Information about activities presented by the Public Defender of Rights in accordance with the provisions of Section 24 (1) (a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended (hereinafter also "*the Public Defender of Rights Act*")

for the third quarter of 2013

A. Number of cases, investigations

I received a total of **1807** cases during the third quarter of 2013, which is down **57** compared to the same period last year. The number of cases in relation to public administration also slightly declined - **1029** cases received, which means **99** fewer than in the third quarter last year. The percentage of cases outside the sphere of my authority as defined by the Public Defender of Rights Act grew very slightly (IIIQ 2013 [778; 43%]; IIIQ 2012 [736; 39%]).

In addition, I received **48** cases relating to protection against discrimination, and discrimination was also claimed in 31 cases falling within the area of public administration. Further, the staff of my Office made **9** systematic visits to supervise the restriction of personal freedom. In connection with the powers concerning the monitoring of the detention of foreigners and administrative expulsion procedures, I received **613** monitoring rulings.

In the public administration agenda I again received most cases relating to social security – 286, followed by cases relating to building proceedings and town planning – 120 and by cases relating to the prison system, police and army – 85.

B. Activities of the Defender

B.1 Public Administration

During the third quarter of 2013 I issued in particular the following recommendations and statements in relation to public administration:

B.1.1 Provision of extraordinary instant assistance for covering co-payments for medicinal products

I dealt with a complaint about the procedure of a labour office which had not awarded an instant assistance allowance for covering co-payments for medicinal products, stating that expenses for medicinal products were already contained in the amount of the living minimum and that they needed to be paid from the subsistence allowance received by the complainant. I arrived at a conclusion that the office had erred because it had failed to substantiate in a sufficient manner its decision not to award the benefit.

The Act on Assistance in Material Need enumerates necessary one-off expenses for which instant assistance may be provided and thus does not rule out the coverage of co-payments by means of this benefit. In the given case, it cannot be stated without anything further that it is always possible to prescribe a medicinal product not subject to a co-payment because a particular medicinal product is not always suitable for a patient (due to its side effects or interactions with other medications). The provision of Sec. 16 of the Public Health Insurance Act cannot be applied either; it enables an insurance company to cover in exceptional cases healthcare not otherwise covered if its provision is the only option of treatment with respect to the state of health of the insured person since in such cases an insurance company covers healthcare services that are not covered at all (and not services covered partly).

If the statements of the attending doctor, requested by the labour office, showed that the complainant could not be prescribed medicinal products fully covered by the health insurance company, the labour office should have taken into consideration what amount of money the complainant was spending monthly on co-payments for medicinal products and whether it was possible for him to pay for them from the subsistence allowance (the complainant received an allowance of about CZK 3,400) besides paying for food, hygienic articles, clothing etc. If, after paying for co-payments for medicinal products, the complainant was not left with necessary funds to buy food and to pay for other basic living needs, extraordinary instant assistance should have been provided to him.

Proper substantiation of a decision is essential not only for applicants (so that they understand the reasons for refusal) but also for the procedure of an appellate body. Decisions insufficient in this respect become unreviewable, which is the reason for their subsequent cancellation. Special attention needs to be paid to the substantiation of a decision if an administrative body uses administrative discretion or the interpretation of a vague legal term, so as to prevent the breach of the prohibition of arbitrariness in decision-making of an administrative body.

In the case in question the labour office had to interpret the vague legal term "necessary one-off expense" and subsequently consider, based on its administrative authority, whether grounds were given (with respect to the income and the overall social and property situation of the complainant) for providing an allowance to cover such expense. It should have given due attention to both these procedures in the substantiation of the decision.

I have long disagreed with the simple line of reasoning that extraordinary instant assistance cannot be provided for covering co-payments for medicinal products and that medicinal products should be paid for from a subsistence

allowance. In my opinion, such line of reasoning cannot be adopted, without anything further, because in specific cases the affected person does not have to have sufficient funds for food and other necessary living needs after having paid for co-payments for medicinal products.

