VEŘEJNÝ OCHRÁNCE PRÁV

Report for Fourth Quarter 2010

Information provided by the Public Defender of Rights

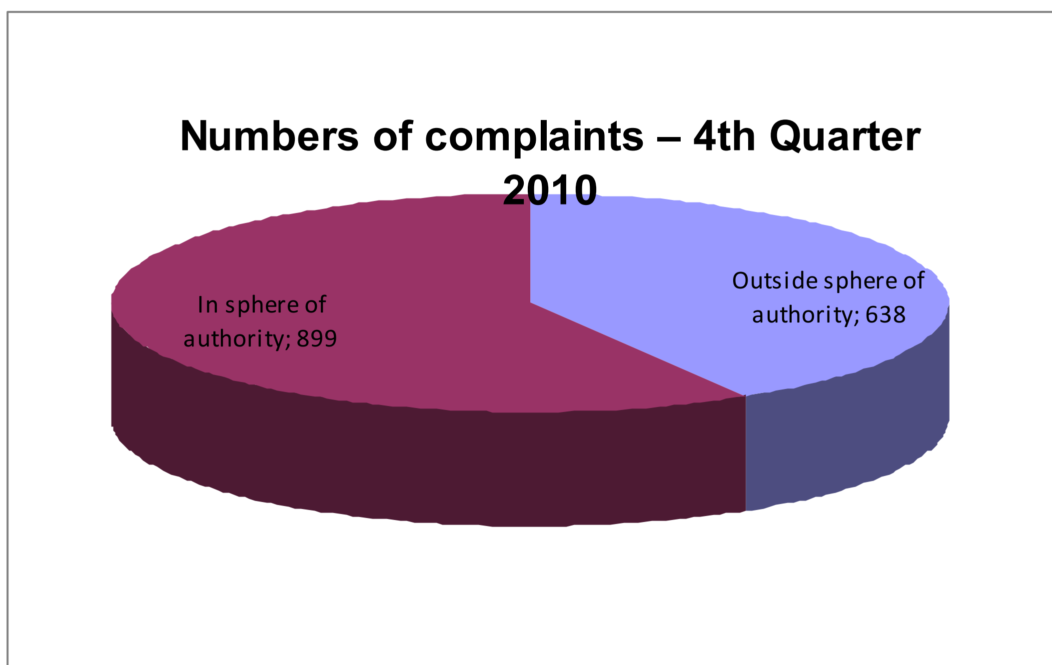
in accordance with the provisions of § 24 Paragraph 1 a) of Law No. 349/1999 Coll., the Public Defender of Rights Act, as subsequently amended (hereafter simply the Public Defender of Rights Act)

for the period of 1 October to 31 December 2010

The Public Defender of Rights (hereafter simply "*the Defender*") hereby provides the Chamber of Deputies of the Parliament of the Czech Republic with information regarding his 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 third quarter of 2010.

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

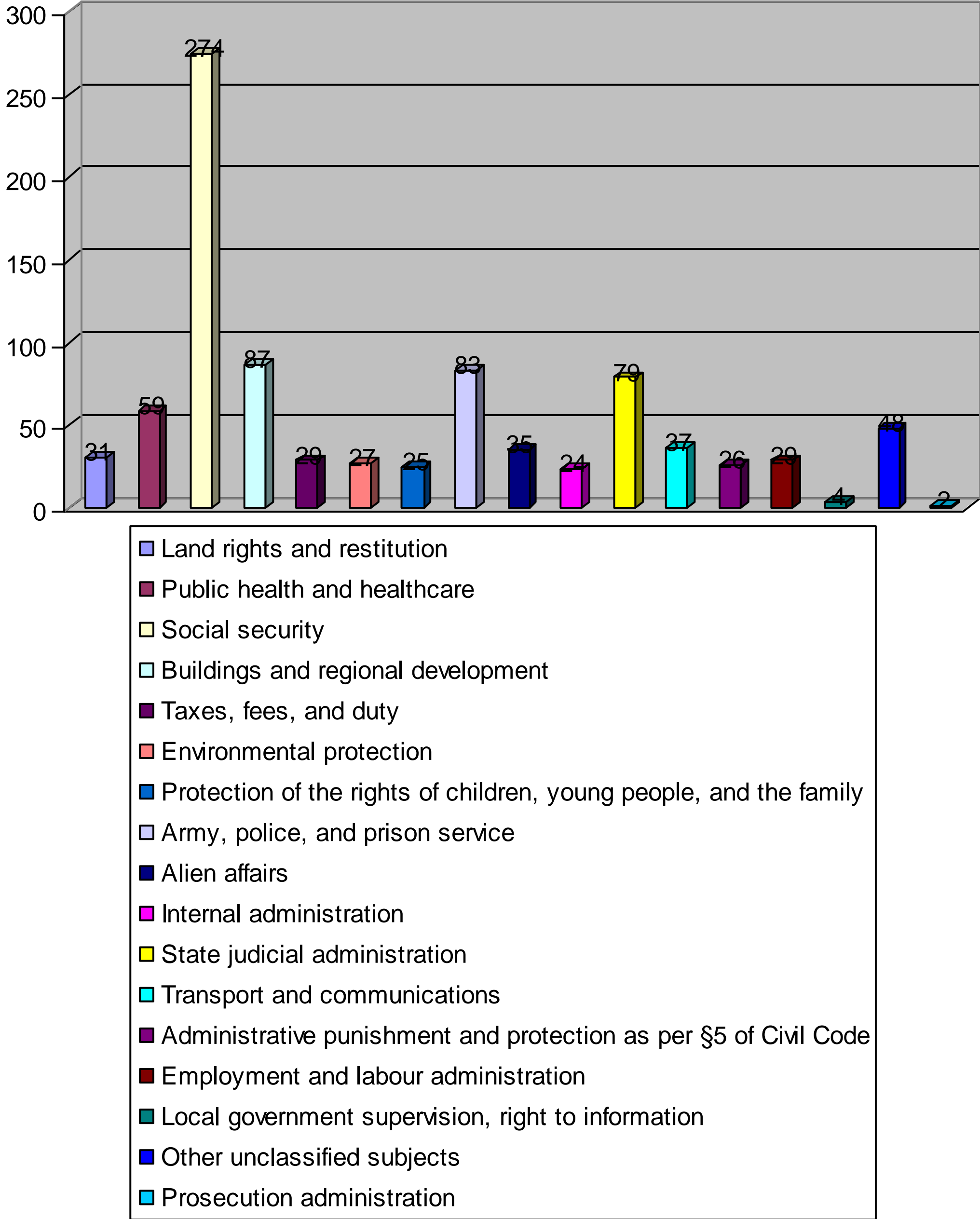
Number of cases received and processed



During the fourth quarter of 2010 the Defender received a total of 1537 complaints, 899 (58 %) of which fell within the legally defined authority of the Public Defender of Rights and 638 (42 %) were outside the scope of that authority. The

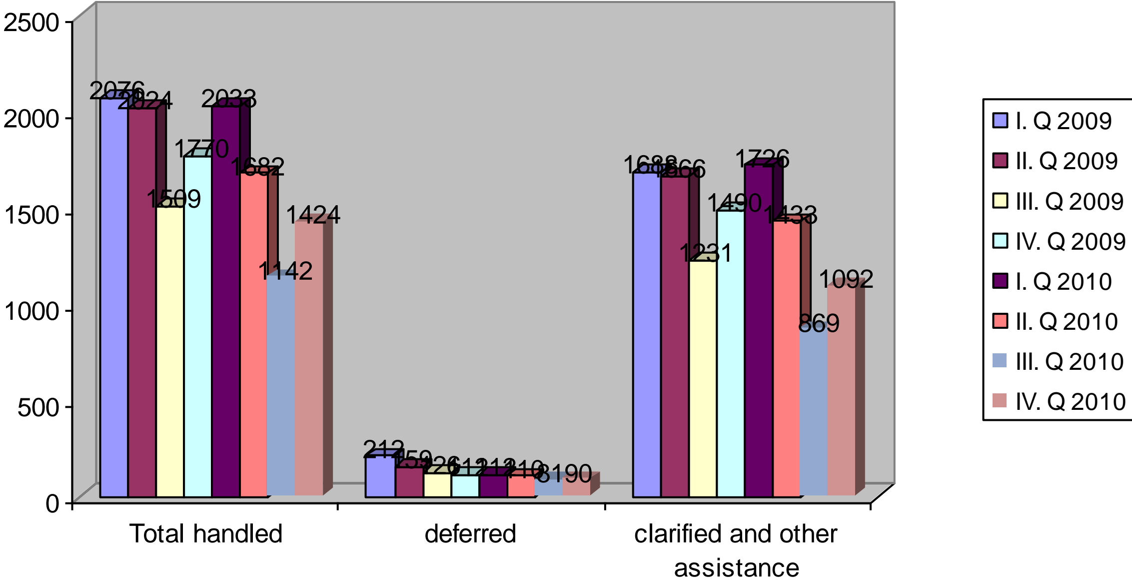
increased number of complaints within the Defender's authority also reflects the increased number of investigations.

