficient […]; in the time between the reports consultations by phone, short statements would be adequate […]. These could be stored by data recording processes. The basis of invoicing could be the certification of the authority on a uniform sheet, like the payment voucher today."

"I could imagine a report prepared by the attorney not in accordance with a prepared form sheet, and only if a substantial event occurs in the procedure, not on a monthly basis. When I contact the client, and then at the closing of the investigation."

"The attorney should write a report only after a substantial investigative or other procedural action occurred, the summary report should be submitted following the closing of the investigation, or the bringing of the first instance judgment, based on certain elaborated aspects […]"

" I feel it to be unnecessary and straining that a report has to be submitted even in those cases, where no substantive event occurred, therefore the case just came to a halt. If the number of cases is higher it may mean a more significant burden on the defense counsel, who constantly fights with lack of time anyway. […]

With regard to the reports I would feel it sufficient to prepare a report only in case of substantial procedural actions, for the work of the defense counsel may be judged from these. It is questionable though whether in a final system it would be necessary to attach detailed documentation to the reports. It seems that it would be sufficient to limit this obligation to certain parts of the documentation only, or to leave this out completely from the system. In the latter case it should obviously be made possible that the supervisory body obliges the defense counsel to attach documents in order to back up his/her report. Evidently the scope of documents depends on how intense supervision is to be performed over the defense counsels."

"The report should be obligatory following the contact and at the closing of the given procedural phases only. Perhaps also in those months when a procedural action occurred."

There was an attorney who suggested the application of a solution that has proved to be workable in the (non-criminal) legal aid system operated by the Justice Office: namely that based on the characteristics of the particular case where the appointing body (which has to be separated from the investigating authority)

determines the expected number of hours at the time of the appointment, the client certifies the usage of the hours permitted, the attorney issues the invoice based on the certification of the client, and detailed reporting is done or different documents are attached only if the lawyer requests the increase of the permitted number of hours, because more time is spent on the case than the previously determined timeframe.

> "As it is known, there is the Justice Office, which already has a quite developed practice, from which the positive elements could be taken over. Such is, for example, that the office sets a certain number of hours at the time of the appointment. This naturally can be detailed further, e.g.: discussing the case, recording the facts: 2 or 3 hours; preparation: 1–2 hours; one court hearing: 2 hours, which can be increased based on the protocol; consultation in the penitentiary institution, discussion: 2–3 hours.
>
> At the time of the appointment it should be considered how much time seems necessary for the different activities. In practice, based on the reasoned request of the client and the attorney further hours can be permitted. Here we usually certify the amount of work with e.g. submissions, protocols, and thus later no such reports and certifications are necessary. […]
>
> It is important to add the costs to the hourly fee: e.g. 500 HUF/hour […]. Based on the certification of the client the attorney prepares the invoice within a given time. […]
>
> At the time of the appointment the number of inevitably necessary hours has to be determined. I know that it is not easy to consider whether there is going to be a court hearing when the case is only in the police phase, but in the given case this does not pose a problem, since on the invoice the attorney shall indicate the hours used [from the permitted number of hours] along with the activity those hours were used for, and the potentially emerging questions can be cleared when handing over the invoice. Each activity (discussion, hearing, preparation, etc.) should be indicated already at the time of the appointment, and if these activities have really taken place during the procedure, they have to be indicated separately on the invoice."

4. a) *Do you have reservations regarding the system where an external body monitors your professional activity?*

   b) *Has your opinion changed about this issue during your participation in the Program? What do you regard as an advantage and disadvantage of such a supervised system?*

This question divided the lawyers. From the 26 persons answering this question 14 (54%) said that they have no reservations against such monitoring, 6 of them (23%) expressed some kind of aversion, while 6 (23%) gave an answer, from which it seemed that they consider the advantages and disadvantages to be of the same weight.

Among those who replied as having no reservations against some kind of professional control, there were some who felt that such a system could even be distinctly useful.

> "I think the program is good and it is right that the activity of the attorneys is constantly monitored. This makes their activity considerably more planned and professional. Regular professional supervision and control is fair and good, I regard it as an appreciation of my professional work."

Others emphasize that it is a self-evident right for the person or organization paying the attorneys' fee, to exercise some kind of supervision.

> "We consider a kind of external monitoring to be necessary during the work, since this is the only way in which the supervision of the adequate completion of the obligations encumbering the defense counsel can be performed."
>
> "In the retained defense counsel system too, there is a constant reporting obligation for the attorney towards the client."
>
> "An elaborated system can be certified and supervised only by monitoring, this is how its results can be evaluated."

Those who do not consider monitoring to be acceptable mainly base their views on the independence of attorneys and on the offending nature of distrust, which in their view is also expressed in the administrative obligations imposed by the Program. In this latter regard many (including some of those who otherwise do not object to professional control) called attention to that detailed reporting should only be necessary in extreme cases.

> "In my view the system is over-administered, it gives the participants the impression that an external body is closely controlling whether there is excessive spending. There should be more trust towards the assigned colleagues, for excessive payment requests are easy to recognize for practicing lawyers.
>
> All the supervision which may infringe the independence of the attorney's work is in my opinion unacceptable."

> "[The] awkward administration […] does not only influence the work of the defense counsel, but gives ground to the suspicion that it is aimed at controlling the attorneys participating in the program, which may be insulting. […] I do not have reservations against an external body monitoring my activity, for I think that from a professional point of view it cannot really judge my work anyway, I rather feel that I have been supervised only in order to substantiate the necessity of payments."

> "There are legal obstacles to monitoring. […] A monitoring process is possible only if the Attorneys Act is amended accordingly. The consent of the Hungarian Bar Association is necessary for monitoring the attorneys' work. […] Such a supervised system would be illegal […]"

> "The administration should be decreased. There should be more trust in the integrity of the colleagues, perhaps in case of a strikingly high number of working hours they could be called to account on the reasons for the seemingly excessive numbers. […] Then if there are abuses, the conclusions must be drawn with regard to the lawyers concerned, but in connection with the other colleagues the presumption of innocence should be respected."

> "If it did not entail the existing and excessive reporting and administrative obligations, then actually I would not [have reservations], but the distrust is humiliating."

Many respondents admitted that external supervision may have positive effects on the standards of the professional work as well as to the activity of the defense counsel. Under Section 1., we have already quoted some opinions in this regard. When answering question no. 4, some respondents again highlighted this advantage of monitoring the defense counsels' work.

> "The advantag[e of external control] is that this way the professional representation of the interests of the defendants is ensured. Its disadvantage is the excessive administrative obligation."

> "I can see so much advantage that the possible professional mistakes [of the lawyer] may be eliminated."

> "The advantage of a supervised system may be that the acting person is aware of the requirement that his/her work is to be performed precisely, responsibly, and therefore the standards of his/her work get higher."

> "The advantage of a supervised system is that it incites everybody to a conscientious and professional work."

> "It is by all means an advantage of the system that the elimination of the possible professional mistakes may take place during the supervision."

> "The advantage of supervision may be a constant incentive for the participants of the program to do their task more precisely and conscientiously, and to adopt not only the quantitative but the also qualitative approach during their work as defense counsels."

> "I would regard it as fair and good if an external body monitored the professional work of the attorneys. This by all means would motivate them to use their rights and fulfill the defense counsel's tasks in all cases."

An interesting viewpoint was raised by one of the lawyers, according to whom the supervision grants protection for the attorney against the unfounded complaints of the clients.

> "The advantage of a controlled system is that it can provide the lawyer with protection in cases when the client questions the diligent and high-quality professional work of the defense counsel."

Even those who had no reservations concerning professional monitoring, pointed out as a drawback the disproportionate administrative burden entailed by such monitoring, while one lawyer considered the additional costs of monitoring, and another, the slowness of payments to be the most severe disadvantage of the system.

4. c) Is there a method for monitoring professional performance that is different from the one applied in the Program and would make the monitoring of the work of ex officio appointed defense counsels possible without excessively limiting the autonomy of attorneys?

With regard to this question a number of lawyers have claimed that although they have no fundamental reservations against external professional monitoring, they do not think that the work of ex officio appointed defense counsels could be controlled from the point of view of quality, which on the other hand does not mean that the possibility of a more formal type of monitoring focusing on the defense counsel's participation in the procedure should be excluded.

> "I think that it is not the quality of defense work that should be guaranteed. It is not possible to do. The level of performance of retained lawyers is also mixed. The monitoring should focus on whether the lawyer really takes part in the interrogations and court hearings."

> "It is a crucial question. Ex officio appointed counsels are not 'brought in' the case by the trust of the client, but by the authority's decision aimed at fulfilling a state obligation. And if somebody pays, he/she/it should have the right to exercise some kind of monitoring.
>
> The question is obviously aimed at finding a method for monitoring the quality of the work of ex officio appointed defense counsels. I do not think that such monitoring would be possible. But the attitude of the lawyer could be controlled.
>
> The system of fees could be used for this purpose, since when filling out the record of fees, the investigating authority (the court) at the same time certifies the lawyer's presence. [...] If the record of fees is compared to the list of all those procedural acts at which the lawyer could have been present in a particular case, it is easy to establish whether the lawyer fulfilled his/her obligations at least formally, by being there.
>
> Naturally, the approach could be more than purely formal, but this segment of the system – i.e. its formal efficiency – should also be assessed. We all know that presence does not in itself reflect professional quality, but it could still mean a point of reference. [...]
>
> This comparison could be the first step to prove that the state takes its obligations seriously and does not simply 'tick off' this issue by spending some money on mandatory defense. It could also have an impact on the legal profession."
>
> "[I]f [professional control] means the monitoring of whether the professionally required minimum level of service is adequately provided, it may be justified, but in this case remuneration shall be allocated for maintaining contacts with the defendant outside the scope of procedural acts, independently from whether the defendant is detained or not."

Others proposed random checks, or a combination of such checks with regularly repeated, comprehensive examinations.

> "If the Program is introduced on a national level, the more thorough control of the professional board may be limited to severe cases, and cases in which such control is requested by either the client or the lawyer him/herself."
>
> "In my opinion, the improvement of the quality of the work of ex officio appointed defense counsels could be achieved through legislative changes, and random examinations performed by a professional body based on an elaborate methodology known to all the lawyers."
>
> "If the appointing organ has an up-to-date register about who was appointed, when and for what case, then random checks or comprehensive subsequent examinations of a given period may ensure that everyone performs his/her

> tasks at an appropriate quality level. It would be possible to adapt a solution similar to the one applied with regard to judges: at first, every lawyer would be put on the list of ex officio defense counsels for a limited period of time, which would be followed by a comprehensive examination. In the framework of this examination the attorney could choose a certain number of cases, in which he/she acted as an appointed counsel, and the board performing the examination would have the right to choose the same number of cases. The attorney's performance would be evaluated on the basis of the survey, and he/she would obtain the right to remain on the list for an indeterminate period of time, or would be removed from the list. Later on, the attorneys on the list could be checked randomly or in a comprehensive manner from time to time. The issues of confidentiality and the lawyers' autonomy could be solved if the monitoring body acted within an appropriate legislative framework."

One of the lawyers emphasized that the only entity that could be authorized to exercise professional control is the bar association.

> "The system of appointment should be modified. Lawyers should be appointed and monitored through the bar association. This requires the reform of the system of appointment and an increase in the fees. Furthermore, either the law should be amended or the police should be made to accept these changes. [...] I think that monitoring by the bar (maybe in combination with certain elements of the Program) would be a good solution. This would be an internal form of control, so it could positively influence the work done by attorneys."

According to some attorneys, professional control should be exercised in the selection phase (with the addition that this would require a radical change in the prestige and remuneration of the work done by ex officio appointed defense counsels).

> "It should be achieved that the provision of defense based on ex officio appointment is not seen as a burden but as professional acknowledgment. [... P]rofessional control should not mean the obligation to send reports – it should be exercised in the selection phase. What ought to be changed is the mentality that it is more than enough to formally provide defense. Of course some degree of monitoring would be required until we realize this objective."

> "A model similar to the Program would be good for the purposes of appointed defense work, but professional competence should also be required besides voluntary application, as it happened when the lawyers were selected for the Program. Appointed defense work could be seen as an honor for lawyers, but certain conditions must be set."

5. a) *Do you regard the monthly reporting obligation of the Program as a disproportionate administrative burden?*

b) *If yes, do you have an idea how the lawyers' performance could be monitored through a method that would be less demanding on the lawyers?*

Out of the 25 persons answering this question, 12 (48%) regarded the reporting obligations as disproportionate, 5 lawyers (20%) said that it is a burden but not disproportionate, whereas 8 attorneys (32%) considered the reporting obligation to be acceptable. Since we have outlined the opinions on the administrative burden and the possibilities of performance monitoring above, here we would only like to refer to what has been already said.

