VEŘEJNÝ OCHRÁNCE PRÁV

I.

Report for Second Quarter 2010

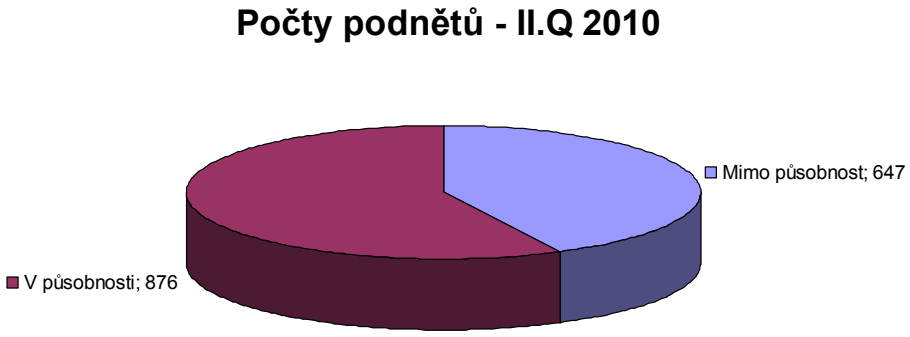
Information provided by the Deputy Public Defender of Rights

in accordance with the provisions of § 24 Paragraph 1 a) of Law No. 349/1999 Coll., on the Public Defender of Rights, as subsequently amended (hereafter simply Public Defender of Rights Act)

for the period of 1 April to 30 June 2010

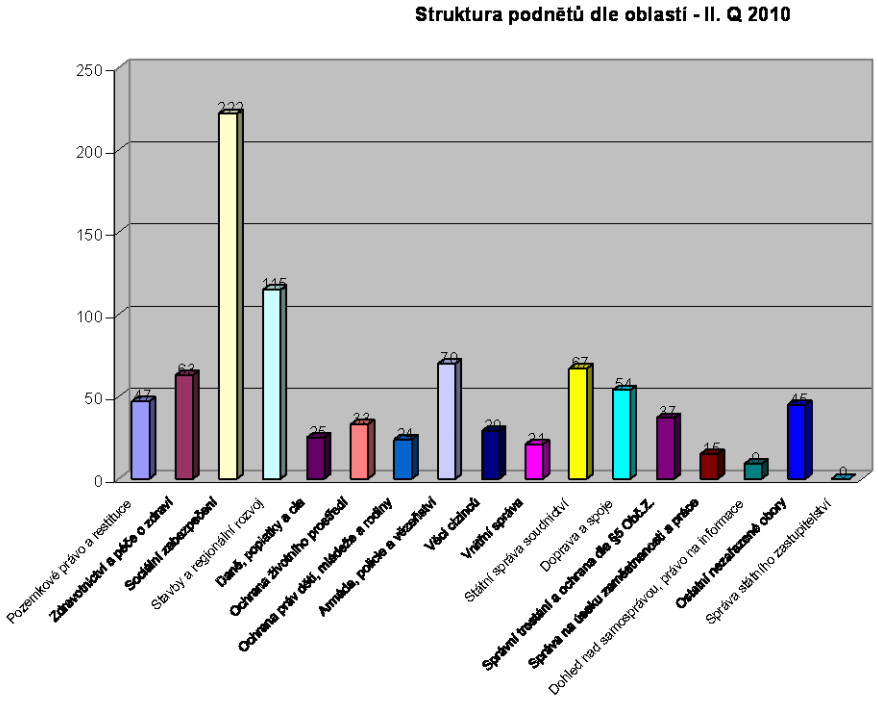
The Deputy Public Defender of Rights (hereafter simply "*Deputy Defender*") hereby provides the Chamber of Deputies of the Parliament of the Czech Republic with information regarding her work and activities during the period in question and also informs the members about the current state of public administration based on experience acquired in resolving cases. In terms of its content, this report follows on from the information about the Defender's activities during the first quarter of 2010.

A. General information regarding the work of the Public Defender of Rights

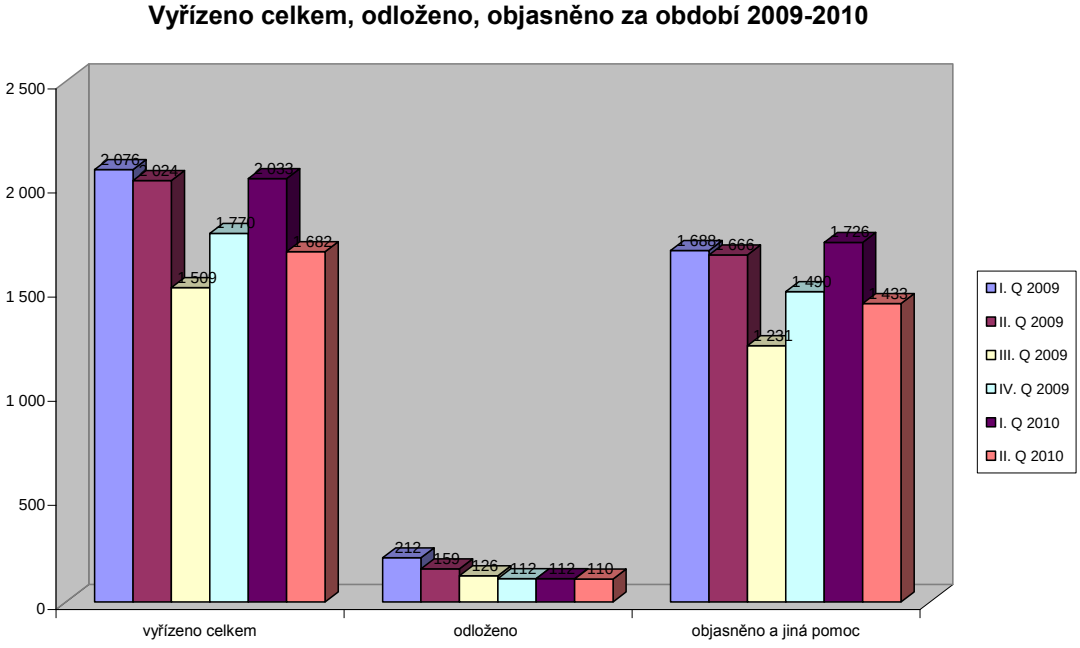


Number of cases received and processed

During the second quarter of 2010 the Deputy Defender received a total of 1523 cases, 876 (57 %) of which fell within the legally defined authority of the Public Defender of Rights and 647 (43 %) were outside the scope of that authority.

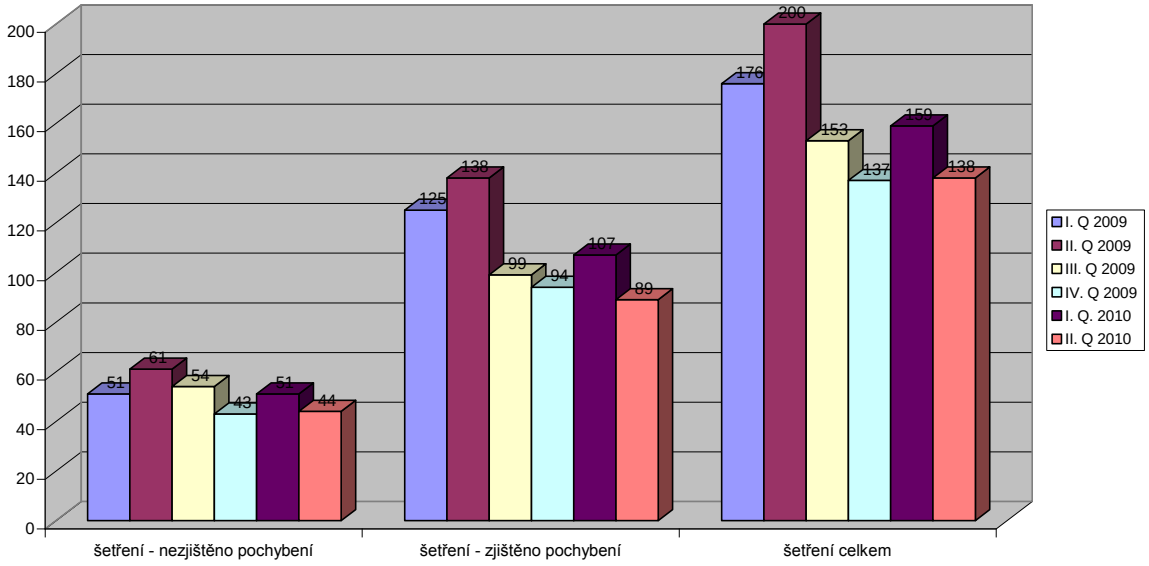


The structure of the cases received changes only slightly during the period in terms of the legal aspects of the cases. The most frequent are long-term cases relating to **social security** (222), particularly in matters of pensions and the provision of social benefits. In the second quarter of 2010 the second most frequent group of cases related to **buildings and regional development** (115), most of which concerned planning inquiries, building permits, and approval proceedings. In third



