Public Defender of Rights
OMBUDSMAN

ANNUAL REPORT ON THE ACTIVITIES OF THE PUBLIC DEFENDER OF RIGHTS 2011

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Introduction

In the submitted annual report, JUDr. Pavel Varvařovský, the Public Defender of Rights (hereinafter also the "Defender"), sums up his control activities in the area of public administration, detention agenda, discrimination agenda and supervision over the expulsion of foreigners in 2011.

In this Annual Report, the Defender places emphasis particularly on the general observations following from his activities. The Report is therefore more detailed especially in the parts dedicated to the Defender's legislative recommendations to the Chamber of Deputies and his commenting on legal regulations, while adopting a more concise and, compared to previous years, illustrative approach in the part dealing with inquiries into specific cases, whether in the area of control of public administrative authorities, systematic visits to facilities where persons restricted in their freedom are held and in the area of non-discrimination law.

The Report is divided into seven parts.

The first part draws general conclusions on the most severe problems and, at the same time, the Defender attempts to outline options for their resolution in the form of recommendations to the Chamber of Deputies.

The second part of the Report is dedicated to the Defender's special powers and his participation in proceedings before the Constitutional Court. The Defender also provides information in this part on his activities in commentary procedures, the agenda of administrative actions to protect public interest and the agenda of disciplinary actions.

The third part comprises statistical data and presents observations made in individual areas of governmental authority. In accordance with Section 2 (4) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended), the Defender entrusted his deputy, RNDr. Jitka Seitlová, with the exercise of a part of his mandate. Thus, the Defender's conclusions and standpoints in the areas family and child; healthcare; land law; construction and territorial development; environment; citizens registry; right to information; consumer protection; State supervision and control over local authorities; and personal data protection, mean the conclusions and standpoints of the deputy of the Public Defender of Rights.

In the fourth part, the Defender presents information on the results of his systematic visits to facilities where persons restricted in their freedom are held (the so-called detention facilities).

The fifth part focuses on protection against discrimination under the so-called Antidiscrimination Act (Act No. 198/2009 Coll.).

In the sixth part, the Defender presents the mandate newly entrusted to him in the area of the so-called Returns Directive, which consists in monitoring the exercise of administrative expulsion, surrender or transit of detained foreigners and the penalty of expulsion of foreigners who were placed in pre-expulsion custody or are serving imprisonment.

The seventh part comprises general information on the management of funds by the Office of the Public Defender of Rights (hereinafter also the "Office") and on the Defender's international activities.

The eighth part is the closing summary.

The Annual Report contains observations from all areas of the Defender's mandate (control of public administration, detention agenda, discrimination agenda) and, as such, it includes, among other things,

- a report pursuant to Art. 23 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- a report in the sense of Art. 13 (2) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;

- a report in the sense of Art. 8a (2) of Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;

- a report in the sense of Art. 20 (2) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.









1 General Observations – Recommendations to the Chamber of Deputies

The general observations made by the Defender in the previous year, taking the form of his recommendations to the Chamber of Deputies, are newly provided in the first part of the Annual Report. In relation to the Chamber of Deputies, the Defender regards these general observations as the most important part of his annual information for the Chamber, to which he is accountable for the discharge of his office. By virtue of providing this information, the Defender also fulfils his duty pursuant to Section 24 (1) (a) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended) to submit recommendations for amendments to legal regulations to the Chamber of Deputies.

The Defender first briefly evaluates the fulfilment of his 2010 recommendations addressed to the Chamber of Deputies, where he referred to amendments to the legal regulations that he considered desirable.

The Defender simultaneously attaches new recommendations that followed from his activities in 2011. He again concentrates only on those recommendations that he considers absolutely essential (there are therefore no more than ten such recommendations). The Defender will welcome it if the Chamber of Deputies itself ensures that the recommendations are reflected in the applicable legal regulations in the form of an MPs' initiative and, to this end, the Defender will yet again strive to make sure that the individual recommendations are examined by the relevant committees of the Chamber of Deputies. In those cases where a legislative recommendation requires a substantial intervention in the legal system, the Defender will welcome it if the Chamber of Deputies adopts a resolution (as common in the past years) requesting that the Government address the recommendations in question.

1 / Evaluation of the Recommendations for 2010

The Public Defender of Rights is pleased to note that a major part of his recommendations to the Chamber of Deputies from 2010 have been fulfilled, whether by being directly reflected in the applicable legal regulations or at least by being taken into account in the preparatory legislative work.

Thus, the recommendation concerning **orphans' pensions** was heeded as the Pension Insurance Act was amended effective from 1 January 2012. An insurance period of two and a half years during the decade before the death is now sufficient for most surviving children to become entitled to the orphans' pension.

The recommendation was also accepted that the State should also provide, or should not postpone, **unemployment benefits in cases where severance pay has not been paid**.

The new Healthcare Services Act stipulated statutory guidelines for using means of restraint and took an important step towards a legal regulation of the living conditions of patients in medical facilities including **psychiatric hospitals** that would be in accordance with the Constitution, which the Defender called for in another of his recommendations last year.

The amendment to the Construction Code is also currently subject to the legislative process, and although the Defender has a number of reservations in this respect, the amendment attempts to follow his recommendation in addressing problems with poor **inspection work by chartered inspectors.**

The compensation for **property left in the Carpathian Ruthenia** after 18 March 1939 also appears to be satisfactorily addressed by the Senate's draft amendment to the relevant law, to which the Chamber has already given its consent.

Lastly, in relation to the trade of **"keeping registries"** that hold the documents of wound-up enterprises and the problem of commercial registries that have ceased to exist, for the time being, the Government tasked the Minister of the Interior with preparing an analysis and the Defender was assured that he would be acquainted with the results.

Thus, only the following two recommendations of the Public Defender of Rights for the year 2010 remain unheeded:

1 / 1 / Changed competence of highway administrative authorities

Building on his observations, the practice of the Regional Authorities and the opinions of the professional public, the Defender deems that the existing legal regulation of the competence of highway administrative authorities is inappropriate and untenable in the long term. At the time being, every municipal authority in the country is simultaneously a highway administrative authority, which places insurmountable practical problems before small municipalities given by the complexity of this agenda.

The Defender recommended that the Chamber of Deputies adopt an amendment to the Roads Act (Act No. 13/1997 Coll., as amended) which should entrust the competence of highway administrative authorities exclusively to the municipal authorities of municipalities with delegated competence.

In addition to the Resolution of the Chamber of Deputies tasking the Government with submitting a report on utilisation of the recommendations of the Public Defender of Rights for the year 2010, the Defender also addressed the Government with a separate material in this matter. However, the Government merely stated that the current situation is not satisfactory, but did not task the Ministry of Transport with drawing up the necessary amendment, because it considers that the problem should be addressed through a more comprehensive regulation of the status and competence of municipalities within public administration. The Defender is aware of the completed analysis of the existing condition of public administration and the proposal for its reform which is under preparation, but he still believes that his recommendation should have been implemented as a partial step, because at the time being it is not even possible to estimate when the comprehensive report being prepared will actually be adopted.

1 / 2 / Heritage preservation

The Defender has long pointed out shortcomings in the legislation on heritage protection. He refers particularly to the absent stipulation of the entitlement of owners of real estate in heritage reserves and zones to a contribution for the renovation of historic buildings that are not listed cultural heritage. A state thus prevails in the long term where the owners of real estate in heritage zones and reserves are obliged to comply with the requirements of heritage preservation when repairing their premises, but in contrast to the owners of cultural heritage, they are not entitled to a contribution for preservation of the cultural and historic values of the buildings. Thus, at variance with Art. 11 (4) of the Charter of Fundamental Rights and Basic Freedoms, there is no compensation for the restriction on the owners of real estate in heritage zones and reserves.

Problems are also connected with the duplication of heritage preservation where two independent institutions (national institutes of cultural heritage and heritage authorities) exist in parallel and often view planned construction projects in entirely different ways.

The Defender recommended that the Chamber of Deputies adopt a new Heritage Preservation Act which

(1) will stipulate the possibility of compensation for the costs of renovation and maintenance of heritage values of premises in heritage reserves and zones that are not listed cultural heritage and

(2) will unify the exercise of heritage preservation under a single institution whose standpoint on heritage preservation would be binding.

The Government stated in respect of this Defender's recommendation that it would address the new heritage law in 2013 and that it envisaged the possibilities of compensation for the limitation of ownership rights along the lines of the requirement of the Public Defender of Rights. However, it seems that it is not planned to combine heritage institutions and heritage authorities into a single structure of authorities and the Defender's recommendation thus remains unheeded.

2 / New Recommendations of the Defender for 2011

2 / 1 / Advice on the right to file an administrative action

Given the constitutionally guaranteed right to claim one's right before an independent an impartial court (Art. 36 of the Charter, Art. 6 (1) and Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms), the Defender considers that, for a truly effective exercise of this right, all second-instance administrative decisions should contain an advice about the possibility to lodge an action against an administrative decision in order to prevent forfeiture of entitlement to judicial protection due to ignorance of the law.

The requirement for advice about the option to lodge an administrative action is also contained in the Code of Good Administrative Behaviour, which was approved by the European Parliament on 6 September 2001 (Art. 19 (2)). A comparative analysis of the legal regulations in selected countries of the European Union shows that advice on administrative action is a common standard in these countries (e.g. Slovakia, Austria, Poland, Slovenia, Denmark, the Netherlands, Latvia, Spain).

Examples of good practice include the procedure of the Czech Social Security Administration as well as several cases where administrative authorities obligatorily provide advice on the possibility of filing an administrative action in view of the duties following for the Czech Republic from EU law (customs proceedings, proceedings concerning the detention of a foreigner).

In the past, building on the applicable legal regulations and the principles of good governance, the Defender attempted to impose the duty to provide advice in relation to the Regional Authorities and the Ministry of Finance. Unfortunately, his efforts were not successful. The Defender still insists that it is necessary to stipulate the duty to provide advice in a clear and explicit manner by legislative means. This objective could be achieved through minor modification of the Code of Administrative Procedure.

The Defender recommends that the Chamber of Deputies stipulate in the Code of Administrative Procedure, through an MPs' initiative (Art. 41 (2) of the Constitution), the duty of administrative authorities to advise the parties to proceedings of their right to lodge an administrative action against an administrative decision.

2 / 2 / Exclusion from the jobseekers register for failure to appear at the contact point of public administration (DONEZ)

Pursuant to Section 7a of the Employment Act (Act No. 435/2004 Coll.,) in the wording effective from 1 April 2011, a labour office may determine that a jobseeker shall fulfil his (her) obligations through an authorised contact point

of public administration. In simple terms, selected jobseekers are obliged to report regularly (mostly twice to three times every week) to the relevant branch of the Czech Post (Czech Point). According to the Ministry of Labour and Social Affairs, the system is to reduce illegal employment, where failure to report to the contact point of public administration by the set deadline without serious grounds results in exclusion of the jobseeker from the register.

The Public Defender of Rights is of the opinion that this practice is at variance with Art. 2 of the Charter of Fundamental Rights and Basic Freedoms and also contravenes the purpose of the Employment Act. With regard to the wording of Section 8a of the Act, a regional branch of the Labour Office has powers related to the mediation of employment, provision of mainly advisory activities and exercise of the means of active employment policy. The obligations of the jobseeker follow from this purpose and are inextricably linked to the mediation of employment. Neither any of the provisions of the Employment Act nor the purpose of the regulation suggests that jobseekers should report to a contact point of public administration (post office) for reasons other than to receive mediation or advice. In reality, a jobseeker failing to appear at the specified contact point of public administration (where no mediation or advisory activities are provided) is excluded from the jobseekers register on the grounds of failure to comply with an obligation which not only is not stipulated by law, but is in no way related to the mediation of employment.

As mentioned above, the DONEZ system has been established with a view to preventing illegal employment. However, the prevention of illegal employment is not among the statutory powers of the Labour Office; instead, since 1 January 2012, the control of illegal employment has been entrusted to labour inspection authorities. In order to legitimise the requirement of the labour office for appearing at a contact point of public administration, activities related to the mediation of employment should be performed at the contact points of public administration.

Thus, by including jobseekers in the DONEZ system, the Labour Office exceeds the limits of its statutory power and governmental authority is exercised outside the statutory boundaries.

The Defender recommends that, by means of an MPs' initiative (Art. 41 (2) of the Constitution), the Chamber of Deputies

- **repeal Section 7a of the Employment Act,**
- **amend Section 28 (2) of the Employment Act by repealing the words *"the duties pursuant to this sentence may also be fulfilled at a contact point of public administration determined by the regional branch of the Labour Office",***
- **amend Section 31 (c) of the Employment Act by repealing the words *"or a contact point of public administration".***

2 / 3 / Refund of value added tax to persons with disabilities

The Defender has concluded that the refusal to grant the right to the refund of value added tax to persons with disabilities on the grounds of purchasing a vehicle abroad is unlawful. He claims that Section 85 (1) of the Value Added Tax Act (Act No. 235/2004 Coll., as amended) is incompatible with the law of the European Union to the extent of the condition applicable to the purchase of a passenger vehicle in the Czech Republic (or delivery with the place of performance in the Czech Republic). In spite of continued correspondence with the Ministry of Finance, the Defender has not yet achieved remedy in two specific cases and, ultimately, of the administrative practice as such.

The Ministry merely states that it is considering a systemic solution where it would remove this agenda from the Value Added Tax Act and subsequently address it in some other manner in cooperation with the Ministry of Labour and Social Affairs. The Defender does not object to this solution; on the other hand, he does not expect this systematic step to take place in a foreseeable future and he therefore proposes to the Chamber

of Deputies a simple legislative amendment that would eliminate the interpretation problems related to the effective legal regulation until the envisaged systematic solution is put in place.

The Defender recommends that the Chamber of Deputies amend Section 85 of the Value Added Tax Act through an MPs' initiative (Art. 41 (2) of the Constitution) by repealing the words *"with the place of performance in the Czech Republic"* in par. 1, 2, 3 and 6.

2 / 4 / Lotteries

In spite of the right of municipalities to regulate the operation of other technical gaming equipment similar to gaming machines, which has always existed and has been explicitly confirmed by the Constitutional Court, the amendment to the Lotteries Act (Act No. 300/2001 Coll.), by means of the new wording of Section 50 (4) of the Lotteries Act, and in the words of its explanatory memorandum, *"extends the power of municipalities to regulate not only gaming machines, but also other kinds of lotteries and other similar games in its territory through a municipal edict"*. What is even more important, its transitional provision (Article II. (4) of the amendment) attempts to exclude the effects of such municipal edicts of municipalities for a period of three years from the effective date of the amendment, including in relation to the games whose regulation has always belonged (in the opinion of both the Constitutional Court and the Defender) under the authorisation of municipalities.

The Defender considers that the transitional provision is not applicable to cases of the already existing regulatory authorisation of municipalities as this would amount to retroactive infringement of the municipalities' right to self-government. For the time being, however, the Ministry of Finance is refusing this interpretation.

The Defender recommends that the Chamber of Deputies repeal Article II (4) of Act No. 300/2011 Coll. through an MPs' initiative (Art. 41 (2) of the Constitution)

The Defender also states that, if the required majority of votes is not obtained for the aforementioned amendment to the legal regulation, he recommends that a group of 41 MPs address the Constitutional Court with a proposal for repealing this provision pursuant to Section 64 (1) (b) of the Constitutional Court Act (Act No. 182/1993 Coll., as amended), because the Public Defender of Rights himself is unable to do so.

2 / 5 / Health insurance for foreigners

The previous Public Defender of Rights, JUDr. Otakar Motejl repeatedly pointed out that all categories of foreigners with the exception of employed foreigners are excluded from the system of public health insurance during the initial five years of their stay (this applies particularly to minor children and husbands/wives of foreigners from third countries who stay in the Czech Republic on the basis of a visa/long-term residence permit to unite the family). He also pointed out the inferior status of the family members of a citizen of the Czech Republic (typically a husband/wife) compared with the status of the family members of other EU citizens staying in the Czech Republic, i.e. the so-called reverse discrimination.

In relation to these categories of foreigners who can currently only conclude commercial health insurance (which is not claimable, is narrower, more expensive, commercial insurance companies will not insure citizens older than 70 years or a child with a birth defect, etc.), for several years, the Defender has endeavoured to ensure that they are included in the system of public health insurance. He has repeatedly communicated with several Ministers of Health, commented on the legislation, put through a motion via the Government Council for Human Rights, etc. All this to no avail.

The Defender recommends that the Chamber of Deputies request the Government to adjust the health insurance of the above-specified categories of foreigners.

2 / 6 / Territorial competence of distrainers

In spite of indisputable legislative efforts to reduce the adverse phenomena associated with distrainment, the Defender continues to encounter problematic consequences of the existing option of the entitled parties to freely choose a court distrainer. The stipulation of the territorial competence of distrainers would improve the contact between the court distrainer and the liable party and would prevent the unnecessary increase in the costs of the distrainment (distrainment on movable assets performed at the opposite end of the country). This would also minimise the number of cases of separate enforcement of several negligible receivables from a single liable party (it would be easy to combine the cases into a joint procedure). The State supervision could also be performed more effectively (the supervising chairman of a court would know better "his" or "her" distrainers in the relevant territory).

The Defender recommends that the Chamber of Deputies request the Government to stipulate territorial competence of court distrainers.

2 / 7 / Public Service Act

The Public Defender of Rights has long pointed out the failure to implement Art. 79 (2) of the Constitution, which envisages legal regulation of the position and relationships of employees who exercise governmental authority in governmental agencies differing from the Labour Code.

The unresolved status of employees exercising governmental authority in administrative authorities is often reflected in shortcomings ascertained by the Defender. This often leads to inactivity.

The continued postponement of the effect of the Public Service Act (Act No. 218/2002 Coll.) is particularly unfortunate, all the more because the law was already adopted in 2002 and has been amended almost thirty times. It should also be mentioned that, under these circumstances, i.e. while having an approved and applicable Service Act whose effect has been repeatedly postponed, an entirely new law on officers and employees of public administration is being prepared.

The Defender recommends that the Chamber of Deputies request that the Government remedy the unfavourable situation related to a lacking effective legal regulation that would regulate the status of employees exercising governmental authority.








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2 | Relations with Constitutional Authorities and Special Powers of the Defender

1 / The Defender and the Chamber of Deputies

In 2011, the Defender concentrated on establishing closer contacts with the Chamber of Deputies of the Parliament of the Czech Republic (hereinafter the "Chamber of Deputies") through its committees. He appeared in person in some of the committees and promoted his legislative suggestions or requested the MPs to push for them in the form of a draft MPs' amendment or MPs' draft law. In addition to personal appearances, he sent his written standpoints to the chairmen and chairwomen of the committees with a request for taking them into account when examining laws.

The Defender was regularly appearing before the Petition Committee, under whose agenda the Defender's activities fall. In spite of the long-lasting successful cooperation with the Petition Committee, the Defender suggests that his regular quarterly reports and special information on systemic failures of the authorities might also be provided to and examined by the Constitutional and Legal Committee. The reason is that the Defender's observations are often related to the exercise of the fundamental rights and basic freedoms guaranteed to every individual, to the protection of which he contributes by his activities. The Defender's activities in this area naturally became more thorough as his mandate was extended in 2006 to also include supervision over places where persons restricted in their freedom are held and at the end of 2009, when he became an antidiscrimination focal point.

1 / 1 / Petition Committee

The Public Defender of Rights has traditionally been a regular participant in the meetings of the Petition Committee of the Chamber of Deputies which examines his **quarterly reports** (Section 24 (1) (a) of the Public Defender of Rights Act – Act No. 349/1999 Coll., as amended).

The Defender also submits to the Petition Committee his **reports on individual matters where remedy was not achieved** even after exhausting all the Defender's means envisaged by law (Section 24 (1) (b) of the same Act). In 2011, the Defender informed the Petition Committee of an incorrect procedure of the Hořovice Municipal Authority (the construction authority) and the Regional Authority of the Central Bohemian Region that had erred in permitting the restoration of the power network (replacement of pylons). Another case he reported was a shortcoming by the Czech Telecommunications Office which, in a specific case of resolving a dispute concerning the payment for electronic communications services, failed to examine whether the monetary claim of the service provider was justified in terms of its grounds and amount.

1 / 2 / Healthcare Committee

In 2011, the Defender submitted comments on the Government draft of the Healthcare Services Act and the Government draft of the Specific Healthcare Services Act. The Ministry of Health as the drafting party did not satisfy these comments, despite the Defender's personal appeal addressed to the Minister of Health. The

deputy of the Public Defender of Rights therefore appeared at a meeting of the Committee on Healthcare of the Chamber of Deputies (hereinafter the "Committee").

The Defender is glad to state that the Committee reflected the submitted suggestions in its comprehensive draft amendment to the Healthcare Services Act. Thus, the **explicit right of the patient to disclosure of the name and surname of an independent expert** or members of an independent professional commission appointed by the Regional Authority for handling a complaint about medical care was incorporated in the text of the Act. The Defender had previously repeatedly pointed out the difficult access by complainants to the names and surnames and had received no response. The presentation by the deputy Defender at a meeting of the Committee also contributed to the **stipulation of deadlines for handling a complaint about medical care.** Last but not least, the provision which required that the potential costs of an interpreter be paid by persons with disabilities was omitted from the text of the Healthcare Services Act in order to **ensure equality of persons with disabilities.** The drafting party subsequently pledged that the costs would be settled within the system of public health insurance.

1 / 3 / Committee on Social Policy

Building on the recommendation set forth in the 2010 Annual Report, the Defender was seeking to amend the legal regulation of **orphans' pensions**. The Defender's objective was to considerably reduce the period of insurance required for incurring entitlement to the pension. He formulated a legislative suggestion, which he presented to the Committee on Social Policy (hereinafter the "Committee") at the time when the so-called small pension reform was discussed. An MPs' draft amendment reflecting the Defender's suggestion was subsequently submitted during the discussion of the Sickness Insurance Act.

The Defender also promptly responded to amendment to the legal rules which allowed for **non-payment of unemployment benefits if the employee was entitled to severance pay** but the severance pay had not been paid. The Defender personally attended the Committee's meeting with a legislative suggestion, which was subsequently reflected in an MPs' draft amendment presented during examination of an amendment to the Employment Act. The Defender also took an active part in discussing the social reform. He formulated legislative suggestions and repeatedly participated in discussion of the reform.