6. *Would you welcome if the ex officio appointment system would be replaced nationally by a model similar to the one applied in the Program? If such a model was introduced nationally, what problems may emerge in your view? (How often could reports be required, could a professional monitoring body be set up, would the operation of a dispatcher system be similar, is the means test used in the Program applicable, and so on) Would you take part in such a system?*

13 lawyers said that they would welcome the introduction of such a system, 2 persons said no, and 8 failed to take a clear stance on the issue. 11 lawyers said that they would participate in such a system (some of them with the addition that only if the modifications they proposed were taken into consideration).

Problems raised by the attorneys – besides the ones already outlined – were the following.

A number of lawyers mentioned that the solutions applied in the Program (duty system, monitoring of professional performance) would not be adaptable to the ex officio appointment system or would severely violate the interests of those lawyers who earn most of their living from ex officio appointments.

> "I regard monitoring by a professional body to be acceptable, although it is clear that there would be a direct connection between the strictness of the control and the number of lawyers applying to be involved in the system."

"To run a system like this on a national level would require a huge apparatus, and – in light of their remuneration – the administrative obligations would put a disproportionate burden on ex officio appointed counsels."

"It is obvious that such a duty system would mean a more even distribution of tasks for the legal profession as a whole, but it would deprive those colleagues who base their living on appointments from most of their income."

"One of the most crucial differences between the ex officio appointment system and the Program is that one is based on a contract whereas the other is obligatory. I can hardly imagine such a reporting mechanism in a system like the ex officio appointment system."

"On a national level the control of a professional body over attorneys would trigger a great outcry within the legal profession."

"If the whole ex officio appointment system was replaced, monthly reporting and the copying of all the files would put a disproportionate burden on those colleagues whose practice consists mostly of ex officio appointments."

"The way I see it is that for a lot of lawyers the manipulation of ex officio appointment fees is an important source of income. A lot of attorneys submit fee claims for tasks they have not performed.

Furthermore, the present system of ex officio appointment is based on the close relationship (even friendship) between the appointing officer and the appointed lawyer, and it also must be mentioned that lawyers who appear at too many procedural acts or put forth too many motions are often excluded from further appointments.

The national introduction of such a system would lead to severe conflicts of interest."

"I would definitely not welcome the replacement of the ex officio appointment system with a mechanism similar to the Program. One of the reasons is that there is no means test in the ex officio appointment system. [...I]f the laws on ex officio appointment were amended, only in that case could ex officio appointed defense counsels be requested to submit reports, especially because it is already a problem for them to participate in all procedural acts due to their wide-ranging obligations. It would mean a significant step forward with regard to criminal procedures against juveniles if the law was amended to make sure that a juvenile may only be interrogated in the presence of the defense counsel. This of course would require lawyers acting in juvenile cases to have the infrastructure necessary for guaranteeing presence at interrogations – personally or through a substitute. Therefore, if we consider possibilities on a countrywide level, we come to the conclusion that appointments have to be sent to lawyers locally, from districts or areas close to their office or home."

Others suggested that the deficiencies of the ex officio appointment system should be eliminated through alternative solutions that could be applied parallel or instead of the mechanism of the Program. The elements of the public defender model applied in common law countries also appeared among these ideas.

> "I believe that the ex officio appointment system is not dysfunctional, and since the Program was only restricted to the police phase, it would be much better if the ex officio appointed counsels received a fixed monthly amount they could base their living on, because this would enable them to organize their work more efficiently, they would not undertake too much, because this is what leads to the situation that they cannot appear at the police, since appearance before the court is mandatory. Everyone knows that that the lawyer has a more important role during the investigation, since not much can be done in the trial phase if the police has sufficiently proved the offense."
>
> "I do not consider the ex officio appointment system to be functional in its present form. A real solution would be the improvement of the professional and financial conditions of this job, and there would be adequate professional control. [...]
>
> The other solution could be ex officio appointed defense counsels organized into a separate profession (as civil servants or public employees), and receiving a salary from the state for their work. This version may raise problems in smaller settlements, but would definitely be feasible in Budapest."
>
> "I think that the idea to replace the ex officio appointment system with a system modeled by the Program is good and feasible. However, I would make it conditional on the introduction of the institution and status of 'defense lawyers.' Such lawyers would primarily do defense work. [...] This could make the control of a professional body workable, but this control would be exercised by the colleagues working in the system. If the number of cases rises, this control may become cumbersome and could require the setting up of a large apparatus."
>
> "I would only welcome [the countrywide introduction of a system similar to the of the Program] if the lawyers were employed by or permanently contracted to the Helsinki Committee, since if someone lives mainly from ex officio appointments, one or two cases per month will not secure his/her living."

The last group of remarks comes from those who think that if the fees available for ex officio appointed counsels were similar to those paid by the HHC, the Program's other elements could also be introduced on a national level.

> "In order to achieve that a high proportion of lawyers would be interested to participate in a national system – with special regard to the obligations stemming from a duty system – the level of fees paid in the Program should be applied on the national level as well."
>
> "The introduction of a model similar to the Program would be desirable from a constitutional point of view as well, since in this case it would be justified to call on the lawyers to account for the quality of their work, which could improve the indigent citizens' access to justice. The adequate remuneration of the work done could contribute to the moral acknowledgment of the job performed by ex officio appointed counsels who are at the moment looked down upon."
>
> "I would definitely welcome if the fees were increased to an acceptable level. This would enable those who are doing their job diligently to earn a decent living, and at the same time the moral ground for monitoring performance would be also created."

7. *Did you find that some elements of your defense work were modified in the framework of the Program, compared to when acting as an ex officio appointed counsel? (Do you work differently? Is the attitude of the police, the prosecutor, the court or the clients different?)*

The opinions on attorneys' work and the attitude of the authorities have already been quoted (see Sections 3.1. and 4.1.), therefore we only provide the answers concerning the behavior of clients. In this regard experiences seemed to be rather mixed. Out of the 20 attorneys replying to this question 4 (20%) said that the clients' reactions were positive, 3 (15%) gave accounts of negative attitudes (mostly passivity), 5 (25%) described the reactions as varied, and 8 (40%) were of the opinion that clients did not see the difference between HHC lawyers and ex officio appointed counsels. This meant that the defendants were as distrustful as if the lawyers had been appointed counsels. Below, we are quoting some characteristic examples from each type of answer.

> "The clients were very happy about the fair treatment they received, this is not what they are used to."
>
> "I have experienced passivity from the clients. Practically only I call them on the phone, never the other way round. There is one who is not available at all, he did not react to the letter in which I asked him to contact me […]. Only one case is in the trial phase, but there the defendant is more active."
>
> "Unfortunately the clients [...] are as distrustful as in ex officio appointment cases."

> "The clients are biased against ex officio appointed counsels, but this can be changed if the lawyer's attitude is appropriate. In the eyes of the clients there was not a clear distinction between HHC lawyers and ex officio appointed defense counsels."
>
> "The attitude of the clients depended upon how they were prepared by the authorities. Where they were informed that this is a professionally monitored system, the client knew that he/she would be in good hands. Where the dispatcher service was called because no one else was available, the client's attitude was as if the lawyer was an ex officio appointed counsel."
>
> "Those clients who cared at all about their own case seemed to have more trust in me, but those who did not, remained indifferent. Generally it can be said that the clients found my appearance strange at first, and were therefore distrustful, but when it became clear that they would not have to pay for the defense, they soon accepted my services."

5.2. Replies to the police questionnaire

The answers given by the police organs involved in the Program are summarized in a structure similar to that of the above Section. With a view to the fact that the Program received only one notification from the Department of Investigation of the BPH, this organ wrote in a letter that its personnel had not gained sufficient experience to provide a well-grounded evaluation of the Program. Accordingly, we received answers from the Department of Inquiry of the BPH (hereinafter: Department of Inquiry), and from the 6–7th District Police Headquarters, the 8th District Police Headquarters and the 13th District Police Headquarters.

1. What are the advantages of the Program compared to the ex officio system in your opinion?

Three out of four police organs[72] mentioned as an advantage of the Program that the defense counsel is present already at the first interrogation and in this way the defendant's right to defense is not infringed. According to the 6–7th District Police Headquarters the greatest advantage of the Program was that the dispatcher

[72] Department of Inquiry, 8th and 13th District Police Headquarters

system "took over the burden of finding an appointed lawyer," although this issue can otherwise be considered to be solved because "most of the lawyers who can be appointed are available any time of the day and if later they should have any other engagement they can arrange their own substitution."

2. What are the disadvantages of the Program compared to the ex officio system in your opinion?

3. If there are any disadvantages how would you eliminate them?

According to the 6–7th and the 13th District Police Headquarters the Program has no disadvantages at all. (The 6–7th District Police Headquarters noted in its answer that certain ex officio lawyers made verbal complaints at the police organ that the hourly fee in the HHC's Program is higher than the fee paid by the government.)

In contrast, both the Department of Inquiry and the 8th District Police Headquarters mentioned the temporal consequences of the obligation to wait for the lawyer as the primary disadvantage of the Program.

> "In relation to the lawyers appointed within the framework of the Program we experienced that they could arrive at the interrogation only after a long time – hours – following the notification. This in certain cases slowed down the procedure, especially in case of urgent procedural actions or actions taken in the evening and at weekends. As a result, the number of unnecessary overtime hours – i.e. overtime not connected to real activities – increased significantly."[73]

> "The duration of taking initial actions also increased significantly as the interrogation of the defendants involved in the Program could not be commenced until the lawyer participating in the Program had arrived, while at the same time the investigating authority is only obliged to notify the lawyer and according to the CCP it is not forbidden to start the interrogation in the absence of the defense counsel."[74]

It seems to be a certain kind of internal contradiction to hold on the one hand that the participation of the lawyers is an advantage, to regard it as a guarantee

[73] Department of Inquiry

[74] 8th District Police Headquarters

for the realization of the right to defense, and on the other hand to object to having to wait for the lawyer to arrive – which is otherwise understandable from organizational point of view.

The 8th District Police Headquarters would resolve this problem by determining a certain term for the lawyer to arrive, stipulating that if this term has elapsed the interrogation could be commenced without the presence of the lawyer.

> "In case defense is mandatory, the policeman on duty selects/appoints a lawyer from a list compiled in advance or calls the dispatcher system to select a lawyer. After that the resolution appointing the lawyer shall be forwarded to the round-the-clock dispatcher system with the time of the interrogation indicated. The interrogation starts one hour after the notification no matter whether the lawyer is present or not, as it is regulated by the CCP in force. If the lawyer arrives before or during the interrogation he/she and the defendant should have the possibility for a consultation and for submitting the retainer. In the course of this procedure the interrogation would not be unnecessarily drawn out, especially in the night."

The Department of Inquiry mentioned that a duty system of lawyers should have been applied in the Program. As it has been outlined in Section 2., a duty system did exist in the Program but the lawyers assigned for a given day were not always available. Therefore it took long for the dispatcher system to find a lawyer. Had there been more lawyers involved, it is likely that the duty system would have operated more smoothly.

The 8th District Police Headquarters mentioned as a further disadvantage of the Program the extra burden of administration, noting the following:

> "I found it rather inconvenient having to keep several records and that even this did not convince the HHC that the defendants were informed about the possibility of participating in the Program by the policeman on duty and that they refused to participate in the Program voluntarily."

4. Did you experience any kind of difference between the activity and professional competence of the lawyers participating in the Program and ex officio lawyers?

Three out of four police organs did not experience any kind of difference between the activity of the HHC lawyers and the ex officio lawyers. In contrast, as we have

referred to it above, by the experiences of the 8th District Police Headquarters there was at least one lawyer who acted rather passively as an ex officio appointed counsel and became more agile when working within the framework of the Program.

5. *Did you experience any difference compared to the normal routine in the course of investigating cases involved in the Program (e.g. did more defendants deny to testify? Did the possibly more numerous motions of the lawyers prolong the average time of the procedures, etc.)*

The judgment of the 8th District Police Headquarters differed from the other participating police organs in this aspect as well. The latter did not experience any difference between the cases of the Program and other procedures, while the 8th District – besides noting that there was no difference in the number of denials to testify – wrote the following:

> "In part of the cases of the Program, especially in cases during which the defendant was taken into pre-trial detention, the lawyers' motions and complaints – which later proved to be unjustified – heavily prolonged the investigation, making it impossible to conclude the investigation within the legally prescribed timeframe. Lawyers having no experience in criminal procedure prolonged the procedure by submitting every week or every second week requests for release of the defendant, because in line with the rules in force the documents with perfectly the same content were continuously circulating between the prosecutor and the court. And the presentation of case files can only take place in possession of at least one copy of these documents."