Structure of complaints by subject – 4th Quarter 2010



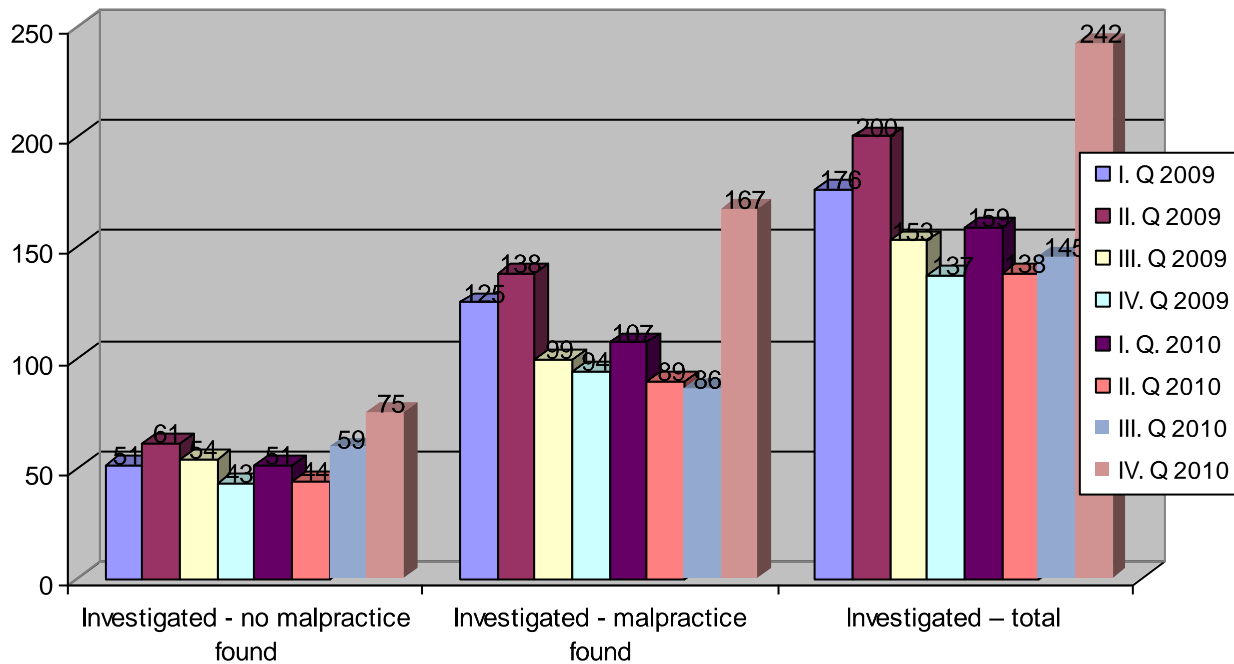
The structure of the complaints received changes only slightly during the period in terms of the legal aspects of the complaints. The most frequent are long-term complaints relating to **social security** (274), particularly in matters of pensions and the provision of social benefits. In the fourth quarter of 2010 the second most frequent group of cases related to **buildings and regional development** (87), most of which concerned planning inquiries, building permits, and approval proceedings. In third place were cases relating to the **prison service** (83). The most cases from outside 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).

Total number of complaints handled, deferred, and clarified during the period 2009-2010



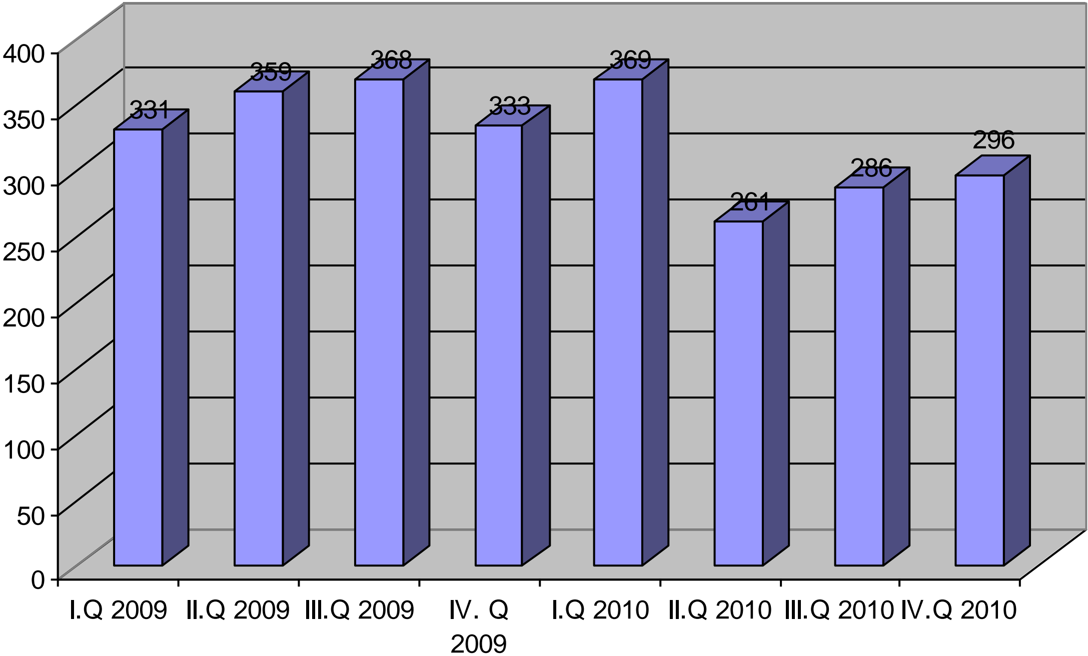
During the fourth quarter of 2010 the Defender dealt with 1424 complaints. A total of 90 complaints were deferred for legal reasons and in 1092 cases the Defender provided claimants with a legal analysis of their case.

Of the 242 investigations carried out by the Defender in the fourth quarter, in 167 cases (69 %) an office was found to be at fault.



In the period in question the Defender, the Deputy Defender and 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 fourth quarter of 2010 the Defender's office was visited by 296 claimants in person to complete claims forms or to acquire information or basic legal advice.

Trend in the number of personal petitions filed – comparison for the period 2009-2010



The information helpline of the Public Defender of Rights was used by a total of 1213 people. This was mainly for the provision of basic legal advice (particularly in matters relating to social security, building regulations and civil law matters), general or specific questions about the Defender's work, or questions on progress with cases.

During the period in question the Defender's website at www.ochrance.cz was visited by 146 358 people.

B. Generalised findings

In this part of the quarterly report the Defender would like to inform the legislators about his 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 propose that the Supreme Public Prosecutor file a lawsuit to protect the public interest in accordance with the provisions of § 22 Paragraph 3 of the Public Defender of Rights Act

1) Building work to extend the metro line A from Dejvice to Motol

The Defender headed an investigation in a case filed by a civil association in which the association complained about the procedure taken by the construction department of the Office of the City District of Prague 6 (hereafter simply "OCD Prague 6") and the Municipal Council of the Capital City of Prague (hereafter simply "Municipal Council") in relation to the issuance of a planning ruling on the location of building work which included the extension of the metro A line from Dejvická via Petřiny to Motol.

To summarise, the association's objections to the aforementioned planning ruling were that there were doubts surrounding the issue of the ruling, as in the association's opinion the documentation for the planning ruling and the ruling itself do not comply with the approved change No. Z1344/00 and the applicable binding part of the Territorial Plan of the Capital City of Prague for the Červený vrch locality. Although the association repeatedly informed the above administrative bodies of this discrepancy, as well as the risks involved in the building work to extend the metro line A below apartment buildings, no remedial measures were promised. The association also referred to the conclusions of the appraisal carried out by the Klokner Institute of ČVÚT in Prague on 19.11.2009, according to which the metro construction work could cause a building to subside or tilt as a result of the dynamic effects of the tunnel boring work and blasting work.