Last quarter, the matter was discussed at a meeting with the representatives of the Ministry of Labour and Social Affairs, the Ministry of Health, Všeobecná zdravotní pojišťovna and the State Institute for Drug Control. At the meeting we expressed our belief, along with the representatives of all the institutions addressed except the Ministry of Labour and Social Affairs, that the situation of persons in material need who do not have sufficient funds for necessary co-payments for medicinal products is solvable in individual cases by means of an extraordinary instant assistance benefit. The Ministry of Labour and Social Affairs, however, rejected such position and provides methodological guidance to the Labour Office of the Czech Republic requiring it (regardless of the financial situation of the client), after necessary co-payments for medicinal products are covered, not to provide extraordinary immediate assistance to a client. This can have a material impact on the situation of the client in some cases since the client is de facto forced to choose between paying for necessary medicinal products and basic food. In the previous period I also discussed with the Ministry of Labour and Social Affairs the provision of extraordinary instant assistance for covering the expenses of travelling to a healthcare facility by means of public transport. In this case, the Ministry agreed with my proposals and will provide the benefit to clients in justified cases.

B.1.2 Methodological work in detecting child abuse

In connection with the publicised case of abused children (in particular Dominik, a minor child from Brno), I looked into the administrative practice of bodies of social and legal protection of children in detecting child abuse. The aim of the inquiry was to analyse the present methodological work with respect to the detection of child abuse in the Czech Republic. I addressed selected regional authorities, the Municipal Authority of the City of Brno and the Ministry of Labour and Social Affairs, in an effort to discover what methodological guidance they gave with respect to the given matter or what materials they worked with. Owing to the preparation and the subsequent change of the legal regulation related to the issue subject to the inquiry (amendment No. 401/2012 Coll.) the call was later repeated. Above all, I asked about the procedure of bodies of social and legal protection of children in cases when criminal prosecution on grounds of suspected child abuse was suspended. Further, I was interested in the procedure during methodological and preventive work in the area of child abuse. Last but not least, I looked into the use of supervisions of social workers within the department of the social and legal protection of children and into the experience of the bodies with selecting a specialised worker of the body for social and legal protection of children in the given matter. In addition, I followed the opinions of social workers about the benefit of amendment No. 401/2012 Coll.

I recommended that regional authorities focus in their methodological work on the key role of supervising social workers and their further training, that they support wide participation in the system of early intervention, that they thoroughly consider all possibilities of bodies for social and legal protection of children after the conclusion of criminal proceedings on the part of the Police of the Czech Republic and that they consider selecting a social worker specialised in the problem of abused children (or

as a consultant) and use new tools introduced by the amendment to the Act on Social and Legal Protection of Children (in particular case conferences, and methodological assistance with the preparation of individual action plans).

B.1.3 Providing information about misdemeanours of public officers

My deputy inquired into the procedure of the Municipal Authority of the City of Ostrava and the Regional Authority of the Moravian and Silesian Region in connection with the failure to provide information about the disposal of a notice of misdemeanours of public officers. As a reason for not providing the information, the obliged entity mentioned the protection of personal data of the persons in question. In the course of the inquiry my deputy arrived at a conclusion that the Conflict of Interest Act imposes certain duties on persons engaged in a public office specifically on the basis of their public office. A misdemeanour according to the Conflict of Interest Act committed by a public officer is a textbook example of a situation when the right to information usually prevails over the right to privacy. The breach of such duties is directly and closely related to their position as persons engaged in a public office. Therefore information about how an administrative authority has handled the notice of a misdemeanour and how it has disposed of it on merits/procedurally (including information about potential innocence/guilt and the penalty imposed) may be provided also without the consent of the public officer concerned.

The respective authorities accepted my deputy's conclusions and promised to change the decision-making practice and to provide methodological guidance to subordinate municipalities.