Although the statement seems to be a bit curious since due to the tender applied when selecting the lawyers only those could take part in the Program who had experience in criminal law and can be appointed as ex officio lawyers as well, we have no information about any cases in which requests for release had been submitted so frequently (it can also be presumed that lawyers would have requested a fee for preparing these documents, so the HHC would have knowledge about such instances), but it can be concluded from the answer that the HHC lawyers were more active than appointed lawyers, submitting more complaints and motions.

6. *Would you prefer if the ex officio system was replaced by a system similar to the Program? What kind of problems could arise by applying the system at a national level? (Is the duty system workable, is the means test used in the Program appropriate, what burden it would mean that the first interrogation cannot start until the arrival of the lawyer?)*

In the view of the 13th District Police Headquarters it is indifferent whether the ex officio system or another system similar to the Program operates in the country. The Department of Inquiry drew attention to the fact that the late arrival of lawyers endangers the efficiency of the investigation, therefore it is inevitable to find a way in which lawyers can arrive faster at the interrogations.

It can be established on the basis of the 6–7th District Police Headquarters' opinion that the dysfunctions of the ex officio system have no impact; therefore the reform does not seem to be inevitably necessary.

> "The ex officio system is satisfactory for my authority, but my authority is certainly open for a model similar to the Program. The ex officio lawyers appointed by my authority are available at any time of the day and by this I do not primarily mean contact via fax but the direct contact via telephone. The appointed lawyers provide for their substitution if necessary."

According to the 8th District the round-the-clock duty system is useful (bearing in mind the one-hour restriction mentioned above), but at the same time the whole system should be placed under the supervision of the Bar Association.

> "I would request the Bar Association for cooperation, in which case ideally lawyers with experience in criminal procedure would be involved in the Program. The Program would be working partly under the supervision of the Bar Association. The 24-hour duty system is to be preserved if channeled into the operation of the Bar. [...]
>
> I would prefer if a system similar to the Program existed but only within the operation of the Bar, under the supervision of Bar officials. This way professionalism could be guaranteed. [...]
>
> I think that the reform of the ex officio system is sufficient (24-hour duty system), because a lawyer who has taken an oath must fulfill his/her obligations in the same way no matter who pays for the work.

> Furthermore, I note that the topic of 'the first interrogation may not be started until the lawyer arrives' problem can be wrapped up as follows: the proceeding authority – taken into consideration the rights of the defendant and assuring enough time for the lawyer to arrive (in Budapest at night and in the weekend one hour should be enough) – has the right to start the interrogation in the set time, and this right is also guaranteed by the law [...]."

Further police views on the possible reform of the system are articulated by the NPH survey. Due to the strong thematic connection, it seems necessary to list these here, although the answers described below were not given to the HHC's questionnaire, but to the questions posed by the authors of the NPH survey.

To the NPH's question, whether it is difficult to find a lawyer who could be appointed, the answer was negative with the addition that "there are problems in certain periods (at night, during the weekend, on banking holidays), when less lawyers are available. Therefore, a number of police units suggested that the bar associations should come up with a duty scheme that could make the appointment of the counsel easier in the problematic periods as well. In Szabolcs County, there are some investigating departments that appoint the lawyers on the basis of a so-called 'system of rotation', i.e. they always call the next person on the list provided by the bar."[75]

Most police units saw no reason for the comprehensive reform of the ex officio appointment system. This conclusion seems to be in contradiction with the problems pointed out by the NPH survey, namely the low percentage of appointed counsels attending first interrogations and the difference between the level of performance of appointed and retained lawyers (see what has been said about the NPH survey's results under Section 1.2.2.). In spite of this, the police units interviewed in the course of the NPH survey "almost unanimously claimed [...] that there is no need to change the time honored system of appointments. According to the majority of the respondents, if the lawyers were appointed by another entity, that would complicate the procedure, increase the administrative burdens, have a negative influence on the timing of the investigation and would therefore lead to processes that are disadvantageous from the point of view of the right to defense. [...] The general stance [of the police] is that there is no reason to involve an organization independent from the police into the selection of lawyers. On certain occasions, the

[75] Equality of Arms, p. 41.

fair and efficient handling of the case is guaranteed by the personal acquaintance [between the police officer and the lawyer], and an organization independent from the police could not take such factors into account."[76] (We have already referred to the potentially negative consequences of personal connections between the police and the lawyer under Section 4.1., therefore, we only wish to call attention again to the obvious contradiction between the above quoted police opinion and the fact that in the majority of the counties the attendance of appointed counsels at first interrogations remains below 50%.)

Besides the above outlined general opinion, there were some police units which did not exclude that a change in the system may have positive consequences.

> "Although – similar to most of the interviewed units – the National Investigation Office does not agree with giving the right of appointment to an independent organization, it pointed out that a positive effect of such a measure would be that 'the Police could not be charged with always appointing their own acquaintances as defense counsels.' [...]
>
> Nógrád County raised the idea of creating a 'body of defense counsels' that would be available 24 hours a day and has the sole responsibility of providing defense and taking care of other matters related to defendants. They suggested that this body could be established in attachment to the courts of the county bar association. The same is raised by Pest County, namely that a network independent from the Police would be favorable, but only if it was accompanied by a permanent duty scheme of defense lawyers [...]."[77]

Certain police units believe that the efficiency of the system could be improved through an increased accountability of lawyers. "Only Baranya County is of the view that the present system of appointment is insufficient, because some of the lawyers are reluctant to take criminal cases. They raise the possibility of establishing a system of 'compulsory appointment' so that an appointment could be made anytime and anywhere. The county unit also refers to the inadequacy of the work performed by ex officio appointed counsels, which they would try to redress by 'appropriate sanctions'."[78]

[76] Equality of Arms, p. 42.

[77] Equality of Arms, p. 42.

[78] Equality of Arms, p. 42.

The authors of the NPH survey would also approach the problems from the direction of defense: "In order to raise the efficiency of the work of appointed counsels [...] we suggest the creation of a system in which only lawyers meeting certain criteria may be included in the list of attorneys who can be appointed. This would be a system based on qualifications and experience: it would make the possession and constant improvement of a solid knowledge of criminal law compulsory for all attorneys who wish to work in this field. Even the passing of a specialized exam may be required. The attorneys who are part of this system based on adequate quality assurance may be called 'defense lawyers'."[79]

Not wishing to deny that there are strong arguments supporting the setting up of such a system, we have to point out that this type of specialization could only be required if the fees of appointed lawyers would be at least close to the market prices. If that is not the case, the introduction of such a system would only be feasible if only these "defense lawyers" were allowed to provide retained defense as well. The same opinion was voiced by dr. János Bánáti, President of the Hungarian Bar Association at the Closing Conference.

5.3. Replies to the defendants' questionnaires

In order to assess the efficiency of the model tested in the Program, it was obviously inevitable to gain information on the defendants' opinions. To this end, the HHC sent a letter to the participating defendants asking them to visit the HHC's office in order to fill out the questionnaire prepared for them. Based on a special permission given by the National Penitentiary Administration, members of the HHC visited the detained defendants in the penitentiary institution in order to have their opinions asked. The interviews were conducted in Spring and Summer 2006.

This way, we managed to contact 22 out of the 121 defendants. 20 of them gave comprehensible answers to the questionnaires. The questions posed coincided to a great extent with those included in the 2003 questionnaire concerning ex officio appointed defense counsels (see Section 1.2.2.), therefore, the answers given by defendants participating in the Program will be compared to responses provided in the 2003 research.

[79] Equality of Arms, p. 42.

One of the most important conclusion of the 2003 research was that even among defendants who were able to retain a lawyer, only 40.2 percent managed to contact their defense counsel before the first interrogation (with regard to defendants with an ex officio counsel, this ration was 23.6 percent). As opposed to this, in the Program every defendant had a lawyer present at his/her interrogation.

The next important issue is how active the lawyer is in the course of the investigation. This can be measured on two factors: (i) whether he/she is present at the investigative acts and (ii) whether he/she tries to influence the procedure by putting forth motions and comments.

All the 20 defendants participating in the Program said that their defense counsel had been present at the different investigative acts. This is a much better result than that of the 2003 research in connection with the ex officio appointed defense counsels, in fact even better than the performance of retained lawyers as shown by that research.

Table 3: According to your knowledge, did the defense counsel take part at any procedural action during the investigation?

Response	*Respondents who had ex officio defense counsels (234 persons) – 2003 research*		*Respondents who had retained defense counsels (220 persons) – 2003 research*		*Defendants participating in the Program (20 persons)*	
	Person	*%*	*Person*	*%*	*Person*	*%*
Yes	70	29,91	149	67,73	20	100
No	123	52,56	52	23,64	—	—
Trainee attorney was present	3	1,28	6	2,73	—	—
Does not remember	39	16,67	21	9,55	—	—

In the 2003 research the same respondent could give several responses (e.g., sometimes the defense counsel and sometimes the trainee attorney participated at certain actions).

The Program's results with regard to activities beyond simple presence were also better than those produced in 2003 in relation to ex officio appointed counsels. Compared to the responses related to retained lawyers in the 2003 research, the Program's results are somewhat better, however, the difference is not significant statistically. This seems to support the conclusion that if there is some sort of control

(usually by the client who is able to withdraw the retainer, in the Program by the Board), this obviously inspires the lawyer to show a high level of activity. In the case of ex officio appointed defense counsels – where there is no such control mechanism – the results are significantly worse.

Table 4: According to your knowledge, did the defense counsel/trainee attorney make any motions in the course of the procedure?

Response	*Respondents with ex officio defense counsels – 2003*		*Respondents with retained defense counsels – 2003*		*Defendants participating in the Program (20 persons)*	
	Person	*%*	*Person*	*%*	*Person*	*%*
Yes	92	38,17	171	77,73	17	85,00
No	100	41,49	30	13,64	2	10,00
Does not know, does not remember	49	20,33	19	8,64	1	5,00
Total	241	100,00	220	100,00	20	100,00

In the case of detained defendants the frequency of visits paid by the lawyer to the client is also of great importance. In the 2003 research out of the 494 defendants responding to the questions concerning defense counsels, 261 had ex officio appointed counsels. Out of them, 181 (69%) met his/her lawyer in the course of the procedure. The number of defendants claiming that the counsel visited them on his/her own initiative was 51. This means 27% of the 181 defendants who met their lawyer, and 19% of all the defendants with ex officio appointed counsels. 24 (13 or 9% respectively) said that the lawyer visited them upon their request. In 2003, out of the 233 defendants with retained lawyers, 216 met the counsel by the time of the interview. Out of them 105 (49%) said that the lawyer visited upon his/her own initiative, and the same number of respondents gave an account of a visit paid upon the defendant's request.

All 12 pre-trial detainees participating in the Program and responding to the questionnaire said that they had been visited by the lawyer provided by the HHC. This should be obvious, as in the agreement outlining the lawyers' obligations in the framework of the Program, it is stated that they shall visit their detained clients with the necessary frequency but at least once a month. In fact, the answers given to the questionnaire show that only some of the participating counsels met

this requirement. Out of the 10 detained defendants responding to the question concerning the frequency of the visits, 4 claimed that their lawyer visited them once or more per month. One respondent gave account of one visit per two months, another one of one visit per four months. Two persons stated that by the date of the interview (i.e. in about one and a half years) there was only one visit, in one case this number was three, and one responding defendant said that he did not know the exact number but he felt that his lawyer visited very rarely.

The defendants' general evaluation of the lawyers' work in the investigation phase is summarized by the table below (only 19 persons responded to this question).

Table 5: How would you rate the work done by the HHC lawyer in the investigation phase?

Response	*Person*	*%*
Excellent	10	53
Good	5	25
Acceptable	2	11
Useless	2	11
He/she works for the police*	—	—
Total	19	100

* This possibility was included in the questionnaire because during the 2003 research some defendants voiced such suspicions in connection with the ex officio appointed counsels.

The cases of altogether 11 defendants were in the court phase at the time of the interview. We posed the same questions to them in relation to this phase of the procedure. As the counsel's presence is mandatory at the court hearings, conclusions concerning the lawyers' level of activity could be drawn on the basis of the motions and comments made by the counsels before the court. Out of the 11 respondents 8 (72%) said that the defense counsel made some kind of oral contribution to the procedure (question, motion, comment) and 4 (36%) claimed that the lawyer submitted written materials (petitions, motions) to the court. 4 persons said that they did not know whether any written contribution was made by the counsel, and only 2 persons said a definite 'no' to this question.