After assessing the case the Defender decided to begin an investigation into the matter, as part of which he requested a statement from the Mayor of OCD Prague 6 and the director of the Municipal Council. In his Investigation Report the Defender stated that the Municipal Council had failed to provide convincing proof that the building work was in compliance with the territorial plan, when the divergent routing of the work to extend the metro A line, which differed from the approved plans as shown in the graphical part of the territorial plan, was justified by the nature of the building work (i.e. that it would have to run underground) and the general nature of the territorial plan, the basic design of which is not affected by these changes. The Defender was also critical of the fact that the Municipal Council's statement on the plea filed by the association on 23.12.2009 for a review of the planning ruling, containing objections to the infringement of the rights of the owners of the homes (flats) above the metro construction, was too general and inadequate and, from the viewpoint of the criteria for the judicial review, could not be verified; this statement declared that the rights of the owners of the homes (flats) above the metro construction could not be affected as this was an underground construction which would not infringe upon the rights and lawfully protected interests of home-owners.

The Defender also referred to the fact that the administrative offices had been at fault when they, together with the builder (i.e. Dopravní podnik hlavního města Prahy, a.s. (Transport Authority of the Capital City of Prague)) and the designer of the planning documentation did not inform citizens in advance that due to new findings concerning the geological conditions in the territory in question the route of the metro A line extension would have to diverge from the route shown in the territorial plan and that it would have to run under the Červený vrch estate.

Considering the fact that no proper or extraordinary appeal may currently be filed to have the aforementioned planning ruling reviewed, the Defender decided to act on his own special authority in accordance with § 22 Paragraph 3 of Law No. 349/1999 Coll., the Public Defender of Rights Act, and to propose that the Supreme Attorney file a lawsuit to protect the public interest against the decision of OCD Prague 6 regarding the position of the building work in question. Considering the fact that two building permits had already been issued by the Municipal Council as the special building authority, he also called for a lawsuit to be filed to protect the public interest in the matter of these building permits.

II. 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 Constitution of the Czech Republic

Outside the framework of the draft the Defender made comments intended to incorporate the institute of the Public Defender of Rights into the Constitution (the draft of the new Article 97a). The Defender has relatively extensive powers and often liaises with constitutional bodies (the right to join meetings of the Chamber of Deputies at any time if the matters being discussed are in his sphere of authority, the right to make recommendations to the government concerning changes to the law, the right to initiate proceedings before the Constitutional Court or to participate in such proceedings as a subsidiary party, and the right to file proposals that proceedings be initiated in matters relating to judges and attorneys and to participate in such proceedings).

The aforementioned powers and authority of the Defender as an independent institution, which cannot be classed under any of the three traditional powers, imply that the fact that this institute is not incorporated into the Constitution is a regrettable constitutional deficit which should be rectified. The Defender therefore proposed a general definition (similar, for example, to that of the Supreme Audit Office) with the proviso that other questions will be (and now are) covered by the general law. Although at present the Public Defender of Rights is not a constitutional body, in practical terms the office is perceived as such. This is corroborated by the Defender's relevant relations with the Chamber of Deputies or special salary assessments in accordance with Law No. 236/1995 Coll., on salaries and other matters relating to the role of representatives of state authority and certain state bodies and judges.

The incorporation of the office of Public Defender of Rights into the Constitution is proposed in relation to a more extensive amendment to the Constitution. The Defender based his comments on the fact that in most EU member states the institute of the ombudsman is covered by the constitution (nearby countries include Slovakia, Austria, Hungary and Poland, and other examples are Holland,

Sweden, Denmark, Finland, Spain and Portugal). As a rule the wording of the constitutions of most of these states define the powers and election of the ombudsman only in general terms, with the majority of other issues being governed by law.

2) Comments on the amendment to the law on public health insurance

According to the Defender a ceiling should be set on mandatory healthcare fees relating to hospitalisation, either as a specific sum or as the number of days for which a person is hospitalised in a calendar year, otherwise the fee is not regulatory, as in the vast majority of cases a long period of hospitalisation is not a reflection of the patient's will, but is the result of a serious medical condition.

During the course of the comments proceedings the Defender repeatedly drew attention to health insurance for two categories of foreigners residing in the Czech Republic, a situation which has long been unsatisfactory. These two categories are the family members of citizens of the Czech Republic (typically husbands/wives) originating from third countries during the period of temporary residency in the Czech Republic (i.e. the first two years of residence in the country) and foreigners from third countries who are not family members of citizens of the European Union/Czech Republic, during the first five years of residency in the Czech Republic. According to the Defender the personal scope of the public health insurance system should be extended particularly so that it complies with the updated concept regarding the integration of foreigners and access to the system of public health insurance for all children and the husbands/wives of citizens without means who reside in the Czech Republic on the basis of a residential visa lasting for more than 90 days or a long-term residency permit to bring the family together as guaranteed by the applicable governmental resolutions.

3) Comments on the amendment to the law on court fees

The Defender expressed doubts over whether the intention behind the amendment, i.e. to lessen the burden on the judiciary, would be fulfilled as it does not treat the lack of flexibility on the part of the judiciary in increasing court fees or introducing new fees. He does not agree with the abolishment of exemptions in adoption proceedings, as crucial factors in such proceedings are the interests of the child, one of which is that adoption proceedings are not disputable. If it is also in the state's interests to support adoption, no fee should be applied in the case of adoption proceedings. The Defender considers it unreasonable when in a dispute over the legitimacy or amount of receivables or the order in which they are declared a fee of 5,000 CZK is charged. In such a case the creditor who might have a claim settled in insolvency proceedings (depending on the assets of the bankrupt party) must first pay 2,000 CZK for the declaration of the receivable and then, if the insolvency administrator contests the receivable or if the insolvency proceedings involve any kind of dispute over the receivable, the creditor will have to pay a further 5,000 CZK. Similar costs on the part of the creditor also come into consideration, if he has first tried to recover the receivable through the courts. Other fees that in the Defender's opinion are excessively high are the court fee for the resumption of proceedings and the fee for a nullity-related suit (increased from 1,000 CZK to 5,000 CZK), the court fee for proposals to have cases transferred to another court for reasons of

convenience (proposed to rise from 300 CZK to 2,000 CZK), as well as the fee of 50 CZK for each page of copies made on photocopiers or using a computer (with or without verification). In the Defender's opinion the latter charge is not commensurate with the actual cost of making the copy; it is also questionable whether charging for making copies does not infringe on the parties' right to peruse the court files and take excerpts and copies (§ 44 of the Civil Court Rules of Procedure).

4) Comments on the amendment to the law on experts and interpreters

The Defender recommended that the amendment should be carefully considered to ensure that it clearly defines the conditions covering the erasure of experts and interpreters from the list, instead of merely making reference to the reasons specified in the provisions covering the moment when a person is deleted from the list. The Defender also proposed that delictual liability be assigned jointly for physical and legal entities who are experts or interpreters.

The Defender would also welcome it if a special part of the explanatory report, instead of merely describing the content of the proposed provisions, actually described the purpose, principles and, where applicable, the relationship to the existing law and laws on similar relations. The Defender believes that if the explanatory report were in this form, it would have a positive effect on the legislative process.

5) Comments on the amendment to the law on electronic communications

The Defender did not agree with the intention to transfer decisions on monetary disputes from the Czech Telecommunications Office to the Arbitration Court at the Chamber of Commerce of the Czech Republic on the basis of the law, without the parties first consenting to the dispute being resolved by the Arbitration Court. The concept of arbitration proceedings is based on the principle of autonomy. The Defender considers that decisions on disputes should be entrusted either to an administrative body in the case of administrative proceedings (while retaining wardship in accordance with Section Five of the Civil Court Rules of Procedure) or to a court in the case of civil proceedings. He does not believe any other alternative to be legitimate and in compliance with the right to a fair trial. The Defender also draws attention to the fact that while dispute rulings by the Czech Telecommunications Office incur an administrative fee of 100 CZK or 200 CZK (depending on the subject of the dispute), when disputes are dealt with by the Arbitration Court at the Chamber of Commerce of the Czech Republic the fee charged is 3% of the value of the subject of the dispute, although no less than 7,000 CZK.