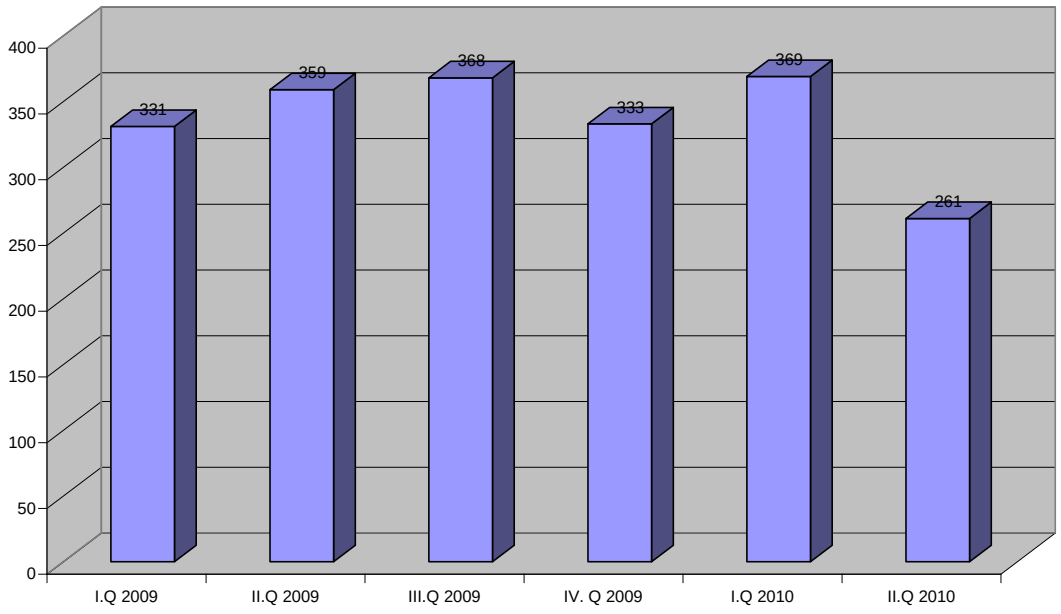
place were cases regarding the **prison service** (70). The most cases from outside

Počty šetření za období 2009-2010



the Defender's sphere of authority are criminal cases (proceedings of crime-related bodies) and civil rights (e.g. distraints and issues of rented housing).

Vývoj počtu osobních podání od roku 2009



During the first quarter of 2010 the Deputy Defender dealt with 1682 cases. Her investigations found that in 89 cases (64 %) an office was at fault.

In the period in question, the appointed lawyers of the Office of the Public Defender of Rights also personally registered cases brought in by claimants who visited the Office of the Public Defender of Rights. During the second quarter of 2010

the Defender's office was visited by 261 claimants in person to complete claims forms or to acquire information or basic legal advice.

B. Generalised findings

In this part of the quarterly report the Deputy Defender would like to inform the legislators about her findings in general and about the enforcement of the special powers granted by the Public Defender of Rights Act.

I. Right of the Defender to submit recommendations on legislation in accordance with the provisions of § 24 Paragraph 1 c) of the Public Defender of Rights Act

1) Comments on the amendment to the Arbitration Proceedings Act and on the enforcement of arbitration awards

In relation to the material presented, the Defender stated that he does not consider it as a proposal which could effectively protect the consumer against any possible misuse of arbitration proceedings to the detriment of the consumer. The Defender believes that the only truly effective solution which, under the current arbitration proceedings system, could prevent the mass "privatisation of justice" in the case of contracts concluded between the consumer and an entrepreneur, would be a proposal which precludes the option of arranging an arbitration clause in all forms of consumer contracts (for a similar case, see the provisions of § 53 Paragraph 4 r) of the Slovak Civil Code [Law No. 40/1964 Coll., as subsequently amended]). This is the only way to ensure that the rights of the weaker contracting party are protected. Not even modifications to the supervisory mechanism would eliminate what the Defender claims is the basic problem with the Czech arbitration system, i.e. that it does not allow for an appraisal of the merits of matters ruled upon by the arbitrator, thus rendering it inapplicable for consumer relations (being inconsistent with the specified EC Directive).

2) Comments on the amendment to the Act on Mining, Explosives, and the Czech Central State Office for the Mining Industry

On the basis of information acquired through his investigations into individual cases, the Defender repeatedly referred to the fact that the mining legislation is now outdated and does not adequately respect the rights of owners of land affected by mining operations. Several times in the past the Defender has warned of the need to modify the way in which property that is affected or at risk of being affected is assessed (the state mining industry bodies see this risk as a qualified form of being affected) for the purpose of settling conflicts of interest in accordance with the provisions of § 33 of Law No. 44/1988 Coll., on the protection and exploitation of mineral resources (Mining Act), as subsequently amended. In this respect the draft bill did not make any positive changes. Within the framework of the comment procedure the Defender drew attention to the fact, amongst others, that the conditions under which the district mining authority is authorised to order the provision of mining rescue services are formulated only in general terms. The Defender also proposed that the wording of the provisions of § 17 Paragraph 2 of the Mining Act be changed back to how it was in the period between 1 January 2006 and 22 June 2006 (i.e. obliging mining organisations "*to submit*

agreements concerning the settlement of conflicts of interest with owners of properties affected in cases where the owners request such an agreement in writing."

3) Comments on the amendment to the decree of the Ministry of Employment and Social Affairs covering some provisions of the Social Services Act

The Defender stated that considering the need for the legislation and any changes thereto to be general, the proposed amendment seems particularly casuistic. Although he did not dispute the main aim of the amendment to the decree, which is to further specify the methods used to assess degrees of dependency in people under the age of 18, the Defender stated that the proposed changes may raise the question of whether or not the conditions set for all groups of disabled people are well-balanced. In order to ensure equality for those affected by the amended legislation, the optimal solution would be to apply the amendment only after a special analysis and after assessing the utility of the system and its impact on individual groups of disabled people. The proposed amendment, however, merely specifies the criteria in a more casuistic sense, which, when supplemented in a similar manner, may flood the medicinal assessment criteria with a casuistic list (compare the criteria for measuring glycosuria and acetone bodies in urine, measuring glycaemia, etc.) In some cases the Defender believes that the problem may only be resolved through methodical polarisation.

4) Comments on the draft regulations covering the selection of a candidate to serve as judge in the International Criminal Court

The Defender in relation to the adopted Regulations for the Selection of Candidates to Serve as Judges in the European Court of Human Rights (governmental resolution dated 26.8.2009, No. 1063), as amended by governmental resolution dated 14.12.2009 No. 1552, recommended the adoption of "uniform" regulations for the selection of candidates to serve as international judges, obviously with the legislation to differ to suit the individual supranational courts. According to the Defender, de lege ferenda can certainly be considered comprehensive and reliable material which would include the selection of candidates and other supranational institutions, including the aforementioned international courts, when the Czech Republic's obligation to propose a candidate stems from international commitments, while the conditions for the selection of candidates are defined in a similar manner.

5) Comments on the draft of the pragmatic plan for the Experts and Interpreters Act

With regard to this material the Deputy Defender stated that she agrees with the recommendations of the Justice Ministry. However, she considers the draft as a whole to be too general and, in some cases, ambiguous. What is lacking is draft legislation covering the assessment of the quality of the work performed by experts. The Deputy Defender believes that the list of experts and interpreters should be divided up into a public list and a non-public list. Records of offences committed by experts and interpreters should be included in the public list and not in the non-public

part. If experts and interpreters are to be authorised by ministerial appointment, the draft does not stipulate the ministers' obligation to appoint an expert/interpreter who complies with all the conditions. It is also unclear what is meant by administrative consideration in examinations of experts/interpreters. Does the proposal mean that the only decision in accordance with Part Two of the Administrative Procedure will the ministerial decision on failure to pass the examination? The explanatory memorandum, at least, should make it clear that the minister's decision will be impugnable in the Administrative courts. The basic propositions regarding the nature of the examination, which should be covered in greater detail by the implementary decree, should be incorporated in the law and also in the aforementioned explanatory memorandum. Examination results should be comparable and supervisable. The courts should have access to the register of expert appraisals of interpreting work.

II. Proceedings of the Constitutional Court in accordance with the provisions of § 69 Paragraph 2 of the Constitutional Court Act

1) Proposal of the Interior Ministry to abolish Article 3 Paragraphs 2, 3, 4 and 5 of the generally binding directive of the town of Chrastava No. 1/2009, on the local fee for the system of gathering, collecting, transporting, sorting, usage and removal of municipal waste

The Interior Ministry, in supervising the legality of municipal local government laws, came to the conclusion that Article 3 Paragraphs 2, 3, 4 and 5 of the aforementioned decree are in violation of the laws of the Czech Republic.