In the area of housing benefits (housing allowance, supplementary payment for housing), the Defender expressed disagreement with the **practice of limiting the provision of housing benefits to 5 years** during the period of 10 years following the effective date of the Act (1 January 2012). In his opinion, the provision of housing benefits is part of the constitutionally guaranteed right to assistance in material need, and persons at risk of social exclusion may not be entirely refused this assistance, especially where there is no alternative housing available (absence of the so-called social housing). Furthermore, the Defender required that the exemption where the time limitation is not applied be extended in relation to elderly people's housing. The Defender required that families with children be included in the exemption. The suggestion was partly accepted in relation to elderly people while families with children were neglected. Although the period of provision of benefits was prolonged to 7 years during the period of 10 years following the effective date, the time limitation remains.

In the area of State income support benefits, the Defender **disagreed with the complete abolition of the parental allowance for the parents of children up to 7 years of age** resulting from the merger of benefits for disabled children into a single benefit (allowance for care). The Defender pointed out that the new legal regulation would lead to a fundamental drop in income from non-insurance social benefits for families with a disabled child and illustrated the actual impacts of the new legislation on individual cases dealt with in his previous practice. He was unsuccessful in demanding preservation of the status of a long-term (heavily) disabled child at least until the age of 3 and an increase in the amount of the allowance for care with respect to children up to 7 years of age. In spite of his efforts, the parental allowance for disabled children was abolished.

In terms of the new method of payment of benefits using the **social systems card**, the Defender pointed out the numerous legislative shortcomings of the legal rules regulating this new instrument. He primarily pointed out that the aspiration of the drafting party to adjust the process of issuing the social card and its requisites through an implementing decree is at variance with the Legislative Rules of the Government and may also be at variance with the constitutional order. He also found legislative flaws in the process of exchange of data on recipients of benefits in the Uniform Information System of Labour and Social Affairs. Although the draft law was partly modified in accordance with the Defender's standpoint, the requisites of the card as a public deed, as well as other procedures in the exercise of governmental authority, nonetheless continue to lack statutory regulation (i.e. there are no statutory limits for secondary law-making).

Within examination of the Social Services Act, the Defender supported criticism of the abolishment of the so-called **minimum balance of income (i.e. pension) in residential social service facilities** (e.g. homes for elderly people). Should the submitted draft law be passed, persons with an average or even above-average pension will not have enough funds for paying accommodation and catering in residential social service facilities unless they have a third person (children, spouse) to pay the balance of the total price. In addition, as a result of this situation, a person with an income from CZK 8,527 to 10,230 per month would be left with no means for paying healthcare regulation fees, purchasing the necessary hygiene means, clothes and shoes and other essential living costs. The Chamber of Deputies did not pass the abolition of the minimum balance of income in residential social service facilities.

In connection with the social reform under examination, a fundamental change occurred in the method of **assessment of health condition for the purpose of determining the degree of dependence**. The Defender stated, already during the commentary procedure, that the new method of assessment of the degree of dependence is not sufficiently predictable and provides too much room for arbitrariness on the part of review doctors. The Defender therefore required that the basic principles of assessment be stipulated directly in the law. Consequently, the law was merely supplemented with the statutory authorisation of the Ministry to issue a Decree stipulating in detail the abilities to manage the basic essentials of living and the manner of their evaluation. The Public Defender of Rights therefore attended a special discussion of this implementing regulation in the Committee. He warned that the approach of the implementing regulation should not be excessively casuistic as this could paradoxically result in a situation where certain groups remain unintentionally neglected by the social assistance system.

In addition to examining the social reform, the Defender personally attended examination of the MPs' draft amendment to the Act on Assistance in Material Need and the Code of Civil Procedure and **refused the submitted draft concerning the distrainment of social benefits.** In his opinion, the draft failed to reflect the concept of jointly assessed persons and allowed to curtail also the minimum living standard of a child due to the parent's debt. He considered the submitted draft to be unsystematic in relation to the Code of Civil Procedure, which generally rules out the curtailment of benefits. He raised doubts as to whether a family whose subsistence allowance has been subject to distrainment is left with means for securing the necessary living conditions as envisaged by the constitutional order. The Chamber of Deputies refused the distrainment of social benefits (after it was returned by the Senate).

As part of examination of the MPs' draft amendment to the Misdemeanours Act, the Defender opposed the submitted concept of the option to **refuse residence in municipalities as a penalty imposed by authorities.** He pointed out that only a court may make a decision on such interference with the freedom of residence and movement, because only a court of law may make decisions on an individualised penalty for specific unlawful conduct. The Defender stated that the submitted draft did not satisfy the conditions for limiting the freedom of residence and movement as envisaged by the Charter of Fundamental Rights and Basic Freedoms. Such a limitation is obviously mainly preventive, i.e. residence or movement is limited due to a threat of breach of security, etc. and aims at preventing it generally rather than individually (which is typical e.g. of martial law). After the Committee for Regional Development and the Constitutional and Legal Committee had failed to adopt any resolution on the MPs' draft, the Committee for Social Policy merely took note of it. The Chamber of Deputies has not approved the draft as yet.

1 / 4 / Constitutional and Legal Committee

As part of examination of an amendment to the Act on the Code of Administrative Justice, the Public Defender of Rights brought suggested that the Defender's power be extended to include **the option of lodging an action to protect a public interest.** This suggestion was incorporated in the MPs' draft amendment and subsequently passed by the Chamber of Deputies.

The Defender also supported (during examination of the Mediation Act) consistent **differentiation between mediation and legal aid**, because combining them or even preferring legal counsels who provide mediation over "simple" mediators is inappropriate. The Constitutional and Legal Committee did not agree with the Defender's standpoint; the Chamber of Deputies had the same view and passed the draft law.

2 / The Defender and the Government

In early 2011, the Public Defender of Rights and the Prime Minister of the Czech Republic (hereinafter the "Government") agreed on details regarding the exercise of the Defender's powers in relation to the Government. The Defender appreciated the constructive approach of the Prime Minister because earlier there had been certain discrepancies between the requirements of the Public Defender of Rights Act and the rules of procedure of the Government. These discrepancies were now entirely eliminated. Under the law, the Defender addresses the Government in three groups of cases.

The first group includes situations where, after the Defender's inquiry, a Ministry **has not adopted sufficient measures to remedy a specific shortcoming.** In that case, the Defender advises the Government of this situation (Section 20 (2) (a) of the Public Defender of Rights Act). The Government is advised only in the form of a material "for reference of the members of the Government".

The second group consists of cases where, following the Defender's inquiry, a Ministry **has not adopted sufficient measures to remedy a general unlawful administrative practice.** In such a case, the Defender advises the Government of the systemic issue (again Section 20 (2) (a) of the same Act). The advice is submitted to the Government in the form of a non-legislative material, as a rule with a draft resolution through which the Government would oblige the relevant Ministry to change the administrative practice. The Defender usually attends the examination of the material.

The third group represents cases where the Defender utilises his special power and **recommends that the Government adopt, amend or repeal a law** or a Government Regulation or Government Resolution (Section 22 (1) of the same Act). The Defender submits his recommendation to the Government in the form of a non-legislative material, without a commentary procedure and with a draft Resolution through which the Government would oblige the relevant Ministry to carry out the relevant legislative work. The material is usually examined with participation of the Defender.

2 / 1 / Advising the Government of unlawful administrative practice

Blocking incorrect data in citizens registry

The Public Defender of Rights already drew attention to the inadequate technical implementation of the statutory requirements for identification of incorrect data and the "blocking of data before potential further processing" in the preceding Annual Reports on his activities. In 2011, the Defender therefore addressed the Government in connection with the failure to block data on the biological parents of adopted children and in connection with failure to ensure remote access of courts to adoption data, because the Ministry of the Interior had not adopted the measures proposed by the Defender to remedy the generally unlawful administrative practice. On the basis of the Defender's advice, the Government tasked the Minister of the Interior, through Resolution No. 263 of 13 April 2011, to adopt the measures recommended by the Defender. In Oc-

tober 2011, the Minister of the Interior presented the Defender with a report on the measures adopted with a view to fulfilling the task contained in the aforementioned Resolution of the Government.

The Ministry of the Interior has prepared and put into operation the new UNIQUE software which makes it possible to set the relevant privileges for individual institutions so that the data provided from the information system of the citizens registry (ISEO) are in accordance with the applicable legislation. However, through a question to the courts (those at which he had previously inquired into the management of adopted children's personal data), the Defender found that the courts **did not have remote access to adoption data even after the above measure was introduced**.

The identification (blocking) of incorrect data has also not been resolved satisfactorily. The Defender's observations suggest that the identification of incorrect data is in place only at the authorities of municipalities with extended competence, while ordinary registry offices are still showing irregularities. The existing "Reklamace" or "Complaint" application, which enables a user/editor of the information system to identify incorrect data in the system, is not very user-friendly. The Defender considers it necessary that the individual departments of the Ministry of the Interior cooperate more closely in the preparation of the new version of the application so that the terminology used by the manual is in compliance with the law.

In summary, a substantial part of the Resolution of the Government has not been complied with. The Defender intends to further address this subject through inquiries on his own initiative.

2 / 2 / Recommendations to the Government for amending laws

Administrative fee for copies made from an official file

In 2011, the Defender recommended that the Government change the Tariff List of Administrative Fees (specifically item No. 3) contained in an annex to the Administrative Fees Act (Act No. 634/2004 Coll., as amended). The main issue lies in the fact that even parties to administrative proceedings that are still pending are required to pay a fee which substantially exceeds the costs of making a copy from the official file. This, according to the Defender, is at variance with the right to a fair trial. The Defender recommended that the **tariff list be changed so that either the price of a photocopy for one page is reduced to the usual commercial level (CZK 1.50 instead of CZK 15) or that the law entirely exempts parties to pending proceedings from payment of the fee.** On the basis of the Defender's recommendation, the Government tasked the Minister of the Interior, through Resolution No. 633 of 24 August 2011, with submitting an amendment to the Administrative Fees Act which would reflect the Defender's recommendation.

The Ministry of the Interior complied with the Government Resolution at the end of 2011; however, in the Defender's opinion the **amendment under preparation does not satisfy his recommendation.** The administrative fee was reduced only partly (to CZK 15 for the first page and CZK 5 for every additional page) and the parties to pending administrative proceedings will not be exempted under the law (they may be exempted only based on discretion of the authority and *"for reasons deserving special attention"*). The Ministry of the Interior has observed that the budget revenue on this fee is absolutely marginal and many authorities no longer require it from the parties to proceedings. The Defender does not understand why the amendment was submitted in this form and has submitted his comments on the amendment. The Government did not reflect these Defender's comments and the draft amendment will be submitted to the Chamber of Deputies in the form prepared by the Ministry.

Damage to special-purpose roads

The Defender recommended that the Government **supplement the Roads Act (Act No. 13/1997 Coll., as amended) with the merits of *"soiling or damaging a publicly accessible special-purpose road"***, because the existing wording of the Act provides for official penalties only on the grounds of soiled or damaged higher-category roads (local road, highway, motorway). The Defender's recommendation was a response to

a growing number of complaints of highway administrative authorities which lacked a tool for penalising unlawful ploughing of field tracks and other damaging and destruction of special-purpose roads. On the basis of the Defender's recommendation, the Government tasked the Minister of Transport, through Resolution No. 634 of 24 August 2011, with submitting the recommended amendment to the Roads Act by 30 June 2012.

2 / 3 / Submission of comments by the Defender

The Defender made use of the option of commenting on draft legal regulations and other materials submitted to the Government of the Czech Republic on **38 occasions**. The Defender submits his comments particularly in cases where he has observed, in the exercise of his mandate, that legislation should be amended. Thus, he exercises a simplified form of his authorisation stipulated in Section 22 of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended) – to submit to the Government recommendations for issuing, amending or repealing a legal or internal regulation.

The following can be regarded as the most important comments made:

Comments on the Control Rules

Government draft of the Control Act (Control Rules); Chamber of Deputies, 2012, 6th electoral term, parliamentary print 575. ***The Defender's comments were accepted.***

The Defender has long supported the adoption of new Control Rules in order to unify control procedures in public administration (particularly for inspecting the exercise of both independent and delegated competence of regional self-governing units). In the commentary procedure, the Defender concentrated on the concept of **control survey, deadlines for conducting and completing State control**, refusal of explanation on the grounds of compliance with a **confidentiality** obligation imposed or recognised by the State, reasons for **denying cooperation** and stipulation of the request for detailing **objections against the control protocol.** The drafting party (the Ministry of the Interior) provided an explanation in respect of the first two of the above comments. The remaining comments were accepted and incorporated in the draft wording of the Act.

However, during the intersectoral commentary procedure, the drafting party stated that it would refrain from submitting the **amendment law** which was to amend approximately 60 generally binding regulations that currently regulate the exercise of control by the State in individual areas of public administration. Since this would endanger the main objective of the new Control Rules (i.e. unification of the scattered and confusing legal regulation), the Defender addressed directly the Minister of the Interior and the Deputy Prime Minister. Based on this initiative, the Ministry changed its original intention and proposed to the Government a schedule to be followed by the individual sectors in submitting draft amendments to the laws falling under their competence. The Ministry of the Interior should be one of the drafting parties in each case. This plan was accepted by the Legislative Council of the Government.

Comments on the amendment to the Local Fees Act

The Government's draft amendment to the Local Fees Act (Act No. 565/1990 Coll., as amended) has yet to be submitted to the Chamber of Deputies. ***The Defender's comments were partly accepted.***

The Defender welcomed the effort to amend the Local Fees Act. On the other hand, he questioned the attempts to excessively **broaden the group of payers liable to pay fees for municipal waste in that it would include foreigners staying for a short term** in the territory of the Czech Republic (because of fundamental risks in the administration of the fee) **and natural persons who are the owners of flats where no-one is registered for permanent residence** (because of unequal treatment of legal persons who are the owners of flats and because the proposed legal rule is virtually impossible to put into practice). It is likely that the drafting party will satisfy the Defender's comments in both cases.

The Defender also supports the drafting party in its endeavour to resolve the **situation of payers of local fees** (particularly for municipal waste) **who are of minor age (financially dependent)** so that the legal regulation makes it possible to enforce the obligation directly towards the legal representatives. The Defender and the drafting party have agreed that a solution is necessary but the manner of achieving it (its appropriateness) is still being debated. Despite the fact that municipalities and regions call for restoration of the **option to waive local fees and their accessions on a case-by-case basis**, including on the grounds of harshness, the drafting party is still opposing this in spite of the Defender's support for the municipalities' requirement for the option of waiver.

Comments on amendments to the Code of Civil Procedure

1) Government's draft amendment to the Code of Civil Procedure (Act No. 99/1963 Coll., as amended); Chamber of Deputies, 2012, 6th electoral term, parliamentary print 537. ***The Defender's comments were taken into account.***

In 2011, the Defender joined the commentary procedures on amendments to the Code of Civil Procedure several times. Some of them were related to an amendment regulating the **enforcement of decisions**. These comments were not duly addressed by the Ministry of Justice; nevertheless, consensus was subsequently reached when the draft amendment was rewritten following the commentary procedure and examination in the working committees of the Legislative Council of the Government.

2) Government's draft amendment to the Code of Civil Procedure (Act No. 99/1963 Coll., as amended); it has yet to be submitted to the Chamber of Deputies. ***The Defender's comments were taken into account.***

As part of another amendment to the same procedural rule subject to comments, the Defender again raised the issue of inadequate **judicial protection in cases involving placement (holding) in facilities providing residential social services** (the agenda of detention proceedings). The Ministry pledged to address the issue of a broader approach to detention proceedings during the year 2012.

In the same draft amendment, the Defender disagreed with the proposed option of **alternative delivery of payment orders** in so-called "negligible disputes" (amounts of up to CZK 10,000), stating that he had repeatedly encountered cases where the creditor did not communicate with the debtor at all. Thus, in the pre-litigation stage, the debtor is totally unaware of his or her failure to pay the debt, which is often small. The existing obligation of personal delivery of payment orders to the debtor allows the debtor to remedy his or her shortcoming at the stage of the fact-finding procedure conducted by the court. Should alternative delivery be introduced, many debtors would become aware of the omission at an even later date (after having been visited by the distrainer). Although the Defender did not succeed with this comment, the problem was partly resolved through the stipulation of a new concept, **"pre-litigation call"**, where the creditor who fails to call on the debtor before lodging the action does not become entitled to reimbursement of the costs of the proceedings. If this "incentive for the creditor" to contact the debtor proves to be sufficient, the Defender will no longer regard alternative delivery of payment orders to undisciplined debtors as a problem.

Comments on the Act on the Operation of Betting Games

Government's draft Act on the Operation of Betting Games; it has yet to be submitted to the Chamber of Deputies. ***The Defender's comments were partly accepted.***

In line with its existing decision-making practice, the Ministry of Finance prepared an entirely new law on the operation of betting games. At variance with the case-law of the Constitutional Court, the Ministry attempted to **limit the authorisation of municipalities to regulate gambling in their territory through municipal edicts.** This intention was ultimately abandoned after addressing critical comments (not only from the Defender). However, the draft law does not grant municipalities the status of parties or competent authorities in individual proceedings on granting authorisation. In addition, **the authority issuing the permit will not take any steps at all to examine the risk of disruption of public policy,** for example through installation of a game

at a specific location. The Ministry even intended not to adopt the existing rule which makes it possible to respond to an edict (or amendment) issued after the gaming machine has been permitted. Following the Defender's comments, it now allows for removal of the permission to install a game, but *"not earlier than"* one year of the legal force of the municipal edict in question. The Defender is dissatisfied particularly with the vague words *"not earlier than"* that allow the Ministry to extend the already long period of time. The draft also does not address a situation where an already existing municipal edict is ignored in permitting a game.

The Ministry proposed, without providing any explanation, **a dramatic intensification of the gambling element, i.e. the danger to society posed by** technical gaming equipment operated directly by the gamer (existing gaming machines, video lottery terminals, electromechanical roulettes and dice). The existing maximum bet per game is CZK 2 or 5 or 50 depending on the installation site of the machine and the maximum loss per hour is CZK 1,000 or 2,000 or 10,000. The Ministry proposed limits that are up to ten times higher. With some simplification, a machine with certain parameters that could previously be installed only in a casino could now be installed on premises with the lowest permitted gambling intensity (e.g. a restaurant). Based on the comments from the Defender and other parties, the Ministry substantially reduced the limit (with the exception of machines installed in casinos). The proposed maximum hourly loss is to be CZK 3,000 or 6,000 or 80,000; the maximum bets CZK 10 or 20 or 500, which is a concession, but we can still regard this as an unsubstantiated dramatic intensification of the gambling element and hence danger to society posed by the operation of this equipment. The Defender also criticises the absence of any study of impacts of gambling on the population.

On the regulation of gambling by the Ministry of Finance, see also page 74.

Comments on the Act on Citizenship of the Czech Republic

Government draft of the Act on Citizenship of the Czech Republic; it has yet to be submitted to the Chamber of Deputies. ***The Defender's comments were not accepted.***

The Defender raised several comments on the draft wording of an entirely new law on citizenship. He expressed disagreement, for example, with the exclusion of court review of rejecting decisions of authorities on the grounds of security of the State.

The Defender also strongly criticised the **exclusion of the option available to Slovak citizens to acquire Czech citizenship through a simplified procedure (by declaration).** The simplified procedure and acquisition of the citizenship of the Czech Republic by declaration will be available to former Czech and Czechoslovak citizens and their children who were never Czech or Czechoslovak citizens. In practice, this will apply especially to persons who lost Czech citizenship after 1 January 1993 through the acquisition of foreign citizenship pursuant to Section 17 of the existing law and to children and grandchildren of former citizens who emigrated before the year 1989. In the Defender's opinion, a Slovak citizen may not be prevented from acquiring Czech citizenship through the simplified procedure if the person meets the same criteria as a citizen of any other country.

Comments on the amendment to the Act on the Exercise of Institutional Education or Protective Education

Government's draft amendment to the Act on the Exercise of Institutional or Protective Education in School Facilities and on Preventive Educational Care in School Facilities (Act No. 109/2002 Coll., as amended); Chamber of Deputies, 2012, 6th electoral term, parliamentary print 574. ***The Defender's comments were accepted.***

The Defender strictly rejected the "legalisation" of **bars in reformatories**, including those where only children undergoing institutional education are held. Based on his previous visits to detention facilities, the Defender is aware that the existing statutory prohibition of technical measures (in the form of bars) is not always respected in practice and the submitted amendment would legalise the present unsatisfactory (and unlawful) state of affairs. In reality, the intended purpose can already be achieved by adopting simple technical ar-

rangements (by replacing window openers so that the windows can be locked and by using the tilt section for ventilation; a special foil can be glued on the window against breaking, etc.).

The Defender also criticised the new precondition for permitting **movement outside the facility** – no attempt to escape during the past 12 months. The proposed provision was very strict and against the best interest of the child and its right to family life (for example in case of "infrequent" escapes to the family).

For repeated escapes of the child, the head of the facility was to receive a new explicit authorisation to initiate **abolishment of institutional education**, which the Defender found unnecessary. The new regulation could lead the facilities to resort to this provision in order to get rid of "problematic escapers". The Defender considers it far more appropriate if reformatories could work with "escapers" on an out-patient basis insofar as they are aware of the child's whereabouts and the basic needs of the child are satisfied at least partly (e.g. in case of repeated escapes to the family).

Comments on the amendment to the Employment Act

Government's draft amendment to the Employment Act (Act No. 435/2004 Coll., as amended), promulgated in the Collection of Laws under No. 367/2011. ***The Defender's comments were taken into account.***

In addition to satisfying the Defender's legislative recommendation from 2010 concerning unemployment benefits (or other compensation) in case of non-provision of severance pay by the employer, the commented amendment also brought about **unification of the legal rules in the area of non-discrimination law.** The Defender proposed omission of excessive matters (definition of direct and indirect discrimination, regulation of entitlements following from breach of the right to equal treatment) from the Employment Act, which represents ***lex specialis*** in relation to the Antidiscrimination Act (Act No. 198/2009 Coll.). The drafting party fully complied with the Defender's comment and unified the legal rules. It even went beyond the Defender's requirement as, in addition to "cleaning" the confusing legal rule in legislative/technical terms, it also omitted those prohibited discriminatory grounds that were not contained in the Antidiscrimination Act. Thus, the Employment Act in its present form does not explicitly prohibit difference in treatment e.g. on the grounds of social origin, political opinion and membership of trade unions.

Comments on the substantive intent of the Act on Entry and Residence of Foreigners

Government's draft substantive intent of the Act on Entry and Residence of Foreigners in the Territory of the Czech Republic; it has yet to be submitted to the Chamber of Deputies. ***The Defender's comments were partly accepted.***

The Defender raised very extensive comments on the substantive intent of the new legal regulation of the entry and residence of foreigners in the territory of the Czech Republic, free movement of the citizens of the EU and their family members and protection of State borders, which is to create a new legal framework for the legislation on foreigners for many years to come. Most of the Defender's comments were taken into account; nevertheless, four comments that can be regarded as crucial for a fair future legislation on foreigners were not accepted.