Those 9 defendants in the case of whom a first instance decision had already been delivered at the time of the interview, gave the following responses in connection with the closing speeches made by the HHC lawyers.

Table 6: What strategy did the counsel apply in the closing speech?

Response	*Person*	*%*
Requested an acquittal	3	33
Placed the emphasis on the mitigating circumstances	4	45
Did not question the charges in any way	1	11
Does not remember	1	11
Total	9	100

Out of the 9 respondents only 1 said that his counsel advised him to plead guilty. In the defendant's view it was not fully reasonable in the given situation, however, in general he regarded the counsel's work as excellent.

The defendants' general evaluation of the lawyers' work in the court phase is summarized by the table below

Table 7: How would you rate the work done by the HHC lawyer in the court phase?

Response	*Person*	*%*
Excellent	5	46
Good	2	18
Acceptable	3	27
Useless	1	9
Total	11	100

The person who claimed that the HHC lawyer's work was useless in the court phase is one of the two respondents who gave the same answer with regard to the lawyer's performance with regard to the investigation phase. These defendants were reminded of their possibility to submit a complaint to the Board, which – if their complaint is well-founded – can provide them with another attorney taking part in the Program. (In the two and a half years of the Program, only two defendants resorted to this option – for more details see Section 5.4.).

Out of those 4 respondents who said that the HHC lawyer's performance was useless or acceptable, one person identified the lack of regular contacts as the

reason for his dissatisfaction, while the other 3 said that their counsel did not pay enough attention to the case.

Since in the 2003 research we did not request the respondents to evaluate their lawyers in this way, in order to reach a certain degree of comparability, we asked those participating defendants who had been defended by ex officio appointed lawyers before to rate the performance of those earlier appointed counsels. Out of the 20 respondents 14 had previous experiences with appointed lawyers.

The respondents' opinion of their former ex officio appointed counsels are summarized by Table 8 (not everyone responded to all questions).

Table 8: How would you rate the work done by your former ex officio appointed lawyer in the investigation and court phase?

Response	*Investigation phase*		*Court phase*	
	Person	*%*	*Person*	*%*
Excellent	2	19	2	20
Good	3	27	1	10
Acceptable	3	27	2	20
Useless	3	27	5	50
He/she works for the police	—	—	—	—
Total	11	100	10	100

If we compare these results with those included in Tables 4 and 6, we can see that a significantly higher percentage of the defendants (53 and 46 percent in the investigation and the court phase respectively) considered the counsel provided by the Program to be excellent than the former ex officio appointed lawyer (19 and 20 percent). Also significantly more defendants said about their former ex officio appointed counsel that his/her work was useless (27 and 50 percent in the investigation and the court phase respectively) than about the HHC lawyers (11 and 9 percent).

We get a similar result if we only consider the HHC-related opinions of those participating defendants who had experiences with ex officio appointed lawyers earlier. Out of the 12 such defendants 6 (50%) said that the HHC lawyer did an excellent job in the investigation phase, and only 1 (8.3%) was of the opinion

that the performance of the counsel provided in the framework of the Program was useless (4 respondents rated the HHC lawyer's work as good and 1 as acceptable).

Out of the 12 defendants who formerly also had ex officio appointed counsels, the case of only 8 was already in the court phase at the time of the interview. Out of them 5 (63%) said that the HHC lawyer's performance was excellent, 2 (25%) described the job done by the lawyer provided by the Program as good and 1 (12%) as acceptable. Out of these respondents no one was of the opinion that the HHC lawyer's work was useless.

Although the sample is very small, we may draw the conclusion that the defendants responding to the questionnaire had a much better opinion of the performance of the HHC lawyers than of the work done by former ex officio appointed defense counsels.

5.4. Complaints in the Program

During the two and a half years of the Program's operation two defendants submitted complaints to the Board concerning the performance of their lawyer.

The first complaint was filed in May 2006. In the particular case the first interrogation took place on 11 October 2004. After this date the defendant was not informed about the case either by the authorities or by the attorney. Only in February 2006 did he learn that on 23 March 2005 the investigation had been accomplished and on 30 May 2005 the prosecutor pressed charges against him. The defendant acquired the case files and found out that the attorney had not been present at the "display of documentation" (the final act of the investigation, during which the defendant and/or the lawyer is provided with the possibility of looking into all files of the case).

Although the defendant admitted that it was possible that the lawyer was also not informed about the display of documentation, he thought that the attorney ought to have tried to contact him during the one and a half years. Upon the HHC's intervention, the lawyer consulted with the defendant on 20 February 2006, but this occasion did not convince the defendant about the lawyer's commitment. On 9 May 2006 he received a notification that his first court hearing was scheduled for 30 May 2006. The following day he called the attorney, and asked him to discuss the case strategy in person. The lawyer answered that he could not meet him before 26 may, and that he was not sure that he would be able to be present at the hearing, but he

would do his best to be there. Following this conversation the defendant requested that the Board provided him with another lawyer, because he had no trust in the lawyer any more.

The Board requested the attorney to react to the complaint. He stated that he was not informed about either the display of documentation or the indictment, and this is why he was not present at the said procedural act and did not try to contact his client. He said that he had 6–700 cases per year, and therefore if the authorities do not notify him or the client does not contact him, he is not in the position to keep track of which cases progress in order and which do not. He called attention to the fact that never during those one and a half years did the client try to reach him in any way. With regard to the February meeting he claimed that the consultation had lasted for one and a half hours and that he had provided the client with all the necessary information. In relation to the hearing he admitted that due to his workload and other already scheduled court obligations it was possible that he would have to request a postponement of the hearing. However, in the light of the complaint, he agreed that due to the lack of trust the retainer should be terminated and the client should continue with another lawyer.

Since the authorities' omission (the lack of proper notifications) was the primary cause of the problem and the client (who was not detained) did not try to contact the lawyer until he found out about the developments of the case, the Board did not regard the lawyer's behavior as a breach of the contract he had concluded with the HHC. At the same time, due to the fact that the necessary trust between the parties was lacking, it agreed to the termination of the retainer and provided the complainant with a new lawyer.

The second complaint was submitted in July 2006 by a defendant who had been in detention since 20 October 2004. The essence of the complaint was that his lawyer had failed to appear at most investigative acts (interrogations) and to visit him in the penitentiary institution, although this would have been her obligation under the framework agreement concluded with the HHC. The client felt that the problem was urgent because his case came to the court phase.

The HHC's coordinator informed the lawyer about the complaint via telephone. She promised to immediately visit the defendant in the penitentiary and also to submit the documentation refuting the complainant's claims concerning her absence from procedural acts. From the documents it became clear that with the exception of one interrogation (on the day of which she had an accident and was taken to hospital) the attorney was present at all procedural acts. Furthermore, after

the personal encounter the defendant withdrew his complaint. Consequently, the Board did not take any further measures.

5.5. The court's view on the Program

The courts' view on the Program will be outlined on the basis of the presentations given by dr. Zoltán Lomnici, President of the Hungarian Supreme Court at the Round Table and the Closing Conference.[80]

The President of the Supreme Court shares the HHC's view on the fact that the efficient operation of the ex officio appointment system depends on the effective performance of four basic functions (management function, individual and general quality assurance and budgetary function). He also admits that "the need to find a solution still prevails since the previous amendments of the legal provisions (increase of the hourly fees, free copies of the case files, increase of the number of free services) failed to make the system more effective and because there are numerous examples in practice showing that the provision of defense during the investigation is still often just formal."[81]

He thinks that "the Hungarian legal background in this regard is adequate, the law has a broad approach as to when the authorities are obliged to provide for defense. However, the legal framework does not always set out the safeguards clearly, thus causing uncertainty in the implementation."[82]

Dr. Lomnici does not agree with the HHC's presumption though, that there would be a conflict between the interests of the different participants of the criminal proceeding: "I believe that the ex officio appointment system cannot be improved if the entities taking part in the procedure claim the problem to arise from their incompatible demands."[83]

Therefore he supposes that the dysfunctions of the system do not stem from the inherent conflicts but from the violation of the norms by the different participants and the lack of proper control. "It is possible however, that even with a proper legal

80 On 20 April and 30 November 2006.

81 Dr. Lomnici's lecture at the Round Table

82 Dr. Lomnici's lecture at the Round Table

83 Dr. Lomnici's lecture at the Round Table

background, the individual goals of the participants of the procedure will distort the system in such way that it will not be able to fulfill its functions anymore.[...] It seems obvious [...] that the solution will not always be the amendment of legal provisions.[...] The evaluation of a system's operation may not be based on the notion that some participants abuse the law, the system should not be formed on the basis of the extremes. The problem should be resolved through internal supervision which, in certain cases, could lead to disciplinary impeachment. When trying to point out the deficient elements of the current framework of appointments, the expertise and knowledge of the persons acting on behalf of the different authorities as well as their long developed working practice must be examined. It is possible, that even the overview of the given organization's internal operation or the further training of its staff itself can improve the effectiveness."[84]

It has to be mentioned here that the empirical researches described above make it clear that during the investigation phase, dysfunction seems to be the "normal" course of action, since in most of the cases the appointed counsel does not contact his/her client and does not show up at the different investigative acts. The NPH research has also pointed out that nationally the ratio of first interrogations conducted in the presence of an appointed counsel is below 50%. This means that the problem's roots go deeper than the individual responsibility of the participants of the procedure: the whole system is in a structural crisis, which can be improved by institutional control, but taking into account the extent of the problems, such control will not in itself be sufficient.

The structural problems are closely related to the question of the participants' conflicting interests. Obviously, this question does not arise as seriously with regard to the court phase as in connection with the relation of the investigating authority and the defense. After establishing a well-founded suspicion, the investigating authority conducts its investigation against a given person (the defendant) on the basis of a certain investigating concept. The aim of the defendant and his/her lawyer is to refute this concept, and sometimes to disable the investigation work as a whole (for example when the defendant makes a false confession, which is allowed by the CCP, unless the contents amount to false accusation of another party). The procedural positions of the two sides (the defendant and the investigating authority) are therefore fundamentally conflicting.

[84] Dr. Lomnici's lecture at the Round Table

The above does not mean that there cannot be a fair relationship between the participants, but it must be guaranteed that the investigating authorities do not exercise far too much power over the accused. The practice that it is the investigating authorities that choose the defendant's counsel whose task is to assist the accused in refuting the concept of the investigation, leads to excessive power on the authorities' side. The legal framework must be formed in a way that it always guarantees the realization of the legislative aim irrespective of the goodwill or malignity of those applying them. That is why the HHC still finds a structural reform necessary, the idea of which – by the way – is not rejected by the President of the Supreme Court.

The experiences of the Program confirm those former opinions of professionals that it would be useful to assign the task of appointing counsels – and perhaps the settlement of accounts – to organizations different from the proceeding authorities.

> "To the question who should perform these tasks, there are several alternative answers: the possible role of the bar associations was mentioned with regard to both functions. [...]
>
> Or, as an another alternative, the participants of the Program proposed to empower the Justice Office to appoint the defense counsels. [...]
>
> As a third solution, the establishment of public defenders' offices could be raised. This institution would peculiarly combine the characteristics of legal aid by attorneys and state organs, but would successfully solve the questions of appointment, the even distribution of tasks among counsels and the problems of individual and general quality control. This office could function within the Justice Office or as a distinct institution absolutely separated from the authorities that take part in the criminal proceedings."[85]

The President of the Supreme Court also pointed out that the control of retained counsels may also be problematic, as the client is not always in the position to exercise professional control.

> "To define the elements of quality assurance is certainly an elaborate and difficult task, though in the case of retained lawyers we tend to believe that the discontented client can easily solve the problem himself by changing the counsel.
>
> In these cases both the selection and the individual quality control as well as the question of responsibility will be the matter between two parties. If the client is unsatisfied, he/she can simply switch his/her legal representative.

[85] Dr. Lomnici's lecture at the Round Table

> It is of fundamental importance that when the quality of defense is in question there should be no distinction between systems based on appointment or a retainer. [...]
>
> The problem of quality assurance in the case of retained lawyers cannot be settled simply upon the principle of confidence. People are usually unable to judge the performance of their attorneys even when the lawyer is paid according to the market prices."[86]

Certain aspects of this question were already pointed out in the 2003 HHC report: "effective control over the performance of retained defense counsels can only be exercised by those defendant who, in case of dissatisfaction, can afford to hire another attorney, regardless of payments already made. If legal fees are paid in advance, many families are no longer able to change the defense counsel."[87]

Even though the raising of the issue is fully justified, we are of the opinion that it does not seem possible to interfere with the contractual freedom of the client and the lawyer with any form of quality assurance. In this context the bar associations' disciplinary powers ought to be sufficient. With regard to disciplinary complaints of not so well-to-do families, it could be a solution to – in addition to the disciplinary fines – make the lawyers liable to pay back the fees to the client fully or in part.