B.1.4 A decision of a court on the settlement of community property of spouses as a source document for recording a right in the Land Registry, public character of the collection of documents

My deputy dealt with a complaint of a complainant requesting an inquiry into the procedure of several cadastral authorities which, after the death of her husband, recorded her exclusive right of ownership of several properties. While doing so, cadastral authorities did not proceed uniformly (some newly recorded a court resolution regarding the settlement of community property as a so-called source document while one stated, besides this resolution, the original acquisition title on the basis of which the properties had originally become part of community property). The complainant also objected to the amount of personal data contained in documents kept in the collection of documents, which is almost freely accessible.

After looking into the complaint, my deputy stated that only the resolution on the settlement of community property should have been recorded as the source document, which also corresponds to the prevalent administrative practice. The erring cadastral authority removed the shortcoming. My deputy also dealt in detail with the objection related to the content of the collection of documents and its public character. However, he considers the mechanisms set correct and lawful since they are not in violation of the Personal Data Protection Act. The same stand was also taken by the Office for Personal Data Protection. The public character of the collection of documents does not breach the Personal Data Protection Act. Cadastral authorities may process personal data by means of collecting and publishing them in the collection of documents without the consent of a data subject since the

processing is necessary for the compliance with the legal duties of a controller (Sec. 5 (2) (a) of the Personal Data Protection Act). The public character of the collection of documents is an essential element ensuring a problem-free course of real estate transactions. Certain protection against the misuse of personal data contained therein is provided by the legal duty of the person searching in the collection to prove his or her identity and state the purpose of search.

B.1.5 Education in self-government – selection of head teachers of schools

A complainant questioned the procedure and the composition of a selection committee since he believed that in a committee that selects a grammar school head teacher, a head teacher of a grammar school and not a head teacher of a secondary technical school should be one of the members. He made his objection only after the selected candidate was appointed head teacher of a grammar school, requesting the invalidation of the appointment so that a different person could be selected. He made a complaint with the President of the Regional Authority and the Ministry of the Interior, the division of inspection and supervision; however, none of the bodies took any further steps.

My deputy found a shortcoming on the part of the Ministry of the Interior, which had taken a very reserved stance to performing the supervision of the resolution of the regional board announcing the selection procedure and appointing the selection committee and which had refused to perform inspection of the performance of independent competence. He stressed the necessity of inter-branch cooperation and consistency in handling complaints. At the same time, he confirmed the conclusions that the resolution of the regional board whereby a specific person is appointed head teacher of a school cannot be subjected to supervision. He also agreed with the conclusions of the Ministry of Education, Youth and Sports that from the point of view of expertise it was not decisive that the head teacher of a secondary technical school was a member of the committee for the appointment of the head teacher of the grammar school. This fact cannot further influence the resulting appointment of the head teacher.

By the inquiry, my deputy managed to initiate cooperation with the Ministry of the Interior and the Ministry of Education, Youth and Sports. The outcome should be uniform methodology for municipalities and regions and the change of a decree of the Ministry of Education, Youth and Sports, according to which the result of a selection committee, following quite a complicated process for the municipal or regional council, serves only as a recommendation. In any case, the Ministry of the Interior should be more willing to launch inspection and supervision and should be more consistent. If the handling of citizens' complaints is not to be just formality, the Ministry of the Interior must request a factual statement from the Ministry of Education, Youth and Sports. Insufficiently ascertained facts and the absence of cooperation cannot be to the detriment of a complainant since this causes a loss of confidence in public administration.

B.2 Supervision of the restriction of personal freedom

As part of the supervision of the restriction of personal freedom, the staff of my Office made a total of nine systematic visits in the third quarter of 2013. Visits continued to be made to social service facilities serving as homes for elderly people

or homes with special regime, and five such facilities were visited. During the visits special attention was paid to persons suffering from the dementia syndrome. Additionally, two visits to police cells were made. Further, one follow-up visit was made to a facility for the exercise of institutional and protective education, namely a children's home with school.

