I. Introduction

1. These written comments are submitted by the European Roma Rights Centre in accordance with permission to intervene granted by the President of the Chamber pursuant to Article 36(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

2. This intervention addresses the degree to which freedoms guaranteed under Article 11 of the Convention can be legitimately restricted to protect the rights and freedoms of members of minority communities. It focuses on the way in which discrimination – and in particular racism – is considered in the context of a democratic society, in relation to Article 11(2) and/or Article 17 of the Convention. It also recalls several positive obligations by which states are to protect against discrimination and various forms of racial hatred. It also examines the situation of Roma – broadly and in Hungary – which is also pertinent to an evaluation of democratic values and in the narrower consideration of restrictions under Article 11(2), in particular for the protection of rights and freedoms of others.

3. Within this framework, the intervention sets out a considerable body of international and regional human rights law, non-binding regional guidelines and jurisprudence of the European Court of Human Rights (the Court) which indicates the following principles should be taken into account when considering restrictions to Article 11 freedoms:

   a) combating racial discrimination is of vital importance given the foundational nature of equality in democratic society;
   b) racial and ethnic minorities, such as Roma, are to be afforded special protection within the framework of the Convention, including the protection of their rights under Article 11(2).
II. Racism in a Democratic Society

4. Article 11 protects freedom of assembly and association to be restricted only in the context of what is necessary in a democratic society. The following demonstrates the extent to which international and regional norms consider discrimination, and racism in particular, to be contrary to the fundamental principles of democratic society in the context of respect for freedoms of expression, assembly and association. In this regard, the Court has noted that restrictions under Article 11 must also be considered in light of Article 10, and the Article 10 jurisprudence cited below is noted insofar as the principles under review are similar in context of both Articles.¹

5. Several of the positive obligations cited in this section are also informative in interpreting and applying permissible restrictions under Article 11(2), particularly of protection of rights and freedoms of others and most obviously where Articles 3, 5, 8 and 14 are engaged.

International and regional human rights law and non-binding regional guidelines on combating racism

6. Restrictions similar to those set out in Article 11(2) exist in all international and regional human rights instruments in which freedoms of assembly and association are enshrined.²

7. Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) in particular are preceded by Article 20 which imposes an explicit positive duty upon states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. This imperative has been considered by the Human Rights Committee to justify a restriction in the context of freedom of expression in the case of Faurisson v France,³ and may be considered applicable mutatis mutandis in Article 21 and 22 cases.

8. Notwithstanding the importance of expressive freedoms, the strength of protections afforded in international law against discriminatory / racist organisations is best illustrated by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination⁴ (ICERD), which requires that: “State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote

¹ United Communist Party of Turkey v Turkey [GC], no. 19392/92, 30 January 1998, para. 42. See also: Ezelin v France, no. 11800/85, 26 April 1991, para. 37
³ Decision of 8 November 1996, Communication No. 550/1993
racial hatred and discrimination in any form” and imposes upon State Parties the duty to adopt “immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”. However, it goes further and requires State Parties to criminalise “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” and “declare illegal and prohibit organizations, and also organize and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.”

9. Similarly, the European Commission on Racism and Intolerance (ECRI) has called for the criminalisation of statements “inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group”. ECRI further advises that states, “[i]n conformity with the [aforementioned] international obligations, take measures, including where necessary legal measures, to combat racist organisations – bearing in mind the fact that they can pose a threat to the human rights of minority groups – including banning such organisations where it is considered that this would contribute to the struggle against racism”. ECRI General Policy Recommendation No. 13 (2011) calls for states “to condemn all public discourse which publicly incites direct or indirect discrimination, hatred or violence against Roma”.

10. The CoE Framework Convention for the Protection of National Minorities (FCNM) requires State Parties “to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”

11. The OSCE/ODIHR Venice Commission Guidelines on Freedom of Peaceful Assembly also highlights that those who advocate “national, racial or religious hostility [that] constitutes incitement to discrimination, hatred or violence” may forfeit the protection of their expressive rights under the ECHR and the ICCPR.

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6 Ibid., page 4
8 Council of Europe Framework Convention for the Protection of National Minorities, adopted 1 February 1995, Strasbourg, European Treaty Series No. 157, Article 6(2)
10 “While expression should normally still be protected even if it is hostile or insulting to other individuals, groups or particular sections of society, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.
Protection of democratic values under the Convention

12. The Court has also established a clear link between the Convention, democracy and the importance of equality. The Court has defined “tolerance, social peace and non-discrimination” as basic values protected by the Convention and affirmed that “it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations”. In Gündüz v Turkey, the Court stated:

“Having regard to the relevant international instruments [...] and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”

13. The Court has further established that organisations with “undemocratic” aims or who use “undemocratic” means will not come within the scope of Article 11 protection. In the case of Refah Partisi the Court lays down a threshold test for associations seeking the protection of the Convention. The two fundamental conditions are that (i) the means used “must be legal and democratic”, and (ii) any proposed change “must itself be compatible with fundamental democratic principles”. In the case of Herri Batasuna and Batasuna v Spain, the Court reiterated that political parties can only use legal and democratic means to propose changes, which must be compatible with fundamental democratic principles. Consequently, the Court stated that “a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds.”