On the other hand, in the case of ex officio appointed defense counsels, the state – as a quasi client – should be able to monitor the lawyers' performance. In line with the independence of the legal profession, the state cannot perform such control directly. The solution for this issue could be the setting up of a board within the bar associations, as described in Section 6.

The President of the Supreme Court also touched upon the problematic question of fees.

> "The question of appointment and the problems stemming therefrom are closely related to the issue of appropriate financial support. […]
>
> It is very important to decide who should appoint the defense counsel, but this in itself does not resolve the problems arising from the difference of the fees paid by the authorities and private clients. A country's economic situation will determine the amount of money that the state will be able to spend from its budget on its disadvantaged citizens and their right to access to justice.

[86] Dr. Lomnici's lecture at the Closing Conference

[87] Presumption of Guilt, p. 144.

> It is not my job to represent the lawyers' interests, but I have to say that eventually we cannot expect the self-sufficient lawyers to do unpaid jobs, in other words, they cannot be expected to finance from their other resources the function of ex officio appointment."[88]

Regarding the same question, in his second presentation, dr. Lomnici was arguing for the voluntary nature of the ex officio appointments: "perhaps there is no country in this world where an appointed defense counsel would receive the same fee as the one who works for a private client. In other words, it could be said that appointments belong to a low paid category of work. And exactly this is the reason why the principle of voluntary application should be applied in ex officio appointment cases. At the same time, it should be the bar associations' responsibility to ensure that these appointed counsels deliver on an acceptable quality level when doing their job."[89]

In conclusion, the President of the Supreme Court stated that the courts are basically not against the structural reform if it does not impair their procedural interests and does not impose additional burdens on them.

> "As opposed to what has been concluded by the coordinators of the Program, I do not attribute such importance to vesting an independent authority with the task of appointment. However, I would like to make it clear that in the judicial proceedings our main interest is to ensure that a judgment be delivered within reasonable time and to guarantee that the basic constitutional principles and the safeguards of the criminal proceedings are respected. Within this framework and in order to ensure these results, we would be willing to hand over the task of appointing the defense counsel and pay his/her fees. [...]
>
> It is important to emphasize that the system of appointment should be transparent, simple and predictable. In this framework the courts are open to further surveys and the development of the system, but I have to emphasize that we can only support a system which (i) does not make the proceeding longer and does not hinder the conclusion of cases within a reasonable time, and (ii) does not increase the administrative burden of the courts. Furthermore, as I already indicated, we would be willing to hand over the task of appointment and settling the accounts."[90]

88 Dr. Lomnici's lecture at the Round Table

89 Dr. Lomnici's lecture at the Round Table

90 Dr. Lomnici's lecture at the Closing Conference

5.6. The views of other key stakeholders on the conclusions of the Program

Mrs. Anikó Varga, representative of the Chief Public Prosecutor's Office stated at the Closing Conference that the prosecution is in favor of the defense counsel's presence during the investigation. The defendant has the right to change his/her statement, but in order for the new statement to be taken into consideration he/she must be able to give a reason why he/she changed the earlier version. If the defense counsel is not present at the interrogation, the defendant may claim that he/she was pressured by the investigator or that the police officer paraphrased what he/she actually said. The prosecutor cannot refute such statements, if however the attorney is present at the interrogation, his/her signature on the record of the hearing is a proof that the hearing was lawful.

Another argument in favor of the counsel's presence is that if the investigating authority fails to carry out some procedural act or to gather some evidence, the counsel can call attention to the omission, thus making the job of the prosecutor easier, who otherwise would have to send the file back for further investigation.

Mrs. Varga also pointed out that without contacting the defendant, the defense counsel cannot fulfill his/her other obligations prescribed by the CCP (informing the defendant about the lawful ways to defend him/herself and about his/her procedural rights, etc.). At the same time she stated that the legislator would have had the chance to make the counsel's presence mandatory at interrogations and other procedural acts if that had been the intention.

Numerous attorneys participating at the Closing Conference said that making the presence of the counsel mandatory at the interrogations was the most important change to achieve, because without this, the task of the defense counsel in the investigation phase would remain merely formal. Dr. János Bánáti, President of the Hungarian Bar Association emphasized that until the investigation plays such an important role in the ultimate judicial sentence, the rights of defense in the investigation phase should be almost identical with what the lawyer is authorized to do before the court. Unless this is so, lawyers may not be held responsible for not being present.

Dr. Ágnes Frech, Head of the Criminal Board of the Metropolitan Court did not agree that interrogations in the investigative phase should only be allowed in the presence of the defense counsel, since this would be disproportionate with the aim of crime detection and may open further possibilities for strategies aimed at the

protraction of the proceeding. At the same time she pointed out that courts could help to move the investigative practice in the direction of providing defense counsels with a real chance to appear if they attributed bigger weight to statements made in the presence of the lawyer than to confessions made without an attorney.

She also raised the possibility that investigating authorities could be obliged by law to notify the bar association if the defense counsel fails to contact the defendant who has been in pre-trial detention for a long time.

The majority of the participants of the Closing Conference agreed that it would be beneficial if the function of appointment was taken over from the investigating authority by an authority that is not directly concerned by the criminal proceeding. There was also consensus that the most suitable organization would be the Legal Aid Service of the Justice Office, which is already responsible for operating the legal aid system in administrative and extrajudicial civil matters.

From among the counter arguments the following views are worth mentioning. Based on financial reasons and potential conflicts of interest in determining the appointing authority, Mrs. Varga said that she saw no chance that such a change might take place in the near future. University professor and constitutional judge dr. Árpád Erdei warned that although the basic idea is good, it is Budapest-centered, while in a small town a well-functioning system is much more difficult to organize. He also mentioned that US examples of public defender offices show that if it is not the defendant who chooses the lawyer, the establishment of the necessary trust between the client and the lawyer will be difficult even if the lawyer is appointed by an independent organization (a solution for this is offered by the Dutch model, which is based on the free choice of the lawyer in criminal cases as well – for more detail see Section 6). Colonel Mihály Szabó, Head of the Department for Prevention at the National Police Headquarters, who represented the NPH at the Closing Conference repeated the conclusion of the NPH survey, according to which there is no need to change the present system.

Not even the police leadership is in full agreement with regard to this issue, which was shown by the comment of dr. Ernő Kiss, Commander of the Budapest 13th District Police Headquarters, who said that the police should not insist on its right to appoint counsels. At the same time he warned that the timeliness of the investigations is an outstanding interest that has to be given priority by the Justice Office if it is to take over the appointment function.

Other participants however supported the idea. Dr. Ágnes Frech emphasized that the conflict of interests between the investigating authority and the defense

is undeniable. It does not exclude a fair relationship between the two sides, but it makes the reform of he structure necessary. She regards the expanding Justice Office to be suitable for the task, and thus no new institution should be established for the sole purpose of managing appointments.

The attorneys participating at the Closing Conference also supported the idea. Their main argument was that this could guarantee the even distribution of appointments. Confirming the HHC's conclusions on the too close cooperation between investigators and some lawyers, two attorneys claimed that although they are experienced criminal lawyers, they are almost never appointed in the investigation phase.

On behalf of the Hungarian Bar Association, dr. János Bánáti also drew attention to the problem of the uneven distribution of appointments, the lack of data on this distribution and the necessity of the reform of the system. "The (fair) distribution of appointments becomes ever more important. [Those who undertake appointments voluntarily] are interested in the fair distribution of appointments. The hopefully coming increase in the fees will make the cases (which will thus guarantee a still not too high but predictable income) 'desirable' for the attorneys, so these cases need to be distributed in a way that is not determined by personal relationships (e.g. between former colleagues). The fact that the lawyer is personally selected by the officer may bring into the relationship between the two sides certain elements that are not strictly connected to the criminal proceeding. This makes the systematic distribution of appointments even more important."[91]

Dr. Bánáti also finds the Justice Office suitable for the task.

> "I agree with all the people who say that the appointing authority shall be independent from the authority that brings a decision on the need to appoint a lawyer. The bar association seems like a logical option, however, this type of task does not suit the bar associations, and this would vest the bars with state tasks. This would entail the need to provide the bars with state funding, which on the other hand would make the relationship between the state authorities and the bars as public bodies complicated. Therefore, I believe that the bars do not need to be reformed for the sole purpose of performing this task, nor do we need to create a brand new organization to this end, since the legal aid service of the Ministry of Justice was set up last year and it has been constantly developing ever since. In my view, this organization is capable of performing a new task that is similar to the ones it has been performing, namely the distribution of

[91] Bánáti, p. 52.

> appointments. My recommendation would be that after the fees have been raised to HUF 5,000, the list of lawyers compiled by the bars would be sent to the county offices of the legal aid service. The authorities participating in the criminal procedure would send the decisions on the need for appointment to these offices through the fastest possible means of communication. The office would select the defense counsel on the basis of the principle of proportional distribution, and would notify both the defendant and the authority about the person and availability of the appointed counsel. Naturally, both the appointment and the notification of the defendant and the authority would be done through the fastest possible means of communication. The office keeping the centralized register of defense counsels would also operate a duty scheme, which – after the necessary legislative amendments – may solve the long lasting problem of the absence of ex officio appointed lawyers from the first interrogations of their clients.
>
> besides what is set forth above, the office would a) decide on the cost exemption of the defendant, thus taking over a burden from the authorities participating in the criminal proceeding; b) advance the necessary costs for the lawyer, such as the fee of the interpreter chosen by the counsel for consultation with the detained defendant [...]."[92]

The long-term introduction of this solution is also being considered by the Ministry of Justice and Law Enforcement. Minister of Justice, dr. József Petrétei said the following at the Round Table held in April 2006.

> "In October 2005, the Government adopted the impact assessment study on the first year of the legal aid system and the schedule drafted for the extension of legal services. In this material the Ministry came to the conclusion that the right to defense is one of the most important fields of access to justice, and therefore in the long run it is necessary to integrate the ex officio appointment system into the legal aid service system, as that might provide a suitable ground for organizing this service in a more modern way ensuring higher quality. Naturally, the necessary amendments in the legal framework need to be adopted.
>
> It is our declared objective to use the conclusions of the Program in our work aimed at the long-term development of the legal aid system. We wish to examine to what extent the legal aid system could meet the criteria set by the Program, how it could handle the problems raised by the Program, and what developments are necessary so that legal aid providers can provide criminal defense as well in the future."

[92] Bánáti, pp. 52–53.

This standpoint was confirmed by dr. Erika Plankó, who – as head of the Department for Legislation and Justice Services – represented the Ministry of Justice and Law Enforcement at the Closing Conference. She claimed that the document mentioned by dr. József Petrétei "serves as the basis of the legislation of the coming years, so what is included in it may probably be realized and undertaken as a plausible task." She also warned that the support of the legal profession is insufficient in itself without the necessary political will

On behalf of the Legal Aid Service of the Justice Office, dr. Pál Oswald spoke at the Closing Conference. He stated that the service is open for such a reform, and – if the necessary human and financial resources are provided – they can perform the task of appointment and the related functions.

5.7. Conclusions based on the statistical analysis of the data of cases and the defendants participating in the Program

The total number of the defendants remaining in the Program is 121. The low number does not make the application of the statistical method impossible, but the validity of the results is somewhat restricted. This number only slightly exceeds the upper threshold of a so called "small multitude", the methodological aspects of which are discussed by the scientific literature. Multitudes between 3 and 99 belong to this category.

However, certain characteristic features may be established from the Program's samples and conclusions may be drawn from the results. The question may be raised whether the data concerning the defendants participating in the Program show a pattern that is comparable to other groups, such as persons with a deviant behavior or – with certain restrictions – the complete Hungarian population. Comparing the data of participating defendants with those of the offenders and convicted persons in the year 2005, some interesting conclusions may be drawn.

Starting the comparison with gender distribution, out of the defendants participating in the Program, 100 (82.64%) are males and 21 (17.36%) are females. This does not correspond to the gender distribution in the total population, but is close to the gender distribution of identified offenders (The distribution of offenders and convicted persons has changed in the past decade, but is all in all close to this. The proportion of women has in the past decade increased from 8–9 to 14–16 percent.)