Systematic visits to children's psychiatric hospitals and hospitals performed over the last two years were concluded with a summary report on systematic visits to children's psychiatric hospitals, published in the third quarter of 2013. Further, survey "Access to the social service of a home for elderly people" was published.

An employee of the Department for the Supervision of the Restriction of Personal Freedom attended a work meeting of the deputies of ombudsmen of the Visegrad Group, organised by the Polish ombudsman in Katowice. The topic of the work meeting was the status of elderly people and the protection of their rights.

In connection with performing systematic visits to school facilities for the exercise of institutional and protective education, a work meeting was held, attended by public prosecutors who supervise the observance of legal regulations in school facilities, i.e. in diagnostic institutions, children's homes, children's homes with school and reformatories.

B.3 Protection against discrimination

B.3.1 Results of the testing of banks and insurance companies

In view of an increasing number of complaints made by elderly people about the inaccessibility of some financial products on grounds of age, a survey was conducted with an aim to test, across the board, the accessibility of financial products to elderly clients. The accessibility of financial products to elderly clients and their possible discrimination was thus mapped for the first time in the Czech Republic. In case of banks, elderly persons most often encountered the rejection of an application for a credit card although they had been, for example, long-time clients of the bank, holders of golden payment cards, solvent clients with accounts in the Czech koruna and foreign currencies.

Within the survey it was verified that the restriction of access to financial services solely on grounds of age still occurs in the Czech Republic, although not to a large extent. Nevertheless, in some cases higher age significantly increases the purchase price of a specific product or service.

The results of a questionnaire survey showed that life assurance is a service the least accessible to elderly people. Its provision is restricted by age by all the insurance companies surveyed. However, with respect to the character of this product, setting an appropriate age limit is legitimate, which also applies to mortgage loans, whose provision is restricted by age by about a third of the surveyed entities. Accident insurance is restricted by age by 90% of insurance companies. The strictest conditions in terms of age limits apply to the payment protection insurance, which the financial entities addressed refuse to provide to clients on average from 63 years of age. Based on what the financial institutions stated in the questionnaires, services that are relatively most accessible to elderly people include financial leasing, voluntary motor insurance, compulsory motor third-party liability insurance, credit cards and an overdraft account. Each of them is restricted by age only by one entity.

If the provision of short-term services, such as credit cards, short-term consumer loans, overdraft accounts and so on were limited by an upper age limit, it would constitute discrimination on grounds of age.

Situation testing, which tested the actual accessibility of products, showed that two of thirteen tested entities (15%) restrict providing credit cards on the basis of the client's age without examining any other circumstances, thus allowing discrimination. One entity denied before a test person that it provided credit cards although they are advertised on its website. In one case an employee was not sure whether a credit card could be provided and indicated that age could present a problem.

Age was not an obstacle only in travel insurance, according to the situation testing. However, it occurred as a factor that considerably increases the price of insurance. For clients aged over 70 years, insurance premiums rise by 66-200%, and on average by 100%. Some insurance companies also introduce the category of clients aged over 80 years, for whom insurance premiums are raised by another 50 – 81%. Only two of nine insurance companies tested do not enable persons aged over 80 years to take out travel insurance online.

The survey was evaluated with knowledge that there may be reasons justifying the use of age restriction in specific cases (e.g. the duty of banks to proceed with prudence and not to make contracts that could be detrimental to the interests of depositors or endanger the soundness of the bank). At the same time, however, financial services are offered and provided to consumers and therefore they are subject to consumer protection and the prohibition of discrimination. In general, elderly people cannot be denied financial services solely due to age. Equal treatment of elderly people means not only the fulfilment of a statutory duty but it also increases the reputation of a financial institution in society as such. The survey will serve as the basis for a broader discussion about the quality of providing financial services to consumers. My deputy provided detailed information about the results of the survey in a press release dated 11 September 2013.