The Defender disagrees with the **separation of the legal regime applicable to the entry and residence of family members (from third countries) of citizens of the Czech Republic from the regime applicable to family members of EU citizens.** The Defender considers that equality of Czech citizens with EU citizens in terms of the right to live together with their closest family members, which was introduced at the time of the Czech Republic's accession to the European Union, was the right step, which should certainly be preserved. It is hardly conceivable that Czech citizens and their family members (whose permanent residence is likely to be in the territory of the Czech Republic in an overwhelming majority of cases) would be in a worse position than EU citizens and their family members who often migrate only for a limited time for work or business. The chosen solution places Czech citizens' family members and hence Czech citizens themselves at a strong disadvantage. A worsened legal status of Czech citizens' family members would affect all areas of the resi-

dence agenda and the proposed legislation would establish what is called reverse discrimination, as it places family members of Czech citizens from third countries at a disadvantage compared to family members of other EU citizens staying in the Czech Republic.

The Defender also disagrees with **detention (in other words, limiting the freedom) of unaccompanied minors aged 15 to 18 in facilities for the detention of foreigners** (except for the time necessary for verifying the minor's age if the age reported by him or her is questionable). Despite all their specifics, these facilities can hardly be conceived as being anything other than a prison of a kind. The Defender holds that depriving a child of its freedom on the grounds of a misdemeanour (rather than a crime) is not an appropriate response in a democratic rule of law. In connection with the above, the Defender strongly disagrees with the setting of the **age limit for legal capacity in relation to proceedings conducted under the Foreigners Act at mere 15 years** as was originally proposed by the Ministry of the Interior. The Ministry made a limited concession; on the other hand, it is absurd that the commentary procedure led to a situation where general legal capacity is to be set at 18 years, while being set at 15 years for the purposes of determining liability for unlawful conduct (including administrative expulsion and detention). It is devoid of all logic that, in standard residence matters, a child who is a foreign national would be afforded greater protection than in proceedings with the greatest intensity of interference with its rights that may limit its freedom. In these proceedings, regarding a person over 15 as enjoying legal capacity is at variance with the principle of the best interests of the child contained in Art. 3 (1) of the Convention on the Rights of the Child.

3 / The Defender and the Constitutional Court

In relation to the Constitutional Court, the Defender has a special power to submit his own proposals for repealing secondary legislation (Section 64 (2) (f) of the Constitutional Court Act (Act No. 182/1993 Coll., as amended)). In 2011, the Defender made use of this right **in one case** as he proposed that the Constitutional Court repeal the municipal edict of the Lukovany municipality on a local fee for permits for entrance by motor vehicles. The Public Defender of Rights considers that the edict does not serve for regulating traffic in historically or otherwise valuable comprehensive parts of a municipality as anticipated by the law, but it rather represents a hidden toll, which is prohibited by the Roads Act (Act No. 13/1997 Coll., as amended).

In relation to the Constitutional Court, the Defender most often stands in the position of a so-called enjoined party in proceedings on proposals of other parties for the annulment of secondary legislation (as a rule, municipal edicts). In 2011, the Defender **opined on 6 proposals,** 3 of which were directed against edicts of the towns of Chrastava, Františkovy Lázně and Kladno that sought to **regulate gambling** (the operation of interactive video lottery terminals and other similar technical gaming equipment). The Defender supported these municipalities in the proceedings before the Constitutional Court.

3 / 1 / Proposal of the Ministry of the Interior for annulment of a part of a municipal edict of the Chrastava municipality (regulation of gambling)

File Ref. Pl. ÚS 29/10

On 14 June 2011, the Constitutional Court concluded, based on a systematic and teleological interpretation, that the law uses two definitions of gaming machines. A narrower definition is stipulated in Section 17 (1) of the Lotteries Act (Act No. 202/1990 Coll., as amended). The broader definition under Section 2 (e) of the Lotteries Act includes both gaming machines under Section 17 (1) of the Lotteries Act and "any equipment similar to electronically or eletromechanically controlled gaming machines". **Thus, the Constitutional Court accepted the authorisation of municipalities to regulate the operation of equipment similar to gaming machines pursuant to Section 50 (4) of the Lotteries Act**; however, these machines cannot be considered to be gaming machines under Section 17 (1) of the Lotteries Act. In other words, the Constitutional Court concluded that the above regulation of the operation of gaming machines also applies to other technical gaming equipment.

At the same time, the Constitutional Court inferred the **statutory duty of the Ministry of Finance to commence proceedings on review of previously issued permits that are at variance with municipal edicts if it ascertains such a conflict** and to proceed in accordance with Section 43 (1) of the Lotteries Act, which allows for annulment of existing permits. In relation to the risk of interference with the legal certainty of operators, the Constitutional Court pointed out that the "operators of this equipment must have been aware of the existence of Section 43 of the Lotteries Act and hence the fact that the permit may be removed essentially at any time if circumstances excluding the operation of this equipment arise during the validity of the permit".

Thus, the Ministry of the Interior was unsuccessful with its proposal and the Constitutional Court found in favour of the Chrastava municipality and the Public Defender of Rights.

3 / 2 / Proposal of the Ministry of the Interior for annulment of a municipal edict of the Františkovy Lázně municipality (regulation of gambling)

File Ref. Pl. ÚS 56/10

On 7 September 2011, the Constitutional Court rejected the proposal of the Ministry of the Interior and confirmed by its award the authorisation of municipalities to regulate the operation of lotteries and other similar games in their territories by virtue of the constitutional guarantees of the right to self-government. It also confirmed that **regulation was possible on the basis of Section 10 (a) of the Municipalities Act** (which means that the authorisation stipulated in Section 50 (4) of the Lotteries Act is, in fact, unnecessary).

The Constitutional Court also emphatically reiterated the **obligation of the Ministry of Finance to commence review proceedings and identified potential inactivity by the Ministry as interference with the constitutional right to territorial self-government of municipalities.** The Constitutional Court added that, in such a case, it could not only act to protect the affected municipalities on an individual basis (e.g. in proceedings on constitutional complaints in municipal matters), but it would also need to consider whether the very division of powers between the State and local authorities in this area (where the decision-making authority in relation to the operation of lotteries and other games in the territories of municipalities) is in accordance with the Constitution.

3 / 3 / Proposal of the Ministry of the Interior for annulment of a municipal edict of the Kladno municipality (regulation of gambling)

File Ref. Pl. ÚS 22/11

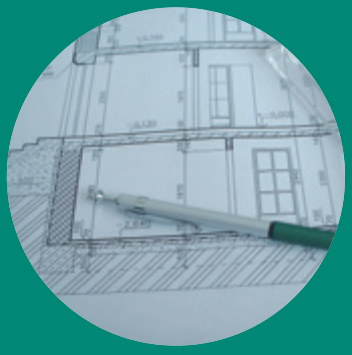
By its award of 27 September 2011, the Constitutional Court followed on from its previous decisions. Again, it did not find the edict unlawful or unconstitutional.

For more on the inquiry of the Public Defender of Rights towards the Ministry of Finance regarding the regulation of gambling, see page 74; on the prepared Act on the Operation of Betting Games, see page 25.









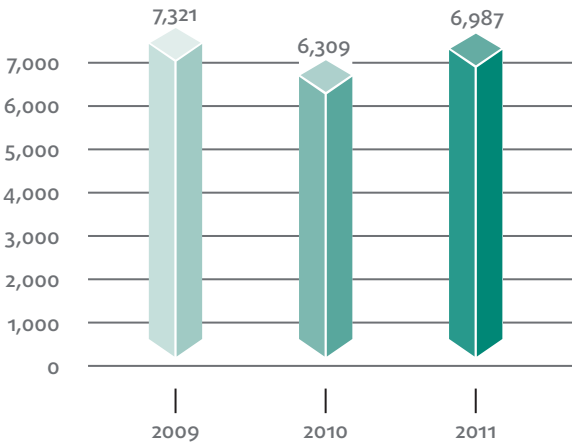
3 | The Defender and Public Administration

1 / Basic Statistical Data

1 / 1 / Information on complaints received

The Defender received **6,987 complaints** in 2011. The Office of the Public Defender of Rights was **visited by 1,228 individuals** in person, of whom 651 used the option to file a complaint orally in a protocol and 577 obtained legal advice on how to deal with a specific problem. It should be noted for the sake of completeness that the number of complaints received by the Defender does not include additional filings made by the same complainant and delivered to the Defender while the file concerned is being processed. The bar graph below documents the comparison of the number of complaints received in previous years.

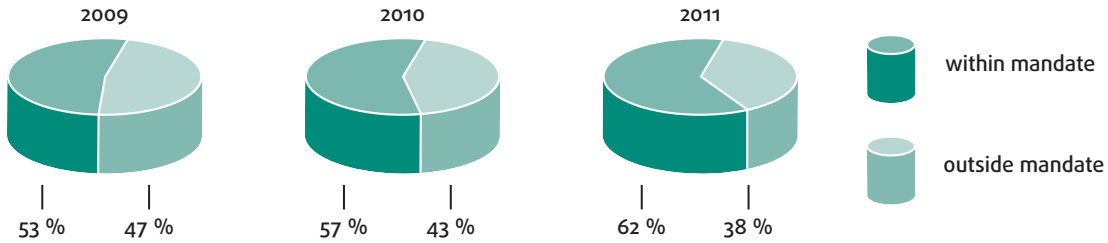
Complaints Received in Individual Years



The **information hotline** available for requests for simple legal advice and queries regarding the progress in addressing a complaint was used by **4,840 people** last year.

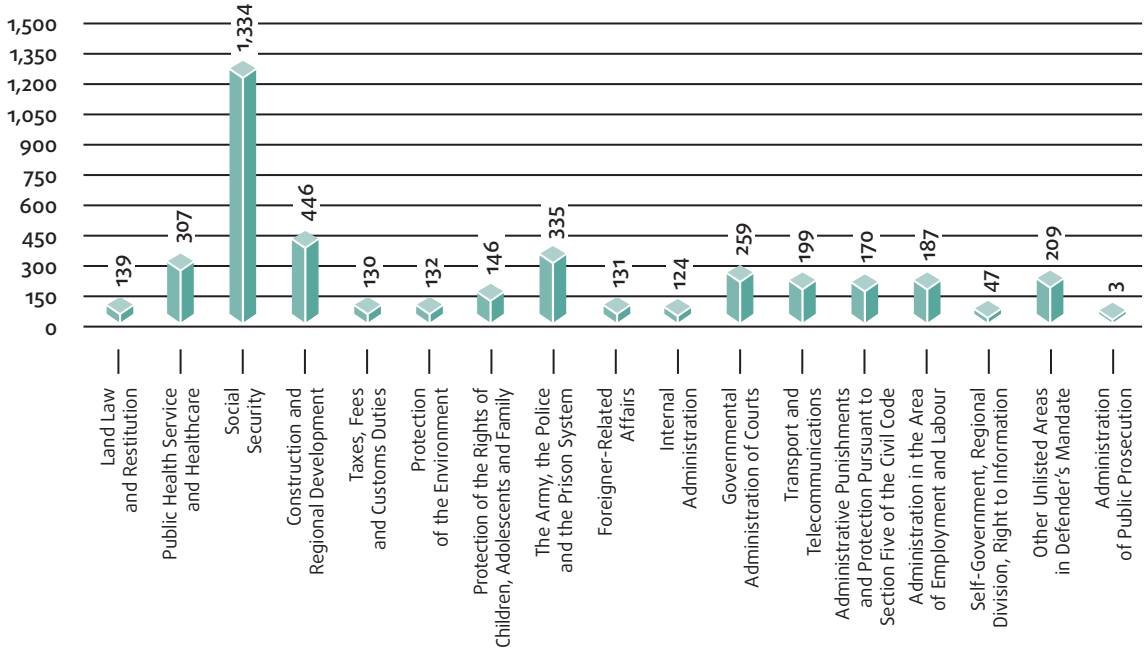
A positive trend can be found in the structure of complaints. As in previous years, complaints within the mandate of the Defender prevailed (**62 %** of the total were **within the Defender's mandate**, and **38% of complaints outside his mandate**). In terms of the trends over the past three years, it is encouraging that an increasing proportion of complainants understand correctly the Defender's mandate, which seems to suggest that the institute has anchored itself firmly in the legal awareness of the population (for more, see the pie chart below).

Complaints Received in Individual Years

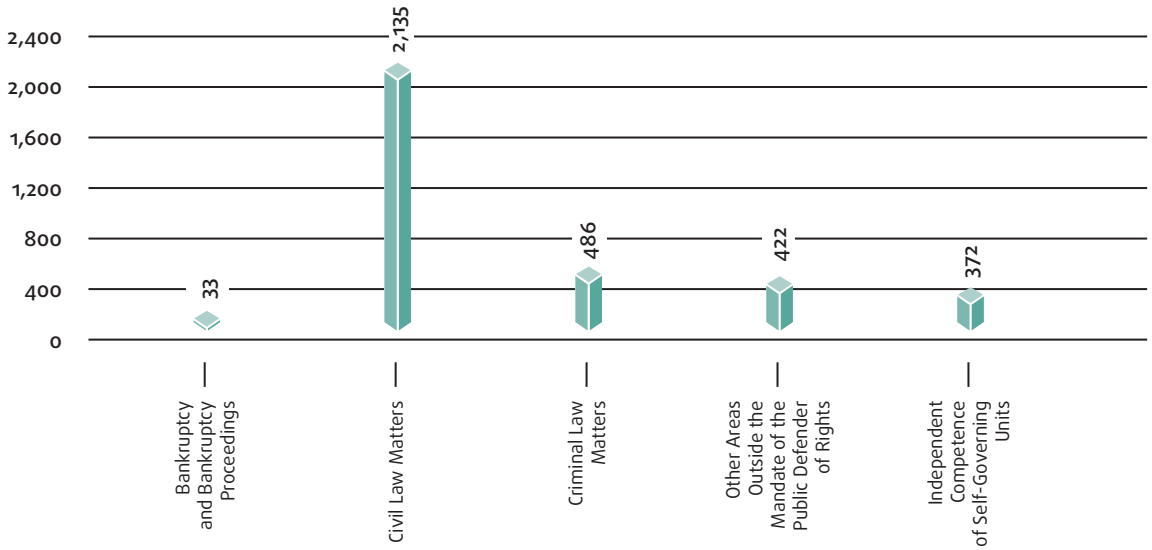


The following graphs show that **most individuals** consistently address the Defender **in the fields of social security, the Construction Code, the Police and the prison system, healthcare and governmental administration of courts.** The individual areas of governmental authority to which the complaints were related can be shown graphically as follows:

Complaints Received Within the Mandate by Area



Complaints Received Outside the Mandate by Area



The Defender opened **856 inquiries** in 2011, whilst using his authorisation to **open an inquiry on his own initiative in 49 cases**. As in past years, these pertained to issues of general character or situations where the Defender learned of incorrect conduct by the authorities from the media.

1 / 2 / Information on complaints handled

The Defender **handled 6,687 complaints** in 2011. Of the complaints handled:

- **472 were suspended**. The suspension was based primarily on a lack of mandate. Fewer complaints were suspended as a result of failure to supplement the missing prerequisites of a complaint or as a result of an obvious lack of substantiation;

- **5,172 were explained.** The Defender provided these complainants with legal advice as to the further steps to be taken in protecting his or her rights. The Defender handled some complaints by informing the complainant that his or her issue was not unusual and opened a general inquiry on his own initiative on the basis of some similar complaints.

The Defender **closed 914** inquiries in 2011 while:

- **not ascertaining any maladministration** in the procedure of the authority concerned **in 219** cases

- **finding maladministration** in the procedure of the authority subject to inquiry in **695** cases, where

- in **585** cases, the authorities already took remedial measures themselves following the issue of the **inquiry report**;

- n **97** cases, the authorities failed to take remedial measures and the Defender had to release a **final statement,** including a proposal for remedial measures; only then did the authorities ensured remedy;

- in **13** cases, the authorities failed to remedy their maladministration even after the final statement was released. The Defender therefore used his **punitive power** and notified the superior authority of the maladministration or informed the public.

The number of complaints handled in 2011 also includes **99** cases where the complainants **withdrew** their complaints and **20** filings where the complaint was actually, in respect of its contents, an **appeal** pursuant to the regulations on administrative or judicial matters.

The Defender also closed **4** so-called **inquiries of particular significance** in 2011, which should result in a change in the administrative practice in certain areas or creation of a legislative recommendation for the Government and the Chamber of Deputies.

2 / Selected Complaints and Commentaries

2 / 1 / Social security

Impacts of the abolition of the social allowance

The "austerity package" came into effect on 1 January 2011 (Act No. 347/2010 Coll.), amending certain laws in relation to the austerity measures taken within the competence of the Ministry of Labour and Social Affairs. This legal regulation (in addition to some other austerity measures) abolished the social allowance for families with dependent children whose income was less than twice the amount of the minimum living standard.

As a result of this austerity measure, many **families with dependent children found themselves in a difficult situation** because the drop in their income was not sufficiently compensated. It affected most harshly those families that were receiving benefits of assistance in material need before 1 January 2011. Indeed, in the transitional provisions of the "austerity package", the legislature omitted to stipulate that the social allowances paid to families in the previous months should not be taken into account in recalculating the amount of the subsistence allowance after cessation of payment of the social allowance. As a result of inclusion of social allowances paid earlier, the benefits provided during the initial three months of 2011 were lower by up to several thousand crowns and were not sufficient for covering the families' basic essentials of living. These families were at risk of debt and an even deeper material need.

To resolve this situation, the Defender recommended that the families apply for extraordinary instant assistance (particularly to cover necessary one-off expenses and on the grounds of a threat of social exclusion). The Defender further invited the authorities in charge of assistance in material need that they approach these cases on an individual basis and he pointed out that the families receiving benefits of assistance in material need were at risk of social exclusion in case of a significant drop of income which was not sufficiently compensated.

Limitation of the period for choosing the manner of drawing the parental allowance

The austerity package also changed the conditions for the entitlement to the parental allowance. The deadline for claiming entitlement to the three-year variant of the parental allowance was newly set at the **child's 9 months of age** (formerly 21 months). In cases where the parent did not declare his/her choice for any reason, (s)he was left with entitlement to draw the parental allowance in the amount of CZK 3,800 until the child reached 4 years of age. Thus, the **overall volume of the means paid** in the four-year variant of drawing the parental allowance **was reduced**.

In connection with this development, the Defender received a great many complaints referring to this change, particularly from those parents who were left with the four-year variant of drawing. A specific category comprised **the parents of children born in March 2010,** who claimed that, as a result of the expedited and flawed change, of which they had not been sufficiently informed and advised, they were unable to choose the three-year variant of drawing the parental allowance. Indeed, based on literal interpretation of the law, in their case, the last day for making the choice was 31 December 2010, i.e. a date when the new legal regulation was not yet even effective. This category of parents was not subject to the transitional provisions that extended the deadline for choosing the three-year variant until 28 February 2011 (it was applicable only to the parents of children who were older than 10 months and younger than 23 months on the effective date of the law). It follows from the statement of the Ministry of Labour and Social Affairs on this matter that the "shorter" deadline for the parents of children born in March was chosen intentionally to prevent possible organisational problems for the labour offices in dealing with this agenda.

However, the Defender is convinced that, given the negative impact on families with children, which is contradictory to the purpose of the parental allowance as State income support benefits that may be drawn by parents flexibly based on their needs, literal linguistic interpretation of the transitional provisions concerned must be refused as construction that is not in conformity with the constitutional order. In view of the purpose and sense of the "three-speed" parental allowance, administrative authorities should apply teleological interpretation and construe these provisions in such a way as to ensure that **the option to choose a drawing variant which suits best the applicant is preserved also for the parents of children born in March 2010.**

Housing benefits

The Defender repeatedly addressed cases of persons who lacked funds to pay for housing. These cases included particularly situations where people in material need in rental housing **were not registered for permanent residence in a flat** because of the threat that a lease agreement for a fixed term would not be prolonged. These persons could be granted neither the housing allowance nor a supplementary payment for

housing. They could apply for extraordinary instant assistance for covering the costs of housing; however, this benefit is not claimable and it is one-off benefit (although it may be provided repeatedly).

The Defender also examined whether authorities were correct in assessing the **cohabitation of socially vulnerable multi-generational families in family homes and multi-room flats.** The labour offices usually assessed all persons jointly; their income was therefore higher than the costs of housing incurred and the families received neither the housing allowance nor a supplementary payment for housing. The Defender recommended to the administrative authorities concerned that, rather than formalistically referring to occupancy permits (which may be many years old), they should always evaluate the actual state of affairs, i.e. whether the rooms inhabited by individual families can serve for separate long-term housing, i.e. whether they form "separate flats" with joint sanitary facilities, and if so, define them as several groups of jointly assessed persons so that each family receives housing benefits.

The Public Defender of Rights was also addressed by many **persons living in other than rental housing** (typically in a lodging house, as subtenants). These persons are entitled neither to the housing allowance nor to a supplementary payment for housing. However, they may be provided with a supplementary payment for housing in cases deserving special attention. The Defender deems that, in cases where non-payment of the costs of housing could put the person concerned at risk of homelessness and the person is taking active steps to escape material need (particularly by seeking a job), the supplementary payment for housing should be provided.

In connection with the deregulation of rent in municipal flats, the Defender addressed several complaints from **elderly people receiving old-age pensions** in an average amount who lived in two-room and multi-room flats and were left with less than CZK 2,000 for other expenses after paying the costs of housing despite the fact that they were receiving the housing allowance. There is no easy solution to these cases because, even if these persons exchanged their large flat for a single-room flat, the usual market rent for a single-room flat in the place of their residence is nevertheless equal to or just a little lower than the existing costs of housing. This means that finding a smaller flat does not reduce the costs of housing. Although finding a co-tenant, moving to a lodging house or becoming a subtenant are certain possibilities, these solutions are not satisfactory given the age and health condition of elderly people.

The above is related to the problem of examining what costs of housing can be regarded as justified. Until the end of 2011, a supplementary payment for housing was provided in most municipalities only up to the amount of the target rent, i.e. deregulated rent rather than usual rent. Thus, **people in material need living in flats with a market rent** had to pay a part of the costs of housing from benefits intended for satisfying their basic essentials of living (food, clothes, etc.), because in an overwhelming majority of cases the market rent is higher than the target rent.