6) Comments on the draft governmental directive on the protection of public health against the adverse effects of noise and vibration

The Defender did not agree with the proposed increasing of noise hygiene limits for protected outdoor areas, particularly in relation to noise from roads. He stated that neither the European Union Green Book on noise nor the documents of the World Health Organisation imply that it is appropriate or necessary to increase tolerance to noise (e.g. in the form of raising noise hygiene limits); on the contrary, all these documents describe growing noise levels as a problem and are aimed at reducing them. Therefore he did not agree with the increasing of hygiene limits on

noise from roads, and particularly rejected the increase in night-time limits. He was fundamentally opposed to the proposed 10 dB increase in the night-time hygiene limit to allow for *“the construction of the most important new high-capacity roads (bypasses and circulars) in individual cases”.* Directing traffic off to the edge of town and allowing the noise from this traffic to exceed the limits does nothing, in the Defender’s opinion, except increase the number of people affected by noise. This would also reduce the current level of protection, which the Defender considers to be inadmissible and in contravention of the documents in place to protect the Ministry of Health.

In relation to the prepared governmental directive the Defender recommended that the government consider defining specific higher limits for one-off events, considering that he is aware of situations where although public musical events tend to be a source of noise which exceeds hygiene limits (particularly in outdoor protected areas around buildings or in protected rural areas), the exposure to the noise is too short to have any effect on people’s health. Defining such limits should facilitate the supervisory role of public health protection bodies.

7) Comments on the legislative plan for the election law

The Defender had fundamental objections to the fact that the active and passive right to vote on the part of foreigners from third countries in elections to municipal and regional councils is restricted only to those people whose right to vote is acknowledged by an international contract. The Defender believes that participation in decision-making concerning public matters at a local level is an important part of the integration process for foreigners. The exercising of this right can only intensify the foreigner’s feeling of belonging to his local environment, instil a feeling of trust, express the majority community’s acknowledgement of his contribution towards local society, and help the foreigner to become involved in local decision-making processes, including the assumption of co-responsibility. The proposed amendment is not in compliance with the Integration Concept of Foreigners as adopted by Resolution No. 126 of the government of the Czech Republic on 8 February 2005, Analysis of the Status of Foreigners with Long-term Residency in the Czech Republic and the draft optimisation measures from October 2004, as well as the latest trend in EU countries, which clearly aims to ensure that foreigners residing in the country in question either permanently or for a certain length of time can exercise their active and passive right to vote (in elections to local or municipal bodies). The Defender therefore proposed that the electoral laws be amended so that the active and passive right to vote in elections to municipal and regional councils is granted to all foreigners from third countries who have been granted a permanent residency permit, including the family members of citizens of the EU (Czech Republic) who remain in the Czech Republic for longer than 5 years. In the cases of the family members of citizens of the EU (Czech Republic), their specific and preferential status means that a period of less than 5 years could be considered.

8) Comments on the amendment to the law on pension insurance

The Defender proposed deleting the provisions of the amendment which extend the period used to determine the personal assessment basis to cover the entire period from the calendar year following the year in which the policy holder

reached the age of eighteen to the calendar year prior to the year in which the pension was first granted. In practice, for the great majority of policy holders the proposed change would reduce their personal assessment basis, as most policy holders earn less at the start of their career than they do later. In the case of policy holders who after reaching the age of eighteen after 1.1.2010 are studying for a future career, during the computation of their old-age pension their earnings would be reduced in the assessment period (i.e. the time spent studying would reduce their earnings achieved in later years of the assessment period), which is unreasonable with regard to the aim of the amendment in question. According to the Defender the existing legislation covering the period used to determine the personal assessment basis should remain in place; therefore, he did not agree with the abolishment of the guaranteed minimal percentual invalidity pension defined in accordance with the provisions of § 42 Paragraph 2 of the Pension Insurance Act for policy holders who have been entitled to pension insurance for at least 15 consecutive years as of the date on which they become entitled to an invalidity pension. He also did not agree to narrowing down the group of people who remain entitled to a widow's (widower's) pension for longer than one year after the death of their spouse, people caring for their own children and parents or those of their deceased spouse who are dependent on the care of another person in the second degree. The Defender also voiced objections against the shortening of the period for which a person becomes re-entitled to a widow's (widower's) pension from five years to two years. He then expressed fundamental opposition to the abolishment of the institute aimed at eliminating harsh treatment by the Ministry of Labour and Social Affairs, or the Ministry of Defence, the Ministry of the Interior and the Ministry of Justice.

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

1) Proposal to annul the provisions of Article 3 Paragraph 1 of the generally binding directive of the town of Břeclav No. 5/2008, on the securing of local public order matters in cases where catering events are held in residential areas within the town

The Defender did not concur with the proposal of the Ministry of the Interior, as within their territory and to the benefit of their citizens municipalities must be able to regulate phenomena which citizens deem through their elected representatives as being negative (or disturbing public order in the municipality). The Defender did not agree with the view of the Ministry of the Interior as regards the conflict between Article 3 Paragraph 1 of the directive in question, covering binding time restrictions, and Article 26 of the Charter of Fundamental Rights and Freedoms ("*Charter*"), which grants the right to organise and hold catering events, as the right to hold (organise) catering events is an economic right and the implementation of this right is, in accordance with Article 41 Paragraph 1 of the Charter, embodied in the law.

The Constitutional Court found that the offending provisions of the generally binding directive are were not sufficiently specific and do not comply with the general criteria for the creation of generally binding directives. Considering the fact that the

remaining the provisions of the directive cease to be substantiated after the annulment of Article 3 Paragraph 1, in its ruling dated 2.11.2010, File Ref. No. Pl. ÚS 28/09, the Constitutional Court annulled the directive in its entirety.

However, at the general level the Constitutional Court stated that in situations where catering events held during night-time hours could disturb public order, the municipality may, on the basis of the authority granted by § 10 of the Municipalities Act and Article 104 of the Constitution, define the obligations of those organising such events, including obligations involving night-time restrictions. Municipalities may therefore regulate the times of catering and similar events within their territory and may thus to a certain extent restrict the right to hold catering events in accordance with Article 26 of the Charter in the interests of protecting other constitutionally guaranteed rights. **The Constitutional Court concluded the case by ruling that by issuing a generally binding directive to specify the opening hours of catering facilities the municipality had not acted ultra vires**, i.e. had not acted outside the scope of the authority granted by the law and had also not abused its authority and competence as embodied in the law.

2) Proposal to annul the provisions of Article 1 Paragraph 2 and Article 2 of the generally binding directive of the Municipal Authority of Krupka No. 3/2009, on reporting inhabitants over the age of 15 residing in Krupka for more than 30 days while listed as permanent residents of other towns

In this case the Defender agreed with the proposal of the Ministry of the Interior and concurred with a number of the points stated in the proposal, particularly the fact that the Czech Republic is a unified democratic legally consistent state (Article 1 of the Constitution), and that questions of nationwide importance must be regulated by Parliament. However, in his statement the Defender referred to the permanent residency situation introduced by the legislator in the Civil Registration Act and which in practice leads to enormous difficulties in public administration, because a person's permanent address is not necessarily the same as the address at which the person lives. He said that he sympathised with the fact that the Municipal Authority of Krupka had issued the offending generally binding directive as a result of the serious shortcomings in the concept of permanent residency as treated by the Civil Registration Act; however, there is no doubt that municipal authorities are not permitted to issue legislation on matters of nationwide significance.

In its ruling dated 8.12.2010, File Ref. No. Pl. ÚS 39/10, the Constitutional Court annulled the generally binding directive in question. It concluded that the Municipal Authority of Krupka had issued the directive in question to treat a matter which is, as far as its scope of authority goes, ultra vires. The legislator implicitly denied municipalities and other subjects the possibility of monitoring and recording the "temporary residencies" of inhabitants. Civil registration is comprehensively treated by the Civil Registration Act and the essence of this falls under delegated powers in the case of state administration as specified in § 2 of the aforementioned law.

According to the Constitutional Court, debates about the appropriacy of the legislator's conclusions that the institute of temporary residency (or similar institutes) is unnecessary are no substitute for measures taken by corporations governed by public law, which lack the requisite legal empowerment. Such a debate must be held as a parliamentary, i.e. political, debate. A citizen subject to an obligation imposed by

law must not be allowed to become a tool for the municipality to achieve legal and political aims which are not certificated by law.