Table 9: Age and gender distribution of defendants participating in the Program

Age	*Male*	*Female*	*Total*
Juvenile	27	17	44
19–20	6	—	6
21–30	24	2	26
31–40	26	—	26
Older than 40	17	2	19
Total	100	21	121

The age distribution shows a somewhat different picture. Out of the participating defendants 44 (36.36%) are juvenile, which is much higher than the percentage of this age group among offenders and convicts, which has been between 7–11 percent in the past 15 years. This is probably due to the fact that since juvenile age is one of the grounds for mandatory defense, the ratio of juveniles among those in whose case defense is mandatory is as a matter of course higher than in the total population of offenders and convicted persons. The Program's pattern is a reflection of this phenomenon.

Interestingly, the age distribution also shows a different picture if we only examine the data of adults. In this case the percentages are much closer to the proportions observable among adult offenders and convicts of similar age.

The comparison was made in a way that – due to reasons not detailed here – the upper and lower thresholds of the age groups do not coincide with those applied in the usual statistical analysis of offenders and convicted persons (the difference is one year). This however has no practical relevance from the point of view of the results' validity.

- The percentage of participating defendants between 19–20 years of age, and of adult offenders and convicts between 18–19 years of age:

  participating defendants 7,79%
  offenders 7,27%
  convicts 6,82%.

- Percentage of 21–30 year old participating defendants and 20–29 year old offenders and convicts:

  participating defendants 33,77%
  offenders 36,07%
  convicts 37,26%.

- Percentage of 31–40 year old participating defendants and 30–39 year old offenders and convicts:

  participating defendants 33,77%
  offenders 27,66%
  convicts 27,69%.

- Percentage of participating defendants older than 40 and offenders and convicts aged 40 and above:

  participating defendants 24,68%
  offenders 29,00%
  convicts 28,62%.

The dominant proportions of the age distribution are determined by the age distribution of the male defendants due to the high ratio of males within the whole multitude. (This dominance may also be observed in criminal statistics.) An interesting feature of the sample is that out of the 21 participating female defendants 17 (!) are juveniles. Therefore, the age "distribution" of the remaining 4 adult women is not relevant from the point of view of the analysis, we only add here for the sake of completeness that 2 of them are in the 21–30 age group, while the other 2 are older than 40.

Table 10: The distribution of participating defendants according to occupation

Occupation	*Male*	*Female*	*Total*
Student	25	15	40
Manual worker	27	—	27
Intellectual	4	1	5
Unemployed	29	2	31
Retired	6	—	6
Unknown	9	3	12
Total	100	21	121

The participating defendants' distribution according to social status (or position in the societal distribution of labor) is obviously related to the high percentage of juveniles. This explains that almost one third of the 121 persons (in the male group 25 out of 100, in the female group 12 out of 21) are students. Their proportion is fully understandable in the light of the already mentioned age

distribution of women. The ratio of the other categories in the percentage of the total multitude is the following:

manual worker	22,31%
intellectual	4,13%
unemployed	25,62%
retired	4,90%
unknown	9,92%.

The percentages illustrate the long standing conclusion of several scientific analyses, namely that the problems concern the different social groups with different frequency. On the other hand, the high proportion of students does not primarily prove that this group has integration problems (although this may be part of the explanation), instead, it is a result of the specific age distribution of the sample. However, the proportions show similarities with data on deviant behaviors as provided by other sources.

Table 11: The distribution of participating defendants according to the ground of defense

Ground of defense	*Male*	*Female*	*Total*
Deaf, mute or blind	1	—	1
Mental disorder	6	—	6
Does not speak Hungarian	18	2	20
Detained*	44	2	46
Juvenile	27	17	44
Personal cost exemption	4	—	4
Total	100	21	121

* Those who are detained but also fall into any other mandatory defense category, were counted in the other category. The total number of detained defendants is 52.

The ground of defense means the reason why the HHC's assistance became necessary in a certain case. If there are more than one grounds, the categorization took place on the basis of the most important one, in accordance with the principles of court and criminal statistics. Those who are detained but also fall into any other mandatory defense category, were counted in the other category. The number of these defendants is 6, as there are altogether 52 detained defendants, so detention is the sole reason for mandatory defense in 46 cases.

The distribution of grounds for defense shows that detention is the most frequent reason for appointment, followed by juvenile age and the lack of a command of Hungarian. These data coincide with the results of the NPH survey, according to which "in most cases the young age or the detention of the defendant serves as the basis for appointing a counsel. 65% of all the appointments are based on these factors. With 1,059 instances [out of 3,582] detention in itself accounts for a large part of appointments."[93]

The percentages in the Program are again determined by the distribution of male defendants. As their number is 100, the distribution by numbers coincides with the distribution by percentages. In the case of women, due to the specific age distribution (17 juveniles out of 21 defendants) the distribution is not relevant from a statistical point of view, we however wish to point out that 2 of the 4 adult women were entitled to mandatory defense due to the fact that they do not speak Hungarian, while the other two because of their detention.

Table 12: Distribution of the participating defendants according to the suspected criminal offense in relation to the ground of defense

Criminal offense		*Detained*	*Other*	*Total*
Offenses against property	Theft	16	25	41
	Robbery	12	4	16
	Vandalism	—	4	4
	Other	4	5	9
Offenses against public order	Forgery of documents	1	4	5
	Drug abuse	3	5	8
	Rowdiness	2	9	11
Offenses against personal integrity	Bodily harm	7	2	9
	Homicide	1	—	1
Offenses against marriage, family, youth and sexual morals		1	5	6
Other		5	6	11
Total		52	69	121

[93] Equality of Arms, p. 29.

The number of defendants suspected of having committed an offense against property was 70 (this means 57.85%), while in the case of 24 the suspicion was an offense against the public order (19.83%). In comparison, among identified offenders in 2005, the ratio of persons against whom a criminal proceeding was launched into offenses against property and offenses against public order was 38.40% and 27.4% respectively. In 2005, 69.96% of convicted juveniles and 37.19% of convicted adults were found guilty of offenses against property. We have to mention though that among convicted adults, the percentages are significantly influenced by the number of persons committing traffic offenses. If we exclude them from the multitude, the distribution concerning "traditional" offenses is not so much different between juveniles and adults, the reason being that only few juveniles are convicted for traffic offenses.

Among perpetrators of offenses against property, the proportion of those committing theft is the highest – with regard to both the defendants participating in the Program and the total population of offenders. It needs to be pointed out however, that in the Program, the percentage of defendants accused of robbery is much higher than among offenders or convicted persons in general. The percentages of persons accused of theft are the following.

participating defendants	58,57%
among perpetrators of offenses against property (2005)	60,54%
among juveniles convicted for offenses against property (2005)	72,05%
among juveniles convicted for offenses against property (2005)	60,40%.

In the Program, the percentage of defendants accused of robbery was much higher than among – juvenile and adult – offenders accused of crimes against property in 2005 or juveniles and adults convicted for crimes against property in that year. The percentages are the following:

participating defendants	22,86%
offenders (2005)	3,46%
juvenile convicts (2005)	11,84%
adult convicts (2005)	3,30%.

Table 13: The connection between occupation and the criminal offense in the case of defendants participating in the Program

Criminal offense		*Student*	*Manual worker*	*Intellectual*	*Unemployed*	*Retired*	*Unknown*	*Total*
Offenses against property	Theft	23	7	0	6	0	5	41
	Robbery	1	6	1	4	1	3	16
	Vandalism	1	1	0	0	1	1	4
	Other	3	3	1	2	0	0	9
Offenses against public order	Forgery of documents	2	0	1	2	0	0	5
	Drug abuse	0	2	1	5	0	0	8
	Rowdiness	3	1	0	5	1	1	11
Offenses against personal integrity	Bodily harm	1	3	1	2	0	2	9
	Homicide	0	0	0	1	0	0	1
Offenses against marriage, family, youth and sexual morals		4	0	0	1	1	0	6
Other		2	4	0	3	2	0	11
Total		40	27	5	31	6	12	121

In spite of the low number of items, the data concerning occupation (and therefore the social status) show definite characteristics as a result of the detailed and unambiguous categorization. Out of the defendants accused of robbery 6 are manual workers and 4 are unemployed. This result shows a great degree of resemblance with the data of and the conclusions drawn from the unified police and prosecutorial statistics as well as with the judicial statistics: namely that the social characteristics of people convicted for robbery are the worst among the whole population of offenders or convicted persons.

The distribution of participating defendants accused of theft is equally typical: more than 50 percent of the students are accused of theft, and more than 50 percent of those who are accused of theft are students. This correlation between young age

and the types of offenses committed has been discussed by the scientific literature in detail: it is a well-known fact that among juvenile delinquents the percentage of perpetrators committing crimes against property is the highest, and within this group theft is the most frequently committed offense.

Within the category of crimes against public order, the internal distribution of the Program's sample diverts from the usual criminal structure, in which the forgery of documents is much more frequent than drug abuse. This result of the Program is likely to be accidental and caused by the relatively small number of cases. The high proportion of unemployed persons accused of drug abuse may be explained by their psychological state caused by the uncertainty stemming from their situation.

Table 14: The connection between citizenship and the criminal offense in the case of defendants participating in the Program

Criminal offense		*Hungarian*	*Foreigner*	*Total*
Offenses against property	Theft	35	6	41
	Robbery	16	0	16
	Vandalism	2	2	4
	Other	7	2	9
Offenses against public order	Forgery of documents	3	2	5
	Drug abuse	4	4	8
	Rowdiness	7	4	11
Offenses against personal integrity	Bodily harm	7	2	9
	Homicide	0	1	1
Offenses against marriage, family, youth and sexual morals		6	0	6
Other		10	1	11
Total		97	24	121

When assessing the results based on citizenship and the offense committed, special attention has to be paid on crimes against property, with special regard to theft and robbery: the results support the conclusion that may also be drawn from

the usual sources of criminal statistics, namely that it is not foreigners who pose the highest risk to the Hungarian public order.

Table 15: The connection between the ground of defense and the age of defendants participating in the Program

Ground of defense	*Juvenile*	*19–20*	*21–30*	*31–40*	*Older than 40*	*Total*
Deaf, mute or blind	0	0	0	1	0	1
Mental disorder	0	0	1	5	0	6
Does not speak Hungarian	0	2	10	8	0	20
Detained	0	4	14	12	16	46
Juvenile	44	0	0	0	0	44
Personal cost exemption	0	0	1	0	3	4
Total	44	6	26	26	19	121

With regard to the connection between age and the ground of defense, we can say that the dominance of the age groups 21–30 and 31–40 among those who do not speak Hungarian, is related to the migration "habits", the above-average mobility of these age groups.

To summarize the results, we can say that in spite of the relatively small number of cases, conclusions may be drawn from the data, which are also comparable to the nationwide data regarding deviant behaviors and people displaying such behaviors.

With regard to the data concerning the outcome of the cases (see Table 2 under Section 3.3.), it can be said that due to the relatively small number of cases, it is not possible to draw far reaching conclusions regarding the efficiency of the lawyers' work. If we still compare these results with the data of judicial statistics on completed cases, we can say that the outcome of the cases taken in the framework of the Program does not significantly differ from the usual legal consequences of similar offenses.

5.8. Analysis of individual cases

During the Program, besides controlling the attorneys' performance, the monitoring of individual cases also made it possible to examine certain issues emerging in the practice of criminal law. Below, we are summarizing a few cases that raised interesting problems of the application of criminal law provisions.

5.8.1. Counting in time spent in pre-trial detention in petty offense cases

The case – which also provides further evidence concerning the difficulties of cooperating with the police – started one night when the dispatcher service notified the HHC's lawyer about an interrogation that was scheduled for the next morning.

When the lawyer arrived at the 8th District Police Headquarters, he discovered that the defendant's first interrogation had taken place on the previous day, three hours before the dispatcher service was notified (on the problem of interrogations during short term arrest, see Section 4.2.). Since the defendant felt sick after the interrogation and he was transferred from the headquarters, the scheduled interrogation (which would have been the continuation of the hearing that was held before the lawyers' arrival) could not take place, and the lawyer was not in the position to have all the necessary Program documents filled out and the power of attorney signed by the defendant (therefore, the attorney sent by the HHC could not become the defendant's retained lawyer from the point of view of the criminal procedure). To be able to contact the defendant later, the HHC lawyer handed over his business card to the detective investigating the case, and asked to be informed as soon as it was decided where (in which institution) the defendant would be placed after his health problem is solved.

However, two days later, when the HHC's attorney inquired about the developments, it turned out that in the meantime – despite the promise he made – the investigator appointed another lawyer for the defendant, and it was this new lawyer whom the investigating authority informed about the continuation of the interrogation and the court session held about the ordering of the defendant's pre-trial detention. Following an intervention by the HHC, the lawyer went to the police station to finally have the power of attorney signed. Although he managed to do so, a week later, when he tried to visit his client at the police jail, it turned out that the investigator had still not informed the jail personnel about the change of lawyer, so

the HHC attorney was denied access to his client. Only upon the lawyer's strongly worded warning did the investigator finally fulfill his duty of notification.