B.3.2 Findings from the activities of the Public Defender of Rights in the area of discrimination due to ethnicity

In connection with the preparation of the Tenth and the Eleventh periodic report on the fulfilment of obligations under the UN Convention on the Elimination of All Forms of Racial Discrimination, Government Commissioner for Human Rights was provided with information regarding the experience of the Defender in dealing with cases of discrimination due to ethnicity.

The information contains a statement concerning the national legislation and non-legislative measures for the protection from racial discrimination, the fulfilment of tasks in the area of equal treatment and the rights specially guaranteed by the Convention (right to work and housing, right to health protection, right to education and training). The absence of laws on free legal assistance and social housing was noted and a recommendation for the reduction of a court fee for filing a discrimination complaint and the Statement regarding the procedural aspects of the Antidiscrimination Act were reiterated.

It was noted that the public-law and the private-law method of regulation of equal treatment and the protection from discrimination do not make it impossible for victims of racial or ethnic discrimination to assert their rights. Barriers in access to effective legal protection in the Czech Republic rather consist in insufficient information or the application of the antidiscrimination law by Czech courts and by Czech administrative bodies, or they exist at the societal level or at the level of individual decision-making. The State should focus not only on repressing racial discrimination but, above all, it should act in a preventive and supporting way.

Although about twenty Romany complainants turn to the Public Defender of Rights annually claiming discrimination, most complaints have to be suspended (e.g. due to failure to supplement information and basic documents, withdrawal of the complaint or impossibility to contact the complainant). Although members of ethnic minorities complain about discrimination in access to work and housing, they are usually not willing to assert their rights in court.

C. Legislative recommendations and special powers of the Defender

C.1 Proceedings regarding the repeal of Decree No. 267/2012 Coll., on setting out the Indicative list for spa-rehabilitation treatment for adults, children and the youth

On the basis of a proposal of a group of senators, I entered the given proceedings as an enjoined party, according to the provision of Sec. 69 (3) of Act No. 182/1993 Coll., on the Constitutional Court, as amended. In my statement **I** largely **agreed with the opinion of the petitioner**, who claims that the provision of Sec. 2 (2) of the above-mentioned decree is in violation of Article 79 (3) of the Constitution of the CR due to its retroactivity.

Referring to the case-law of the Constitutional Court, I concluded that with respect to the objected retroactivity, I consider the respective **provision at variance with the principle of predictability of law** and the principle of legal certainty. In case of a repeated medical stay of insured persons-patients, their **legitimate expectations are violated**, and, consequently, the care is not covered from public health insurance. Last but not least, I pointed out that the inclusion of the Indicative list in the decree in question (whereby rights and duties are de facto established, or more precisely, it is established what is considered care covered from public health insurance and what is not) is beyond the scope of secondary legislation and should be provided for directly by a law (e.g. as an annex to Act No. 48/1997 Coll., on Public Health Insurance, as amended).

C.2 Action for the protection of public interest directed against permitting the construction of a photovoltaic power plant

In 2012 I filed my first action for the protection of public interest directed at a number of final administrative decisions rendered by the Municipal Authority of

Duchcov, whereby the administrative authority had permitted the construction of a photovoltaic power plant in the cadastral area of Moldava in Krušné Hory, and subsequently approved it for operation.

In connection with developments in the case-law (a decision of the Extended Chamber of the Supreme Administrative Court of 18 September 2012, File Ref. 2 As 86/2010), which clarified the character and the reviewability of a consent to the notification of construction and of other consents rendered under the new Building Act, **in the course of proceedings** (in a reply dated 31 October 2012) I **withdrew a part of my complaint** relating to disputable occupancy consents**.**

In September 2013, the Regional Court in Ústí nad Labem separated, by a resolution, a part of the complaint (according to the types of administrative decisions) for separate proceedings without reflecting in any way the procedural act of partial withdrawal of the complaint. In connection with the resolution in question it subsequently issued a resolution whereby the complaint against the respective occupancy consents was dismissed as inadmissible.