The claimant pointed out that these provisions contravene the provisions of § 14 Paragraph 1 of the Local Fees Act (Law No. 565/1990 Coll., as subsequently amended). The Ministry believes that although the municipality has the power to determine the amount of the fee, the generally binding decree does not empower it to increase the fee in cases where the obligation to pay the fee is not fulfilled in a due and timely manner. Increase of the fee is actually dealt with separately by the provisions of § 11 Paragraph 1 of the Local Fees Act and should be implemented by the municipal authority under delegated powers. Only the fee administrator, i.e. the municipal authority, may increase unpaid fees or unpaid portions of fees up to three times the sum, a step which it must decide upon in accordance with the Law on the Administration of Taxes and Fees (Law No. 337/1992 Coll., as subsequently amended).

The Defender did not concur with the legal opinion of the Interior Ministry and proposed that the Constitutional Court reject the proposal. In his statement he supported the provisions of the decree, while stating that in his view the decree passes the Four Steps Test performed by the Constitutional Court as part of the review of generally binding decrees. The authority granted by § 14 Paragraph 2 of the Local Fees Act, together with the demonstrative list of details the municipality can amend, permits the municipality to incorporate regulations covering the timely increase of the outstanding portion of the fee. According to the Defender, this procedure, in the context of specific increases adopted by the municipal authority of Chrastava, is sensible, foreseeable, and contributes towards legal certainty. In particular, the Defender, considering his experience with unfair treatment ("with favoured employees of the municipal authority" and "owners of recreational facilities who do not receive preferential treatment") in cases where fees are increased for

penalisation purposes, stressed the positive aspects of a fair approach adopted towards fee payers. Another positive factor is the information benefits to the addressees of legal obligations. In the Defender's opinion, the only weak drawback of the solution was the formulation adopted by the municipality of Chrastava, if it also uses the term "fee rate" for cases where penalties are increased and thus does not adequately react to the option to increase only that portion of the fee that was not paid in a timely manner. Yet these shortcomings can be overcome through the proper interpretation thus infer that in all cases it is only the outstanding part of the fee that should be increased. According to the Defender, strictness in the formulation of municipal authorities is not appropriate, especially when the legislators themselves are open to accusations of analogous ambiguous formulation.

In its verdict dated 29 June 2010, Ref. No. Pl. ÚS 9/10, the Constitutional Court rejected the proposal of the Interior Ministry and ruled that the decree passes the review Four Steps Test. According to the Constitutional Court, the municipality is entitled to incorporate regulations into a generally binding decree to cover penalty fee increases and that the municipal authority is then bound by such regulations during subsequent assessments. In accordance with the Defender, the Constitutional Court then stated that specification of the amount of the penalty in the decree in the desired way contributes towards the legal certainty of those bodies subject to legal obligations and makes the appropriate rulings foreseeable and fairer, as this minimises the risk of an unfair approach adopted towards fee payers when penalties are imposed or the level of penalties is being set.

C. Media presentations and communication with the public

In the second quarter of 2010 the Deputy Defender informed the public about her activities through the media and also through personal contact with claimants.

- During the period in question three **press conferences** were held. The aim of the April conference was to assess 2009 and to present the Defender's Summary Report for the Chamber of Deputies. Special attention was devoted to the recommendations made to the Chamber of Deputies regarding the legislation covering certain particularly serious problems. At the press conference in May the Deputy Defender presented her findings resulting from systematic visits to remand prisons. The topic of the June press conference was the activity of authorised inspectors, particularly legislative discrepancies which do not allow certificates issued unlawfully by an authorised inspector to be contested. The Deputy Defender also used the June press conference to highlight the poor situation in Šternberk Psychiatric Clinic and to inform the public about the unwillingness on the part of the clinic's management to rectify the inadequacies.
- In addition to **press releases** on the issues presented at the press conferences, reports were also published during the quarter providing information about the rules and conditions covering voting in the elections to the Chamber of Deputies for citizens in hospitals, social care institutions, prisons, etc. The Deputy Defender also drew attention to the fact that doctors

often issue confirmation of medical competency to drive to drivers over the age of 60 on invalid forms, also risking the imposition of a penalty.

- An important aspect of this presentation work was also in the form of **individual interviews and media appearances**. The Deputy Defender gave interviews and answered questions for Czech Radio stations (Radiožurnál, Čro6, Rádio Česko, and regional studios), Česká televize, TV Prima, and Nova. She was also a guest on the Studio 24 programme and Události a komentáře (Events and Commentary). There was great media interest, for example, in the publishing of the results of her investigation into the case of illegal buildings erected by the entrepreneur Oulický in the Ústí region. Interest was also shown in the visit of President Václav Klaus and his meeting with the late Defender JUDr. Otakar Motejl.
- During the 2nd quarter filming began for the sixth series of Případ pro ombudsmana (A Case for the Ombudsman).
- The Information Hotline of the Public Defender of Rights was used by a total of 1364 people. This was mostly for the provision of basic legal advice, general and specific questions regarding the Defender's sphere of authority, or questions about progress with the handling of claims.
- The Defender's website at www.ochrance.cz was viewed by 198 261 visitors during the period in question.

D. International relations, conferences, seminars

Meetings with foreign delegations

- Visit by representatives of the Bar Chamber of Armenia (3 June 2010, Brno)
- Meeting with the Austrian Ambassador (15 June 2010, Brno)

Conferences and seminars

- *Building Regulations* conference (27 April 2010, Brno)
- Seminar entitled *Visa Policy and Practice of the Czech Republic in the Context of the European Union. Quo vadis, visum* (16 June 2010, Brno)

E. Selected cases dealt with by the Defender during the period in question

In this report the Deputy Defender summarises the information about interesting or otherwise significant cases which may help to illustrate the legal spheres and diversity of cases she handled during the period in question:

I. Investigations instigated on the Defender's own initiative

1) Prices in prison canteens

At the request of the Defender the Pricing Policy Department of the Ministry of Finance (through the Finance Directorates) checked the prices in a total of four remand prisons and 7 prisons. The investigations confirmed the fact that the prices for goods on sale in prisons do not always correspond to those in the place where the prison is located (thus failing to comply with the provisions of § 31 Paragraph 2 of Decree No. 345/1999 Coll.). It is, however, necessary to take account of the relativity involved in comparing prices with retail outlets in the surrounding area. Obviously, a shop in a prison, which only has a limited number of potential buyers, cannot compete with the nearby supermarket in terms of pricing. On the other hand, this does not justify the excessively exaggerated prices in prison shops.

In several cases this was found to constitute a violation of the duty to provide information, for which a fine should be imposed in administrative proceedings. The Defender additionally requested a statement from the Pricing Policy Department of the Ministry of Finance.

2) Inspections carried out by the Municipal Council of the Capital City of Prague into the social and legal protection of children from the individual city districts of Prague; the publication of personal and sensitive data on children by the Children in Need Fund

After a personal meeting with the inspector of the Office for the Protection of Personal Data (hereafter simply "OPPD") in March 2010 and learning of the official standpoint of the Ministry of Employment and Social Affairs regarding the publication of photographs on the Children in Need Fund website, the Defender compiled a legal analysis in which he informed the Director of the Municipal Council of the Capital City of Prague (hereafter simply "MACCP") and the Minister of Employment and Social Affairs that to construe the legality of the publication of photographs of children on the Internet on the basis of consent granted by their legal representatives, without assessing the associated "substantive" circumstances, is an interpretation of the law which can be described as formalistic, mechanical, and entirely devoid of ethics. The parents of such children usually fail to comply with their duties as fully as they should and, in the Defender's opinion, the consent of such a parent to the publication on the Internet of a photograph of a child destined for foster care is in violation of good morals and clearly represents a conflict of interests between the parent and the child. Nor can this consent be granted by a body for the social and legal protection of children for the purposes of conflict custody, again because such consent conflicts with the child's interests. The Defender assumes that the principle should be that the

more sensitive and “personal” the data is, the narrower the group of potential recipients should be, i.e. only a clearly defined group of proven candidates for foster care. The general public should only have access to anonymous data, i.e. data which do not lead to a specific or specifiable child. A photograph of a child undoubtedly carries personal information which leads or may lead to a specific or specifiable child (it is sufficient if the child can be identified within a small group of people, such as classmates, friends, teachers, or tutors). A photograph of a child may also contain sensitive data (concerning ethnicity or disability), and thus it is not in line with the principles of good administration or the principles of the social and legal protection of children for bodies for the social and legal protection of children, in the capacity of guardians, to grant similar consent to the processing of personal data. The interest of legal representatives or guardians in publishing a photograph on the Internet a photograph of a child destined for foster care is not significant enough to violate the dignity of the child and one of his or her basic rights, i.e. the right to privacy. The status of the legal representative does not have absolute or unconditional priority over the status of the child. It is important to remember that the right to the protection of data is the right of the child, not the right of the legal representative who enforces the right. The Defender again asked the Director of the MACCP to issue a clear statement on how to proceed in initiating administrative proceedings with the Children in Need Fund in this case. The Defender also called upon the Chairman of the OPPD, having found that this office had not instigated administrative proceedings with the Children in Need Fund with regard to the violation of the Personal Data Protection Act, even though in the past the OPPD had stated that it would initiate proceedings. The reason for this is allegedly that the deadline for initiating the administrative proceedings had expired. The Defender asked the Chairman of the OPPD to explain the situation (the expiry of the deadline for initiating the proceedings) and to state how the OPPD interpreted the provisions of § 46 Paragraph 3 of the Personal Data Protection Act in relation to single and persistent cases of administrative tort.