The Defender also repeatedly encountered incorrect assessment of the conditions for the entitlement to the housing allowance in a situation where **some other person paid the costs of housing for the applicant**. The Defender addressed a complaint made by a retired person who, due to a long-term illness preventing her from looking after her personal affairs, allowed another person to make payments of rent and for services related to the use of flat from the other person's account. The labour office refused to take these costs of housing into account when deciding on the allowance for housing because they were not paid by the applicant. The labour office and the appellate body did not deal with the argument that the complainant had paid her costs of housing to her son who subsequently paid them from his account; they rejected the application without further examination on the grounds of the applicant's failure to document the payment of the costs. The Defender found this interpretation incorrect because the authorities made their decision subject to compliance with a condition which is not regulated by law. The Supreme Administrative Court applied similar arguments in its judgment of 22 August 2011, File Ref. 4 Ads 22/2011.

Extraordinary instant assistance

The Defender ascertained that **people in material need are usually not properly informed** about situations where they can be granted extraordinary instant assistance and about their right to apply for the benefit at any time. The situation is further worsened by the fact that there is a different application form for each type of extraordinary instant assistance (i.e. the applicant may not always pick the right form and the application may thus be rejected). A fundamental problem lies in **non-provision of extraordinary instant assistance for the payment of supplementary charges for medicinal products** that the health insurance company refuses to pay for the insured despite the fact that they are the only product suitable for the insured. It is also very difficult to determine in practice which items represent essential items of prolonged use or essential equipment of a household and what amount should be provided for their repair or purchase (whether the item should be repaired or replaced by a new one; whether a new or a second-hand item is more suitable; whether the cheapest possible item should be purchased in a second-hand shop with a greater likelihood of malfunction or whether a slightly more expensive item should be purchased, etc.). The non-uniform practice leads to unjustified differentiation between the recipients of benefits in different parts of the country. The authorities providing assistance in material need also make little use of the option to provide extraordinary instant assistance on the grounds of a **threat of social exclusion** to persons who are not included in the non-exhaustive list in the law (often with the argument that a person who receives the benefits of assistance in material need in the long term is not at risk of social exclusion). The Defender also encountered unwillingness of an authority providing assistance in material need to provide extraordinary instant assistance for the **payment of the costs of housing in the first month** when the person obtained independent housing or moved from his/her spouse (allowance for housing and supplementary payment for housing are always paid only after expiry of the month for which they are provided). In this respect, the Public Defender of Rights welcomes that, from 1 January 2012, the authorities providing assistance in material need will be centrally managed by the Ministry of Labour and Social Affairs, i.e. they will be obliged to follow the methodological instructions of the Ministry. The Defender also hopes that, as part of methodological guidance, the Ministry will provide its subordinate bodies with more detailed instructions on how to proceed in the cases outlined above.

Allowance for care

In 2011, the Public Defender of Rights continued to pay increased attention to the aspects of allowance for care in relation to persons with a mental illness, namely **persons with disorders on the autistic spectrum.** It followed from the ascertained facts that, in assessing dependence on the assistance of others, there was a persisting tendency to place more emphasis on the assessed person's ability to physically perform an operation under assessment while disregarding the person's inability to understand the need for the operation and to subsequently check its performance.

The Defender took these facts into account also in formulating his comments on the social reform (for more details, see page 20), insisting that, within the general criteria for assessing a person's health, emphasis should be placed on ascertaining the ability of the person under assessment to understand and perform essential operations and to check whether they have been performed correctly. This general principle of assessment was finally incorporated in the amendment to the Decree implementing the Social Services Act.

Complaint File Ref.: 4018/2011/VOP/AV

For the purposes of making a decision on the allowance for care in relation to a child diagnosed with autism or some other mental illness, the review doctor must evaluate whether the person under assessment is capable of performing an operation not only in physical terms, but especially in mental terms, i.e. whether (s)he can understand the need for the operation and check whether it has been performed correctly. From this point of view, it is insufficient to substantiate the different evaluation of successful performance of such operations made by the review doctor, on the one hand, and resulting from the social inquiry, on the other hand, by merely stating that the person under assessment is not devoid of motor skills.

Performing an operation with the use of pictograms does not mean that the operation in question has been actually performed. In such a situation, the operation is not performed in the usual manner and the supportive tool in fact does not reflect the degree of the child's physical, mental and social development because a "healthy child" of the same age does not need such communication tools.

The Public Defender of Rights was approached by Mrs H. M. with a request for inquiry into the procedure of administrative authorities concerning the recently decreased allowance for care for her six-year old son who had been diagnosed with autism. The administrative authorities had made a decision on a decrease in the allowance for care from dependence degree II to degree I despite the fact that, according to the mother, the boy's condition had not improved, but rather the opposite, he was more difficult to handle due to greater physical strength.

As part of the inquiry, the Defender concentrated particularly on the content of the review report by the invalidity board of the Ministry of Labour and Social Affairs prepared for the appellate proceedings. The Defender found this report inadequate in terms of compliance with the requirement for completeness and conclusiveness. The invalidity board had concluded that many of the operations under assessment were successfully performed although the social inquiry had shown that the boy was able to perform them using pictograms, i.e. processual schemes, but would not be able to do so without the representational method and external control. This included, for example, the serving and consumption of food and drinks, washing himself, mouth care, using the toilet, dressing, undressing, etc.

It followed from the statement of the invalidity board of the Ministry that many of these activities depended on motor skills that were not impaired in the child. However, the Defender is of the opinion that even "locomotive operations" for which particularly locomotive abilities are required cannot be automatically regarded as being successfully performed just because no physical disorder is found. Thus, even if the boy diagnosed with autism and hyperkinetic syndrome seems physically equipped for sitting, it is not obvious that he will remain in the sitting position for at least 30 minutes. The invalidity board took an analogous approach to the evaluation of operations consisting in simple self-treatment and observance of a therapeutic regime.

On the basis of the report from the Public Defender of Rights, the Ministry annulled the relevant decision of the Regional Authority in review proceedings and referred the case back for reconsideration and a new decision.

Pensions

Delays in administering pension claims

As in previous years, the Public Defender of Rights dealt with cases where decisions on pensions were not issued within the deadline set by law. Compared to the preceding year, the duration of proceedings on objections was significantly reduced and most decisions were thus issued within the deadline stipulated by law. A partial improvement was also achieved in the area of pensions with a foreign element, although there are still cases where the proceedings last more than one year, the claimant obtains no down payment and is left virtually without means. Delays in the payment of pensions occur most often when the file is being processed at the enforcement department for the purpose of exercising deductions from pensions (see the following paragraph). On the other hand, the Defender increasingly encounters a situation where more than one distrainment order is issued against a pension recipient in the form of deductions from pension.

Delays in enforcement of decisions

In 2011, the Defender repeatedly addressed complaints claiming an incorrect official procedure by the Czech Social Security Administration (hereinafter the "CSSA") in the enforcement of decisions/distrainment curtailing pension insurance benefits (hereinafter "pensions"). These were recurring complaints that the **CSSA had not terminated deductions despite the fact that the debt had been paid, had retained the deducted amounts** without authorisation instead of sending them to the distrainer (the entitled party) or **failed to respond** to requests for remedy.

The CSSA has already been dealing with a critical situation in the agenda of distrainment deductions from pension insurance since November 2010. It has established a project team for implementing the project "Optimisation of the Agenda of Distrainment Deductions from Social Security Benefits", transferred most seizure matters to district administrations, changed the agenda of the department which exercises distrainment deductions from pension insurance benefits at the headquarters of the CSSA, created control and methodological procedures for this agenda and is preparing software modifications in the central software of the application. More than 800 employees of district administrations who participate in the processing of the distrainment agenda have currently access to the application software of the CSSA.

Since it was originally promised to the Defender that remedy would be ensured by 30 June 2011, a local inquiry was performed in August 2011 with the aim of ascertaining how the CSSA managed to cope with the enormous increase in the distrainment agenda. As the **CSSA did not manage to cope** with this deficit **by the promised deadline**, the Defender discussed the matter directly with the Minister of Labour and Social Affairs and the head of the CSSA. According to the latest information and promises from the CSSA, **the pension distrainment agenda** could perhaps **be stabilised in the first quarter of 2012**.

The Defender repeatedly receives complaints from persons who find themselves entirely without means due to seizure of the account into which they receive their whole pension, on the grounds of distrainment. He therefore inquired whether it would be within the capacity of the CSSA **to immediately change the manner of payment of the pensions** that had so far been paid into accounts. (The enforcement of a decision through the assignment of a receivable from an account kept by a financial institution is currently one of the most commonly used forms of distrainment. However, it is absolutely common that income which would otherwise be subject to distrainment through deduction from salary or pension either only partly or not at all is also remitted into the account. This fact is not taken into account in the process of distrainment.) In relation to the payment of pensions, Section 64 (3) of the Pension Insurance Act (Act No. 155/1995 Coll., as amended) imposes the obligation on the CSSA to change the manner of payment *"at the latest from the pension instalment payable in the third calendar month after the calendar month when the application was made".* The CSSA informed the Defender that the processing of applications for a change in the payment of a pension (just as the processing of other changes) depends on the technological capabilities of the payment system and it is always necessary to follow the processing timetable for automated agendas so that pensions are paid by their due dates. The processing of a change depends on the date of delivery of the application and the date of the payment of the pension. The CSSA assured the Defender that, based on a duly completed and confirmed application, **most changes are implemented by the 2nd payment month** following the date of delivery of the application.

Overpayment on pension

When addressing complaints in the area of pension insurance, the Defender encountered an incorrect procedure of the CSSA in making decisions on overpayments on pension insurance benefits, where the CSSA imposed the obligation on the pension recipient to return the overpayment in spite of the fact that the person had reported the facts required for examining whether the pension insurance benefit should continue to the CSSA properly and in due time (or with a very little delay). Instead of removing the pension benefit immediately, the CSSA continued to pay it for several months and only later issued a delayed decision on removal of the benefit (typically a widow's pension bound to an orphans' pension received by a dependent child) and imposed the obligation to refund the overpayment on the received pension benefit which was still provided, through the fault of the CSSA, even several months after expiry of the entitlement. The liability of the recipient of a pension benefit for an overpayment is a subjective one, i.e. the recipient is liable in the event that the overpayment occurred through the recipient's fault. However, in the cases addressed by the Defender, the pension had been paid incorrectly through no fault of the pension recipient who had duly fulfilled his or her notification duty. Instead, it resulted from an erroneous procedure of the CSSA. The Defender concluded that pension recipients were not liable for the procedure and decision-making by social security bodies; as such they must not be prejudiced **if the CSSA decides to remove the pension several months later**; the CSSA **is thus not entitled to reclaim overpayments on pension benefits for such periods of time.**

Disability pensions

In the past year, the Defender received an increased number of complaints concerning disability pension as a result of the introduction of three-degree disability from 1 January 2010. In the complaints addressed to the Defender, the complainants mostly objected to **being reclassified into a lower degree of disability** which resulted in a reduced disability pension. Complainants who lodged their complaint within two months of delivery of the decision in proceedings on objections were advised to defend themselves by lodging an action with an administrative court because their health condition would be assessed once again by the invalidity board of the Ministry of Labour and Social Affairs during the litigation.

In cases where the complainants did not use the option to have the matter reviewed by the court, the Defender examined whether the review reports on the degree of disability met the requirement for completeness and conclusiveness imposed on review activities by the legal regulations and the case-law of administrative courts. As in previous years, the Defender most often found maladministration in review activities in terms of determination of the date of commencement of disability, which was not adequately substantiated in the relevant review reports; the medical records had not been requested in case of doubts, etc.

Complaint File Ref. 2907/2010/VOP/ZO

Where a causal link between the claimant's serious psychological problems and the fact that the claimant discontinued his studies at a higher-education institution in the past can be demonstrated in proceedings on a claim for disability pension, the person's subsequent unsuccessful attempts at obtaining a job must be seen as a proof that the person is de facto unemployable, i.e. has a reduced ability to work. When reaching a degree stipulated by law, this reduced ability to work may constitute grounds for granting disability and incurrence of entitlement to disability pension. The review doctor must take this aspect into account when determining the date of commencement of disability.

The Defender was approached by Mr O. V. (represented by his father) with a complaint concerning the amount of his disability pension. The complainant had to discontinue his study at a higher-education institution in 1997 and was subsequently hospitalised at a psychiatric clinic. After the therapy, he sought employment. Several attempts at finding a permanent job were unsuccessful (most often by termination of employment during the trial period). He therefore remained in his parents' care. The parents supported him financially and provided him with all the help he needed. He began to deal with his situation only after a very long time because earlier he was reluctant to admit and deal with the gravity and impacts of the illness.

He claimed disability pension as late as 25 February 2005. Full disability pension was granted to him through a decision of the CSSA of 3 June 2005; however, the amount of the pension was a mere CZK 3,849 per month. The low amount of pension was caused by the overall very short participation in pension insurance with low assessment bases, which were further "diluted" by interruptions in insurance periods.

The Defender opened an inquiry into the case because of doubts regarding correctness of the determined date of commencement of disability. He found the inadequate substantiation of the review report on disability to be at variance with the requirements for completeness and conclusiveness of a review report, which are imposed by the Code of Administrative Procedure and the case-law of administrative courts in relation to review activities.

On the basis of the Defender's initiative, the CSSA section of medical review service re-examined the date of commencement of Mr O. V.'s disability and reconsidered the original review conclusion in that the disability had commenced on 1 October 1997 when his study at Charles University was prematurely terminated. Through a decision of 26 May 2011, the CSSA granted the complainant a pension in the amount of CZK 8,312 per month. In accordance with the law, the CSSA paid the complainant the balance of his pension retrospectively for a period of 5 years from the last decision in the case.

2 / 2 / Work and employment

Employment administration

In 2011, the Defender addressed problems concerning the application of the Employment Act (Act No. 435/2004 Coll., as amended), especially the aspect of exclusion of jobseekers from the register on the grounds of **frustration of cooperation with the labour office**. This issue is closely related to the aspect of assessment of serious grounds on the part of jobseekers in the sense of Section 5 of the Employment Act, based on which a jobseeker may not be excluded. However, labour offices often look at documented serious grounds separately from the personal, family and social circumstances of jobseekers. This approach is unacceptable for the Defender and he regards it as maladministration by the authorities.

Furthermore, the Defender dealt with the issue of entitlement to unemployment benefits in a situation where the **employer had not paid the statutory premiums for the employee** despite its statutory duty to do so. The Defender is convinced that **employees must not be prejudiced** by the employer's failure to pay premiums. If the employee proves to the authority (e.g. by presenting the employee history record, employment contract, agreement on termination of employment, decision of the district social security administration) that (s)he performed activities in the period in question that give rise to participation in pension insurance, (s)he becomes entitled (subject to meeting certain other conditions) to unemployment benefits.

Last but not least, the Defender addressed the issue of **summary dismissal** and the related entitlement to unemployment benefits. In general, a jobseeker is not entitled to unemployment benefits if his or her employment has been terminated on the grounds of breach of a duty arising out of legal regulations applicable to the work performed by the employee in an especially gross manner. If, however, the (former) employer agrees with the employee (e.g. in or under the threat of litigation) on some other form of termination of employment, there is absolutely no reason why the autonomous manifestation of their will should not be respected. The labour office must take this act into account also when making the decision on unemployment benefits.

The Defender also noted an increased number of complaints about the **DONEZ system** (the obligation of jobseekers to report to a contact point of public administration) at the end of 2011. For more on this subject, see the legislative recommendations on page 13.

Labour inspection

In addressing complaints, the Defender repeatedly encountered cases of **inconsistent controls.** Situations have repeatedly occurred where the Labour Inspectorate dealt only with certain facts indicated in a complaint while disregarding other essential facts or documents that pointed out possible unlawful conduct. Specifically, this included failure to check the variable components of the salary whose payment was not subject to the employer's discretion and inconsistent checks of overtime work performed by employees of retail chains.

File Ref. 1272/2011/VOP/JB

If there is a suspicion that the attendance records kept by an employer are merely formal and are not in line with reality, it is up to the labour inspection body to investigate the facts regardless of the documents furnished by the employer (e.g. by hearing the employees).

The Defender was approached by Mr F. Z. with a request for inquiry into the procedure of the Area Labour Inspectorate for the Plzeň and Karlovy Vary Regions regarding a check of observance of labour-law and salary regulations.

It follows from the notification of the result of the control addressed to the complainant that the control had confirmed only part of the matters claimed in the complaint, while the Inspectorate had not ascertained any shortcomings regard-

ing overtime work and work on holidays. The complainant disagreed with the control process. He stated, amongst other things, that he had provided the Labour Inspectorate with information on attendance which considerably differed from the attendance records that had been additionally created by the employer.

The Defender concluded that the Area Labour Inspectorate had erred in the control. In practice, employers often keep double attendance records; the employees check in and out in a book and the employer subsequently transfers the attendance into electronic form which often differs from the manual records – e.g., the employer does not record overtime work, while the duration of shifts and breaks at work do not correspond to the facts. This is a practice which cuts the employees' salary for the performed work and potential extra pay for overtime work; they also have to face health risks as a result of a lack of rest between shifts. If there is a suspicion that the attendance records kept by an employer are merely formal and not in line with reality, it is up to the labour inspection body to investigate the facts e.g. by hearing the employees.

The Area Labour Inspectorate decided to perform a subsequent control following the conclusions indicated in the investigation report.

Employment in civil service

During the year 2011, the Defender encountered an increased number of complaints concerning employment in civil service. This is a specific area, to which the Defender's statutory mandate applies only partly. The cases addressed in 2011 can be divided into three main areas.

The first, very large group, consisted of complaints based on disagreement with the new legal regulation introducing **taxation of long-service allowances.** The Defender did not find any room for his intervention in this area as the complaints were directed exclusively against the legislation, rather than against the procedure of a specific authority.

Another group of complaints was also concerned with the taxation of long-service allowances, but the complainants objected to **retroactivity of the law.** In their opinion, long-service allowances for December 2010 that were paid in 2011 should not have been subject to the special withholding tax. However, the Defender found the procedure to be in accordance with the law because, for the purposes of income tax, the time when the income in question was paid, rather than the period for which it is provided, is of essence.

The Defender also dealt with cases where **the period of compulsory military service was counted towards** the long-service allowance. In the cases under scrutiny, the complainants had been issued with a final decision of the administrative court in their case, according to which a civil servant is obliged to shall include the period of his or her compulsory military service. Since the Supreme Administrative Court expressed an opposite legal opinion in the period between the termination of the litigation and their retirement from civil service, the Minister of the Interior annulled, in review proceedings, the previous administrative decision on inclusion of the period of compulsory military service. By applying the later case-law, the Minister not only violated the express wording of Section 193 (3) of the Act on Civil Service Employment of Members of Security Corps, but also negated the purpose of the review proceedings.

2 / 3 / Family and child

Confrontational relationships between parents

A child and the parent into whose custody the child was not entrusted are still entitled to have mutual contacts. The Defender continues to encounter cases where the child is manipulated against the other parent to such an extent that it refuses any contact with him or her. If such contact is enforced, the other parent either does not prepare the child for the contact at all or does so in an inappropriate manner. The child is traumatised by being handed over between the parents; its reactions are often recorded and there are even cases

where the media are invited to be present at the exchange. The child may even be removed from the family and temporarily placed in a so-called neutral environment, which it perceives as punishment.

The Defender considers it a systemic problem that **the Czech Republic lacks an adequate network and background for professional therapeutic work with parents** which would help them manage mutual communication and come to terms with each other in matters that are related to the child and its upbringing. This could include specialised in-patient or out-patient sites where the parents can be together with the child so that the child does not feel punished by the stay in the facility. Temporary foster care accompanied by intensive family therapy would be a suitable option for extreme cases.

In the Defender's opinion, many cases would be prevented by a timely and consistent intervention by the bodies of social and legal protection of children. Furthermore, he considers it necessary that **all measures be primarily directed at parents rather than at children.** The Defender believes that effective means include mediation, if provided in time, or therapy with training the skills ensuring that the parents are able to exchange the child and communicate with each other. It is in the competence of the bodies of social and legal protection of children to order such procedures. The Defender is strictly against recording of the child's reactions on a camera or even presentation of the case in the media on a parent's initiative. The media should also be very restrained in publishing similar cases.

Right of siblings to be placed together and to mutual contact

In connection with the preventive systematic visits to facilities where children are placed, the Defender also dealt with certain individual cases. He often noted that siblings were placed in different facilities or that some of them were placed in an institution while others were placed in foster care or adoption. It was often found that the divided siblings were not in contact except for, in some cases, weekends spent with their parents. **In these cases, the Defender recommends to the bodies of social and legal protection of children that they actively assist children in maintaining contacts with their siblings and family members**, and also with parents who were relieved of parental responsibility unless the court has prohibited the contact and unless the contact is harmful for the child. It was also recommended that family therapy should be broader and the parents should be actively involved in the child's life, the resolution of the child's problems and the problems due to which it was removed from the family.

In cases where institutional education is ordered gradually in relation to the individual siblings, the body of social and legal protection of children must try to achieve that they are placed together, also in cooperation with the relevant diagnostic institution. If the siblings are removed from the family together, placing them together should be an obvious thing (with very few exceptions such as when one of the siblings commits a crime against another sibling). The practice of dividing siblings is also criticised by the European Court of Human Rights which found (Judgment in Olsson v. Sweden of 24 March 1988, Application No. 10465/83) that even the need for special care for one of the siblings does not justify their separation.

Disturbed cooperation between client and social worker

If one of the parents, or even a minor child itself, refuses cooperation with a body of social and legal protection of children in the long term due to bad mutual relationships and claimed bias on the part of the social worker (even if such a suspicion has not been confirmed or has been confirmed only partly), it is in the interest of the child, in order to find a constructive solution to this serious case and to ensure cooperation among all the parties involved, that the social worker be replaced. In this respect, the Defender considers that apprehension voiced by the child or the child's negative relationships with the social worker are arguments of utmost importance. **In very exceptional cases where the parents or the child are no longer able to effectively cooperate with any of the workers of the body of social and legal protection of children, the Defender recommends a change in local competence** pursuant to Section 131 (4) and (5) of the Code of Administrative Procedure (Act No. 500/2004 Coll., as amended).

Mediation of substitute family care

The Defender repeatedly encounters errors made by authorities in mediating substitute family care. It is always necessary to look for substitute families that are suitable for the child given its specific needs and not vice versa. The opposite procedure is inadmissible.

Complaint File Ref.: 1036/2011/VOP/EHŠ

When substitute family care is mediated, it is necessary to take into account that the child's contact with the parents should be preserved and entrust the child into foster care, rather than relieve the parents of parental responsibility with a view to achieving adoption of the child.