According to Sec. 47 (a) of Act No. 150/2002 Coll., the Code of Administrative Justice, as amended, a court discontinues proceedings by a resolution if the petitioner has withdrawn his or her petition. Therefore, if the complaint was (partly) withdrawn, the regional court **could choose only to discontinue (and not to dismiss) proceedings in that part.** Therefore, **I turned to the Supreme Administrative Court with a cassation complaint** regarding the unlawful resolution on the dismissal of the complaint**.**

C.3 Procedure of the Ministry of the Interior in exercising the supervision of the lawfulness of municipal edicts

I was addressed by the operator of a restaurant facility with a request to make a proposal for the annulment of a municipal edict of the Municipality of Dobřany No. 2/2013, on setting the places and time for the operation of gaming machines and on prohibiting some betting games, lotteries and other similar games on the territory of the municipality.

The operator claimed unlawfulness consisting in the fact that places stipulated by the municipal edict where betting games may be operated pursuant to Sec. 2 (e), (g), (i), (l), (m) and (n) of Act No. 202/1990 Coll. on Lotteries and Other Similar Games, as amended, were not in accordance with Sec. 50 (4) of the said law and therefore went against its purpose and the interest in public peace and the prohibition of discrimination. With respect to the fact that **the complainant had not exhausted all means of defence, in particular he had not turned to the Ministry of the Interior**, I advised him of this possibility. The Ministry possesses, **unlike me**, statutory instruments to ascertain possible unlawfulness while **exercising supervision**, in particular in a situation **where a regulation does not show apparent signs of unlawfulness (from the formal side)**.

I received a complaint of a different operator regarding the same kind of issue. The operator claimed unlawfulness of municipal edict of Karlovy Vary No. 6/2013, on setting the places and time for the operation of betting games, lotteries and other similar games. He also attached a reply of the Ministry of the Interior regarding the claimed unlawfulness, which raises doubt as to the adequacy of the

procedure of the Ministry in exercising supervision. Therefore I launched an inquiry into the matter.

C.4 Comments on the amendment to the Employment Act (restriction of access of persons with disabilities to temporary agency work)

In 2012 I started to be addressed by persons with disabilities trying to find employment. At the same time, most employment offers for persons with disabilities consisted of offers of employment agencies. From **1 January 2012** agencies started to reject persons with disabilities because the **Employment Act restricted temporary agency work and excluded persons with disabilities from it**. Nevertheless, even after that employers would send persons with disabilities to agencies although these could no longer procure employment according to the new legal regulation. As a result, such persons found themselves in a situation when **nobody wanted to employ them.**

In May 2013 I submitted, **beyond the amendment** to the Employment Act, fundamental **comments** on Sec. 66 of the Employment Act. **I argued**, in particular, that the current wording of the Employment Act was **at variance with** the prohibition of discrimination pursuant to the Antidiscrimination Act, the Charter of Fundamental Rights and Freedoms (Art. 3 in combination with Art. 26) and the so-called Framework Directive (Directive 2000/78/EC of the European Parliament and of the Council of 27 November 2000). The Czech Republic, in my opinion, transposed in a faulty manner Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work by excluding persons with disabilities from temporary agency work, moving them out of the possible scope of the restriction of this type of work. My **comments gained support** during an external commentary procedure and **were incorporated** in a draft amendment to the Employment Act. The effective date of the amendment, which was to make it possible again for persons with disabilities to get agency employment under the same conditions as healthy persons, was set for 1 January 2014. **The political situation, however, halted legislative work on this amendment**. Therefore, at present I am helping specific complainants in dealing with cases of discrimination on the part of employers due to the complainants' disability. Persons with disabilities should have the same opportunity of temporary agency work as healthy persons.

Brno, 6 November 2013

JUDr. Pavel Varvařovský
Public Defender of Rights