3) Possible sanctions against unfair trading practices by second-hand car lots by the Czech Trade Inspection

The Deputy Defender decided, on the basis of findings acquired from cases brought by several claimants, to begin an investigation on her own initiative into the activity of the Czech Trade Inspection (hereafter simply “CTI”) in cases where a person had filed a complaint against a car lot which had sold a second-hand car. One particular problem with sales of second-hand cars is stating (declaring) the tachometer reading, which does not necessarily reflect the actual number of kilometres the car has done, something which consumers are not made aware of. In this case a statement was issued which expressed the opinion that if a consumer (buyer) approaches the CTI with a complaint about a second-hand car lot which has incorrectly stated the number of kilometres done or the tachometer reading, this matter should be investigated as a possibly unfair (misleading) trading practice. Information about the tachometer reading or about the number of kilometres a car has done is important information for the consumer, information which not only characterises the degree of wear and tear on a second-hand car, but also greatly affects the consumer’s decision as to whether or not to buy the car. In its inspection work the CTI should focus on the actual text of the purchase contract. If the car lot sells the buyer a car while declaring the tachometer reading and at the same time

promises that the condition of the vehicle corresponds to the actual degree of wear and tear and the number of kilometres the car has done, one may deduce that this is the actual number of kilometres the car has done. If these figures do not match and do not correspond to the actual number of kilometres the car has done – this is a violation of § 9 of the law (duty to provide information) on the part of the second-hand car dealer, but such conduct may also be classified and sanctioned in accordance with § 5 Paragraph 1 b) of the Consumer Protection Act as an unfair trading practice. Therefore, the seller (the second-hand car lot) should be penalised accordingly by the CTI in compliance with § 24 of the Consumer Protection Act. A statement on this matter has already been received from the appropriate CTI inspectors, stating that this issue has been discussed within the CTI and efforts will be made to apply its conclusions in the form of the appropriate supervision.

II. Investigations instigated on the basis of cases filed by claimants

1) Sanction for the destruction of a publicly-accessible special-purpose road

The Deputy Defender decided to compile a file of special importance on the problem raised by the mayor of a small municipality, who filed a case with the Defender objecting to the current legislation which prevents road management offices from penalising the destruction of publicly-accessible special-purpose roads. The case in question involved the ploughing of a cart track which was protected under Law No. 13/1997, the Roads Act, as subsequently amended, as a publicly-accessible special-purpose road. The road management office imposed a fine for this offence in accordance with § 42b Paragraph 1 a) of the Roads Act (unauthorised closure of a - accessible special-purpose road), as it considered the complete destruction of the road by ploughing to constitute the closure of the road. This ruling was confirmed by the appeal body (the Regional Authority of Hradec Králové), although was subsequently annulled by the Regional Court of Hradec Králové. Through cassation the case was subsequently passed to the Supreme Administrative Court, which in the case under Ref. No. 9As 39/2009 (accessible at www.nssoud.cz) ruled that under the provisions of the law as cited herein the imposition of the fine was actually unlawful and rightfully annulled the Regional Court's ruling. The Supreme Administrative Court ruled that actual damage (destruction) of the road cannot be confused with its "administrative closure" in accordance with § 24 of the law. Therefore, the damage (destruction) of the special-purpose road cannot be classed as actus reus under § 42b Paragraph 1 a) of the Roads Act, which only allows sanctions to be imposed against breach of the law in the administrative closure of the road (e.g. in order to repair the road, etc.). The law also includes § 42b Paragraph 1 g), which explicitly prevents the imposition of sanctions against the damage (destruction) of a publicly-accessible special-purpose road, but only against damage (destruction) of a higher category of road. For these reasons the damage (destruction) of a publicly-accessible special-purpose road cannot be penalised. If the Roads Act obliges road management bodies to protect all categories of roads and provides a range of legal instruments for this purpose (see, for example, the possibility of removing unlawful fixed obstacles from all kinds of road, including special-purpose roads), this is evidently a legislative gap in the law, if it is not possible to penalise the complete destruction of (or damage to) a publicly-accessible special-purpose road. The Deputy Defender therefore referred the matter to the Ministry of Transport with the aim of informing the ministry on a general level about the problem of the inadequate

legislation, proposing a possible solution, and obtaining the ministry's standpoint on a possible amendment to the legislation.

2) Issue of a ruling on the registration of a social service

The Defender investigated a case where a special hospice-type of bed facility (hospice), besides being a medical facility (19 beds), also provided – duly registered and separate – a residential respite care social service (11 beds). Therefore, in order for the hospice to be able to apply for a grant to enable more extensive provision of social services, it applied for a change in the registration so as to have 19 hospice beds registered for respite care. It planned to use these beds in the capacity of both a hospice and also as a social services facility. As a hospice defines its care for terminally-ill patients not only as medical care, but also as psycho-social care, and as the nature of its care can be classed as an activity stipulated by the law for respite care, it considered this procedure to be justified. The regional authority with the power to pass registration-related rulings rejected the application, although the reasons it gave were questionable. The Ministry of Employment and Social Affairs (hereafter simply "MESA") rejected the appeal, although after a notable delay.

The Defender's investigations found that there had been a four-month delay on the part of MESA, and rebuked the ministry. In his report on the investigations he particularly stated that it was possible for a single bed to be used by both a medical facility and a social services facility. According to the Defender, "even after detailed perusal of the wording of the Social Services Act it cannot be inferred that a certain type of residential social service would be provided only to someone who at that time is in a medical care bed. A new and certain step forward came in the form of the amendment to the provisions of § 7 Paragraph 2 by Law No. 206/2009 Coll., which acknowledged the entitlement to a contribution towards care, including for patients of a hospice-type bed hospital. This new amendment, however, has no impact on the provisions of the law which directly relate to social services (the provisions of § 32 and following). No special services is attributed to hospice care, and a hospice is not accounted for in the same way as a social services facility. The hospice may proceed like any legal entity and apply to register for a social service, but the hospice bed was not adopted into the social services system." Therefore the Defender backed the procedure adopted by the regional authority and the Ministry on principle, i.e. the rejection of the registration application.

3) Removal of a child from parental care on the basis of a preliminary measure

The Defender performed an urgent investigation into a case he received and found serious deficiencies in the procedure adopted by the Body for the Social and Legal Protection of Children of the Municipal Authority of Prague 13 (hereafter simply "BSLPC"), in relation to the draft of a preliminary measure in accordance with the provisions of § 76a of the Civil Court Rules of Procedure covering the removal of a child from parental care. Although a crisis had clearly arisen in the family in that the mother had not responded in a suitable manner to the educational problems of her underage child, it was not appropriate to resolve the situation through such a serious intervention. The conduct of the mother was not adequate and the ambulance service doctor stated that she was in an acutely psychotic state and needed to be taken to hospital. However, as the Czech Police Force and the BSLPC were intervening, the child's father arrived at the residence and stated that he was able to

take care of the child. This was also confirmed by the doctor. The case was no different even on the grounds of previous information from the BSLPC which stated that there had been conflicts in the family in the past. All the more so, when from the records it became apparent that this was a good deal of information which the BSLPC practically neglected to take into account, except for a few unsuccessful attempts to investigation the situation in the household. However, even if these notifications were confirmed, without further confirmation it did not constitute grounds for removing the child from the care of its parents. In such a case the BSLPC has a range of means granted by the law for the social and legal protection of children to resolve the situation in the family in the interests of the child – interviews with the parents by social workers, recommending or ordering cooperation with a specialised consultancy centre, appointing a supervisor to monitor the child's upbringing, etc. In the case of underage children, the Defender stated that the conditions had not arisen for the situation to be resolved in accordance with the provisions of § 76a of the Civil Court Rules of Procedure, as proposed solely by the BSLPC, as despite the indisposition of the mother, the father was there and was undoubtedly able to assume care of the child at the time. The problems in the family should then be resolved, although with the BSLPC employing less drastic measures. Extreme steps to resolve family crises must be preceded by more moderate measures wherever possible. It is always necessary to carefully consider whether such intervention really is well-founded and essential.

4) Unlawful buildings in the Protected Landscape Area of České středohoří

In December 2009 the Defender began an investigation on his own initiative into unlawful buildings in the municipality of Moravany in the Protected Landscape Area of České středohoří (Czech Central Mountains). In March 2010 a report was published on this investigation. During April the Defender received statements from the appropriate authorities. The statement from the secretary of the Municipal Authority of Ústí nad Labem was delivered on 9.4.2010.