The Defender was approached by Mrs M. Š. with a complaint about the procedure of the Třinec Municipal Authority and the Regional Authority of the Moravian and Silesian Region. In the case concerned, the Defender found that the mother had not been heard before the proposal for relieving her of parental responsibility was lodged, and she was therefore unaware of this step, which is inadmissible. The competent authorities had not proceeded in accordance with the judgments of the European Court of Human Rights and the awards of the Constitutional Court of the Czech Republic according to which, in cases involving family relationships, governmental authorities must proceed so as to ensure that the relationship can develop and adopt suitable measures towards reunification of the parent with the child (e.g. Judgment of the European Court of Human Rights in Kutzner v. Germany of 26 February 2002, Application No. 46544/99, award of the Constitutional Court of 10 October 2007, file Ref. II. ÚS 838/07, award of the Constitutional Court of 13 April 2010, file Ref. II. ÚS 485/10). These positive duties include the duty to inform and duly advise the parent of the possible consequences of his or her conduct, including the possibility that (s)he may be relieved of parental responsibility.

The Defender also emphasised that, in the case of mediation of substitute family care, authorities should take into consideration the interest in preserving the child's contact with the parent. In such cases, foster care, rather than adoption, is the suitable form of care. The procedure of the Regional Authority was at variance with the interests of the child as it required that the Municipal Authority lodge a proposal for relieving the mother of parental responsibility in order to achieve adoption of the child. This approach resulted from wrong mediation of substitute family care; while it was required that foster care be mediated for the child, the consulting committee chose an applicant for adoption because of a lack of suitable foster parents. In practice, adoption should be mediated for children only in those cases that have the relevant legal background.

The competent authorities did not accept the Defender's conclusions; a final statement will therefore be released in the matter with a recommendation for remedial measures.

2 / 4 / Healthcare

Processing complaints about healthcare

As part of inquiry into the procedure of the Ministry of Health and the Regional Authorities in processing complaints about healthcare, **authorities most often erred in that they failed to address some of the objections raised by the complainant**. In some cases, the conclusions from the meeting of the regional expert committee were merely reproduced without further comments. The Defender repeatedly criticised authorities for the considerable disproportion between the extensive observations made during the inquiry and their presentations in the written output. Another problem lay in the fact that the authority ignored the time references in the complaint where the complainant contested the standard of healthcare provided to him or her in a healthcare establishment over a long period of time, but the authority typically limited its investigation to the last hospitalisation. The Defender also noted a case where the expert in charge of professional assessment of the case disclosed his standpoint to the complainant before presenting it to the competent authority. There were also cases where the complainant was refused when (s)he applied for copies from the minutes

of the meeting of the regional expert committee and disclosure of the name and surname of the expert, or members of the committee, who had drawn up the review report.

As for the duration of processing of complaints, an improvement was noted in 2011 and the deadlines stipulated in internal regulations were exceeded quite rarely.

In conclusion, it should be noted that the **Act on Healthcare Services and the Conditions of their Provision (Act No. 372/2011 Coll.), which will come into effect on 1 April 2012, reflects many of the above problems** (amongst other things, it explicitly stipulates the right of the complainant to inspecting the file on the complaint and to disclosure of the name and surname of an expert, or member of an expert committee, or deadline for the processing of complaints). For more on this Act, see also page 19.

Complaint File Ref.: 5493/2010/VOP/PH

An expert authorised to draw up a review report is not authorised to disclose his or her conclusions to the complainant before presenting them to the Ministry of Health. While the proceedings are pending, a meeting in person between the expert and the complainant is acceptable only in exceptional cases, exclusively for obtaining additional information necessary for assessing the case, and a representative of the Ministry should be present at the meeting.

Mrs M. B. addressed the Ministry of Health with a request for investigation of the standard of healthcare provided to her late daughter. The expert authorised to draw up the review report invited Mrs M. B., before closing the investigation and without consulting the Ministry on this step, to a restaurant where he presented her with his conclusions. Thus, the meeting was not aimed at obtaining additional information concerning the complaint. According to Mrs M. B., the expert commented on the medical records, stating that they were too extensive and unclear.

It is impossible to reconstruct objectively the form and content of the communication between the expert and Mrs M. B. as no other person was present at the meeting; however, the complainant clearly concluded during the meeting that the expert was not doing enough to review her daughter's case. She therefore found the conclusions of the Ministry in the matter of her complaint unconvincing.

Where an investigation has not been closed, a meeting in person can be held with a view to supplementing the information essential for assessing the complaint. However, it is necessary to proceed most prudently so as to avoid objections against the expert. The meeting should be ideally held with the awareness and on the premises of the authority administering the complaint and in the presence of other persons. It is not the expert but the Ministry who is responsible for due processing of the complaint.

The Ministry ordered new professional assessment based on the final statement of the Defender.

Health insurance

Assessment and enforcement of due premiums was a prevailing topic in complaints concerning health insurance. The Defender repeatedly pointed out that health insurance companies are obliged to interpret the period stipulated in Section 16 (1) of the Act on Premiums for General Health Insurance (Act No. 592/1992 Coll., as amended) in accordance with the case-law of administrative courts (e.g. decision of the Supreme Administrative Court of 6 August 2008, File Ref. 3 Ads 24/2008) as prescription period (i.e. a period after which the right in question ceases to exist). The Defender also encountered a case where a debt on premiums was enforced inappropriately – without any objective reasons, a negligible amount was claimed through a court distrainer in distrainment proceedings instead of judicial enforcement; the chosen form of enforcement was all the more wrong as it was at variance with the internal regulations of the health insurance company concerned.

The Defender considers it a serious maladministration when a person whose income is derived exclusively from the exploitation or granting of industrial property rights is included in the category of self-employed payers of health insurance premiums. It should be stressed that the definition of a self-employed person in the Public Health Insurance Act (Act No. 48/1997 Coll., as amended) is not identical with the definition given in the Income Tax Act (Act No. 586/1992 Coll., as amended).

Complaint File Ref.: 2169/2011/VOP/PH

Persons deriving their income exclusively from the exploitation or granting of industrial property rights cannot be qualified as payers of premiums for public health insurance because the law refers exclusively to persons performing artistic or other creative activities on the basis of copyright relationships. Any "extensive" interpretation or analogies must be rejected.

A health insurance company initiated administrative proceedings against Mr J. Š. for failing to fulfil the obligations of a self-employed person. However, the complainant derived his income only from the granting of industrial property rights and he therefore objected to this approach. The case was special in that the health insurance company had already proceeded in an analogous way in 2007 but, at that time, it had moved away from its position based on J. Š.'s objections and apologised to J. Š. for its shortcoming in writing. Although the complainant reminded the health insurance company of this fact, this time it did not accept his arguments.

The Defender stated in this respect that payers of premiums are defined in Section 5 of the Act on Public Health Insurance. Since the aforementioned legal provisions do not include persons with a certain kind of income in the category of self-employed payers, no obligation to pay premiums for public health insurance can be inferred from Section 7 of the Income Tax Act or from Section 3a of the Act on Premiums for General Health Insurance, which defines the assessment base for self-employed persons. An assessment base can be determined only when the insured is qualified, using Section 5 of the Act on Public Health Insurance, as the payer of premiums.

The insurance company admitted its maladministration, discontinued the administrative proceedings and apologised to the complainant.

2 / 5 / Courts

Complaints about inappropriate behaviour of judges and judicial persons

Referring to Section 3 of the Code of Administrative Procedure (Act No. 500/2004 Coll., as amended), the Defender requires that, in investigating complaints about inappropriate behaviour of judges, court officials ask a party to the proceedings or a member of the public to provide an audio recording of the court hearing as soon as they become aware that such a recording was made. The recording is to be assessed in accordance with the principle of free evaluation of evidence. The Defender repeatedly reminded in this respect that an **audio recording from court hearings can always be made without the court's consent** (with the court's awareness), notwithstanding whether it will be later published or not, because only live broadcasting of a court hearing, rather than subsequent broadcasting or communication of the recording to the public, can be regarded as audio transmission (subject to the court's consent).

In terms of the specific forms of inappropriate behaviour, the Defender stated that these elements are fulfilled even in a situation where the judge, due to his ignorance, **prohibits the acquisition of an audio recording** in disregard of Section 6 (3) of the Act on Courts and Judges, but later, after being advised by some other member of the chamber, (s)he no longer prevents members of the public from making an audio recording. A complaint about this conduct must be found justified. A complaint aimed against a judge who **describes in detail the appearance of persons present** in the courtroom is equally justified. Doing this goes beyond obtaining a due protocol as it is in no way related to the case being heard or the processing of potential fu-

ture complaints. However, a judge does not behave inappropriately if (s)he asks the persons present in the courtroom in a suitable and dignified manner about their relationship to the case being heard. It is in the interest of an accurate record of the course of the court hearing when the presence of the members of the public is recorded in the protocol, and if the members of the public voluntarily tell their names to the public, the names can also be recorded in the protocol.

Complaints about delays in court proceedings

The Defender concluded that the bodies of governmental administration of courts are obliged to address complaints about delays in proceedings that have been **validly closed**. According to the Defender, the concept of complaint must be interpreted in a broad context, especially in relation to the disciplinary liability of judges and claims following from an inappropriate official procedure (indemnification or appropriate satisfaction). In terms of the deadline for lodging a complaint about delays in proceedings, the period of three years from the valid termination of the court proceedings seems to be reasonable.

The administrative body must also investigate a complaint about delays lodged by a **person other than a party to the proceedings.** The scope of information which is provided in the reply of a court official to the complainant is limited by the fact that, in principle, the official does not have the right to access all information about the course of the proceedings. However, in a processed complaint, a body of governmental administration of courts should never withhold information which can be obtained using other legal means (e.g. by participating in person at a public hearing or by means of a request pursuant to the Act on Free Access to Information (Act No. 106/1999 Coll., as amended)).

In two cases, the Defender found maladministration in the work of a body of administration of courts consisting in **poor communication between the competent public authorities.** As a result of delays, it was impossible to enforce a judgment ordering monetary performance; in the other case, the creditor was unable to meet the deadline for registering a receivable in insolvency proceedings. The Defender concluded that it is exclusively up to the State as to how it organises the flow of data and information among individual public administrative bodies. From the viewpoint of protection of the rights of an individual, it is important whether accurate and up-to-date data are provided in a predictable quality and extent and within a reasonable period of time. If this is not the case, the State is responsible for the possible (non-)proprietary damage. The Defender recommended to both complainants that they lodge a complaint under the Act on Liability for Damage Caused within the Performance of Public Authority (Act No. 82/1998 Coll., as amended).

Amended guidance concerning the processing of complaints about the procedure of courts

The Ministry of Justice implemented the remedial measure which the Defender proposed in 2010, in that it amended, effective from 1 July 2011, guidance Ref. No. 106/2001-OSM, on the processing of complaints about the procedure of courts under the Act on Courts and Judges (Act No. 6/2002 Coll., as amended). The guidance now contains new Section 7a, which regulates in more detail the evaluation of complaints in cases where **defects in the smooth flow of proceedings occurred due to objective circumstances on the part of the court.** In situations where delays are caused by an excessive number of filings, excessive backlog, lack of personnel and equipment in courts and long-term unfitness to work among judicial persons, a body of governmental administration of courts must find the related complaint justified or at least partly justified.

Delays of experts

In terms of delays caused by experts, the Defender concentrated in his inquiries on abidance by two principles. The first is the observance of the obligation stipulated in Section 12 of the Decree implementing the Act on Experts and Interpreters (Decree No. 37/1967 Coll., as amended), which orders the court to ascertain, before appointing an expert, whether the expert can perform the required act within the required period of time. This can prevent unnecessary delays and repeated appointment of experts in the same proceedings. The other principle lies in consistent exchange of information among judges (judicial persons) and court officials about delays caused by experts. The Defender is of the view that, only based on mutual provision of information, can the chairman of the court or the Minister who registered an expert in the list of experts assess the gravity of the expert's unlawful conduct (and particularly its frequency) and choose appropriate penalties

(warning, removal, deletion from the list of experts). However, the existing findings rather suggest **benevolence among judges and bodies of governmental administration of courts** in respect of delays caused by experts. The Defender will therefore consistently require fulfilment of the outlined principles (also taking into account the new legal regulation of administrative punishment of experts (Act No. 444/2011 Coll.)).

File Ref.: 1820/2011/VOP/DL

The appointment of an expert by the court can be accelerated if the court ascertains (e.g. by telephone), before appointing the selected expert, whether the expert will be able to draw up the expert report by the deadline required by the court and whether the expert report will actually fall within the person's field of expertise. The fact that the approached expert will be unable to draw up the expert report by the required deadline must be communicated to the parties to the proceedings, who have the right to be acquainted with the intended procedure of the court and to opine on the person of the expert and on the period of time in which the expert report is to be drawn up.

If insistence on a reasonable length of proceedings is to be more than just theoretical, an active attitude must be taken to all the negative phenomena accompanying court proceedings. Along these lines, judges and bodies of governmental administration of courts must always ensure that experts consistently observe deadlines and impose measures aimed at compliance with Art. 38 (2) of the Charter of Fundamental Rights and Basic Freedoms and Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

While the courts may impose procedural fines or curtail the remuneration of experts, public administrative bodies are obliged, in pending court proceedings where an expert has caused unjustified delays, to communicate the improper behaviour of the expert to the chairman of the Regional Court or the Minister of Justice who appointed the expert so that the former can examine the gravity of the expert's unlawful conduct and choose an appropriate penalty (warning, removal, deletion from the list of experts).

The Defender was assessing the length of proceedings concerned with a contract for work – defects in a wind power plant. The proceedings were to assess the causes for damage to the wind power plant, which required a complicated expert report.

Despite the complexity of the case, the Defender found unjustified delays in the period from August 2006 to February 2008, when the court had difficulties in finding a suitable expert, and in the period from October 2008 to June 2010, due to delays caused by the expert in drawing up the expert report. The length of the proceedings on expert's appeal against the imposition of a procedural fine (7 months) was also entirely disproportionate to the actual complexity of the case. A shortcoming was also found in the work of the body of governmental administration of courts as the vice-chairman of the court failed to inform the chairman of the competent Regional Court about the conduct of the expert who had caused considerable delays in the proceedings. By doing so, it violated the basic principles of activities of administrative authorities (Section 4 (4) of the Code of Administrative Procedure, Section 8 (2) of the Code of Administrative Procedure). The Defender based his consideration on the judgment of the European Court of Human Rights in Cambal of 21 February 2006, where the European Court found that, while an expert is independent in drawing up its report, at the same time (s)he is subject to control by the judicial authorities that are obliged to ensure a correct procedure in drawing up the expert report.

The proceedings were validly terminated and the complainant claimed, based on the Defender's recommendation, appropriate satisfaction from the Ministry of Justice for the caused delays under the Act on Liability for Damage Caused within the Performance of Public Authority.

Specification of a deadline for the performance of a procedural act

In several inquiries, the Defender encountered non-uniform procedure of courts in making decisions on proposals for the specification of a deadline for the performance of a procedural act under Section 174a of the Act on Courts and Judges. These were cases where the parties to the proceedings required an "earlier decision" ***in rem*** (i.e. issuing a decision on the substance of the case). Since the decision-making on a proposal in itself rep-

resents the exercise of independent judicial power, the Defender believes that a court official is competent in that, when **assessing unclear filings**, the official has the right to advise the relevant judge that the party's filing meets (certain) requisites of a proposal for specification of a deadline for the performance of a procedural act and that the judge should either perform the relevant act within 30 days or forward the case within 5 days to a higher court for decision. If the judge fails to do this, (s)he is in delay and may have disciplinary liability.

The Defender and disciplinary action (compliance with the constitutional order)

In 2011, the Constitutional Court opined on the Defender's *locus standi* in proceedings on disciplinary liability of the chairman or deputy-chairman of a court under the Act on Proceedings in Matters of Judges, Public Prosecutors and Court Distrainers (Act No. 7/2002 Coll., as amended). The opinion of the Constitutional Court is that the **special power of the Defender *"fully fits with the sense and purpose of his activities"* and is therefore in full accordance with the constitutional order** (Resolution of 15 March 2011, File Ref. Pl. ÚS 60/10). The Constitutional Court therefore refused the proposal of the Supreme Administrative Court for abolishing the Defender's powers that are stipulated in the above-cited Act and also in the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended).

After the Constitutional Court delivered its verdict, the Disciplinary Chamber of the Supreme Administrative Court continued the disciplinary proceedings initiated at the proposal of JUDr. Motejl in 2010. Through the ruling of 17 May 2011, File Ref. 13 Kss 1/2010, it **acquitted** vice-chairman of the Superior Court in Prague JUDr. Jaroslav Bureš of the disciplinary charge as the alleged act was not a disciplinary violation. The Supreme Administrative Court found that *"as a body of governmental administration of the Superior Court in Prague, the party charged with disciplinary violation cannot be liable to disciplinary punishment for his opinion expressed in the reply to a complaint insofar as the opinion was in accordance with his due examination of the facts alleged in the complaint".* In factual and legal terms, the case was further complicated by the reprimand (Section 88a of Act No. 6/2002 Coll., on courts, judges, lay judges and governmental administration of courts and on amendment to certain other laws (the Act on Courts and Judges)) from the former Minister of Justice against a judge of the Superior Court in Prague who had interfered with the right to public court hearings. According to the disciplinary chamber, this was an obstacle of *res iudicata.*

The Defender states, on the result of the disciplinary proceedings, that he is not certain whether the disciplinary court took sufficiently into account the temporal aspects of the act. Indeed, the judge was reprimanded only after the vice-chairman processed the complaints as unsubstantiated. Thus, at the time of processing the complaints, there was no obstacle preventing the party charged with disciplinary violation from submitting a motion to the chairman of the Superior Court in Prague for lodging a proposal for initiation of disciplinary proceedings.

Governmental authority in the sector of experts and interpreters

In the area of governmental authority in the sector of experts and interpreters, the Defender issued a fundamental statement indicating that a body of governmental administration of courts **makes decisions on appointing and removing an expert (interpreter) in administrative proceedings.** Thus, its decision (e.g. dismissal of an application) can be contested through an appeal addressed to the Minister of Justice of the Czech Republic. Both decisions can subsequently be reviewed within administrative justice. Potential inactivity of the body of governmental administration of courts can be challenged through a motion pursuant to Section 80 of the Code of Administrative Procedure. The Defender also clearly rejected the practice of several Regional Courts that required the so-called certificate of negative screening in assessing the qualification (personal characteristics) of a candidate for the position of expert (interpreter). The courts abandoned this practice following the Defender's inquiry.

Disputes before general courts concerning electronic communications

The Defender has expressed his **doubts about future viability of courts**, taking into account the intention of the government (Government Resolution No. 815 of 9 November 2011) to transfer the resolution of subscription disputes in the area of electronic communications services (concerning monetary performances)

from the Czech Telecommunications Office to general courts. Even now, most problems in the resolution of these subscription disputes result from delays in administrative proceedings due to an increasing volume of the agenda without corresponding personnel at the Czech Telecommunications Office. The State is obliged to provide administrative authorities with such organisational means and personnel as to ensure that they can cope with the increasing volume of cases and resolve cases within reasonable periods of time. If the resolution of subscription disputes is transferred to general courts without making arrangements in (increasing the numbers of) justice personnel, the intended effect is unachievable. Moreover, proceedings before courts will be a financial burden for the parties (costs of proceedings) and deprive them of the right to appeal, because in an overwhelming majority these will be "negligible disputes" where appeal is inadmissible. The change intended by the Government will paralyse the judicial power, which will lose its capacity to protect subjective rights to a high standard, fairly and within reasonable periods of time.

Distrainment

In the performance of distrainment, the Defender finds a fundamental shortcoming in the practice of making a **list of movable assets at a place other than the liable party's flat** (confiscation for the purpose of sale). This, in fact, represents pressure on the user of the flat to pay immediately for the liable party, in order to avoid removal of the user's belongings and the need to reclaim them using formal procedures. The Defender further criticises the absence of advice in those distrainment orders that affect a receivable from the account of the liable party in the sense that a maximum of **twice the minimum living standard** of an individual (CZK 6,252 in 2011) may be withdrawn from the account. The Defender was also critical about the fact that the recipients of pensions face an irresolvable situation if the account into which they receive their pension is seized (often after distrainment deductions). The Defender often recommends that the liable party lodge a proposal for **combining several cases into a joint procedure** when a single creditor enforces several negligible debts through separate distrainment procedures.

The Defender welcomes the legislative effort of the Ministry of Justice to decrease the costs of court and distrainment proceedings by **decreasing the remuneration of the legal counsel and distrainer** in simple cases, as well as the contemplated explicit stipulation of absence of the plaintiff's right to reimbursement of the costs of the proceedings if the action was not preceded by a **request for performance** (payment).

2 / 6 / Land law

Land Registry

A major part of the complaints was related to **proceedings for the correction of an error in the Land Registry and proceedings on an objection against renewed cadastral documentation.** Fewer complaints were directed against performed or non-performed registration in the Land Registry by entry, record or note.

In most cases, the Defender found that the administrative authorities had not erred and proceeded correctly. It should be mentioned in this respect that the complainants mostly did not understand correctly the mechanisms at the Land Registry and the objective of the proceedings for the correction of an error. The complainants believed that cadastral authorities had the authorisation to make decisions on the ownership title (e.g. in respect of duplicate registrations) or that the purpose of proceedings for the correction of an error was to bring data in the Land Registry into accord with the actual facts rather than with the contents of the instruments filed in the collection of instruments. This is closely related to misunderstanding of the reasons stated for the individual decisions, which fact can be partly attributed to the complexity of the agenda surrounding the Land Registry. Some of these issues included the technical aspects of the operation of the Land Registry, while others involved maladministration by the administrative authorities operating the Land Registry, which failed to substantiate their decisions with sufficient clarity for the complainant. In these situations, the Defender attempted to clarify to the complainants the basic principles of operation of the Land Registry or to provide additional explanation of the reasons, and assure the complainant that the administrative authorities proceeded correctly. It must be noted that he was not always successful.

Where the Defender found maladministration or doubts regarding correctness of the chosen procedure, the problem mostly lay in a violation of procedural rules (e.g. wrong interpretation of a complaint, unjustified delays in administrative proceedings or preliminary ruling in administrative proceedings).