14. Further, the Court considered that in cases in which a policy is incompatible with the Convention and democracy, and in which the dangers from such policy are sufficiently established and imminent, a State cannot be required to wait for the implementation of concrete steps of such a policy before intervening. The Court stated that “[...] where the presence of such a danger
has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may “reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime”.\(^\text{17}\) In the Court’s view such a power of preventive intervention on the State’s part is also consistent with Contracting Parties’ positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction.\(^\text{18}\)

15. In several other judgments, the Court has confirmed that some expressions constituting hate speech are not protected by Article 10, by virtue of Article 17 of the Convention. For example, in the case of \textit{Norwood v UK} the Court relied on Article 17 and stated that “the general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention” and therefore held that deliberate incitement to racial hatred constituted an abuse of rights and was not protected under Article 10.\(^\text{19}\) The result was the same in \textit{Glimmerveen and Hagenbeek v the Netherlands} in which the Commission declared that the applicants (members of an extreme-right party advocating for a racially-pure population and the removal of all non-white people from the Netherlands) could not rely on the protection of Article 10.\(^\text{20}\)

### III. Protection of Ethnic Minorities

16. Among the justifications set out in Article 11(2) for restricting the right to freedom of assembly and association is the “protection of the rights and freedoms of others”. It is submitted here that in assessing the legitimacy of any restriction of Article 11 rights, particular regard should be had to the importance of safeguarding the rights and freedoms of vulnerable minorities, such as Roma.

**Special protection of Roma under the Convention**

17. The Court has established that discrimination on account of a person’s ethnic origin is a form of racial discrimination. In view of its perilous consequences it is particularly invidious and requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence.\(^\text{21}\) The vulnerability of the group against whom discrimination takes place has been a factor in the Court’s analysis: the Court has established that Roma enjoy special protection under Article 14 of the Convention.\(^\text{22}\) In

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17 Ibid., para. 81. See also \textit{Refah Partisi}, above, para. 102
18 Ibid., para. 82
19 \textit{Norwood, above}
20 \textit{Glimmerveen and Hagenbeek v the Netherlands}, nos. 8348/78 and 8406/78, 11 October 1979, Decision on Admissibility
21 \textit{Nachova and Others v Bulgaria} [GC], nos. 43577/98 and 43579/98, para. 145, ECHR 2005-VII; and \textit{Timishev v Russia}, nos. 55762/00 and 55974/00, para. 56, ECHR 2005-XII
D.H. and Others v the Czech Republic, the Court reiterated that “the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.” This, more recently, was reaffirmed by the Court in Aksu v Turkey in which it was stated that “the Roma have become a specific type of disadvantaged and vulnerable minority [...] they therefore require special protection”. The Court had observed over a decade ago “that there is an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community.”

Protection of Roma in Hungary

18. The particular vulnerability of Roma as noted by the Court, is aligned with a wealth of opinions from several international and regional monitoring bodies and non-governmental organisations. Such opinions have also mapped the increasing precariousness of the situation of Roma in Hungary in particular.

19. In the past few years, international monitoring bodies and national non-governmental organisations have expressed particular concerns about the rise in anti-Roma rhetoric and racism among extreme political forces and

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23 D.H. and Others v the Czech Republic [GC], no. 57325/00, 13 November 2007, para. 181
24 Aksu v Turkey [GC], nos. 4149/04 and 41029/04, 15 March 2012, para. 44, See as well: Muñoz Díaz v Spain, no. 49151/07, 8 December 2009, para. 60
25 Chapman v the United Kingdom [GC], no. 27238/95, para. 93, ECHR 2001-I
physical violence against Roma in Hungary. In particular, in his report on Hungary, Githu Muigai, United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance expressed its deep concern “at the growth of paramilitary organizations with racist platforms which target Roma […]”. 29

20. Thomas Hammarberg, then CoE Commissioner for Human Rights, in a letter addressed to the Prime Minister of Hungary expressed grave concern about “the observed rise of extremism, intolerance and racism which has been specifically aimed at members of the Roma community […]”. 30 In his report the Commissioner noted the rise of hate speech and antigypsism being exploited by extremist groups. 31

21. Similarly, in its report on Hungary ECRI noted that “there has been disturbing increase in racism and intolerance in public discourse in Hungary.” 32 In its Conclusions on the Implementation of the Recommendations adopted in December 2011, ECRI noted “[b]earing in mind the possible links between hate speech and racist acts, it considers this situation especially worrying in a context where the overall climate appears to have become increasingly intolerant and violent racist attacks, targeting Roma in particular, have occurred.” 33 The Advisory Committee of the FCNM in its Third opinion adopted in 2010 also noted the particularly intolerant climate towards Roma in Hungary and the “worrying rise in intolerance and racism, chiefly aimed at Roma”. 34

22. Finally, during a field assessment in June/July 2009, the OSCE/ODIHR expressed its concern about “the formation and development of a political movement that has openly voiced extreme anti-Roma attitudes and used its

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33 European Commission Against Racism and Intolerance (ECRI), Conclusions on the Implementation of the Recommendations in Respect of Hungary Subject to Interim Follow-up, 8 December 2011, page 5., available at: https://wcd.coe.int/ViewDoc.jsp?id=1892255&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=FFC679
paramilitary Hungarian Guard organization to induce fear among Roma and, at the same time, to gain public support.”

Budapest, 11 July 2012

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