In a letter dated 21.4.2010 the Public Defender of Rights called upon the secretary to send the source materials in order to document the procedure adopted by the Ústí building office and the individual steps which it had taken since the publication of the investigation report. The Defender requested documentary evidence of whether and, if so, how the building office planned to continue with the proceedings to remove the unlawful buildings, including proof of whether it had already taken steps to check the usage of these unlawful buildings. On 18.5.2010 the secretary submitted a report which stated that the building office of the Municipal Authority of Ústí nad Labem was dealing with the case in accordance with the Building Act and related laws.

Taking account of the previous request of the Public Defender of Rights it was necessary to inform the authority that the information submitted was inadequate, as specific documents (notification of the continuation of proceedings, notification of the initiation of proceedings, building inspection report, etc.) were not provided to substantiate which specific steps had been taken by the building office since the publication of the investigation report. The Deputy Defender, who had taken on the case, therefore urgently requested that the Lord Mayor of Ústí nad Labem provide the aforementioned documentation to substantiate the procedure adopted by the building office.

5) Local referendum on a change to the municipal plan

At the end of 2009 the Mayor of Městys Dub nad Moravou asked the Defender for advice in the procedure adopted by the municipality of Věrovany in relation to a plan to quarry gravel. From the materials presented by the mayor in relation to this case it was apparent that in 2005 the municipality of Věrovany had concluded a contract of cooperation with the investor behind the plan; this contract obliged the municipality, amongst other duties, to incorporate the plan to quarry gravel into the municipal plan. On 10.10.2009 a local referendum was held in Věrovany on the question of whether or not the citizens of Věrovany wanted the municipality to support the construction of a gravel-pit within the cadastral territory of Věrovany, including a change to the municipal plan which would permit the quarrying of gravel in this territory. On the basis of administrative action the validity of the local referendum was dealt with by the Regional Court of Ostrava, which on 12.11.2009 issued Resolution No. 22 Ca 265/2009-68, which stated that the aforementioned local referendum was invalid.

One of the main reasons behind this decision was the Regional Court's finding that the local referendum was held in a case where the use of a local referendum was precluded by § 7 e) of Law No. 22/2004 Coll., the Local Referendums Act, as subsequently amended, as this matter should have been decided upon in special proceedings. According to the Regional Court, such proceedings are classed as special proceedings concerning the publication of a municipal plan as a general measure, and therefore a local referendum cannot be held in such a case. However, the Defender is aware of a similar resolution passed by the Regional Court in Prague dated 14.9.2009, Ref. No. 44 Ca 89/2009-31, where the aforementioned Regional Court dealt with the legal aspects of a local referendum in a case the subject of which was a municipal plan. In its ruling the Regional Court in Prague concluded that a local referendum was possible, provided that the preparation of the municipal plan was only in the preparation phase.

Taking account of the ruling of the Regional Court in Prague, whose conclusions differed from those reached by the Regional Court of Ostrava, the Deputy Defender, after weighing up all the source materials as well as the fact that a cassation cannot be filed against a Regional Court resolution in the case of a local referendum , while this is a fundamental issue from the viewpoint of the assertion of citizens' rights to participate in the administration of their municipality, decided to appeal to the presiding judge of the Supreme Administrative Court requesting that in the interests of unified decision-making on the part of the regional courts in the case in question, the court should proceed in accordance with the provisions of § 19 Paragraph of the Code of Administrative Procedure, according to which the presiding judge of the Supreme Administrative Court or the chair of the advisory board of the Supreme Administrative Court or the extended Divisional Court may, in the interests of unified court rulings on the basis of assessment of the legitimate decisions of courts, propose that the appropriate advisory board adopt the standpoint.

6) Görges – proposal for the annulment of a municipal decree

The claimant asked the Defender to submit a proposal to the Constitutional Court for the annulment of the generally binding decree of the municipality of Dobřany No. 2/2009, which specifies the time and place at which gambling machines

may be operated, as it is in contravention of the law. According to the Defender, the illegality arose from the fact that the purpose of the generally binding decree was not to protect public order in the town, but was to prevent entrepreneurial competition to existing gambling clubs (the decree defines an exhaustive list of “permitted” gambling clubs as identified by a trading firm of entrepreneurs instead of generally specifying places where gambling machines may not be operated). The claimant therefore filed a complaint with the Interior Ministry to examine the legality of the generally binding decree of the town of Dobřany No. 2/2009. The Supervisory and Inspection Department of the Interior Ministry concluded that the generally binding decree was not in contravention of the law. The Ministry interprets the positive designation of places where gambling machines may be operated in such a way that the Lotteries Act gives the municipality the right to regulate the operation of gambling machines in either a positive or negative way, and it is up to the municipality as to which form it adopts.

After collating the source materials from the ministry and the municipality, the Defender concluded that the Ministry was not at fault in its supervisory duties, nor did he see any reason for the enforcement of his special powers. Law No. 202/1990 Coll., on lotteries and other such games, as subsequently amended, in the provisions of § 50 Paragraph 4, empowers the municipality to issue a generally binding decree to independently rule that gambling machines may only be operated in the places and at the times specified by the decree, or to determine in which publicly accessible places in the municipality the operation of gambling machines is forbidden. On the basis of their statutory authority municipalities thus have the power regulate the places and times that gambling machines may be operated, thus restricting entrepreneurial activity in accordance with Article 26 Paragraph 2 of the Charter of Fundamental Rights and Freedoms. Regulation of the operation of gambling machines is conditional upon the municipality assessing the state of public order and adopting a form of regulation which is best suited to the local conditions. The municipality of Dobřany took a positive approach to the regulation of gambling machines when it issued a generally binding decree to determine the places where gambling machines may be operated and also defined specific addresses and buildings. The investigations showed that by means of the generally binding decree in question, the municipal authority of Dobřany is following a long-term plan to not support the establishment and operation of places with gambling machines anywhere within the cadastre of the town. The generally binding decree is only one of the measures which aims to achieve this plan and expresses the municipality’s actual goal of fundamentally restricting access to gambling machines by specifying places where such machines may be operated. Together with other, precisely defined preventive measures, the town is clearly demonstrating its desire to maintain public order in order to protect families, young people, and civil cohabitation. The municipal authority is acting in a transparent manner and the factual negative impact on the business of owners and operators of existing facilities and the business plans of the claimant cannot be considered discriminatory. The Defender closed the investigation without finding any fault on the part of the municipal authority.

7) Gambling machines versus similar games permitted by the Ministry of Finance

At the beginning of June 2010 the Deputy Defender began an investigation into the procedure and decision-making process of the Ministry of Finance regarding

permission for central lottery systems with interactive video-lottery terminals, electro-mechanical roulette machines, electro-mechanical dice, and multi-seat gaming facilities. The investigation focuses on the nature of these games (whether or not they can be classed as gambling machines) and whether the ministry, in permitting such games and approving the permanent placement of individual gaming facilities, has duly and appropriately applied the provisions of the Lotteries Act which affect gambling machines. The Deputy Defender was prompted to initiate the investigation particularly by justified doubts as to the legality of the ruling by which the ministry approved the placement of these facilities in sites where the operation of gambling machines is forbidden by the provisions of § 17 Paragraph 11 of the Lotteries Act or by a generally binding municipal decree, albeit directly affecting gambling machines. The towns of Chrastava, Františkovy Lázně, Bohumín and Hrádek nad Nisou later became involved in the case. A statement on the matter was also sent by the Municipal District of Prague 2. The reservations and disputes stemmed from the approach of the Ministry, as a result of which "prohibited" gambling machines are "replaced" by other (similar and even more hazardous) facilities, based on the claim that these are not gambling machines, but completely different games which are not affected by the regulations covering gambling machines.

8) Correspondence address and data box of a Czech citizen with permanent residency abroad

In a preliminary report on the results of her investigations the Deputy Defender rebuked the Interior Ministry (hereafter simply "IM"), stating that a Czech citizen with permanent residency in Sweden had not received access details to a data box immediately after the box had been set up. In response to the report, the IM stated that access details are sent by Česká pošta, s. p., which is only willing to deliver to countries in which it has contracted a service which operates in a similar manner to the "delivery into the hands of the recipient" service. The requirement for delivery into the hands of the recipient is stipulated directly by Law No. 300/2008 Coll. on Electronic Acts and Authorized Document Conversion, as subsequently amended, and Sweden is not on the list of countries to which Česká pošta, s. p. delivers into the hands of the recipient. The technical means by which access details are currently delivered is that the applicant may request that the original access details (which were actually never received) be rescinded and new access details be issued. New details are issued partially by email and partially in person to the applicant at the Czech POINT office (also available at particular Embassies). This procedure can be substituted by delivery of the details in a letter.