In particular, a **preliminary ruling based on a lodged action for determination of the ownership title or invalidity of a legal act** on the basis of which a title should have been registered in the Land Registry, and the ensuing discontinuation of the proceedings for permitting registration of the title in the Land Registry, was a problem which the Defender addressed in several cases. Although the Defender's doubts regarding correctness of the procedure of some cadastral workplaces were not dispersed (the authorities discontinued the proceedings almost automatically when an action for determination of the ownership title or invalidity of a legal act was lodged), he decided to close his inquiry because the subject was to be regulated (from 1 January 2012, which indeed was the case) by an amendment to the Act on Registration of Ownership Titles and Other Rights ***In Rem*** to Real Estate (Act No. 265/1992 Coll., as amended). The amendment stipulates that the lodging of such a claim does not represent reference for a preliminary ruling in registration proceedings and the amendment also contains a mechanism for amending registration in the Land Registry in cases where the claim is satisfied.

However, considering the quantity of the complaints and the number of shortcomings found, it can be concluded that governmental authority in the area of the Land Registry operates well.

Land-use measures

A minor portion of the Defender's agenda in the area of land law comprises complaints against the procedure of land authorities on land-use measures under the Act on Land-Use Measures and Land Authorities (Act No. 139/2002 Coll., as amended). The Defender did not find any shortcomings in this respect. Similar to the Land registry, the **Defender concentrated on explanation of the meaning of land-use measures to the complainants,** emphasising that the result of the proceedings on a land-use measure does not depend on the consent of all the property owners affected by the land-use measure in question.

2 / 7 / Construction and regional development

Floodplains

The Defender has long encountered complaints related to the construction of real estate and performance of groundwork in floodplains or in territories intended to become floodplains or even active floodplain zones. **The law prohibits a number of activities in an active zone, including the location of structures except for water works,** because of dangerous flow rates during floods. The Defender has also been approached by citizens who disagree with the scope of determination of a floodplain or its active zone (either because they were determined too narrowly or rather the opposite, too broadly). **In some cases, a determined floodplain overlaps with another area which was intended for construction in an earlier adopted land-use plan**, which means the prohibition of construction in the active zone. Floodplains are determined by issuing a general measure. All these cases share the element of conflict between the ownership title and public interest in the protection of territories against the adverse impact of floods. Subject to fulfilment of the legal requirements, an issued general measure can be contested by administrative action; the Defender informs the complainants of this fact.

Review of consents of construction authorities

When examining complaints, the Public Defender of Rights noted a lack of uniformity among administrative authorities and courts in their view of the nature of consents to the location and implementation of construction projects and the review of these consents.

The opinion prevails in administrative practice that planning approval, notification of construction, notification of a change in the use of a structure and occupancy permit are "only" measures taken by administrative au-

thorities that can be reviewed using the procedure under Part Four of the Code of Administrative Procedure (Act No. 500/2004 Coll., as amended). **The established administrative practice was affected by the case-law of the Supreme Administrative Court; however, the case-law lacks uniformity.** On the one hand, the Supreme Administrative Court has ruled that a planning approval is an administrative decision in the sense of the Code of Administrative Procedure which, can be reviewed by administrative justice (see the judgment of the Supreme Administrative Court of 22 January 2009, File Ref. 1 As 92/2008), but on the other hand, it stated that consent of a construction authority to the notification of construction is not a decision reviewable by administrative justice (see the judgment of the Supreme Administrative Court of 13 March 2009, File Ref. 5 As 7/2008).

The Defender took both views into cognisance and (for the time being) he does not consider the existing procedure of administrative authorities in reviewing the measures taken by construction authorities under Part Four of the Code of Administrative Procedure to be unlawful. One of the reasons for this approach is that the Construction Code (Act No. 183/2006 Coll., as amended) brings about a great many simplified processes terminated by consent, where the legislator explicitly stipulates that an occupancy permit does not represent an administrative decision. **The Defender therefore appreciated**, in the interest of unification of the judicial and administrative practice, **that the question of whether the relevant consents of the construction authority are subject to court review has already been submitted to the extended chamber of the Supreme Administrative Court for a ruling** (see the Resolution of the Supreme Administrative Court of 20 July 2011, File Ref. 2 As 86/2010).

Certificate issued by a chartered inspector

The practice provides an increasing number of examples of problems resulting from the application of "accelerated proceedings" under the Construction Code. More specifically, this includes situations where a construction project can be implemented on the basis of a certificate issued by a chartered inspector. Under the applicable legislation, such a certificate, no matter how defective it is, cannot be reviewed or annulled by administrative means. Nevertheless, the Supreme Administrative Court has ruled (see the judgment of the Supreme Administrative Court of 4 August 2010, File Ref. 9 As 63/2010) **that administrative action is one possible defence against a certificate issued by a chartered inspector.**

In 2010, the Defender opened an inquiry on his own initiative with the objective of identifying the number and content of complaints about chartered inspectors and gathering findings about the possibilities of bodies of governmental authority of effectively supervising the activities of chartered inspectors. As part of this inquiry, he seeks to achieve a legislative change in the Construction Code so that it allows for the annulment of a certificate issued at variance with the law. The Defender further requests that the Ministry for Regional Development issue a methodological instruction for the processing of complaints about the activities of chartered inspectors under the applicable Construction Code and the Code of Administrative Procedure.

Nevertheless, the Public Defender of Rights is of the opinion that judicial protection against a certificate issued by a chartered inspector is not sufficient as has also been ruled by the Supreme Administrative Court (see above). In practice, the absolute inadequacy of the legislation regulating remedies available against a defective certificate leads to cases such as the construction of the Brno-Ivanovice Hobby Market Shopping Centre, the Apartment Buildings and Lodging Houses in Brno-Líšeň, Horníkova street, and others.

Complaint File Ref.: 3554/2010/VOP/JG

I. A certificate issued by a chartered inspector in accelerated construction proceedings under Section 117 of the Construction Code constitutes a decision in spite of the fact that the process leading to the drawing up of the certificate and its lodging with the construction authority for recording does not constitute typical administrative proceedings. The certificate cannot be contested by remedies under the Code of Administrative Procedure; instead, it is only subject to court review, i.e. administrative action can be lodged against it.

II. Delivering goods to a structure which has not been approved for occupancy and subsequent storage of goods there constitutes unauthorised use of the structure and constitutes an administrative offence pursuant to Section 180 (1) (m) of the Construction Code.

The Public Defender of Rights was approached by the Klidné Ivanovice (or Peaceful Ivanovice District) civic association with a request for inquiry into the procedure of the competent administrative authorities regarding the construction of the Brno-Ivanovice Hobby Market Shopping Centre between Černohorská, Řečkovická and Hradecká streets, for which a certificate had been issued by a chartered inspector. The complainant questioned this certificate, claiming that it was at variance with the planning permit, the binding standpoints were obsolete and the method used by the chartered inspector to determine the group of persons who were parties to the construction proceedings was problematic. The Public Defender of Rights may not apply his authorisation to perform an inquiry in relation to a chartered inspector. Although a chartered inspector is a person who performs activities in the area of construction on the basis of appointment by the Minister for Regional Development, (s)he does not have the status of an administrative authority. Despite this, the Defender decided to open an inquiry into the case with the aim of clarifying whether and how it is possible, under the effective Construction Code, to address situations in accelerated construction proceedings that lead to an unlawful state of affairs.

After the inquiry, the Defender expressed his opinion on the nature of a certificate issued by a chartered inspector and the possibilities of its review, taking into account especially the development of the existing case-law. He stated that a certificate issued by a chartered inspector in accelerated construction proceedings under Section 117 of the Construction Code constitutes a decision in spite of the fact that the process leading to the drawing up of the certificate and its lodging with the construction authority for recording does not constitute typical administrative proceedings. Although a certificate issued by a chartered inspector takes the form of an administrative decision, it cannot be contested by remedies available under the Code of Administrative Procedure; on the other hand, it is subject to review by courts.

While the action against the certificate issued by the chartered inspector in the case at hand was granted suspensory effect (only when the structure had already been completed), goods were stored in the structure and the owner of the structure requested that the construction authority issue an occupancy permit. The Defender stated in this context that storing goods in a structure which has not been approved for occupancy constitutes unauthorised use of the structure constituting an administrative offence pursuant to Section 180 (1) (m) of the Construction Code and that an occupancy permit may not be issued until a court decision is made.

Heritage preservation

Financial compensation for owners of historic premises

In 2011, the Defender again noted a persisting problem in the area of heritage care, where the owners cannot be provided with financial compensation for the costs incurred on the renovation and maintenance of heritage values of buildings in heritage reserves and zones that are not listed cultural heritage.

Despite the fact that the Defender repeatedly pointed out this problem in the previous annual reports on his activities, this undesirable situation has not been remedied in the legislation. A new law on State heritage preservation or a partial amendment to the existing Act (Act No. 20/1987 Coll., as amended) which would regulate the compensation for the owners of real estate situated in listed territories (zones and reserves) have not yet been passed. Nevertheless, the Defender is aware that, according to the draft Plan of Legislative Work of the Government for 2012, the Ministry of Culture is tasked with drawing up a substantive intent of a new Heritage Act and should submit it to the Government in the first half of 2012 and, under the Outlook of Legislative Work of the Government, a draft Heritage Act should be submitted in 2013. For more on this subject, see also page 12.

Measures for preserving a cultural monument

The Defender's findings in the area of heritage preservation suggest that the bodies of State heritage preservation do not impose measures directly aimed at preserving heritage and do not perform alternative enforcement of imposed measures. As a result, effective protection of cultural heritage in a situation where the

owner does not fulfil his/her obligations is not ensured. Many cultural monuments are therefore in a state of disrepair.

Complaint File Ref.: 3419/2011/VOP/MH

I. The owner of a cultural monument is obliged to care for its preservation, to keep it in a good condition and to protect it against danger, damage, destruction or theft, all the above at his own expense.

II. Contractual relationships between the owner of a monument and a tenant may not supersede the obligations following for both parties under the State Heritage Preservation Act.

III. If the State Heritage Preservation Act imposes the obligation to request a binding statement of a body of State heritage preservation and the related opinion of the professional organisation (National Heritage Institute) on the maintenance, repair of restoration of a cultural monument, this obligation should be all the more fulfilled in case that demolition or destruction of a listed building is considered.

The Public Defender of Rights performed an inquiry on his own initiative concerning protection and preservation of the cultural monument Štvanice Winter Stadium in Prague. He opened the inquiry at the instigation of a Prague resident who addressed the Defender with a request for action against the removal of the building of the Štvanice Winter Stadium, which is listed as a protected monument in the list of cultural heritage, and also on the basis of information published in the media.

After performing the inquiry, the Defender released a report where he stated, amongst other things, that contractual relationships between the owner of a monument and a tenant may not supersede the obligations following for both parties under the State Heritage Preservation Act. Under the State Heritage Preservation Act, the owner of a cultural monument is obliged to care for its conservation, to keep it in a good condition and to protect it against danger, damage, destruction or theft, all the above at his own expense.

The Defender stated that, in the case concerned, the control mechanisms ensuring protection and State supervision over buildings subject to heritage preservation in the sense of the applicable legal regulations had failed. In proceedings under the Construction Code, the construction authority must proceed in cooperation with a body of State heritage preservation. Thus, in the proceedings on urgent removal of the building, the body of State heritage preservation should have been treated as the competent authority and the latter should have cooperated with the relevant branch of the National Heritage Institute. As a minimum, the construction authority should have obtained a statement of the body of State heritage preservation before issuing its own decision that led to demolition of the listed building.

Protection against noise

The Defender received complaints about nuisance through noise from industrial operations (factories, industrial zones), car traffic, hospitality industry (restaurants, bars, gambling houses, discos, night clubs, etc.), restaurant terraces, public performance of music (concerts and music festivals, technoparties, community festivals, etc.), as well as neighbourhood and community noise (particularly noise from neighbouring buildings and noisy people), noise from sports facilities and playgrounds.

The Defender has repeatedly noted that nuisance through noise often results from absolutely wrong land-use planning, where noisy operations (premises) are entirely incorrectly located in territories directly adjacent to existing residential zones; no remedy is attained when the body of public health protection later imposes fines on the operators of the noise source due to exceeded noise limits. The Defender also often criticised administrative authorities making decisions in cases under the Construction Code for failure to respect the contents of the binding statements of the competent body of public health protection (Regional Public Health Authorities). On the other hand, he no longer encounters (with a few exceptions) the problem of poor communication between construction authorities and the bodies of public health protection regarding their competence to address burdening noise. The Defender appreciates that, as part of their statutory

authorisation, municipalities increasingly often stipulate binding conditions for the organisation, course and termination of public sports and cultural events, including dance parties and discos (within the scope essential for ensuring public policy) through municipal edicts.

At a personal meeting with representatives of the Ministry of Health in June 2011, the Defender discussed problematic aspects regarding the regulation of noise limits, time-limited permits for sources of noise (noise exemptions), costs of measuring noise, low-frequency noise and non-ionising radiation, as well as the potential new comprehensive regulation, whether by amending the existing Public Health Protection Act (Act No. 258/2000 Coll., as amended) or through an entirely new law.

The Defender commented on the draft Government Regulation on protection of health against the unfavourable effects of noise and vibrations as he disagreed with the proposed increase in the safe limits for noise in protected exterior areas, particularly in relation to noise from roads at night.

The Ministry has not yet come to terms with the Defender's view that, in justified cases and in observance of the requirements of the law, a time-limited permit for operating a noise source exceeding the safe limits could be given to a public music performance with a view to preserving the social and cultural life in municipalities. According to the Ministry, this matter should be thoroughly assessed in the amendment to the Act on Public Health Protection being prepared. The aforementioned requirement of the Defender will again be made in the commentary procedure.

2 / 8 / Environment

Environmental impact assessment (EIA)

The Public Defender of Rights already pointed out shortcomings in the legislation and incorrect procedure of the administrative authorities in the process of environmental impact assessment (EIA) in the previous reports on his activities. It followed from the Defender's findings in 2011 that the bodies entrusted with the exercise of governmental authority in the area of impact assessment were not always consistent in adopting all the proposed **measures aimed at prevention, reduction or compensation of the adverse effects** following from project notifications (construction projects, activities and technologies) when formulating conditions in the conclusions of the fact-finding procedure.

The Defender also dealt with the issue of **termination of validity of a conclusion of a fact-finding procedure**. While the Environmental Impact Assessment Act (Act No. 100/2001 Coll., as amended) does not address this question explicitly, the Defender found that a conclusion of a fact-finding procedure cannot be regarded as having unlimited validity. Should public officials accept the unlimited validity approach in their practice, the very mission of the EIA process would be strongly undermined. The objective of the EIA process is to fulfil the principle of environmental prevention and to obtain objective information and background for issuing a conclusion on whether the impact on a specific location resulting from a planned project is admissible from the environmental perspective. **The Defender holds the view that permitting planned projects on the basis of conclusions of fact-finding procedures that are many years old is unacceptable** and at variance with the sense and purpose of the Environmental Impact Assessment Act. In this respect, the Defender managed to achieve a convergence of views with the Ministry of the Environment.

Hydrogeological boreholes and construction of wells

In 2011, the Defender continued to monitor the conduct of central bodies of governmental authority concerning hydrogeological boreholes and the construction of wells with the objective of improving the legal status and increasing the protection of the owners of existing wells in cases where new drilling work is performed on the surroundings properties. **The Defender supports the introduction of an information duty** where municipalities would be obliged to provide for a suitable form (e.g. posting on the official board) of provision of information to the public about plans for geological work; this would enable citizens who already

have established wells in the area to take active steps aimed at obtaining evidence of the original condition (for example, by having water level measured in their wells, etc.). This would improve their position when they claim indemnification in a situation where water in their well is lost or its quality compromised.

Construction of photovoltaic power plants in an open landscape

Photovoltaic power plants have become a broadly discussed subject in the recent years. It followed from the Defender's activities that, at the time when the construction of photovoltaic power plants was booming (especially due to economic support from the State), the administrative authorities lacked sufficient experience with permit procedures for this kind of construction. As a result, they were often situated in very inappropriate locations, often in an open landscape. The Defender considers that **photovoltaic power plants are an annoyance in the landscape and more suitable locations should preferably be found**, especially fallow land (typically brownfields, former dumps, quarries, etc.).

Complaint File Ref.: 4983/2010/VOP/JG

In terms of the interests of nature conservation and landscape protection, the construction of a photovoltaic power plant in a Natura 2000 bird area promulgated through a Government Regulation and in a habitat of specially protected plant and animal species requires consents and standpoints from a body of nature conservation and landscape protection.

The Public Defender of Rights is currently performing an inquiry into the construction of a photovoltaic power plant in the cadastral area of Moldava in Krušné hory. The project was situated in the territory of a municipality without a land-use plan and a delimited built-up area; from the viewpoint of the interests protected by the Nature Conservation and Landscape Protection Act, the territory concerned is a Natura 2000 area and Eastern Krušné hory Bird Area as well as a habitat of specially protected plant and animal species.

The Defender found that the Duchcov Municipal Authority and the Municipal Authority of the City of Teplice (the competent body of nature conservation and landscape protection) had fundamentally erred in permitting the project. The construction permit was issued at variance with the law in combined planning and construction proceedings; the body of nature conservation and landscape protection also erred as it issued a summary statement for these proceedings, in which it failed to provide information on the duty to present the necessary consents and exemptions under the Nature Conservation and Landscape Protection Act (Act No. 114/1992 Coll., as amended). In relation to the procedure of the Regional Authority of the Ústí nad Labem Region, the Defender expressed his disagreement with the manner in which the Regional Authority approached a motion for review of the issued construction permit. It is not clear from the decision of the Regional Authority how it understood the legal term "harm to a public interest" and how it compared this harm with the possible harm to the construction owner if the issued permits were annulled. The Public Defender of Rights also has reservations regarding the decisions whereby the Regional Authority permitted, under Section 56 of the Nature Conservation and Landscape Protection Act, an exemption from the conditions for the protection of specially protected plant and animal species.

Air protection

In the area of air protection, the Defender paid attention, amongst other things, to the legal instruments of protection of citizens against odour. While private-law protection, i.e. the option to lodge a "neighbour action", is the primary instrument in this area, the Czech legislation also anticipates a certain degree of official intervention. However, in 2006 the Ministry of the Environment repealed without replacement an implementing regulation which stipulated emission limit values for odorous substances and the scope and manner of determining the concentrations of odorous substances. Nevertheless, the applicable Air Protection Act continues to envisage the existence of an implementing regulation. The Ministry noted that the determination of an objective amount of odour is accompanied by a number of practical problems; nevertheless, the Defender concluded that it was the obligation of the Ministry to find a solution as it was bound to do this by

the Parliament of the Czech Republic. **The Ministry confers on itself the role of the legislator by deciding not to fulfil its statutory authorisation.**

In 2011, the Public Defender of Rights also continued his inquiry concerning **air pollution in Ostrava.**

Complaint File Ref.: 3792/2009/VOP/KČ

The competent authorities have not yet used all means to help reduce the considerable pollution of the air in the territory of the city of Ostrava.

In an extensive inquiry carried out on his own initiative, the Defender addressed the causes for the considerable pollution of the air in the territory of the city of Ostrava, which comes from four major sources: industry, transport, local heating units and transmission from the Republic of Poland. He evaluated the existing steps of the competent authorities towards improvement and concluded that they were insufficient.

The Defender considers that the Ministry of the Environment should have proposed the formation of a joint Czech-Polish programme of air-quality improvement with the use of the structural funds of the EU earlier than it actually did and that it should have engaged representatives of the European Union as an impartial arbitrator in the negotiations with the Republic of Poland. The Regional Authority of the Moravian and Silesian Region should have referred to the adverse local conditions and impose stricter emission limit values and lower emission ceilings on large industrial plants; it also should have imposed specific organisational and control measures to make them use only the best available techniques. The Ministry of Industry and Trade and the CENIA agency do not always provide the Regional Authority with sufficient professional support. The Municipal Office of the Statutory City of Ostrava should have made greater efforts in imposing fines on citizens for exceeding the permissible opacity of smoke and burning waste and prohibited materials in domestic furnaces. The Ministry of Health should have participated in the ongoing toxicology research in the broader Ostrava territory and promoted more extensive preventive measures for children in Ostrava.

In addition to specific measures for remedy addressed to the competent authorities, the final statement of the Defender also contains other proposals for improvement that do not fall within the competence of authorities, but may be considered by the political representatives of the State, the region or the Statutory City of Ostrava.

The Parliament of the Czech Republic should consider supplementing the new Air Protection Act with the option of municipalities to declare a "smoke-free zone" (total prohibition of heating with solid fuels). The Statutory City of Ostrava could promptly acquire land and build park-and-ride facilities in locations at the outskirts of Ostrava that were selected by an existing expert study. The Ministry of Transport, in cooperation with the Moravian and Silesian Region and the Statutory City of Ostrava, could build new (or modernise and electrificate the existing) railway lines connecting the centre of Ostrava with the nearby cities and municipalities; it could also prioritise completion of the national and regional roads in Ostrava anticipated by the land-use plan. The Ministry of Transport and the Moravian and Silesian Region can also consider increasing the allocations from the State and the Region to the dust-removal system for roads in Ostrava. In the new land-use plan for the Ostrava City, the Statutory City of Ostrava should limit further development of residential housing and facilities for long-term stay of people in the most polluted places.

2 / 9 / Misdemeanours against civil cohabitation, protection of a quiet state of affairs

Civil-law basis of the protection of a quiet state of affairs

Under Section 5 of the Civil Code, administrative authorities protect to the actual state of affairs without examining whether it is lawful or unlawful. However, only a state relevant from the viewpoint of civil law, rather than any actual state of the material world, can be a protected state of affairs. This is apparent from the incorporation of this legal rule in the Civil Code. Thus, an administrative authority must first consider

whether the quiet state of affairs in question could at all be subject to a civil-law relationship. If this cannot be inferred, the administrative authority must dismiss the application as one for which no administrative authority has substantive competence.

If an administrative authority receives an application for the protection of a quiet state of affairs without being able to **conceive a civil-law relationship** between the applicant and the infringing entity, this is not a "quiet state of affairs" in the sense of civil law. If, by its content, the application can also not be regarded as some other act towards the administrative authority (e.g. as a motion to a construction authority or a highway administrative authority or as the notification of a misdemeanour), the administrative authority may dismiss the case under Section 43 (1) (b) of the Code of Administrative Procedure.

Pleas of bias

The Defender encountered cases where, after an appeal has been lodged against a ruling that an official would not be excluded from the hearing and resolution of a case, the administrative body **did not continue the proceedings** and waited until the superior administrative body made a decision on the appeal on the grounds of bias. The Defender considers that this is an incorrect practice because, under Section 76 (5) of the Code of Administrative Procedure, an appeal against a resolution does not have suspensory effect. Thus, in such a case the administrative body must continue the proceedings until the appellate administrative body decides that the officials claimed to be biased are excluded from the proceedings.