The defendant was kept in pre-trail detention for almost three months owing to the following offense. He entered a bank, where – in preparation for the closing – the counters were roped off from the client zone with a cordon. Going around the cordon, the defendant stepped to one of the counters, grabbed a mobile phone that was left there by an earlier client, and left the bank. The damage caused was HUF 7,500 (EUR 30), but it was recovered since the arrested defendant returned the phone to the owner. Although the damage did not reach the level where theft is regarded as a criminal offense (if the value of the stolen goods is below HUF 10,000, theft is only a petty offense), the prosecutor (and the police) qualified the act as a criminal offense claiming that it was committed by entering a fenced area (which, under Hungarian law. qualifies thefts even under the HUF 10,000 value limit as a criminal offense). Therefore, the prosecutor motioned the court to impose imprisonment on the perpetrator.

Already in the motion for terminating the pre-trial detention, the HHC lawyer pointed out that the qualification of the offense as a criminal act is unlawful, and it should be regarded as a petty offense, since according to the consistent judicial practice, an area separated by a cordon the role of which is signalizing the separation but is not suitable for actually preventing entry, may not be regarded as a "fenced area" in the sense of the Penal Code. Therefore, the lawyer argued, the ordering of pre-trial detention is not lawful (no pre-trial detention is possible in petty offense cases). Eleven days after the court received the lawyer's motion, it terminated the pre-trial detention.

In its decision that became binding at the first instance, in accordance with the argumentation of the HHC lawyer, the court acquitted the defendant from the criminal charges, but established his responsibility for the petty offense of theft, and imposed a HUF 100,000 (EUR 400) fine on him. The court ordered that the 85 days spent in pre-trial detention shall be counted in the fine (with a rate of HUF 1,000 per day), so the defendant had to pay only HUF 15,000.

The decision is strongly questionable from the legal point of view. The court referred to Article 14 Paragraph (3) of Act LXIX of 1993 on Petty Offenses (Petty Offense Act) as the legal basis for counting in the time spent in pre-trial detention. This provision claims the following: "The full time of the petty offense arrest, and the time of short-term arrest – if that exceeds four hours – shall be counted in petty offense detention. When doing so every calendar day spent in a petty offense arrest

shall equal one day of petty offense detention. Short-term arrest exceeding four hours shall equal one day of petty offense detention."

Thus, the provision the court relied on does not in any way make it possible to count the time spent in pre-trial detention (which is a measure of penal law) in a petty offense fine (which is a punishment defined in petty offense law). Neither the Petty Offense Act, nor Act IV of 1978 on the Penal Code (Penal Code) makes such a deduction transfer possible between the two legal fields.

The lawful (and undoubtedly more complex and time-consuming) solution would have been for the defendant to start after the acquittal a civil lawsuit against the Ministry of Justice for compensation for the time spent in pre-trial detention, based on Article 580 point II a9 of the CCP, which provides this possibility for people who are acquitted after being detained. Taking into consideration the judicial practice, it is also likely that the amount of compensation would have been at least HUF 100,000 higher than the petty offense fine imposed on the defendant. On the other hand, the defendant would by all probability not have been in the position to first pay the fine, and then retain a lawyer to represent him in the lawsuit against the Ministry, so without the court's questionably lawful decision on counting in, he would have probably ended up in a petty offense detention (imposed for not paying the fine). Therefore, it is fully understandable that the HHC's lawyer decided not to appeal against the decision.

The case however raises the necessity for the legislation to consider making counting in possible in similar cases.

5.8.2. Ripping a box of cigarettes open as "violence against an object"

According to the accusation, the defendant participating in the Program attempted to steal cigarettes from a shop by ripping a cigarette box open, hiding the cigarettes in his clothing and trying to leave. At first a petty offense proceeding was launched against him, but then the method of taking the cigarettes (by first ripping the box open) was qualified as "violence against an object", due to which the defendant's behavior was considered to be a criminal act (if theft below the HUF 10,000 value limit is committed this way, it qualifies as a criminal offense instead of a petty offense).

The prosecutor applied a reprimand (the mildest possible sanction in Hungarian penal law) and terminated the investigation, taking into consideration the fact that the defendant admitted the offense and showed repentance, and that

his circumstances were otherwise decent and that the risk posed by the act to society is rather low.

The key question is of course whether ripping off a box of cigarettes really qualifies as "violence against an object." Despite the fact that the box was undoubtedly damaged, this conclusion does not seem well-founded, as the opening of the box is part of its normal use. "Violence against an object" can only be established if the damage is caused by the improper use of the given object, however, a cigarette can only be smoked if the box is opened beforehand.

It would lead to an absurd situation if taking out a cigarette from the box would constitute a criminal offense, whereas taking the whole box (the price of which is way below the HUF 10,000 limit) would still remain a petty offense.

5.8.3. Questions of the fast track procedure

On 12 January 2005, the dispatcher service notified the attorney that she had to appear at the 8th District Police Headquarters in a case launched against a detained defendant of Romanian citizenship, who did not speak Hungarian. The interrogation was properly held, the defendant suspected of forgery of an official document was included in the Program. (He committed the forgery by providing his brother in law's data in the course of an identity check by the police, because he returned to Hungary the effect of an expulsion order.)

On 15 January 2005, the Central District Court of Pest ordered the defendant's pre-trial detention. On 24 January, the HHC attorney wished to visit her client at the police station, but was informed that the defendant had been sentenced in a fast track procedure on 20 January (such a procedure is possible if the maximum punishment for the offense is no more than 8 years of imprisonment, the case is simple, the evidence is at hand and the defendant was caught red-handed or admitted the offense). The attorney asked the investigator why she had not been summoned to the trial. The investigator replied that he had given her a so-called "short notice": on 18 January he tried to call her on the phone, but she did not pick it up, so he left a message that her client's case would be tried in a fast track procedure on 20 January 2005, at 9.00 a.m. Since the attorney thought that this was not in line with the CCP, she asked the investigator for the prosecutor's name, but the police officer refused to provide her with it. Finally, the attorney was able to find out who the prosecutor in the case was by contacting the 8th District Prosecutor's Office.

When she called him, the prosecutor allegedly said that although the judge was reluctant to hold the trial in the lawyer's absence, he managed to get a substituting lawyer, and persuaded the judge to proceed with the case, so there were no legal obstacles preventing the continuation of the case. According to the lawyer, the prosecutor also said that he had been so insistent on the fast track procedure because this way he did not have to write a bill of indictment.

From the records of the trial it seems that after the opening of the trial the defendant waived the retained attorney and requested that a defense counsel would be appointed for him ex officio by the court. At this point the court appointed the substitute lawyer the prosecutor found. The new counsel – without any time for preparation of examining the files – requested the continuation of the trial. In the light of this, it shall come as no surprise that he did not in any way contest the facts and the qualification as put forth by the prosecution, moreover, he agreed with the prosecutor concerning the necessity to impose a punishment on the defendant! The court's decision – suspended imprisonment and expulsion – was not appealed against by either the prosecutor, or the defense counsel or the defendant, so it became binding.

The case raises numerous legal problems, the most important ones being the following.

Firstly, it is questionable whether a summoning performed in the above described manner may be regarded as fully appropriate. The CCP provides the prosecutor with the possibility of applying a so-called "short notice" (summoning by phone, fax, etc.) in fast track procedures. (Article 520). The CCP does not prescribe that the person issuing such a notice shall be obliged to make sure that the addressed person actually receives the summons. At the same time, in fast track procedures – exactly because of the fast track nature of the proceeding – the importance of the defense counsel's participation is even greater than usually. Hence, it would have seemed reasonable to expect the investigator or the prosecutor to try to find out whether the attorney had taken notice of the summons. In the concrete case there was only one attempt to reach the lawyer. On 18 January, the investigator left a message, but neither on the 19th nor on the 20th was the lawyer called to make sure that she knew about the trial.

Furthermore, with regard to fast track procedures the CCP prescribes [Article 518 Paragraph (2)] that if the defendant is detained, the prosecutor shall see to it that he/she can consult his/her defense counsel before the trial. Since the records of the trial show that the defendant in the concrete case agreed to the appointment of

another counsel only after the opening of the trial, it seems likely that he had no chance to consult the substituting lawyer at the time prescribed by law, i.e. before the trial.

The right to defense also includes the requirement that the defense counsel shall be provided with the necessary time for preparing the defense. This is why Article 281 Paragraph (3) of the CCP sets out the following: if the summoned defense counsel fails to show up, the defendant may retain another counsel, or – if the counsel's presence is obligatory – a counsel shall be appointed instead of the absent lawyer. The newly retained or appointed lawyer shall be provided with sufficient time for preparing. If this is not possible, the trial shall be postponed upon the absent counsel's costs. It is obvious that in the present case the substituting lawyer did not have enough time to get prepared. It is of course partly his responsibility that – according to the records – he did not even ask for a pause so that he could look into the case files. The omission committed by the judge and the appointed counsel led to a violation of the effective right to defense.

With regard to the concrete case, the HHC filed a complaint to the Budapest Chief Public Prosecutor's Office. The Office regarded the complaint as ill-founded in all respects. Based on its investigation, the Office claimed that the court had been waiting for the HHC lawyer for half an hour before proceeding with the case. During this time the prosecutor tried to reach the lawyer several times on her mobile. Only after this did the judge ask the defendant whether he agreed to the appointment of a substituting counsel. According to the Office, the new lawyer had the time to inspect the case file, and only after he did so, was the trial continued. The Office concluded that the action of the prosecutor and the judge was fully lawful and professional, the defendant's rights were not infringed in either the preparation phase or the hearing.

The official record of the trial refutes this conclusion. According to the record, there was no 30-minute delay: the trial started at the scheduled time of 9.00 o'clock, and the record was closed down at 9.40. This gives ground to two possible explanations: (a) it is not true that the prosecutor tried for half an hour to reach the HHC lawyer; (b) the whole trial – with interpretation from Hungarian to Romanian and back, and with the court wording and announcing the decision – took no more than 10 minutes. In the latter case the substituting counsel could obviously not have time for inspecting the files and getting prepared for the hearing.

In its decision 6/1998 (III.11.) – already referred to under Section 1.1. – the Constitutional Court declared: it is not sufficient if the right to defense is only formally guaranteed. In the broad interpretation of the right to defense, the

Constitutional Court relied on the International Covenant on Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6), which prescribe that everyone charged with a criminal offense has the minimum right to have adequate time and the facilities for the preparation of his defense.

In the case of *Goddi v Italy*[94] there was a hearing at which neither the applicant nor the legal aid lawyer who was acting for him in the appeal was present. The outcome was the imposition of heavier sentences than those imposed at first instance. Although it was not established on the facts that the applicant's absence was the state's fault, the ECHR found that the appeals court (and therefore the Italian state) was responsible for the absence of his lawyer.

In the ECHR's view the error was not rectified by appointing a third lawyer on the day of the hearing. The lawyer who was designated on the spot as the officially-appointed lawyer was acquainted neither with the case-file nor with his client. In addition, he did not have the requisite time to prepare himself. Hence, the applicant did not have the benefit of a defense that was 'practical and effective' as required by Article 6 (3) (c).

Due to the fact that by the time the problem became known to the Board the defendant had already left the country, no further steps were taken in the case.

[94] Application no. 8966/80, Judgment of 9 April 1984

6. Recommendations for the Reform of the Hungarian Ex Officio Appointment System

Based on the Program's experiences and the opinions received, the HHC also made an assessment on what problems the national introduction of such a system may raise and what the possible solutions may be. The results are presented in accordance with the functions underlined in Section 1.3.

6.1. Management function

The HHC still regards it to be of key importance that the task of selecting the defense counsel be performed independently from the investigating authority.

Although the Program's dispatcher service proved to be very efficient, to maintain such a system for the sole purpose of providing defendants with ex officio appointed counsels in criminal cases seems unrealistic due to the high costs that this would entail.

According to our concept, the central unit of the system to be developed should be the Justice Office, which – in addition to its present tasks related to legal aid in non-criminal matters and probation issues – would also perform the function of appointing defense counsels. The schedule could be established for 3, 6 or 12 months in advance by the Justice Office, based on the average number of appointments and the number of lawyers in the given region. The Justice Office would maintain a round-the-clock dispatcher service to which the police would indicate the necessity of appointment. The attorneys shall undertake to be available on their duty day, and

the Justice Office would have to notify them in accordance with a pre-set algorithm ensuring the even distribution of appointments.