Although this solution is generally in favour of beneficiaries of state administration, the Deputy Defender disputed it with respect to the wording of the law and the definite "questionability" of the aforementioned list of countries compiled by Česká pošta, s. p., according to which access details can be delivered to Denmark, Norway and Finland, but not to Sweden. Yet information from the Embassy in Stockholm shows that Sweden has ideal conditions for the safe delivery of access details into the hands of the recipient. The rationale behind the configuration of the list of countries to which access details can be delivered is even more puzzling considering that it includes countries such as Afghanistan, Burkina Faso, Grenada, Georgia, Cameroon, Sierra Leone and Tuvalu, yet does not include EU member states (France, Ireland, The Netherlands, Poland, Greece, Slovenia, Spain, and Great Britain). It is important to mention that the delivery of access details is

governed by the administrative rules of procedure, which implies that for the purposes of delivering access details to a data box the IM should choose a postal service which is contractually obliged to deliver correspondence in compliance with the requirements of the administrative rules of procedure. The requirements of the administrative rules of procedure include delivery to physical entities in foreign countries. This also includes delivery into the hands of the recipient. The delivery problem extends beyond the scope of this case, as the administrative rules of procedure anticipates that other correspondence (such as summons, administrative rulings, etc.) will be delivered into the hands of recipients in foreign countries. Considering the current approach adopted by Česká pošta, s. p., however, it is not sure if this will even be possible, a fact which, in the 21st century and considering that physical entities now move all over the world (within the EU or beyond it) is wholly unacceptable. Therefore, in her concluding statement the Deputy Defender suggested that the IM assure the delivery of access details to data boxes to people residing in countries with which Česká pošta, s. p. has not concluded a contract for a system of delivery into the hands of the recipient.

In response to the Deputy Defender's statement the IM referred to documents of the Universal Postal Union. These show that Sweden does not assure the "delivery into the hands of the recipient" service when a consignment arrives from abroad. Despite this, Česká pošta, s. p. contacted the Swedish Postal Service requesting that it provide the "delivery into the hands of the recipient" service.

9) Sending cigarettes with non-Czech stamps into prison

Last year the Defender was contacted by a convict currently serving a sentence in Vinařice Prison. He complained that the Prison Service refused to provide him (and other prisoners) with cigarettes which his relatives and friends send him in the package he is entitled to receive (a 5 kg package twice a year). A statement from the governor of Vinařice Prison stated that as of 15.1.2010 the issue of cigarettes (tobacco products) in prisons was governed by Order of the Senior Director of Penology No. 1/2010. This order states that the Prison Service will only issue tobacco products with a Czech stamp to prisoners (the cigarettes in this case had a Ukrainian stamp). If tobacco products have a non-Czech stamp (or no stamp at all), they are sent to the appropriate customs office for inspection in accordance with § 115 of Law No. 353/2003 Coll. This prevents relatives from (legally) importing a limited number of cigarettes into the Czech Republic (the number of cigarettes depends on whether they are imported from EC countries or from third countries or sent by mail) without the need to pay customs duty, VAT, or excise duty. If packages were issued in this manner in all cases, in practical terms this would go against the logic and sense of exemption from tax and duty as defined by the Czech laws and the regulations of the European Community. In this case the Defender also contacted the General Director of the General Directorate of Customs. He, together with the General Director of the Prison Service of the Czech Republic, called upon the Ministry of Finance to issue a statement on the meaning of the term "import for personal consumption" to determine whether legally imported tobacco products (in limited quantities) can be distributed amongst friends and relatives.

10) Refusal to grant temporary residency

In 2009 the Defender was contacted by the lawyer of a client whose application for temporary residency was rejected on the grounds of a ruling by the Foreign Police Inspectorate of Teplice, a ruling which was also confirmed by the Foreign Police Service Directorate (hereafter simply "FPSD"). The claimant filed a case with the Interior Ministry to have the matter reviewed, but was unsuccessful. The claimant expressed objections to the application of ordre public against him as member of a Czech citizen's family (the claimant has been married since 2001 to a citizen of the Czech Republic). He objected to the fact that the ruling does not take account of the specific status of members of families of EU citizens and the practice of the European Court of Justice (hereafter simply "ECJ"); the same applies to the practice of the European Court of Human Rights as regards the law covering the protection of private and family life. According to the Deputy Defender, the claimant may make full use of the guarantees assured for the members of families of EU citizens by Directive 2004/38/EC of the European Parliament and Council dated 29.4.2004, on the right of EU citizens and their family members to freely move and reside in member states. It is true that *ipso jure*, a cross-border element is lacking for the direct application of this directive in the case in question. In national terms, however, the provisions of § 15a Paragraph 5 of the law covering the residency of foreigners render the status of members of families of Czech citizens equivalent to that of members of families of EU citizens. The member of a Czech citizen's family may thus make full use of the guarantees provided by the aforementioned directive for the free movement of the members of families of EU citizens as interpreted by the ECJ. This is clearly corroborated by the explanatory memorandum to amendment No. 161/2006 Coll. The materials provided by the FPSD show that the claimant had committed a crime in his failure to comply with an official ruling by continuing to reside in the Czech Republic despite having been forbidden to remain in the country. His crime did not result in any damage to property, nor did it harm anyone. Ten years have passed since the crime was committed. *Moreover*, this was not a violent crime, nor was it a particularly condemnable crime. The sentence imposed was at the lower end of the punishment scale at that time (3 months reduced from 2 years). In the interval of more than 10 years since the imposition of the last administrative expulsion the claimant had not committed any more crimes, nor had he violated any other laws. With these facts in mind, it is not possible to infer that the claimant represented "*the existence of a factual, actual and adequately serious threat to the fundamental interests of society*" (these conditions must be met cumulatively), or the threat of an "*exceptionally serious*" crime, as is stipulated for the application of ordre public by Supreme Administrative Court Ruling No. 5As 51/2009-68 ("*The Czech legislator … presumes … markedly more intensive intervention than the mere disturbance of public order as defined by the directive; it is therefore not possible to judge all crimes, but only exceptionally serious crimes.*"). In addition to this, the administrative bodies that decided on the case did not take account of the difficulties the wife of the claimant would have to face in Jordan if the family were forced to live there as the result of the refusal to grant the temporary residency permit. In this respect adequate account was not taken of the appropriacy of the ruling to reject the application for the temporary residency permit in relation to its impact on the family life of the claimant and his wife. In her conclusive report on the investigation the Deputy Defender appealed to the FPSD and the Department for Asylum and Migration Policy of the Interior Ministry.

11) Subtitling of television programmes

The case brought by the claimant focuses on failure to comply with the obligation stipulated by § 32 Paragraph 2 of the Television and Radio Broadcasting Act – the obligation to provide subtitles for a certain percentage of television programmes. Compliance with this obligation should not be enforced by the supervisory body – the Radio and Television Broadcasting Council (hereafter simply "RTBC") with reference to the ambiguity of the statutory provisions.

The Deputy Defender reviewed the case from the viewpoint of the Anti-discrimination Act and found that in the case of the formal interpretation of the provisions in question, this could constitute direct discrimination against people with disabilities. According to the Deputy Defender, the relevant provisions of the Television and Radio Broadcasting Act should be amended (she informed the RTBC, the claimant, and the Ministry of Culture regarding her conclusions). From the response of the RTBC it was evident that it supported the legislation incorporated in § 32 Paragraph 2 of the Broadcasting Act and it also identified other (related) problematic points. During May 2010 the Deputy Defender discussed this matter in person with the chairperson of RTBC. She also referred the case to the Ministry of Culture as the body sponsoring media legislation.

In its response to the Deputy Defender's letter, the Minister of Culture agrees with the legislation incorporated in § 32 Paragraph 2 of the Television and Radio Broadcasting Act and proposes that the obligations of broadcasters should be defined in the same way as they are defined for the support of European broadcasts (the percentual proportion of programmes relates to the overall broadcasting time, and does not include time allocated for advertising, teleshopping, etc.); this change could be implemented when the law is next amended.

F. The Defender's work in relation to the detention agenda

In the second quarter of 2010 the Defender informed the public of the results of his systematic visits to remand prisons and referred her conclusions and recommendations to the Justice Ministry and the General Prison Service Directorate. The Defender's basic recommendations particularly include the extension of open confinement, protection of convicts' sensitive data during medical examinations and investigations, assuring compliance on the part of young prisoners with their duty to attend school, reconstruction of exercise yards, or assuring adequate amounts of daylight in cells. The Defender repeatedly referred to the problem of inadequate prison capacity and the difficulties associated with this (overcrowding, lack of activity areas). She called upon the Justice Minister to begin talks aiming to exempt the Prison Service from its obligation to reduce the number of its employees each year.

The Defender also completed his series of systematic visits to the detention facilities for foreigners in Poštorná and Bělá Jezová and the reception facilities for foreign nationals in Zastávka near Brno and within Prague – Ruzyně international

airport. Systematic visits were also made to the prisons in Světlá nad Sázavou and Všehrdy, focusing on the conditions of imprisonment for juveniles.

In the second quarter of 2010 a series of systematic visits to police cells began. During the quarter-year a total of 58 cells were visited within 18 police departments with a total capacity of 80 people. These visits checked compliance with the new order of the Police Commissioner (issued in 2009), which incorporated changes in relation to, amongst other factors, the systematic visits to cells carried out by the Defender in 2006 and 2007.