In relation to proceedings on a plea of bias, the Defender also encountered an incorrect approach where the resolution on the plea of bias (or the decision of the appellate administrative body) was notified only to the party to the proceedings that had lodged the plea. In fact these are decisions on procedural matters that (as any other decision) **must be notified to all parties** unless the law stipulates otherwise.

The Defender further recommends that, in cases where an appeal is lodged against a resolution on a plea of bias, the administrative authority of first instance forward the **complete file** to the appellate administrative body **in copies** so as to be able to continue the proceedings. The reason for this is that the file may contain information relevant for defining participation or representation of a party to the proceedings (e.g. power of attorney), which may in turn be relevant for a due notification, and hence entry into legal force, of the decision of the appellate administrative body on the appeal lodged against the resolution concerning the plea of bias.

Forwarding a case in misdemeanour proceedings

There are frequent cases in practice where the Police of the Czech Republic seize movable assets when investigating a misdemeanour and attach these assets to the written file. The Defender encountered a situation where an administrative authority forwarded the case to another administrative authority but retained the attached movable assets. The Defender considers that, in such a case, the administrative authority to which the case is forwarded is ***de facto*** unable to make a decision on forfeiture (or surrender) of a thing. Likewise, the administrative body may not dismiss the case without having the complete file.

Complaint File Ref.: 35/2011/VOP/IK

An administrative authority forwarding a case is obliged to send the complete file, including any movable assets seized by the Police of the Czech Republic. In accordance with the principles of good governance, the administrative authority should advise the notifying (injured) party that the case is being forwarded to another administrative authority.

The case may be dismissed, particularly under Section 66 (3) (a) of the Misdemeanours Act, only if the administrative authority has the complete file including any movable assets seized by the Police of the Czech Republic.

Complainant R. H. pointed out the procedure of the Authority of Prague 19 Municipal Ward and the Jilemnice Municipal Authority in proceedings concerning an offence against property under Section 50 (1) (a) of the Misdemeanours Act, allegedly committed against the complainant by the accused E. R. The Police of the Czech Republic notified the misdemeanour to the Authority of the Prague 19 Municipal Ward and submitted the seized laptop and financial amount. Without initiating proceedings, the authority of the Prague 19 Municipal Ward forwarded the case to the Jilemnice Municipal Authority pursuant to Section 55 (3) of the Misdemeanours Act but retained the seized movable assets. It justified this approach by the risks associated with sending the items by post. The Jilemnice Municipal Authority dismissed the case under Section 66 (3) (a) of the Misdemeanours Act without advising the complainant about the dismissal. The complainant believed that the case was still dealt with by the Authority of the Prague 19 Municipal Ward. She was informed at her request that the case had been forwarded to the Jilemnice Municipal Authority. The complainant requested the release of the seized financial amount at the Authority of the Prague 19 Municipal Ward; however, the amount together with the laptop had been handed over by an employee of the Authority of the Prague 19 Municipal Ward to the Jilemnice Municipal Ward. The latter sent the amount to the complainant subsequently, during the investigation.

The Defender found maladministration both on the part of the Authority of the Prague 19 Municipal Ward which had failed to deliver the complete file to the Jilemnice Municipal Authority, and on the part of the Jilemnice Municipal Authority which had dismissed the case without authorisation and, in addition, failed to advise the complainant as the injured party of the dismissal, which was at variance with Section 66 (4) of the Misdemeanours Act. As a result, she was unable to contest the dismissal of the case, e.g. by taking the procedure under Section 126 of the Municipalities Act. In this respect, the Defender recommended that the forwarding administrative authority inform the complainant of the forwarding, particularly in cases where it is reasonable to expect that the complainant will be specially interested in hearing of the misdemeanour, for example when the misdemeanour caused harm to health or property.

2 / 10 / The Police

Processing of complaints

As in previous years, in 2011 when exercising his competence towards the Police of the Czech Republic, the Defender often had to tackle issues relating to the processing of complaints; his criticism was directed especially at **insufficient substantiation** of the conclusion of a Police body regarding (a lack of) justification of a complaint.

A typical reply of a Police body processing a complaint was merely that the body had received the complaint claiming a shortcoming, followed by information that, following the performed investigation, it had been concluded that the complaint (as a rule) lacked justification. The complaining person did not learn what considerations led the body processing the complaint to its conclusion, and given the briefness and formality of the reply, the complainant could even believe that the complaint had not been addressed properly.

The Public Defender of Rights already pointed out the issue of processing complaints in the annual reports for the previous years, but remedy was not made. Excessively brief replies to complaints are not in line with the principles of good governance, particularly the principle of conclusiveness. In addition, it can be inferred from the general principles of work of administrative authorities and appropriate use of the provisions on substantiation of a decision (based on Section 154 in conjunction with Section 177 (2) and Section 158 (1) of the Code of Administrative Procedure) that the administrative authority should **deal with all the claims of the complainant contained in the complaint, respond to them and indicate what background and considerations led to its conclusions.**

The Defender had a meeting with the Police President on this subject, where the Police President promised to prepare an internal methodology (internal management act) for processing complaints under Section 175 of the Code of Administrative Procedure, which should clearly indicate that, in its reply to a complainant, the authority processing the complaint should address all the complainant's objections, indicate what backgrounds it considered in evaluating the complaint and only then formulate a conclusion regarding (a lack of)

justification of the complaint. This principle should apply analogously to any further processing of the complaint by the superior body. The internal management act has not been issued yet. The conclusions from the personal meeting between the Defender and the Police President have been implemented only in the form of an instruction requiring that, in processing complaints, it is necessary to duly substantiate the conclusion regarding (a lack of) justification of the complaint.

2 / 11 / Prison system

First contact of the accused with the legal counsel

In 2011, the Defender promoted the right of accused persons taken into custody who are without means to be able to **contact their legal counsel at the costs of the Prison Service of the Czech Republic** (hereinafter the "Prison Service"). This applies only to the primary contact with the counsel. This subject was included among the Defender's recommendations made on the basis of his systematic visits to remand prisons as far back as 2009. The Act on Remand in Custody (Act No. 293/1993 Coll., as amended) stipulates that the costs of using a telephone shall be paid by the accused. It is undoubtedly correct that the Act imposes the obligation on the accused to pay for his or her telephone calls. However, if an accused person taken into custody lacks the means to contact his or her legal counsel, literal application means denial of the right to legal aid (defence, or more generally, the right to a fair trial).

The Prison Service accepted the Defender's arguments and the first contact of an accused person without means with his or her legal counsel immediately after being taken into custody should be mediated by the remand prison at the prison's costs.

Overcrowded prisons

In his annual reports submitted to the Chamber of Deputies, the Defender regularly points out the relatively serious shortcomings of the Czech prison system, particularly the unsatisfactory capacity of prisons. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recently noted the serious problems with overcrowded prisons in its report from the visit to the Czech Republic which took place from 7 to 16 September 2010. In this context, it is appropriate to refer to Recommendation R (99)22 of the Committee of Ministers to the Member States of the Council of Europe concerning prison overcrowding and prison population inflation. It notes that, in places where prisons are overcrowded, attention should be paid to maintaining human dignity, the obligation of the prison administration to treat prisoners with humanity and respect, and the role of the prison staff and effective modern management approaches. In accordance with the European Prison Rules, particular attention should be paid to the floor space available to prisoners in prison, hygiene and sanitary equipment, enough suitably prepared food, the health condition of the imprisoned persons and possibility of walks in open air.

More than 23,000 people are currently held in Czech prisons and remand prisons, and consideration should also be given to additional approx. 6,000 convicted persons (based on information from the Prison Service) who are avoiding the service of imprisonment. In addition, it is not likely that the number of imprisoned people should decrease in the future, but rather the opposite.

The Czech Republic is among the European countries with the highest proportion of convicted persons per 100,000 inhabitants (219 as of 30 December 2012). It must be noted that the capacity standards following from the case-law of the European Court of Human Rights are already disrespected in Czech prisons.

In addition to overcrowded prisons, there is a lasting **lack of Prison Service personnel** (both officers and specialised staff). For example, it is common that the number of convicted persons per warder (determined by a Ministerial Decree) is exceeded several fold. In a situation of more than 60 convicted persons per warder (instead of the set 20), it is virtually impossible to work with the convicts. It is a question **whether the service of imprisonment can serve its purpose under these conditions.** The European Court of Human Rights has

repeatedly emphasised the obligation of the State to organise its prison system so as to respect the dignity of the imprisoned persons notwithstanding financial or logistical difficulties (e.g. Mamedova v. Russia, Judgment of 1 June 2006, Application No. 7064/05; similarly Benediktov v. Russia, Judgment of 24 September 2007, Application No. 106/02).

The Defender therefore addressed the Minister of Justice with these arguments because the current situation cannot be addressed without increasing the funds for the prison system. The Minister of Justice informed the Defender of the contemplated increase in the accommodation capacity of prisons, partial increase in the number of officers and specialised staff and investment in new escort cars. However, if the accommodation capacity is increased at the expense of, for example, culture rooms, this runs directly counter to the above recommendation of the Council of Europe. The premises for the service of imprisonment in Velké Přílepy that were recently put into operation (an inexpensive conversion of a building to a women's prison) are a positive example. Despite measures like this, **the situation is still not in line with European standards.**

The costs of the service of imprisonment and custody

The Defender's discussions with the Ministry of Justice were also concerned with the suggestion for **abolishment of the obligation to pay the costs of the service of imprisonment and custody**. No result has been achieved yet. The volume of unpaid receivables from convicted persons has been rising in the long term. In addition to the rising number of convicted persons, the financial situation of those in prison is constantly worsening. Of the European countries that the Defender already mutually compared in 2003, convicted persons pay the costs of the service of imprisonment only in Finland and Belgium (in addition to these two countries, the following were included in the comparison: Sweden, Norway, Germany, Switzerland, Spain, France and the United Kingdom (or more specifically, England and Wales)). Reconsideration of the obligation to pay the costs of the service of imprisonment, with the objective of abolishing it entirely, was the content of a recommendation received by the Committee Against Torture (CAT) on the third periodic report of the Czech Republic on measures taken to comply with the undertakings under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The receivables from persons released from the service of imprisonment (the largest part of which are the costs of custody and imprisonment) are among the most difficult to enforce. **The rate of enforcement success is a mere 3 %**. The payable receivables amount to hundreds of million CZK. It is then a question whether it is economical to expend costs on the enforcement of these (in fact unenforceable) receivables or whether the cause should rather be resolved. The convicted persons who are unable to pay these receivables because there is no work for them during the service of imprisonment are released to civil life with financial obligations that may lead to recidivism. To say the very least, debts are certainly not a good basis for building a new life after release. The savings of the convicted persons (those who work or have some other income) could be used to a greater degree during the service of imprisonment for the payment of the costs of the criminal proceedings, damage caused by criminal activities and often also for maintenance payments.

Healthcare

The provision of healthcare is among the problems that persons serving imprisonment address to the Defender most often. Their complaints often refer to a lack of medical personnel, which stems from a poor motivation of doctors to practice their profession in prisons. More than once in 2011, the **Defender encountered problems in obtaining medical records for the purposes of his inquiry**. Despite the fact that the law explicitly authorises the Defender to access these records, several prisons still request the patient's consent before providing them. The Defender also encounters cases of **inaccessible professional examinations** in spite of the fact that they have long been indicated for the patient (e.g. postponement of care for an oncology patient aged 71). The Defender also inquired into the procedure of the Prison Service in several cases where the convicted person had died.

Several cases involved the **assessment of the health condition by a doctor** (e.g. for the purpose of escort to the court). The Defender found that, in assessment of the health condition of a prisoner by a doctor in

connection with the planned participation in a court hearing, the doctor should give due consideration to the ascertained health condition of the prisoner. The interest in ensuring participation of the prison in the court hearing should not always prevail, because the principle of health protection must not be disregarded.

Internal security of prisons

A case from the Czech prison system which attracted media attention in 2011 was that of a convicted person at the Valdice prison who managed to arrange, using a mobile phone, and subsequently effect a supply of an addictive substance to an agreed address via usual correspondence controlled by the warders. The Defender was approached with similar observations by a number of convicts from several prisons during the year. Based on their reports, it was possible to detect addictive substances and mobile phones or at least to identify persons under the influence of an addictive substance. Since the Defender is not allowed to intervene in criminal proceedings, he lacks comprehensive information about the results of those complaints that were submitted to the Police. In the above-described cases, the Defender's inquiry is aimed at ascertaining the measures taken by the prison to prevent such cases in the future. It is possible (according to information from several complainants) that **even the employees or Prison Service members may participate in the conveying of addictive substances to prisons**. However (to the Defender's knowledge), the suspects have never been proved guilty. This could change with the expected establishment of an independent control body (with the status of a prosecuting body), which was indeed set up effective from 1 January 2012 as the General Inspection of Security Corps.

In connection with internal security, the Defender addressed (based on a complaint from a convicted person) the issue of **body searches** of imprisoned persons. It is specifically to prevent the conveying of prohibited items into prisons that the Prison Service is authorised to perform body searches on imprisoned persons. However, these searches must not be performed arbitrarily.

Complaint File Ref.: 654/2011/VOP/MS

Body search in general is an interference with human dignity of inmates. It is a legitimate intervention in the environment of the service of imprisonment for the purpose of ensuring internal security (preventing the conveying of prohibited items to the prison), but only provided that the intervention is reasonable and is performed in a manner respectful of human dignity.

A convicted person objected to the practice of performing thorough body searches (they are performed especially after the convicted person's contact with a visitor, after returning from the workplace, etc.) at the Jiřice Prison. The searches are not performed generally but instead on a selected sample of convicts (the percentage rate is determined in an internal regulation) and the search is performed exclusively by a person of the same sex as the searched person. All convicted persons who must undergo the search are asked to do several squats while naked in order to avoid the conveying of prohibited substances in the rectum. They are subsequently asked to raise the scrotum and the penis because, according to the head of the facility, the root of the penis is convenient for smuggling addictive substances into the prison. There is extensive case-law of the European Court of Human Rights on the subject of personal searches, which criticises the routine character and thoroughness of searches in situations where there is no realistic security threat (e.g. Frerot v. France, Judgment of 12 September 2007, Application No. 70204/01). The prison did not provide convincing arguments that would justify such searches. The prison did not agree with the Defender's conclusion regarding their inappropriateness. The Defender therefore addressed the General Director of the Prison Service. The inquiry is still pending.

Disciplinary punishments

The award of the Plenary of the Constitutional Court of 29 September 2010, File Ref. Pl. ÚS 32/08, opened the way to **court review of decisions imposing disciplinary punishments**, which had been incorporated in the legislation since 1 July 2011. The Defender is not aware of any increase in the quantity of these cases. The feared flooding of courts with this agenda does not seem to have happened. Quite obviously, the impo-

sition of a disciplinary punishment remains a frequent objection in the complaints made by prisoners. Unfortunately (in spite of long-term criticism of disciplinary proceedings by the Defender), these proceedings still often show fundamental shortcomings.

In relation to disciplinary punishments for abusing addictive substances (tested on a urine sample), an internal regulation of the Prison Service recommends a verification test by an accredited toxicological laboratory. The Defender ascertained that, contrary to the usual practice in other prisons, the Ostrov Prison refuses to carry out the confirmation tests with reference to high costs. In this case, the Defender stated that the requirement for a confirmation test is not an unnecessary formality. Rather the opposite, refusing it is at variance with the principles of good governance as the test contributes to a proper clarification of facts and factual correctness of the subsequent disciplinary proceedings (the principle of ascertaining facts beyond justified doubts). It should be noted that the Prison Service itself openly states that the reliability of its own indicative tests is about 80 %.

The Defender also encountered a case where a prison annulled a disciplinary punishment imposed without authorisation, but it did so entirely incorrectly in procedural terms. The ascertained shortcoming seems to be related to the rather poor regulation of disciplinary proceedings in the Act on the Service of Imprisonment (Act No. 169/1999 Coll.) and the Act on Remand in Custody (Act No. 293/1993 Coll.). For example, a prison may annul its own final decision on the imposition of a disciplinary punishment through the competent members of its staff, who have the status of administrative authority in the case concerned. However, a prison is not authorised to annul a final decision on the imposition of a disciplinary punishment issued in another prison. If the convicted person has been transferred to a prison other than the one where (s)he was disciplinary punished, annulment of the disciplinary punishment may be claimed by proposing renewal of the proceedings under the Code of Administrative Procedure or (for selected disciplinary punishments) through an action against the decision on the imposition of the disciplinary punishment.

2 / 12 / Transport

Advising drivers of the consequences of disqualification from driving motor vehicles

The Public Defender of Rights performed an inquiry on his own initiative concerning the procedure of administrative authorities in keeping records and enforcing imposed suspension punishments consisting in disqualification from driving motor vehicles (hereinafter "suspension").

It followed from the previous activities of the Defender that drivers on whom suspension has been imposed are often unaware that they **lose their driving licence** on the date of legal force of the decision (Section 94a of the Act on Operation of Vehicles on Roads (Act No. 361/2000 Coll., as amended)), and if they wish to drive after the punishment expires, they must **request returning of the driving licence** (Section 102 of the Act on Operation of Vehicles on Roads). If an "unaware driver" begins to drive again, he commits a misdemeanour punishable by a fine of CZK 25,000 to 50,000 and another suspension lasting 1 to 2 years (plus 7 points in the driver's point evaluation system under the Act on Operation of Vehicles on Roads). The lower level of the penalty appears unreasonably harsh or indeed brutal in many cases.

While the Constitutional Court rejected the proposal for annulment of Section 22 (4) of the Misdemeanours Act through award Pl. ÚS 14/09 of 25 October 2011 (on 1 August 2011, Section 22 (4) was transferred unchanged to Section 125c (1) (a) and (5) of the Act on Operation of Vehicles on Roads), in the conclusion of its award, as ***obiter dictum***, it recommended that the legislator consider stipulation of the general option to alleviate penalties below their lower level or to refrain from punishment.

It is a good practice of administrative authorities when they **inform** the parties to the proceedings, **in the advice** accompanying the decision on the misdemeanour, of the obligation to surrender the driving licence and apply for its return after expiry of the punishment. However, no widespread use of this good practice has yet

been determined. In terms of decisions of courts in criminal proceedings, the Defender has not encountered such an advice at all.

The Defender considers that this "duty to advise" could be entrusted to the administrative bodies keeping driver records. The person concerned would either comply with or disregard their request for surrendering the driving licence and only in the latter case would the case be forwarded to the administrative authority for examining the misdemeanour under Section 46 of Act No. 200/1990 Coll. – failure to surrender the driving licence within the statutory period.

In response to the Defender's observations, the Ministry of Transport promised to prepare the relevant methodology for the administrative bodies.

The inquiry further identified a shortcoming consisting in the **courts' failure to comply with the five-day period** provided for them for sending their decision to the competent administrative body. The Defender is addressing this aspect in cooperation with the Ministry of Justice.

Jumping red lights and fines imposed by the Municipal Police

Based on a complaint lodged in 2011, the Public Defender of Rights dealt with the power of the Municipal Police to impose an on-the-spot fine on a driver of a motor vehicle for jumping the red lights. The Defender concluded that the **Municipal Police lack this power.** Municipal Police officers in the traffic agenda are empowered to apply on-the-spot proceedings only in case of a driver's misdemeanour committed by failure to respect the ban on entry to places marked with local or temporary traffic signs, prohibited parking/stopping of a vehicle on a road or violation of the maximum speed limit. However, this exhaustive list does not contain failure to observe the "Stop!" colour light signal (red light on the traffic lights) or some other indication to stop. In this respect, the fundamental legal argument is the principle of application of the narrowing interpretation of legal rules setting out the powers of governmental authorities. The Ministry of Transport subsequently accepted the Defender's conclusion.

Record of a traffic accident as an obstacle to misdemeanour proceedings?

The Defender considers that the administrative authorities act incorrectly when they refuse to deal with a misdemeanour against the safety and smooth flow of traffic on roads with reference to a record of an accident drawn up by the parties involved in the accident. A record of an accident **does not have any effect on the term or existence of the public interest in examining a misdemeanour.** A record of an accident is a private-law document and it can hardly be inferred that the public interest in punishing the person guilty of a traffic accident ceases to exist when the record is signed.

Complaint File Ref.: 1974/2011/VOP/MK

Drawing up a record of a traffic accident is not an obstacle to holding administrative proceedings on a misdemeanour or a reason for suspending the notification of a misdemeanour.

The son of the complainant was involved in a minor traffic accident to which the Police of the Czech Republic were not called (it was not required under the legal regulations). The persons involved in the accident drew up and signed the formalised "record of traffic accident" on the spot. After learning what his son signed, the complainant (the owner of the vehicle) notified the traffic accident to the Police, claiming that the assessment of guilt in the record did not correspond to the actual facts.

The Police of the Czech Republic investigated the case and notified the administrative authority of suspicion of a misdemeanour by the other person involved in the accident. The administrative body – the Boskovice Municipal Authority – dismissed the notification with the explanation that the notification did not justify initiation of misdemeanour proceedings. The reason stated by the authority was that there was no public interest in examining the misdemeanour because

a record had been drawn up of the accident. The Regional Authority of the South Moravian Region upheld the approach of the 1st instance administrative authority.

The administrative bodies acted incorrectly when they inferred, on the basis of the record of the accident, that public interest in ascertaining liability for the misdemeanour and penalising the offender had ceased to exist. The Defender considers that the drawing up of a record is a private-law act aimed at settling claims for indemnification. A loss event and liability for misdemeanour are two entirely different categories that overlap at most in respect of identity of the offender and the person liable for the loss.

After the Defender released his final statement, the authorities concerned acknowledged their maladministration and promised to respect the Defender's view in similar cases.

2 / 13 / Taxes, fees, customs

Complaints concerning taxes, fees and customs traditionally make a diverse mixture of reservations regarding the procedure and decision-making of territorial tax authorities, bodies of municipalities (particularly concerning local fees) and customs authorities.

In the area of taxes, the Defender dealt with cases of independently assessed taxes (sometimes complicated by the necessity to examine a reference for a preliminary ruling or application of a double taxation treaty), reservations concerning the procedure of a tax administrator in distrainment through the sale of real estate, non-granting a tax benefit for a dependent child and requests for help from persons seeking waiver of a tax or its accessions. The Defender also encountered reservations regarding excessive activity of a tax administrator, to which the tax entities responded by changing their registered office or residence address on purely pragmatic grounds.

In general, the risk of maladministration by territorial tax authorities is more likely in substantively or legally complicated cases. The Defender appreciates the approach of the General Tax Directorate, which streamlines the activities of the territorial tax authorities on the basis of certain investigations (e.g. advice to a tax debtor that a maximum of twice the minimum living standard may be withdrawn from a bank account subject to tax distrainment under a distrainment order; ascertainment of defects and valuation of real estate auctioned in a tax distrainment).