C. Media presentations and communication with the public

- In the fourth quarter of 2010 three **press conferences** were held. In October the Defender presented the results of his visits to police cells; in November a press conference was held on the Defender's findings regarding the procedures adopted by ministries in handling claims for compensation and adequate satisfaction as improper official procedure. Bad practice or long-term inaction was found on the part of the ministries. The December press conference was devoted to the protection of personal data and the work of the Personal Data Protection Office. The specific case of medical documentation lost by a non-state medical facility was publicised as a form of **sanction**. The Defender also used media publicity as a form of sanction in the case of the long-term inaction on the part of the Municipal Authority of Králův Dvůr, highlighting the authority's inability to reach a decision about the existence of a road.
- In addition to **press releases** on the issues presented at the press conferences, other reports were also published during the quarter providing information about the Defender's findings and activities. These particularly included the Defender's objections to the changes on the Employment Act. Interest was also shown in the renaming of the conference hall of the Office of the Public Defender of Rights to the Otakar Motejl Hall as part of the anniversary of the 10th anniversary of the establishment of the post of Public Defender of Rights in the Czech Republic, on 9 December 2010.
- An important aspect of this presentation work was also in the form of **individual interviews and media appearances.** The Defender was a guest on shows such as Dobré ráno, Před půlnocí and Interview ČT24 on Czech Television, on the Fakta Barbory Tachecí programme on TV Prima, Interview Z1 on TV Z1, on Impulsy Václava Moravce on Radio Impuls, and gave an extensive interview for Radio Frekvence 1, amongst others. These interviews focused not only on the Defender's work in general, but also on his opinions of certain topical cases. The Defender then answered specific questions posed by readers of idnes.cz in an on-line interview.
- Throughout the quarter Czech Television showed the sixth series of Případ pro ombudsmana (A Case for the Ombudsman).

D. International relations, conferences, seminars

Meetings with foreign delegations and participation in international conferences

- The Deputy Defender attended the annual meeting and international conference of the International Ombudsman Institute (3 – 6 October 2010, Barcelona)

- The Defender visited the Slovak Public Defender of Rights (19 October 2010, Bratislava)
- There was a visit from a delegation of Korean ombudsmen and senior state officials (10 November 2010)
- Visit by the ambassador of the State of Israel (16 November 2010)
- Visit by staff of the Thai ombudsman (19 November 2010)
- Visit by the Slovak Public Defender of Rights (9 December 2010)
- Visit by a delegation of representatives of Eastern Partnership countries (15 December 2010)

Conferences and seminars

- Conference on the Role of the Ombudsman in the Political System of the Czech Republic (2 November 2010, Olomouc) – in collaboration with Palackého University Olomouc
- Celebration of the 10th anniversary of the establishment of the office of Public Defender of Rights in the Czech Republic (9 December 2010, Brno)

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

In this report the Public Defender of Rights provides brief information about interesting or otherwise significant cases which serve to better illustrate the Defender's work during the period in question.

I. Investigations instigated on the Defender's own initiative

1) Ministerial procedure in the handling of claims for compensation for unlawful rulings or improper official procedure on the part of authorities

The Defender investigated procedural approaches taken by the Ministry of Justice, the Ministry of Labour and Social Affairs and the Ministry of Transport in accordance with § 14 and § 15 of Law No. 82/1998 Coll.[1] in the handling of claims filed by physical and legal entities as part of the so-called preliminary claim assessment process, which is the compulsory precursor to judicial proceedings. This will be followed by investigations of other ministries.

According to the Defender the preliminary claim assessment process is not governed solely by civil principles, as to a great extent it is still a statutory matter. Compensation is provided as the result of the prior unlawful exercising of public authority by the state, or by a municipal authority.[2] The procedure adopted by the ministries and other central administrative bodies in the preliminary claim assessment process therefore needs to be understood as being the exercising of public administration sui generis. With regard to the provisions of § 177 Paragraph 1 of the Administrative Rules of Procedure it is essential to at least respect the basic principles covering the work of administrative bodies (§ 2 - § 8 of the Administrative Rules of Procedure) [3] and these procedures may also be benchmarked through the principles of good administration[4]. The Defender compiled ten rules of good practice for the assessment of compensation claims, which he published on his website at www.ochrance.cz.

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[1] "Section Four – Filing claims

§ 14
(1) Claims for damage compensation are filed at the office specified in § 6.
(2) If a claim is filed with the wrong office, that office must pass on the claim to the appropriate office. In this case the effects of the preliminary claim remain in force.
(3) According to this law, the filing of a claim for damage compensation is a prerequisite for filing a claim for damage compensation in court.

§ 15
(1) If the office in question acknowledges entitlement to damage compensation, the compensation must be provided within six months of the date on which the claim was filed.
(2) The aggrieved party may only seek damage compensation through the courts provided that his claim has not been settled in full within six months of the date on which the claim was filed."
[2] A similar philosophy can be found, for example, in Constitutional Court Ruling No. II ÚS 1612/09 of 23.2.2010. .

[3] "The basic principles covering the work of administrative bodies specified in § 2 to 8 also apply to public administration in cases where a special law stipulates that the Administrative Rules of Procedure are not applied but which in itself does not contain provisions corresponding to these principles."

[4] § 1 Paragraph 1 of Law No. 349/1999 Coll., the Public Defender of Rights Act, as subsequently amended

Procedure adopted by the Ministry of Justice

Based on the results of the investigation the Ministry of Justice adopted the following measures: If the six-month period allocated for the case to be settled out of court in accordance with of Law No. 82/1998 Coll. is exceeded, the claimant will automatically be informed of the reasons for such and, where possible, will be informed approximately when the case can be expected to be settled; the ministry will always react to queries regarding progress with cases and reminders by claimants, except in cases where a final ruling concerning the claim is expected soon after receipt of the claimant's letter, or cases which patently involve chicanery or are unsubstantiated; in cases which take longer than six months to deal with, the claimant will be informed of progress with the out-of-court settlement within one month. The heads of the compensation department were also requested to check fulfillment of this task.

Procedure adopted by the Ministry of Labour and Social Affairs

According to the Defender the most fundamental shortcomings as regards the settlement of compensation claims included the lack of consistent compensation claim records, inadequate differentiation between entitlement to damage compensation and adequate satisfaction and inadequate reasons given in cases where the voluntary acknowledgment of the claim is rejected. In several cases of clients represented by the same attorney (lawyer) the ministry wholly inappropriately used an attorney from a law office, which is in contravention of the constant jurisprudence of the Constitutional Court. In such cases the courts do not award the state the costs of legal representation, even if the case is won by the state. However, the Defender acknowledged that in some cases of delays with proceedings the ministry had already voluntarily awarded adequate satisfaction. The Defender also called upon the Minister of Labour and Social Affairs to issue a statement on his findings and conclusions and inform him of all remedial measures adopted.

Procedure adopted by the Ministry of Transport

According to the Defender's findings the Ministry of Transport rejects claims for compensation in all cases (not a single voluntary settlement was found), which is in direct contradiction to the procedure adopted by the other ministries and also with the assurances the Czech government makes to the European Court of Human Rights. The Defender thus has serious doubts as to whether the institute of preliminary claim assessment as practised by the Ministry of Transport really is an effective remedial measure or whether it is merely an unnecessary six-month extension of the judicial compensation procedure. Moreover, rejection rulings are generally insubstantial and not precisely justified in legal terms. Another major factor is evidently the lack of a central claims assessment site, the staff of which would be systematically trained in this agenda, would follow trends in (Czech and international) court practice, and would share the know-how they acquire with the staff of other ministries. The Minister of Transport was requested to issue a statement of these findings and conclusions and present details of remedial measures.

2) Delays in making deductions from pensions

As part of his investigations into the procedure adopted by the Czech Social Security Administration (hereafter simply "CSSA") in enforcing rulings (distraints) in the form of deductions from pension allowances the Defender found multiple cases of

delays on the part of the CSSA. These are recurring problems, where the CSSA is late in making (managing) pension-related decisions,[1] makes unauthorised use of deducted money when it should have been paid to the executor (entitled recipient), does not stop deducting money even when a debt has been paid in full, and does not respond to requests from people asking for such matters to be rectified.

On September 30 2010 the Petitions Committee of the Chamber of Deputies of the Parliament of the Czech Republic asked the Defender to present his findings regarding delays on the part of the Czech Social Security Administration to the Chamber of Deputies. A report was submitted on 11.11.2010. This topic was also the subject of a personal meeting between the Defender and the Minister of Labour and Social Affairs held on 2.12.2010.