G. Activity of the Defender in relation to protection against discrimination

Since 1 December 2009 the Defender has been involved in new work relating to protection against discrimination and is now the national institution for protection against discrimination (equality body). In the second quarter of 2010, in relation to protection against discrimination and the right to equal treatment, the Deputy Defender issued statements particularly on the following cases:

1) Discrimination against families with more children when beginning work in public administration

A claimant contacted the Defender claiming that the legislation covering the remuneration of employees in public services and administration (Governmental Directive No. 564/2006 Coll., on the salary scales of employees working in public services and administration, as subsequently amended) is discriminatory in that it places families with more children at a disadvantage.

The claimant was aiming to have the law amended so that the provisions of § 4 Paragraph 5 of the aforementioned directive did not set the upper limit at 6 years for including the amount of time spent on maternity leave and parental leave into the total length of time worked for the purposes of determining the pay scale of a job. She stated that she considered these provisions to be discriminatory (constituting indirect discrimination for reasons of sex, or for reasons of motherhood or fatherhood), while the law affected her personally, as with her four children she had spent a total of 12 years on maternity leave and parental leave. According to the wording of the directive, however, only 6 years of this time was counted when assigning her to a pay scale. In the opinion of the claimant it would be more appropriate if this time were not included at all, or if it were shortened as “non-vocational work” in a similar manner as defined by the provisions of § 4 Paragraph 3, i.e. to a maximum of two thirds depending on the degree of utility for the performance of the required work.

According to the claimant, through these provisions the Czech Republic is favouring parents with fewer children, as she believes that conversion into specific sums results in a loss of a thousand crowns a month. The claimant also sees the differentiation between parents based on the number of children they bring up as a problematic issue.

The Deputy Defender reviewed the case from the viewpoint of the Anti-discrimination Act and stated that there was no discrimination evident in the case in question. The legislation of the directive corresponds to the principles for assuring equality amongst childless employees and employees who spend some time on maternity and parental leave. Therefore, the provisions of this directive cannot be seen as sexually discriminatory. In order to be able to state that the provisions of the directive are discriminatory, it would be necessary to review the different impact these provisions have on parents in comparison with childless employees. However, it is not possible to compare various groups of parents who differ in the number of children they have. In this respect the provisions of this directive that cover pay-scale classification as discriminatory on the grounds of sex. The time limit chosen by the government when making this law is wholly in the competence of the state and is a reasonable measure which serves to ensure material equality, even considering that these are social laws and the state has broad scope for deliberation as to how these laws should be amended.

Therefore, the Deputy Defender did not concur with the opinion that it would be more appropriate not to include time spent on maternity or parental leave into the total length of time worked in line with the principles of non-discrimination. Not all unequal treatment or unfairness can be considered as discrimination. The contentious provisions actually serve to intensify the level of equality in this area, while not allowing maternity or parental leave to be included into the total length of time worked could be deemed discriminatory, as it would put all parents at a disadvantage.

2) Discrimination against registered partners in the social benefits system

A claimant contacted the Defender claiming discrimination in the legislation covering survivors' pensions and the transfer of entitlement to a pension for reasons of sexual orientation.

The case referred to specific provisions of the law on the basis of which the Czech Social Security Administration refused to acknowledge the pension of a deceased partner and a survivor's pension. In addition to this, the claimant also objected to the matter of the orphan's pension. In the claimant’s opinion, the relevant laws do not reflect the registered partnership of same-sex couples and thus do not grant the surviving members of a registered partnership the same legal standing as a surviving husband or wife.

The Defender stated that in the case in question the discrimination is the result of the social security laws, from which it is apparent that the case cannot be judged as discriminatory in the light of the Anti-discrimination Act. The only questionable matter is whether Law No. 155/1995 Coll., the Pension Insurance Act, as subsequently amended, is in compliance with a superior law, i.e. the Charter of Fundamental Rights and Freedoms (Articles 1 and 3). In terms of social security, however, the state has broad scope for consideration as to how it governs rights and obligations in relation to social rights in accordance with current social policy. The provisions of Article 41 Paragraph 1 of the Charter of Fundamental Rights and Freedoms stipulate that the rights embodied by Articles 30 and 31 of the Charter of Fundamental Rights and Freedoms (under which the right to a pension falls) may only be enforced within the limits of the laws treated by these provisions. The Anti-discrimination Act is what is known as a “subconstitutional” or “general” law and has

the same legal force as other laws of the Czech Republic. The provisions or principles on which it is based should not and cannot prevent the application of the individual provisions of other laws, including the Pension Insurance Act.

The only body qualified to assess the actual compliance or non-compliance of the provisions in question is the Constitutional Court. The Public Defender of Rights, however, does not have the authority to instigate a review of the constitutionality of a particular law. This authority is only held by the President of the Czech Republic, a group of at least 41 members of parliament, or a group of at least 17 senators. Any application to enforce this authority must be filed directly with these subjects. However, even if the Constitutional Court were to annul the provisions in question as unconstitutional, the survivors of a registered partnership would not become entitled to a survivor's pension. The legislator would, under the circumstances, merely be under greater pressure to adopt an essential change to the Pension Insurance Act.

From the viewpoint of European Union law it is important to note that discrimination on the grounds of sexual orientation is explicitly prohibited by Council Directive 2000/78/EC of 27 November 2000, which defines a general framework for equal treatment in employment and occupation. Clearly this only relates to employment and occupation, and thus cannot be applied to the state social security system. Article 3 Paragraph 3 of the directive explicitly states that the Directive "*does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes*".

Regarding the question of orphans' pensions, the Defender stated that in accordance with the provisions of § 64 of the Pension Insurance Act (Law No. 155/1995 Coll., as subsequently amended) the recipient of an orphan's pension is a dependent child or the legal representative of such a child. The Czech legal system does not allow for legal representation by anyone other than parents or adoptive parents, or by a court-appointed guardian. The applicable laws do not grant registered partners who are not the parents of a child the right to represent that child in legal action. This is owing to the fact that, amongst others, registered partners cannot be listed as the parents of a child (only one of the registered partners may be listed as a biological parent) and, as stipulated by the provisions of § 13 of the law on registered partnerships, they may not adopt a child together or even individually. The only way for a registered partner to become the legal representative of the child of a deceased partner is to become the guardian of the child on the basis of a court ruling in accordance with the provisions of § 78 of the Family Act (Law No. 94/1963 Coll., as subsequently amended).

After clarification of the legislation the Defender closed the case, stating that from the viewpoint of the Anti-discrimination Act she did not consider the case to be discriminatory.

3) Use of the word "gypsy" in textbooks

A claimant sent the Defender a press statement in which he drew attention to a teaching aid: a school exercise-book entitled "Hard and Soft Syllables." In particular, he pointed out a problematic passage which reads (in translation from Czech): "In our countries we speak: Czech, Slovak, Hungarian, Gypsy." The claimant considered the term "gypsy" to be offensive in relation to Romany ethnicity.

The Deputy Defender stated that the word “gypsy” is an exo-ethnonym, i.e. a term by which a certain ethnic group is described by people outside that ethnic group, while the word “Romany” is an endo-ethnonym, i.e. a term used by the members of that particular ethnic group. The publishing house which published this material was asked to give a statement. The Deputy Defender was particularly interested in the reasons which led the publishing house to use the offending term. In a letter, the representatives of the publishing house stated that they did not believe that it was forbidden to teach spelling using this word, because, for example, it is a literary terms (referring to the Dictionary of Literary Czech for Schools and the Public). The word in itself is not abusive, nor, according to the dictionary, does it have any emotional impact. Moreover, when the material was written (i.e. in 1993) nobody could have expected that the word would come to be considered abusive.

The Deputy Defender ruled that despite the argument that in 1993 nobody could have expected that the word “gypsy” could have offensive implications, even back then this term could have been understood as abusive. For example, the Dictionary of Literary Czech, published in 1989, states that the term “gypsy” can be used as a synonym for vagabond, adventurer, and in another context the work “gypsy” can also be understood to mean, for example, liar or thief. Thus, in 1993 the word “gypsy” could also have had negative connotations for the Romany people. Furthermore, seventeen years had passed since the book was written, yet the publishing house did not state a single reason why this term, which at the very least is inconsistent, was not removed, especially at a time when the question of how to refer to the Romany ethnic group had been the subject of such discussion in society for so many years.

The Deputy Defender deduced that while the use of an exo-ethnonym in, for example, a history textbook might be justifiable (e.g. if the purpose was to demonstrate how ethnic groups were referred to, etc.), there could be no clear reason in the case of a grammar textbook, as hard and soft syllables can be taught just as well using the formula “In our country we speak Romany.” Considering the fact that the statement from the publishing house did not give any justifiable reason for the use of the term in a school exercise book, and as the word “gypsy” has negative connotations, this constituted harassment in accordance with the provisions of § 4 of the Anti-discrimination Act and, therefore, also discrimination.

II.