If this mechanism cannot be financed due to its high costs, a solution may be that the police's role in appointing the lawyer is maintained but in a way that it shall have no discretion in choosing the defense counsel, but shall notify the lawyers based on a previously set schedule. The system would be the same as the one described above with the difference that instead of notifying the dispatcher service of the Justice Office, the police would directly notify the lawyer based on a duty schedule that would still be determined by the Justice Office. (A similar method is applied in the Netherlands. Here the Legal Aid Boards determine the duty schedule for 3 or 6 months in advance. Depending on which of the five Legal Aid Boards he/she belongs to, the on-duty solicitor shall be ready so that the police can notify him/her via fax or telephone if there is a client, or he/she has to phone the police station every three hours to ask whether he/she needs to visit the station. Another characteristic feature of the Dutch model is that the defendant has the right to choose his/her defense counsel. This means that the on-duty solicitor has to contact the client at the police station and shall carry out all the urgent tasks, but if the defendant wishes to have another lawyer provided by the legal aid system, the on-duty solicitor shall notify this other lawyer as soon as it is possible.[95])

As dr. Tamás Matusik, trainee judge at the Metropolitan Court raised at the Closing Conference, the appointment of liquidators and receivers in liquidation procedures raise structural problems that are similar to the issue of appointment performed by the investigating authority. Since liquidation procedures can concern significant financial interests, impartiality and also the pretence thereof need to be guaranteed in a systemic manner. To this end, Decree 14/2002. (VIII.1.) of the Minister of Justice on the Rules of Judicial Case Administration claims[96] that the liquidator and the receiver shall be chosen through computer program. The program selects the liquidator and the receiver on a random basis. The defense counsel could also be appointed in this way, the computer program is already in place, with some amendments it could certainly be adapted to the purpose.

[95] Presentation at the Closing Conference by Peter van den Biggelaar, Executive Director of the Legal Aid Board in 's-Hertogenbosch

[96] Art. 63 Par. (3)

As it was described in Section 5.6., the idea that appointments should be done by the Justice Office is supported by the Hungarian Bar Association, the Ministry of Justice and Law Enforcement and – upon certain conditions – the Supreme Court. Furthermore, although the NPH does not regard it as necessary, certain police leaders also find such a reform plan acceptable. The representative of the Legal Aid Service of the Justice Office said at the Closing Conference that the service is willing to take over the task if the conditions are guaranteed. We believe that the agreement of the stakeholders is very important for creating the necessary political support.

Another conclusion concerning the appointment function is that the rules of notification should also be changed. If the investigating authority sends a fax about the appointment, as it does at present, interrogations taking place during the night or in the weekend will continue to be performed in the absence of a defense counsel, as it may not be expected from the attorneys to stay in their offices for 24 hours on their duty day. Therefore, there should be an obligation on the part of the investigating authority to also attempt to contact the appointed lawyers via telephone.

In order to create a balance between the defendant's right to defense and the interests of the investigation, the suggestion of the 8th District Police Headquarters concerning the setting of a maximum time the investigating authority shall wait between notifying the lawyer and starting the interrogation seems to be an acceptable solution, as long as the time limit is realistic. This means that these time limits shall differ according to location and time of the day, so the setting up of such a system requires further countrywide data collection.

6.2. Quality control

The Program's system (in which the Model Legal Aid Board monitors the quality of the attorneys' performance on a monthly basis) is very efficient, however, it is not a feasible solution on a national level. Such close quality control is very time consuming (and therefore also expensive) plus it would put a severe administrative and reporting burden on the attorneys.

The monitoring of the quality of the work of ex officio appointed lawyers could be performed by a two-level system.

The first level would be a more formal type of control, which does not require extensive knowledge of the field. This would be based on monitoring whether the

ex officio appointed counsel participated in all (or most) of the procedural acts (interrogations, confrontations, presentation of the case files, court hearings) where his/her presence was possible. This type of control could be performed by employees of the Justice Office.

The second level of control would be performed by a professional board operated by the Bar Association and consisting of attorneys. Based on the solution suggested by dr. Balázs Rozgonyi, one of the lawyers participating in the Program, it would be possible that regular (e.g. annual) inspections could be performed in the following manner: both the attorney and the monitoring board could choose a set number of cases, where the attorney acted as an ex officio appointed defense counsel. The evaluation of the given lawyer's performance would be based on the inspection of the files of these cases. If the board regards the performance unsatisfactory, the attorney would be removed from the list of lawyers who can be appointed. As we pointed out above, this sanction would only have a deterring effect if only those lawyers could act as retained lawyers in criminal cases who are included in the list of ex officio defense counsels.

The disciplinary function of the Bar Association would remain as a third level for cases of outstanding negligence.

There should be a link between the two (three) levels. If during the inspection of the files the Justice Office detects that the lawyer was absent from the majority of the procedural acts, it could initiate the action of the monitoring board, or (in extreme cases) file a disciplinary complaint with the Bar Association.

With regard to the fears concerning the infringement of the independence of attorneys, the HHC finds the arguments set forth at the Closing Conference by dr. Tamás Matusik, trainee judge at the Metropolitan Court convincing and reassuring. He stated that although the principle of judicial independence is set out in both the Constitution and the laws on the judiciary, the evaluation of the work performed by judges is mandatory under the law.[97] The evaluation is performed by other judges on the basis of cases that have been closed down, so the possibility of a violation of judicial independence does not arise. In our model, the assessment of the performance of attorneys would be conducted in a similar manner (by other attorneys and on the basis of cases that have been finished), so no threat of violating the independence of the legal profession would be in place.

[97] Act LXVII of 1997 on the Status and Remuneration of Judges, Art. 47 Par. (1): The work of the judge shall be evaluated in the intervals and on the basis of conditions defined by this law

It would mean an important step towards the performance of a general quality control function if the Justice Office was vested with the task of appointing and paying lawyers, and performing a formal control over the attorneys' attendance at procedural acts. This would make it possible to create a data base from which the number and costs of cases as well as the percentage of attendance could easily be established.

6.3. Budgetary function

The first important principle should be that all payments within the system should be done by a single entity. The present solution (whereby payments are performed by both the investigating authority – through the Bar Association – and the courts) should be terminated, because it makes it impossible to gain reliable data about the real costs of the system. The single entity could be the Justice Office.

Payment based on an hourly fee and regular report of the work performed by the attorneys requires an enormous amount of administration. Furthermore, to monitor whether the reported number of hours is realistic, an extensive knowledge of the criminal practice is required. Therefore, to efficiently perform this task, highly qualified staff would be needed, which would further increase the costs of the system.

Verification of the hours by the authorities is not a fully satisfactory solution if we want to pay for activities not acknowledged in the present system (e.g. preparation for trial, writing petitions, consultation with defendants who are not detained).

Two solutions seem possible in this regard. The first one is the Dutch solution, whereby a fixed and generally defined number of hours is attached to each case-type, and some additional hours can be required for "irregular" activities (for instance, travel exceeding 60 kilometers). An important element of the system is that the lawyer has the possibility to request payment based on the exact number of hours, provided that the hours spent on the individual case exceeds the triple of the number of hours fixed for that particular case-type.

To set up a typology of criminal cases based on which a lump sum could be defined for each case type would require extensive data collection from the files of ex officio appointment cases already closed down. It also may not be easy to acquire the agreement of professional circles.

Another solution is to combine the two systems. Procedural acts could be paid on the basis of the verification of authorities, and at the end of the given case, the lawyer could ask for a lump sum to cover his/her additional activities (preparation, petitions, etc.). If the Justice Office has doubts about how realistic the sum is, it could require the lawyer to submit different materials to substantiate the claim.

Due to the fact that costs are also difficult to verify (e.g. what percentage of a law firm's telephone costs occurs in relation to a given case in a month), the lump sum solution seems to be a better one in this regard as well. Based on the example of the agreement between the Budapest Bar Association and the Budapest Police Headquarters (see under Section 1.3.), a 30 percent addition to the hourly fees, seems to be an acceptable compromise.

As dr. Pál Oswald said at the Closing Conference on behalf of the Legal Aid Service, the system of lump sums has proved to be successful in administrative and extra-judicial legal aid with regard to both the required number of hours and the reimbursement of costs. He said that the administrative burden related to this solution is also not unbearable.

In our view, the solutions outlined above would make the redressing of the most important structural problems of the ex officio appointment system possible even within the present organizational and financial framework.

At the same time we wish to draw attention to the data presented at the Closing Conference by the head of the Dutch expert delegation and Executive Director of the Legal Aid Board of 's-Hertogenbosch, Peter van den Biggelaar. According to a report published by the European Commission for the Efficiency of Justice, in 2004 Hungary was in the 8th and 9th place among European countries with regard to the annual budget spent on the prosecution system and on all courts (without legal aid) respectively (per inhabitant as percentage of the per capita GDP), whereas with respect to (estimated data on) legal aid, the country was on the 32nd place, followed only by Azerbaijan, Malta, Greece and Armenia.[98]

The reform of the system requires the elimination of this discrepancy in the budget of the justice system, especially because effective legal aid can lead to shorter proceedings, and a decrease in the number and length of pre-trial detentions. This in turn can produce a saving in the justice budget that can create the resources for the setting up and operation of the new system.

[98] European Judicial Systems, edition 2006 (2004 data). Council of Europe, 2006, Belgium, pp. 23, 27 and 31.

Appendix

The implementation of the Model Legal Aid Board Program required devoted work from a number of people to whom we would like to express our gratefulness.

► **From the Hungarian Helsinki Committee**

Anikó Gál;
dr. András Kádár;
Dóra Németh;
dr. Balázs Tóth;
dr. Edina Vinnai.

► **From the Netherlands Helsinki Committee**

Jos Kösters;
Raymond Swennenhuis;
Kirsten Wiemers.

► **Members of the Board**

dr. Ákos Farkas (University of Miskolc);
dr. Tamás Fekete (Budapest Bar Association);
dr. Edit Juhász (Ministry of Justice and Law Enforcement);
dr. András Kádár (attorney at law);
Ferenc Kőszeg (Hungarian Helsinki Committee);
dr. Mihály Tóth (Pázmány Péter Catholic University);
dr. László Zeke (attorney at law).

► **Members of the Dutch expert delegation**

Peter van den Biggelaar;
Marcel de Graaf;
Ger Huijer;
Piet Huisman;
Marcel Janssen;
Guido Schakenraad;
Peter Wagenmaker.

► **Participating attorneys**

dr. Ágnes Baki;
dr. György Ágoston Benkő;
dr. Ádám Békés;
dr. Krisztina Blázy;
dr. Nelly Borsai;
dr. Ilona Buzás;
dr. János Czövek;
dr. Ibolya Csete;
dr. Bernadette Deák;
dr. József Dunai;
dr. István Egyed;
dr. Sára Éliás;
dr. István Falcsik;
dr. László Gál;
dr. Anetta Gesztesi;
dr. Annamária Halászné Hetesi;
dr. Mária Róza Horváth;
dr. Klára Illés;
dr. Rita Kamarell;
dr. Zoltán Kiss;
dr. Éva Koczka;
dr. Tibor Kovács;
dr. Erzsébet Kőfalvi;
dr. Gyöngyvér László;
dr. Erika Makkainé Fóti;
dr. Péter Margitics;

dr. András Medgyesi;
dr. Klára Molnár;
dr. László Molnár;
dr. István Nagy;
dr. Viktor Nagy;
dr. Ágnes Némethné Demeter;
dr. Balázs Rozgonyi;
dr. Katalin Sánta;
dr. István Svéda;
dr. Lajos Szendrői;
dr. András Tinics.

► **The personnel of the Police units participating in the Program**

Personnel of the 6–7th District Police Headquarters;
The 8th District Police Headquarters;
The 13th District Police Headquarters;
The Department of Inquiry of the Budapest Police Headquarters; and
The Department of Investigation of the Budapest Police Headquarters.

► **Members of the dispatcher service**

dr. Anett Csiki;
dr. Péter Honyek;
Ágnes Gosztonyi;
Miklós Kékesi;
Balázs Vid;
Zoltán Virág.

► **The speakers of the Round Table and the Closing Conference**

dr. János Bánáti (President of the Hungarian Bar Association);
dr. Gergely Bárándy (Member of Parliament);
dr. Árpád Erdei (constitutional judge);
dr. Zoltán Lomnici (President of the Supreme Court);
dr. József Petrétei (Minister of Justice and Law Enforcement);
dr. Erika Plankó (Ministry of Justice and Law Enforcement);
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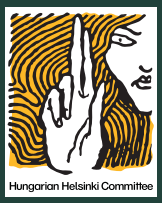
Hungarian Helsinki Committee