3) Procedure adopted by the Ministry of Labour and Social Affairs as the appeal body in administrative proceedings relating to the provision of social services

After learning of the decision of the Ministry of Labour and Social Affairs, which, as the appeal body, rejected an appeal and confirmed the ruling of a regional authority regarding the committal of an administrative offence as defined by the provisions of § 107 Paragraph 1 of Law No. 108/2006 Coll., the Social Services Act, the Defender began an investigation on his own initiative, focusing on the decision-making process applied by the ministry as the appeal body in administrative proceedings on fines relating to the provision of social services. After reviewing other decisions in proceedings on administrative offences in this field of state administration, he concluded that a large proportion of these are not even minimally in line with the principles of good administration,[2] and some, if a lawsuit were to be filed, would be annulled outright by an administrative tribunal. In particular there were shortcomings in the procedural aspects of the case and in the application of the institutes of criminal law, as referred to by the practice of the Supreme Administrative Court, for administrative punishments. The appropriate employee of the ministry deciding on the appeal repeatedly called upon the legal and legislative departments of the ministry for assistance, but this was refused in several cases on the grounds that the area of state administration in question was not under the authority of these departments.

In a situation where there is no effective Civil Service Act which would "guarantee" that ministerial officials are qualified and provided with regular specialised training (paradoxically, unlike regional and municipal officials), the Defender expressed the opinion that in proceedings where the state issues an authoritative ruling on a punishment the appropriate officials with a non-legal background should have the chance to discuss matters of a purely legal nature with the legal department, although ideally a specialised lawyer should be made available to the department or section in question. This recommendation is based on the fact

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[1] On the basis of a distraint order or court ruling.

[2] These principles of good administration were also adopted by the Chamber of Deputies of the Parliament of the Czech Republic, through its approval of the Public Defender of Rights' Report for 2006 which summarised them; however, the great majority of them overlap with the basic principles covering the work of administrative bodies as defined in the provisions of § 2 - 8 of the Administrative Rules of Procedure. In general, the principles of good administration have been incorporated not only in the legal and constitutional regulations of the Czech Republic, but particularly in international documents and the practice of the European courts, on which Czech law is undoubtedly based.

that with regard to Article 2 Paragraph 3 of the Constitution of the Czech Republic and the implicit requirement that the work of state bodies is in line with the law, citizens of the Czech Republic have the right to expect that administrative proceedings on the imposition of an administrative punishment will take account of all the criteria and factors which should be taken into consideration according to the law of the state (though this obligation on the part of the administrative body also derives from the practice of the courts, on the basis of the analogous application of the institutes of criminal law). The Minister of Employment and Social Affairs was asked to issue a statement on the findings and on the adoption of remedial measures.

4) Procedure employed by the Police of the Czech Republic in placing detainees in police cells

The Defender looked at the procedure adopted by the Police of the Czech Republic when detaining a person in accordance with of Law No. 273/2008 Coll., on the Police of the Czech Republic, where the person was then placed in a police cell and several times restrained in the cell. The person was brought in at night to a district department of the Police of the Czech Republic by municipal police offers to identify him, as he was not carrying an identity card on him. After the person had been identified, he allegedly verbally and physically assaulted police officers. As the person was suspected of committing an offence against peaceful coexistence against the police officers present, an act which is under the competence of the municipal offences committee, he was detained and placed in a police cell. After an hour the person was released and the case was passed on to the municipal offences committee.

When investigating individual cases of a similar type the Defender draws on his experience acquired in the course of his systematic visits to detention facilities. In this specific case, which was still not concluded when this report was compiled, it was found that there had been a violation of the Police Act through failure to obtain sufficient grounds for placing the person in the police cell, the lack of adequate detention records and the unreasonable use of coercion. The head of the police department was questioned about the reasons for detaining the man and subsequently placing him in the police cell. According to § 26 Paragraph 1 b) of the Police Act the Police are authorised to detain anybody who verbally assaults a police officer in a police station and the detainee may be placed in a police cell; in this particular case, however, the Defender considers that placing the man in the cell was inexpedient, as it is the municipal offences committee which is competent to review the offence and the police took no further action with the person once he had been placed in the cell. According to the rules of the Constitutional Court, the exercising of public authority must be substantiated and expedient and the mere application of the formally presumptive authority of a public body, without any demonstrable presumptive and rational purpose behind the exercising of such authority, cannot be tolerated.

5) Kyselka Spa – status of a cultural monument

In 2010 the Deputy Defender dealt with a case relating to the spa in Kyselka. This case shares closely ties with monumental care. During the investigation the Deputy Defender referred to the fact that if the state has an interest in monumental protection, in cases where the owner of a particular site takes no action, the state is

obliged to take essential steps to save the listed building and then claim the costs of such work from the owner. The state of the protected sites in Kyselka is proof of what can happen if lack of action on the part of the owner is accompanied by a similar lack of action on the part of the state and state bodies, including the institute allowing for the alternative enforcement of decisions, which does not work.

In 2010 the case had reached the point where an appraisal by the National Monuments Institute deemed that the structural and technical condition of the spa complex, including the Mattoni Villa, was in a state of emergency. In the opinion of the National Memorial Institute there is nothing to prevent the building authority from ordering that buildings which pose a risk to the public and to traffic be demolished. According to the Ministry of Culture, the buildings were now in such a serious state of disrepair that the preservation of the valuable artistic and historical interiors could not be guaranteed. Therefore the Ministry of Culture took steps aimed at declassifying the former spa complex in Kyselka, or at least part of it, as a cultural monument.

It should be said that despite the Deputy Defender's efforts to urge state monumental care bodies to comply with their obligations, and despite meetings with the heads of the Ministry of Culture and the National Memorial Institute, the bodies in the monumental care section failed to meet their commitments as imposed by the law and their lack of action means that the protected sites in the former spa complex in Kyselka can no longer be saved. This case highlights the complete failure of monumental care.

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

The Deputy Defender continues to investigate the case of unlawful buildings and terrain modifications in the municipality of Řehlovice, in the cadastre of Moravany u Dubic, in the Protected Landscape Area of České středohoří. The investigation was prompted by reports from the public media which claimed that a builder, P. Oulický, had erected buildings and carried out unlawful terrain modifications without the requisite planning permission, without the consent of the Administration of the Protected Landscape Area of České středohoří and in contravention of the territorial plan of the municipality of Řehlovice. The press reports implied that the matter should originally have been decided on by the Municipal Authority of Trmice. The Trmice building office had just begun proceedings to have the buildings removed, but before it had time to rule on the matter, the case was taken over by the Ústí Regional Authority (hereafter simply "regional authority"). Following a resolution from the regional authority the cased was passed on to be dealt with by the Municipal Council of Ústí nad Labem (hereafter simply "Municipal Council").

The Deputy Defender summarised her findings in her report and subsequent statement, in which she took exception to the fact that the builder in the Land Register Office committed a gross breach of building discipline when he proceeded to erect a large set of buildings and make terrain modifications without the permission of the building authority or the consent of the relevant state administrative bodies, including the Administration of the Protected Landscape Area of České středohoří. She emphasised that the building law did not leave it to the discretion of the building authority as to whether or not to initiate proceedings concerning the removal of buildings or terrain modifications. The building authority is obliged to act without

undue delay and must initiate such proceedings on the basis of its official authority, provided that source materials are available to justify such action. As regards the fact that the case was taken over by the regional authority, the Deputy Defender considers this non-standard practice which deviates from the general practice of administrative bodies in the building section. Therefore she deemed this action to be in contravention of the Administrative Rules of Procedure, the principles of good administration, and the principle of legal certainty for all parties to the proceedings.

As far as the territorial plan is concerned, the Deputy Defender stated that she had proof that the Municipal Council of Řehlovice repeatedly reviewed the builder's application to have his plots of land included in the territory allocated for building works, and rejected his application. It is therefore clear that the builder did not manage to have his plots of land included in the alterations to the territorial plan so that they would be classed as land allocated for building works. The relevant building authority should now take this into account and respect the decision of the Municipal Council of Řehlovice.

In conclusion the Deputy Defender stated that extending the period granted for completing an application for a supplementary building permit on the grounds of the fact that alterations are to be made to the territorial plan can in no way justify the tolerance of "illegal buildings" in the long term, as the building authority has no power to influence the territorial plan. The builder had more than two years to remedy the matter, to collate all the necessary materials to secure the supplementary building permit, and to present the building authority with a qualified application to acquire permits for all the unlawful buildings. With this in mind, the Deputy Defender considers any further extension of the period to be completely superfluous and unjustifiable. Therefore, she deemed that the building authority had acted erroneously and in violation of the Administrative Rules of Procedure and the principles of good administration.

At the end of 2010 the building authority of the Municipal Council of Ústí nad Labem ordered the builder to take steps at his own expense to remove the buildings which he had erected without permission in the cadastre of Moravany u Dubic in the Protected Landscape Area of České středohoří.