Report in accordance with the provisions of § 24 Paragraph 1 b) of Law No. 349/1999 Coll., on the Public Defender of Rights, as subsequently amended,

on individual cases in which neither adequate remedial measures nor the procedure specified by § 20 were adopted

1) Questionable practice on the part of the Interior Ministry and the Municipal Authority of Přerov regarding the sharing of a surname by an unmarried couple

The claimants, who are not married, had a daughter; the parents agreed that she would take her mother's surname. Before the birth of their second child, who they knew was going to be a boy, they visited the Municipal Authority of Lipník nad Bečvou and made a consensual declaration to establish the paternity of the unborn child, stating that the boy would take his father's surname. The parents were telephoned by the registry office shortly after the birth of their son, David, in the Přerov maternity ward and asked to visit the registry office to discuss the matter of the child's surname. After talking to the registrars, they declared that the child would have the same surname as their daughter.

However, the claimants did not concur with the actions of the registry office and filed a case with the Public Defender of Rights in which they stated that the registry office of the Municipal Authority of Přerov had informed them that in accordance with the provisions of § 38 Paragraph 2 of the Family Act (Law No. 94/1964 Coll., as subsequently amended) it was not possible for the children to have different surnames. Considering the fact that their first-born child, the daughter, bears her mother's surname, in the opinion of the registry office their other child must take on the same surname.

The Municipal Authority of Přerov contested the claimants' allegation, saying that they were not forced into anything. However, in her closing statement the Deputy Defender stated that she saw no reasonable explanation for why the claimants changed their previous agreement at the Municipal Authority of Přerov when the same agreement regarding the child's surname resulted from the complaint they filed later. In the Deputy's opinion, when the claimants agreed at the Municipal Authority of Přerov to give the son the mother's surname, this agreement was not the claimants' free decision, but they were only agreeing with the registry office's claim that it was in accordance with the law.

The Interior Ministry and the Municipal Authority of Přerov concede that the provisions of § 38 Paragraph 2 of the Family Act and the provisions of § 19 Paragraph 2 of the Registries Act (Law No. 301/2000 Coll., as subsequently amended) clearly do not preclude the possibility that, upon the birth of another child to an unmarried couple, the parents' agreement regarding the surname of the child

may differ from a previous agreement, although they refer to the older judicature of R 13/1964, stated in the annotations to the Family Act. In the Deputy's opinion, however, it is necessary to take account of how the legal environment has substantially changed since the publication of R 13/1964. At that time the provisions of the Constitution and of the Charter of Fundamental Rights and Freedoms, in accordance with every citizen may do whatever is not prohibited by the law, did not apply. If the norms of public law are ambiguous and open to different interpretations, public administration bodies should always act in the most favourable possible way to those bound by such legal norms. In the more recent practice of the courts it has been emphasised a number of times that in the execution of public administration it is necessary to consider whether the public interest is great enough to justify interference in the legal sphere of an individual. In this respect it does not seem essential for the children of such parents to always have the same surname. What is more important for the children's interests is that their parents live together in harmony.

In the Deputy's opinion, this judicature from the early nineteen sixties has now been superseded. So far, however, there has been no court ruling which would interpret the provisions of § 38 Paragraph 2 of the Family Act and the provisions of § 19 Paragraph 2 of the Registries Act in a different way. Both of the offices involved (the Municipal Authority of Přerov and the Interior Ministry) stand by their statements. As the case could not be rectified, even in accordance with § 20 of the Public Defender of Rights Act, the Defender has notified the Chamber of Deputies about this matter.

2) Questionable practice on the part of the Czech Police resulting from non-compliance with the Administrative Procedure in proceedings in accordance with the Service Act

The Defender was contacted by a claimant who filed a complaint against the procedure adopted by the then District Directorate of the Czech Police in Uherské Hradiště, which failed to investigate her claims of offences against civil cohabitation and against property, which also constituted offences in accordance with the Service Act (Law No. 361/2003 Coll., as subsequently amended) which were allegedly committed against her by her son-in-law, who is an officer with the Czech Police. These offences allegedly consisted of a variety of wilful acts arising out of the fact that the claimant and her son-in-law's family live in the same house. Mrs J. D. also objected to the way her subsequent complaint was dealt with by the Regional Police Directorate of the Region of South Moravia).

After investigating the case the Defender listed a series of shortcomings (failure to provide advice regarding the submission of a proposal to discuss an offence, failure to meet the deadline for initiating proceedings, evidence not taken properly, failure to examine the claimant's case as a complaint, etc.). In his statement on the Defender's findings, the Director of the Regional Police Directorate of the Region of South Moravia focused particularly on the relationship between the Service Act and the Administrative Procedure, or the applicability of the Administrative Procedure in proceedings in accordance with the Service Act. He stated that the service official in charge of the proceedings is not an administrative body and that the relations arising out of that official's function are actually of a labour-law nature.

Therefore, the institutes embodied in the Administrative Procedure (e.g. the deadline for issuing decisions, measures against inaction, measures to assure the purpose and course of proceedings, etc.) cannot be applied in proceedings in accordance with the Service Act.

In response to this statement the Defender issued his conclusive opinion, in which he stated that the service official is in fact an administrative body as defined by § 1 Paragraph 1 of the Administrative Procedure owing to the nature of the function itself (see, for example, the verdict of the Supreme Administrative Court dated 13.12.2007, Ref. No. Konf 26/2005-9) and the associated hierarchies of superiority and subordinacy within the structure of the security force. From the scope of the Administrative Procedure (§ 1 of the Administrative Procedure) this function is applicable for proceedings in accordance with the Service Act.

As the Director of the Regional Police Directorate of the Region of South Moravia did not agree with the Defender's conclusions regarding the applicability of the Administrative Procedure in proceedings in accordance with the Service Act, the Defender enforced his right to apply sanctions and informed the superior body, i.e. the Police Commissioner. The Police Commissioner did not endorse the Defender's conclusions and only admitted the use of analogies in the case of certain aspects of the Administrative Procedure (e.g. disqualification from discussing and deciding upon a case - bias). He subsequently issued internal normative acts which further specify certain procedures in proceedings in accordance with the Service Act (e.g. actual bias or procedure in the case of inaction on the part of a service official).

The Deputy Defender, who took on the case after 10 May 2010, deemed these measures as inadequate, as internal normative acts are binding and only accessible for members of the Czech Police, while proceedings in accordance with the Service Act may also involve civilians (claimants). In fact, the corroborative application of the Administrative Procedure may in practice not only assure the principles of equality for the parties of proceedings in accordance with the Service Act, but will also make the proceedings as such more transparent. This unsuccessful appeal to the Police Commissioner as the superior body was the last legal means of rectifying the situation. Therefore, the only remaining course of action for the Deputy Defender is to bring this unsatisfactory situation to the attention of the Chamber of Deputies.

3) Questionable practice on the part of the Municipal Authority for Prague 4 and the Municipal Council of the Capital City of Prague regarding permission to erect a television antenna

The Defender warned the superior authority (Ministry for Regional Development) in a case investigating the procedure adopted by the building department of the Municipal Authority for Prague 4 and the building department of the Municipal Council of the Capital City of Prague in the matter of their failure to issue a building office ruling in a dispute between the owner of a building and the tenant of one of the flats in the building concerning the owner's obligation to allow the user to place an antenna on the building to receive digital and satellite and digital terrestrial broadcasts (receipt of radio and television broadcasts in accordance with the provisions of § 104 Paragraph 15 of the Electronic Communications Act [Law No. 127/2005 Coll., as subsequently amended]).

The owner of the building is obliged to allow the person entitled to use the house to receive radio and television broadcasts. This is a lawful restriction of his ownership rights. If a dispute arises between the owner and the tenant regarding the scope of this obligation, such a dispute must be decided upon by the appropriate building office in collaboration with the Czech Telecommunications Office.

In the case of the Municipal Authority for Prague 4, the building office refused to issue a decision on the tenant's plea. The Defender considered that the action taken by the Municipal Authority for Prague 4 was unlawful (the office still had not decided after a period of 18 months). It later moved on from complete inactivity to issuing a ruling to annul the proceedings, stating that it would wait for the court decision determining the invalidity of the eviction notice. During the course of the proceedings the tenant received an eviction notice, which she, however, contested in court. By refusing to issue a legitimate decision for almost two years, the Municipal Authority prevented the parties to the proceedings from adopting any other legal measures (an appeal or administrative action).

Considering the fact that the Municipal Authority for Prague 4 did not make any response to the Defender's findings and the Municipal Council of the Capital City of Prague did not implement the proposed remedial measures, the Defender decided to refer the matter to the Ministry for Regional Development. The continual violation of the law and the principles of good administration as the result of the unwillingness on the part of both offices to deal with the case in the manner and by the deadlines specified by the law is so serious that the Defender called upon the minister to take measures against the inaction of the offices, i.e. to pass the case on to another office or to have the case dealt with by the ministry itself. The Defender also called upon the Ministry to adopt a systematic directive or approach for the building offices to apply if similar cases should arise in the future.

Considering that the ministry did not comply with the Defender's request, the Deputy Public Defender of Rights hereby informs the Chamber of Deputies of the fact.

Brno, 19 July 2010

RNDr. Jitka Seitlová

Deputy Public Defender of Rights