7) Bias in building proceedings

The Deputy Defender investigated the Ústí Regional Authority, which, in several administrative proceedings relating to the industrial distillery in Trmice, held by the Trmice municipal building authority, found bias on the part of the mayor and subsequently passed the matter on to be decided by the Municipal Council of Teplice, i.e. the neighbouring administrative district.

The investigation was begun on the Deputy Defender's own initiative based on a complaint filed by the Mayor of Trmice, who did not agree with the steps taken by the regional authority – she particularly objected to the fact that due to allegations of bias against her person, as the head of the municipality, the case was withdrawn from the building authority, which she believes decided on the case in an impartial and unbiased manner. The Deputy Defender's investigation will focus on checking the procedure adopted by the regional authority with regard to its general impact on

resolving bias in administrative proceedings, if during the course of such proceedings the person heading the administrative authority is excluded.

8) Inspection work of the Municipal Council of the Capital City of Prague concerning the social and legal protection of children by the individual city districts of Prague; the publication of personal and sensitive data relating to children on the Internet by the Children in Need Fund

As part of an investigation into the work of the section for the social and legal protection of children of the Municipal Council of the Capital City of Prague the Defender assessed the publication of children's personal data on the website of the Children in Need Fund for the purposes of mediating foster care.

The Deputy Defender, who took on the case, held joint meetings with representatives of the Personal Data Protection Office, the Ministry of Employment and Social Affairs, and the Municipal Council of the Capital City of Prague. They reached a consensus in the sense that the law does not entitle bodies involved in the social and legal protection of children, institutional care facilities, facilities for children requiring immediate assistance or other bodies specified by the law on the social and legal protection of children or non-governmental organisations to publish personal data about children on the internet or anywhere else in order to mediate foster care. Such information (including photographs and sensitive information about a child's health, ethnic origin or religious persuasion) may only be provided to potential foster parents reviewed by the state who have been selected in accordance with the law as suitable candidates for a specific child in the foster-care register. The general public may only have access to anonymous data, i.e. data which does not lead to a specific or identifiable child. In accordance with the law on the social and legal protection of children, apart from state bodies, no other subjects (e.g. institutional care facilities, facilities for children requiring immediate assistance or other bodies specified by the law) are authorised to mediate foster care by selecting specific candidates for a specific child. Based on the results of this meeting the Ministry of Employment and Social Affairs will modify its interpretation of this issue.

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

1) Refusal to grant a residency visa exceeding 90 days

The Defender managed to make significant progress in the matter of recordings taken of interviews in proceedings concerning the granting of residency visas exceeding 90 days during the course of the interdepartmental comments proceedings on the amendment to the law on the residency of foreigners. The recording of interviews was previously resolved only at the methodical management level of the Ministry of Foreign Affairs. However, as the Defender's many years of experience investigating visa cases show, the actual practice of making recordings of interviews as applied by individual representative offices is inconsistent and in a number of cases inadequate to ensure a transparent visa process (in some cases no recording is taken, or the content of the recording is wholly inadequate to allow the application to be properly reviewed). However, the amendment to the law on the residency of foreigners, effective as of 1.1.2011, now incorporates recordings of interviews directly in the law, including the formal details of such recordings. According to the amended § 57 Paragraph 2 of the law on the residency of

foreigners, recordings of interviews, which, moreover, must be transcribed as separate documents, must contain "data identifying the applicant, details of the course of the interview, the date, the name and surname or service number and signature of the person conducting the interview, and the signature of the applicant." This was the culmination of many years of efforts made by the Defender and as regards long-term visas the law on conducting/recording interviews will finally meet with his requirements. Progress has also been made as regards current legislation and practice. According to the director of the Foreign Police Service, plk. Mgr. Husák, it has been agreed with the Ministry of Foreign Affairs that if any further information is required, the representative offices will conduct an additional interview with the applicant. He also confirmed that the representative offices generally send a recording of interviews to the foreign police inspectorates.

2) Refusal to grant temporary residency for the family member of a citizen of the EU (Czech Republic)

In an individual case the Defender looked at the interpretation of the provisions of § 15a Paragraph 1 d) and Paragraph 3 a) of the law on the residency of foreigners, which states that the family member of a citizen of the European Union means that citizen's dependant next of kin (descendant or ascendant in direct line) or such relative of the EU citizen´s spouse who "*is systematically preparing for a future career*." This term was interpreted by the Foreign Police as meaning that, besides presenting proof of study, the foreigner must also prove that "*since completing your primary school studies you have been systematically preparing for a future career and that this course of study has never been interrupted."* This interpretation was in contravention of the provisions of Article 2 Paragraph 2 c) of Directive 2004/38/EC, which states that the term "family member" is understood to mean "*the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);*". In relation to descendants over the age of 21 let the directive refers to dependents (the spouse of an EU citizen); it recognises no restrictions (the same applies as regards the practice of the EU court of justice) of the type stipulating that study must be continuous after the completion of primary school studies. This is also corroborated by the European Parliament and Council Committee Memo on instructions on how to better implement and apply Directive 2004/38/EC dated 2.7.2009. The Asylum and Migration Policy Department of the Ministry of the Interior accepted the Defender's interpretation and amended the methodical instruction in question. It also instructed the subordinate departments of the Foreign Police to do the same. Also, when proving that a person is systematically preparing for a future career it is no longer necessary to provide evidence of any immediate sequentiality, or that the studies have been uninterrupted.

3) Refusal to contribute towards the care of a mentally-disabled claimant

A claimant repeatedly and unsuccessfully applied to the Municipal Authority of Domažlice and the Regional Authority of Plzeň for a contribution towards the care of his son, born in 1990. In the case he stated that his son suffered from mild to averagely-severe mental retardation and in 2001 was diagnosed with epilepsy. He has been deprived of legal capacity since 2009 and since 2007 has been a client of a weekly social welfare group at an institution providing social care for young people with physical disabilities.

Considering the marked differences in the number of confirmed actions in social investigations and in terms of the assessment made by the advisory doctors, and also due to the lack of adequate justification for the appraisals, the director of the social care institution for young people with physical disabilities was asked to cooperate and staff of the Office of the Public Defender of Rights were also appointed to visit the boy in question. Based on all the source materials the Defender concluded that the crux of the matter in this case is not whether the person in question is capable of performing physical tasks, but whether his intellectual capacity is sufficient to allow him to carry out tasks on a longer-term basis, independently, and reliably and to recognise where action is needed and to check that what has been done is correct. As the minutes of the meeting do not make it clear whether the advisory doctors took this into account, the Defender considered the appraisal of the Assessment Committee of the Ministry of Employment and Social Affairs in Plzeň to be incomplete and unconvincing. He proposed that a review of the matter be initiated as a suitable remedial measure. The Ministry of Employment and Social Affairs has not yet issued any statement on the matter of this review.

4) Convicts' right to information

The Defender investigated a case filed by a convict whom the prison had refused to provide with information (although it had the information in the convict's personal file – particularly the conviction verdict). At the time of the investigation an internal rule of the Prison Service of the Czech Republic contained provisions which forbade the provision of information other than that resulting from the activity of the Prison Service.

In the Defender's opinion this constituted a violation of the fundamental principles governing the activties of administrative bodies and also the regulations covering the provision of information as defined in the Freedom of Access to Information Act (§ 2 Paragraph 1 of Law No. 106/1999 Coll.) In this specific case the prison refused to provide the convict with a copy of the written verdict (i.e. a file not resulting from the activity of the Prison Service of the Czech Republic but directly relating to it, as it was due to this verdict that the claimant was serving a prison term). In this case the refusal to provide information could constitute denial or substantial restriction of the right to a defence as granted by the Charter of Fundamental Rights and Freedoms. After the Defender intervened the internal rule of the Prison Service of the Czech Republic was changed so as to correspond to the stipulations of the higher-level laws (the Freedom of Access to Information Act).

5) Loss of medical documentation and the procedure adopted by the Personal Data Protection Office

The Personal Data Protection Office (hereafter simply "PDPO") failed to carry out a state inspection in a non-state medical facility in which the medical documentation of several patients had evidently been lost. Although the PDPO was informed of the loss of the cards by one of the patients affected back in 2007, it did not investigate the matter in compliance with the law, nor did it exercise its lawful authority to check whether patients' personal data was managed and secured by this medical facility in accordance with the law. The PDPO is guilty of inaction and improper procedure not only due to the fact that it did not apply sanctions against those responsible for the loss of sensitive personal data, but also that it did not take

steps to prevent any recurrence of the situation. The Deputy Defender reprimanded the PDPO for the fact that in handling the patient's complaint regarding the loss of her card it did not proceed in accordance with the law and did not initiate a state inspection or administrative proceedings; all it did was ask some vague questions and eventually deferred the complaint, which was in violation of the law. The PDPO expressed the opinion that the complexity of the relationships involved meant that was not possible to determine who is the administrator of the personal data and therefore none of the parties involved (the facility, the former doctors) could be forced to keep the medical documentation. The Deputy Defender did not accept this procedure and interpretation of the Personal Data Protection Act. She proposed that the PDPO carry out a state inspection in the non-state medical facility, find out how patients' documentation is secured and compare the list of registered patients with the paper or electronic medical documentation on site and, if any discrepancies are found, request that the missing documentation be presented. During this inspection the PDPO should focus on whether proper records are made of how individual employees handle the documentation and whether technical and organisational measures are in place allowing the facility to precisely determine and verify who data is passed on to. If it found that the facility was failing to proceed in compliance with the Personal Data Protection Act and patients' sensitive data was inadequately protected, the PDPO should apply all means and sanction mechanisms, including the imposition of fines.

Considering the fact that PDPO did not implement the proposed remedial measures, the Deputy Defender informed the public of her findings in accordance with § 20 Paragraph 2 b) of Law No. 349/1999 Coll., the Public Defender of Rights Act. After the publication of this information the chairman of the PDPO ordered a fresh investigation of the entire case.

6) Delineation of the boundaries of the Křivoklátsko Protected Landscape Area

The Deputy Defender issued her final statement on the investigation into a case relating to the procedure adopted by the Ministry of the Environment in its assessment of an offence which allegedly occurred on the site of the previously planned Křivoklátsko hydro-electric plant. The claimant asked the Defender to assess whether the inundation area for the future Křivoklátsko hydro-electric plant was part of the protected landscape area.

After investigating the case the Deputy Defender came to the conclusion that the inundation area for the future Křivoklátsko hydro-electric plant, mentioned in Order of the Ministry of Culture of the Czechoslovak Republic No. 21972/78, on the declaration of Křivoklátsko as a Protected Landscape Area, is not part of this protected landscape area. The delineation of the inundation area should primarily be understood as precluding the definition of the protected area. The fact that the plan to build the Křivoklátsko hydro-electric plant was dropped had no influence on the delineation of the protected landscape area and the inundation area did not later become part of the protected landscape area. To conclude otherwise would be in contravention of the principles covering the adoption and amendment of laws; any amendment should be made by the appropriate state body (the then Ministry of Culture) and in the prescribed manner. Although nature protection is classed as a public interest, it would go against the principles of good administration if changes to the extent of a protected area were made extemporaneously and not fully in

compliance with the formal requirements covering the creation and issuance of generally binding laws.

The Deputy Defender and the Ministry of the Environment believe that this situation can be resolved by a new delineation of the protected landscape area and the issuance of a new establishment order. The Ministry assumes that this declaration will be made upon the adoption of the law to declare the Křivoklátsko National Park, the draft of which is to be presented to the government's legislative council in December 2011.

F. The Defender's work in relation to systematic visits to places where people are or may be deprived of their liberty

In the fourth quarter of 2010 the Defender held a meeting with the Refugee Facilities Authority, the Asylum and Migration Policy Department of the Ministry of the Interior, the Medical Facility of the Ministry of the Interior and the Foreign Police Service to discuss the Defender's findings and recommendations regarding facilities used to detain foreigners and reception facilities. During the meeting the Defender was informed that all his proposed measures addressed to the Medical Facility of the Czech Ministry of the Interior had been adopted. In most cases the other subjects had accepted the Defender's recommendations. The conclusions of the meeting will be published in the first quarter of 2011 on the Defender's website.

In the quarter-year in question the Defender began a series of visits to facilities where children could be detained (children's homes, care institutions, children's psychiatric clinics, diagnostic institutions and facilities for children requiring immediate assistance). The aim of these visits is to chart the standard of treatment of children in various types of facilities (school, medical, social).

G. The Defender's work in relation to protection against discrimination

1) The right to do business: restricting entry to a store due to the presence of a child under the age of twelve

Claimants contacted the Defender objecting to the fact that although they always used to allowed into a chain store with a child, they were now forbidden from entering. The reason they were denied entry was that they were with a child under the age of twelve. It was found that the wholesale chain really does apply this rule, and also states it on its website. The reason stated for this practice is to ensure children's safety. The store is designed for entrepreneurs: a few of them use the goods they buy themselves, while the majority use them for trading purposes.

The Defender stated that the Anti-discrimination Act guarantees the right to equality in business and in access to goods and services. It forbids discrimination against entrepreneurs or those wishing to purchase goods or services where such discrimination cannot be justified by any legitimate purpose or reasonable means. The rule in question is aimed at children below a certain age, yet it is evident that those who are put that the greatest disadvantage by the rule are their parents. This

could also be classed as discrimination on the grounds of sex: the Anti-discrimination Act forbids discrimination on the grounds of sex and discrimination on the grounds of pregnancy or parenthood. Although the ban is there for a legitimate purpose (the safety of children), it is not achieved by necessary means, as the store did not consider any other way of achieving its aim. In the Defender's opinion the procedure adopted by the M. wholesale chain, which forbids certain entrepreneurs entry to the company's stores, can be deemed discriminatory. This is indirect discrimination against entrepreneurs (recipients of goods) on the basis of parenthood or sex.

2) The Public Defender of Rights' recommendations on the fulfillment of the right to equality in access to pre-school education

During the last year the Defender has dealt with a series of complaints relating to the criteria covering the acceptance of children into nursery schools. Therefore recommendations have been compiled which comprehensively specify these criteria. One important factor on which the Defender's recommendations were based was the fact that the primary task of nursery schools is to provide children with education; it is the child that has the right to pre-school education, not his or her legal representative, even though in practical terms the nursery school also provides a (secondary) child-mining service. In his recommendations the Defender focused on the criteria of age, the health of the child, the parent's professions, place of residence and the relationship between the child and his or her siblings.

The criterion of age can be applied on a general level without coming into conflict with the Anti-discrimination Act. It is possible to favour older children when there is a tie in points from other criteria. On the other hand, it is not permissible to exclude all children of a certain age from the chance to apply for acceptance into nursery school, for example by setting an unconditional minimal age limit for acceptance which is higher than the three-year limit as specified by the Schools Act. In such a case this would constitute direct discrimination in access to education.

As regards the criteria relating to the health of the child, these are often somewhat vague (e.g. the criterion of "medical fitness of the child" or "recommendations from a paediatrician), and so these should not be applied. However, the content of these criteria needs to be clarified, as they cannot be applied without any limits whatsoever. It is not, for example, permissible to a child to be refused entry to nursery school just because when the child came to be registered he or she was suffering from a common infectious illness (such as influenza). Denying all children with a medical disability entry into nursery school constitutes direct discrimination in access to education on the grounds of disability.

When considering children for acceptance, the directors of nursery schools must also not favour certain children on the grounds of the child's parents' career status. It is not, for example, permissible for a director to favour a child whose parents work in the public sector. Even though at the general level this cannot be classed as discrimination, such criteria do, however, violate the principle of equality for parties to proceedings and the impartiality of administrative bodies as stipulated by the provisions of § 7 Paragraph 1 of the Administrative Rules of Procedure. Moreover, the general requirement that parents be employed is not a legitimate criterion, as it does not take account of the individual needs of the child, but merely restricts the child's access to education on the basis of facts which are not only unrelated to education but also cannot be influenced by the child in any way

whatsoever. In such a case the child is actually being “punished” for the fact that his parents are out of work. Although this criterion is not discriminatory, it could involve elements of arbitrary behaviour and thus violate the provisions of Article 33 Paragraph 1 of the Charter of Fundamental Rights and Freedoms. When considering children for acceptance, the directors of nursery schools should also not consider whether one of the child’s parents is on maternity or paternity leave with another child (it is therefore wrong to differentiate in terms of points between a parent on maternity or paternity leave with another child and an employed parent).

As regards the requirement that the child should be registered as living in the municipality, according to the Defender this could be a legitimate condition, provided that it is not an unconditional criterion for refusal to accept a child into nursery school. However, it is not legitimate if the school requires that both parents be registered as living in the municipality; this is not a criterion which relates to the child as the person entitled to receive and education.

All these recommendations were made with the knowledge that the root of the problem is not the determination of criteria, but the disparity between supply and demand as regards places for children in nursery schools.

Brno, 13 January 2011

JUDr. Pavel Varvařovský

Public Defender of Rights