On the other hand, the Defender continues to note the fundamentally wrong procedure of some municipal authorities in **administering local fees**. This includes, for example, the requirement for an increased amount of a local fee which has not yet been assessed through a payment assessment; "advice" of the possible enforcement of fees that have not yet been assessed; request for payment of underpayments that were time-barred under the previous legislation; defective or almost lacking substantiation of a decision in cases where the payment obligation must clearly be demonstrated (e.g. local fee for municipal waste to be paid by the owner of a structure not specified in the construction permit which serves for private recreation).

The Defender has also noted an increased number of complaints submitted on the grounds of changes in legislation, which no longer allows for waiver of a local fee or its accessions on an individual basis unless the municipality has stipulated this option through its own municipal edict. With a view to the fact that addressing certain situations by an edict alone (by stipulating the exemption from a fee) is problematic, the Defender welcomes the considerations of the Ministry of Finance that the instrument of waiver of a local fee (including on the grounds of harshness) could again be stipulated in the Local Fees Act as well as the attempts of the Ministry to resolve the adverse consequences of failure to pay local fees that were payable by minor children at the time when they were due.

In the area of **customs administration**, the Defender repeatedly encounters the problematic assessment of a customs debt (tax and customs duty) on drivers who transported fuels from a petrochemical plant in Slovakia to the Czech Republic. After the legislation was changed in April 2011 (reduced limit for exemption from

VAT), the Defender also examined the clearance procedure for consignments delivered to the territory of the Czech Republic. The Defender also dealt with customs liens.

Complaint File Ref.: 998/2011/VOP/PJ

The exercise of a customs lien by way of a decision of customs authorities on seizure of goods is limited in time by the individual circumstances of the pending customs fact-finding procedure.

If, after the final assessment of a customs debt (termination of the fact-finding procedure), the customs authorities establish that the distrainment of the customs debt cannot be successfully completed due to a lack of assets on the debtor's part, they may establish a lien with respect to a certain thing only under the conditions stipulated in Section 170 of the Tax Rules (Act No. 280/2009 Coll.) or Section 72 of the former Act on Administration of Taxes and Fees (Act No. 337/1992 Coll.).

On 14 April 2008, a customs authority seized a truck (goods) owned by the T. company. It substantiated its decision by claiming that the truck served as collateral for securing an unpaid receivable following from a customs debt (customs duty and value added tax) of the importer of the truck, Mr V. M. The latter had illegally removed the car from customs control (it had been placed in the customs warehouse on 2 April 2004) and sold it to the aforementioned company on 21 April 2004 without proper customs proceedings. In the meantime, on 13 April 2005, the customs authority determined that Mr V. M. as the importer was liable to pay a customs debt. The customs office subsequently did not succeed in enforcing the full amount of the customs debt from the debtor and it therefore seized the truck (which had been owned by another person – the T. company – for several years at that time) as late as in 2008, with reference to the existence of the customs lien under Section 305 of the Customs Act (Act No. 13/1993 Coll., as amended). On 15 November 2011, a public auction of the truck was held, in which the T. company had to re-purchase its car.

The Defender considers that Section 305 of the Customs Act did not authorise the customs officers to satisfy the State from the subject of a lien owned by a third person in distrainment proceedings initiated and held against the customs debtor, V. M.

2 / 14 / Foreigner-related agenda

VISAPOINT

In 2011, the Defender continued to pay attention to the operation of the Visapoint system (electronic order system for applying for visas and long-term/permanent residence) as he received a great many complaints referring to its malfunctioning. As part of the inquiry, the Defender decided to regularly monitor the system beginning from 1 April 2011. It was confirmed that, in some countries (especially the Ukraine, Kazakhstan, Uzbekistan and Vietnam) it is **impossible to register** for lodging an application for a chosen kind of stay. In addition, not only applicants for long-term visas, but **also foreigners applying for long-term and permanent residence,** have to lodge their applications via the Visapoint system, which the Defender considers to be at variance with Section 170 (2) of the Foreigners Residence Act (Act No. 326/1999 Coll., as amended). Originally, the system did not distinguish between visas and long-term residence (particularly long-term residence to unite the family and to study) that often follow from EU Directives and are claimable subject to fulfilment of specified conditions. In these cases, **the Czech Republic breaches not only national laws but also its obligations towards the European Union,** with all the ensuing consequences. The Defender emphasised that a problem-free, claimable access to the lodging of selected types of application for long-term residence must be a matter of course. In concert with the view of the Supreme Administrative Court formulated in the judgment of 31 May 2011, File Ref. 9 Aps 6/2010, the Defender also pointed out that access to governmental authorities at the national level is ***"one of the important aspects of a fair hearing".*** Following the inquiry of the Public Defender of Rights, a certain progress was achieved in December 2011 as the Visapoint system at least began to distinguish, for ordering purposes, between

long-term visas and stays; nevertheless, the problem with malfunctioning in selected countries and types of stay was not eliminated.

Visas

The Defender traditionally inquired into multiple complaints against the procedure of embassies and the Ministry of Foreign Affairs in proceedings concerning the granting of a **short-term visa**, particularly to family members (spouses) of Czech citizens. The most serious, and recurring, shortcomings were found by the Defender in the area of obtaining records from interviews with applicants for a visa or a family member and a Czech citizen. **The record of the interview was not included in the file at all** or **was not dated, was not signed** by a public official or the data contained in it were absolutely **insufficient** for proving potential marriage of convenience or some other reason for rejecting the visa application. The Defender repeatedly made it clear that an interview (and a record of it) with a family member of a Czech citizen as well as with the Czech citizen him/herself in proceedings for granting a short-term visa for a stay of up to 90 days must be subject to at least the same requirements as those applicable since 1 January 2011, under Section 57 (2) of the Foreigners Residence Act, to the record of an interview with an applicant for a long-term visa. To qualify as evidence in potential reconsideration of the reasons for non-granting the visa (an equivalent to appellate proceedings which have been introduced in visa matters) and court proceedings, a record obtained as a separate document must contain at least *"data enabling identification of the applicant, description of the course of the interview, date, name and surname or service number and signature of the interviewer and the applicant's signature".*

Asylum

As part of complaints concerning proceedings on granting international protection, the Defender dealt with the general question of whether a party to any administrative proceedings has the right to make an **audio recording of the interview**. The Defender was approached by a complainant – applicant for international protection – claiming that the Ministry of the Interior had not allowed him to make a recording of his interview. He was of the opinion that nothing in the Code of Administrative Procedure and the Asylum Act (Act No. 325/1999 Coll., as amended) prohibited him from making an audio recording. The Defender concluded that, although the right of a party to proceedings to make an audio recording of the course of the interview is not explicitly specified in the Asylum Act and the Code of Administrative Procedure, it cannot be deduced that making a recording is not possible. An interpretation to the contrary would deny the basic principle of the democratic rule of law laid down in Art. 2 (4) of the Constitution and Art. 2 (3) of the Charter that *"everyone may do what is not prohibited by law and nobody may be forced to do anything that is not imposed by law"*. Thus, the Ministry of the Interior does not have the right to prohibit an applicant for international protection from making an audio recording of the course of an interview in proceedings on granting international protection. This conclusion can be extended to all other administrative proceedings. The Ministry of the Interior agreed with the Defender's conclusion and it now permits applicants in proceedings for granting international protection to make an audio recording.

Expulsion

The Defender addressed several complaints against the procedure of the Foreign Police bodies in connection with the exercise of administrative expulsion as they had repeatedly addressed the embassy of a foreigner's home country with a request for verifying his or her identity and issue of a passport in spite of being aware that the foreigner was an applicant for international protection. The Defender considers that the bodies of the Foreign Police erred when they continued to prepare the foreigner's expulsion (e.g. by obtaining travel and transport documents) even after the foreigner declared his/her intention to apply for international protection. **Foreign Police bodies may not continue in the exercise of expulsion before the foreigner loses the status of applicant for international protection** in the sense of Section 2 (5) of the Asylum Act. The Defender noted during an inquiry into a complaint that a foreigner's minor son – citizen of the Czech Republic staying in the territory of the Czech Republic – was not accepted as an enjoined party to the proceedings on administrative expulsion. The Defender stressed that, **if proceedings are pending on administrative expulsion of a foreigner who has a minor child in the territory of the Czech Republic, and moreover, the child is a Czech citizen, the minor child must be a party to the proceedings alongside the foreigner.** A minor child

of a foreigner subject to expulsion does not enjoy full procedural competence for legal acts in proceedings on administrative expulsion and must therefore be represented. If there is a mere possibility of conflicting interests regarding the result of the proceedings between the parent and the child (e.g. due to antagonistic relationships between the parents), a guardian should be appointed for the child (as a rule, a body of social and legal protection of children). In accordance with Art. 12 of the Convention on the Rights of the Child and Section 29 (4) of the Code of Administrative Procedure, the Foreign Police are also obliged to ascertain the opinion of the minor regarding the case at issue. The Head Office of the Foreign Police accepted the Defender's conclusions and will observe them in proceedings on administrative expulsion.

Residence

In connection with completion of the transfer of the foreigner-related agenda from the Foreign Police to the Ministry of the Interior after 1 January 2011, the Defender noted a remarkable increase in the number of complaints concerning **delays** in the proceedings held by the Ministry. The Defender managed to resolve most of these complaints during the year through informal communication with employees of the Ministry; nevertheless, the problems with delays became even worse at the end of 2011. Cases where the deadline for processing an application for long-term or permanent residence is exceeded by **many months** are absolutely common. In the first half of 2011, The Defender dealt with a number of complaints about a failure to disclose the names of the competent public officials who prepare basic documents for decisions or take the individual procedural acts in the proceedings. The Defender regards this as direct violation of Section 15 (4) of the Code of Administrative Procedure, because a party to any residence- or visa-related proceedings held by the Department of Asylum and Migration Policy of the Ministry of the Interior must be **informed,** at his or her request, in accordance with the above legal rule, **of all the competent public officials** and of the location of his or her file so that (s)he can exercise his/her procedural rights under Section 38 of the Code of Administrative Procedure (perusing files). The Defender was informed by the Minister of the Interior in August 2011 that the above situation had been remedied.

Complaint File Ref.: 2040/2011/VOP/VBG

The delivery of a decision on withdrawing a foreigner's permit for permanent residence in the Czech Republic under Section 77 (2) (d) of the Foreigners Residence Act is subject to the requirement for appropriateness of the interference with the foreigner's private life or family life. It is therefore necessary to examine, in the first place, the very interference in family life, i.e. to examine the actual impacts of the decision on the foreigner's life, because these are the relevant measures of proportionality of the decision itself.

If a permanent residence permit is to be withdrawn, the foreigner may not ask, in the territory of the country, for any kind of residence (neither visa nor long-term residence) other than a visa for permission to remain during the proceedings on withdrawal of the permanent residence permit. This means that the foreigner "may not further reside" or "arrange for the stay in some other manner" within the country. The withdrawal of a permanent residence permit undoubtedly requires that the foreigner leave the territory of the Czech Republic. Moreover, it is reasonable to doubt that the foreigner could legalise his or her stay in the Czech Republic from abroad – taking into account Section 56 (2) (b) of the Foreigners Residence Act, which is interpreted very restrictively in practice.

In the case concerned, the Ministry of the Interior, the Department of Asylum and Migration Policy, made a decision on withdrawal of a permanent residence permit from a foreigner (an Armenian national) because she had failed to register her children born in the Czech Republic in 2006 and 2008 for residence in the Czech Republic. In the decision, the Ministry of the Interior stated that the decision delivered in this case interfered with private or family life, without specifying the interference. The Ministry found the interference reasonable, referring to the gravity of the foreigner's breach. After the inquiry, the Defender found the decision unlawful and poorly substantiated. In particular, the Ministry of the Interior failed to reflect the degree of integration of the foreigner and her family in the Czech Republic. The foreigner has lived in the Czech Republic since 1999 and received the permanent residence permit in 2000. Her sons were born and grew up in the Czech Republic; they have never been to Armenia and the elder son attends a kindergarten. The entire family speaks fluent Czech and feels at home in the Czech Republic.

2 / 15 / Records of the population, registry offices, travel documents, data boxes

Name at birth after a change of surname during marriage

There are situations in the practice of registry offices where a person (usually a woman) who keeps her surname after contracting marriage changes her mind and wishes to adopt the husband's surname. In the past, most registry offices reflected this change in the marriage certificate (the most recent document in the registry office) in the form of a note and the birth certificate remained unchanged. Following a methodological recommendation by the Ministry of the Interior for these cases, in 2009 the registry offices began to make an additional record also in the book of births. As a result, the name at birth was also changed in the information system of the citizens registry. Thus, according to the interpretation of the Ministry of the Interior, unlike those persons who adopted the surname of the spouse immediately when contracting marriage, **the persons concerned were no longer entitled to indicate the surname they used before marriage as their name at birth.**

Several women approached the Defender after this methodological recommendation from the Ministry. The legislation does not define name at birth. The Defender believes that insofar as there are no rules for using the name at birth after a change of surname has been permitted, it is necessary to act in line with the wish of the applicant whose request for a change of surname was satisfied. If the legislation allows for multiple interpretations, the administrative authority must choose the one which does not harm the person concerned. The Defender believes that, if the future spouses concurrently state, when contracting marriage, that they will retain their existing surnames (names at birth), a later permitted change of the surname of one of the spouses to the other spouse's surname (with the other spouse's consent) must be regarded in the same way as a change of surname agreed by the future spouses when contracting marriage. An additional record of the change of the surname should therefore be made only in the book of marriages.

Following some correspondence on this topic, the Minister of the Interior informed the Public Defender of Rights that it had sent to all registry offices notice No. 21/2011 regarding the registration of final decisions on changes of surnames in registry books. In spite of certain reservations, the Defender accepted this measure as sufficient and reflecting the requirements of spouses whose surnames change during marriage.

Trustee of estate and reporting office for permanent address

There are cases where the trustee of the estate is appointed after the death of the testator (either on the basis of the testator's will or by the court) as there are various situations where it is necessary to cope with the temporary situation between the death of the testator and acquisition of the heritage by the authorised heirs. In the Defender's opinion, **the trustee of the estate is also bestowed with the authorisation of the owner of the real estate following from the Citizens Registry Act** (Act No. 133/2000 Coll., as amended). More specifically, this involves the right of the trustee to request disclosure of information on citizens who have their permanent address in the inherited real estate, the right to receive notifications from the reporting office regarding changes in the number of registered persons and the right to propose deletion of permanent residence in the real estate which is subject to inheritance. This consideration is based on Section 480a (2), the first sentence, of the Civil Code, according to which ***"in discharging his office, the trustee of estate exercises the rights and fulfils the obligations that belonged to the testator in relation to the entrusted assets"***. However, he may perform any acts outside the framework of usual management only with the consent of the heirs and with the approval of the court. In this respect, the Defender inferred when inquiring into a specific case that the above acts under the Citizens Registry Act are acts that do not go outside the framework of usual management and the trustee may therefore take them himself without the consent of the heirs and the court's approval.

2 / 16 / Right to information, personal data protection

Access to information

The Defender released several statements in 2011 on the interpretation of the Act on Free Access to Information (Act No. 106/1999 Coll., as amended), whereby he attempted to ensure that authorities take a more positive approach towards applicants.

First of all, the Defender considers that a person requesting information may not be required to have a detailed knowledge of the internal structure of the authority concerned. **If the applicant requests information at a "wrong" department, such department must forward the request to the competent department** so that the authority as a whole fulfils its information duty **by the statutory deadline**. The applicant is not obliged to indicate the reasons for his or her query and the authority is therefore not authorised to examine or judge them. If the applicant requests information to be provided in the form of **copies of specific documents** and there exist no serious reasons that would prevent this, the authority may not provide information in a mere extract. In relation to exemption from the information duty, the Defender stated that **an authority which is or was a party to court proceedings** may not deny information merely because the required information has become subject to decision-making by the court. And finally, an authority is allowed to request **payment** for retrieving information only if this is demonstrably very extensive, i.e. if a large quantity of diverse and separately kept information needs to be gathered.

In 2011, the Defender noted for the first time that **a final decision on rejection of a request for information cannot be reviewed by the superior body or otherwise annulled** (other than through an administrative action), because the Code of Administrative Procedure applies to processes under the Act on Free Access to Information only to a limited extent. This means that, even if the Defender manages to change the authorities' view of a specific case, the only remedy possible is to lodge a new request for the same information.

Complaint File Ref.: 5137/2010/VOP/KČ

The authority which performed State control at a private entity must disclose to the party requesting information at least its findings from the control, conclusions and imposed remedial measures.

Complainants initiated a fire control at their neighbour who operated a glasswork. They were led by apprehension that his activities could generate fire risk. They subsequently requested that the Fire Rescue Service of the South Moravian Region send all information on the performed control in the form of copies of the control protocol and other documents. The authority provided only partial and general information in its reply (for example, when the control was held, what legal regulations were found to be violated, by when the defects were to be remedied – but without specifying the defects). The requesting persons were not successful even when they appealed to the Ministry of the Interior and the General Directorate of the Fire Rescue Service of the Czech Republic. It was only based on the statement of the Defender that the General Director of the Fire Rescue Service of the Czech Republic admitted maladministration and offered the complainants that they may lodge a new request for information, which would be duly processed.

Personal data protection

In the area of the right to personal data protection, the Defender paid attention to several issues that have not been addressed by administrative courts to date and may considerably influence the standard of personal data protection in the Czech Republic. An overwhelming majority of them were related to the individual aspects of liability of data controllers or processors.

Nature of liability of data controllers

The Defender addressed cases where personal data were processed unlawfully (most often in the form of one-off disclosure or publication) as a result of breach of an obligation by a rank-and-file employee of a data controller

(court, administrative authority). The breach was always a negligent act. The Office for Personal Data Protection did not apply its supervisory powers despite the fact that it had been advised of the possible breach of the Personal Data Protection Act (Act No. 101/2000 Coll., as amended) or other related regulations through a complaint.

The Defender found that, although an employee of a data controller may not be penalised under the Personal Data Protection Act for breaching Section 14 of the Act, this does not relieve the data controller from its possible liability on the grounds of an offence. This liability is conceived as "objective (strict) liability" or "liability for the result". **Thus, it is within the competence of the Office for Personal Data Protection to assess whether, in connection with the conduct of its employee, the controller has committed one or several of the administrative offences** delimited in the Personal Data Protection Act, or to consider whether any grounds for liberation exist in the sense of the cited Act. The authority accepted the Defender's arguments and initiated State inspection at the data controllers involved in the described cases.

The Office should follow similar considerations also in those cases where **several parties are involved in data processing** (controller, individual processors or contractual parties under Section 14 of the Personal Data Protection Act). The Defender encountered illegal data processing in connection with the activities of the so-called acquisition companies that included personal data in the relevant records without the valid consent from the data subject. The Defender expressed his opinion that, if the Office imposes a fine on the controller (processor) corresponding to the gravity of the offence, it is reasonable to assume that the controller (collector) will subsequently claim the imposed fine from the contractual partner. According to the Defender, this could considerably change the approach to data protection within the end link of the entire chain of processing, i.e. on the part of the person who performs "field gathering" of data directly from data subjects (possible labour-law recourse, curtailed remuneration, contractual penalty, indemnification).

Last but not least, the Defender closed an inquiry into the **interpretation of the term "data controller" in relation to Internet portal advertising**. The inquiry was also concerned with the nature of liability for content posted on the Internet by users. The Defender repeatedly communicated with the Office and even addressed the supervisory bodies for personal data protection in selected countries of the EU. The inquiry revealed that **advertising companies mostly have the status of data controllers**, because in the sense of Section 4 (j) of the Personal Data Protection Act they process personal data for the purpose of mediating supply and demand between natural and legal entities relating to movable and immovable assets or services. By definition, the Internet is the means of data processing. Thus, they are subject to the obligations laid down in the Personal Data Protection Act. This was in line with the Defender's long-held view. However, liability for content posted by users is subject to Section 5 of the Act on Certain Services of the Information Society (Act No. 480/2004 Coll., as amended), which means, in the practice of advertising portals, that the controller is **liable only when it is advised of illegal processing and fails to take promptly all the steps** that can be required of it to remove, or avoid access to, such information.

Duration of personal data processing in the bank register

The Defender has been addressing the issue of personal data protection in the banking sector since 2009. Most recently he opined on the duration of data processing in the Bank Register of Client Information (BRKI), which is not stipulated by law and, **based on agreement between the banks and the Office, its duration is 4 years from expiry of the relevant obligation**. In his inquiry, the Defender reminded the Office for Personal Data Protection that the data controller (processor) is obliged to preserve personal data only for a period of time which is necessary for the purpose of their processing (Section 5 (1) (e) of the Personal Data Protection Act). At the same time, the controller (processor) is obliged to ensure protection of the private and personal lives of the data subjects in case of personal data processing pursuant to a special law (Section 5 (3), Section 10 of the Personal Data Protection Act). Therefore, if the inter-bank exchange of information about clients takes place generally and without differentiation for a period of four years from expiry of the clients' obligation towards the bank, without taking account of the overall situation of the client (especially the number of current and expired obligations and their amount), the controller (processor) commits and administrative offence under Section 45 (1) (d) of the Personal Data Protection Act. An authority exercising the powers entrusted to it must always carefully balance the ownership title (or public interest in the stability of the banking market), on the one hand, and the right to the protection of privacy and personal data protection, on the other hand.

2 / 17 / Consumer protection

Unfair business practices in presentation tours

The Defender requests that the Czech Trade Inspectorate (hereinafter the "Inspectorate") consistently use the **instrument of provision of explanation** under Section 137 of the Code of Administrative Procedure (Act No. 500/2004 Coll., as amended) in relation to persons who took part in a presentation event and may have become victims of unfair practices (most often in the form of false winnings and stipulation of the arrangement that the buyer has arranged a visit by the seller at his home for making an order). Carrying out a State control of the sellers seems appropriate only in those cases where **personal data of the persons participating in an event cannot be obtained other than by obtaining the concluded agreements from the seller.** The Defender also monitors whether the Inspectorate has used all the coercive measures for obtaining evidence of unlawful conduct of an entrepreneur, particularly **procedural fine** in the sense of Section 19 of the State Control Act (Act No. 552/1991 Coll., as amended). He also emphasised that presentation events are attended mostly by elderly people and the unfair nature of a specific commercial practice must therefore be assessed **from the perspective of an average member of this group** rather than that of an average member of the majority population (Section 4 (2) of the Consumer Protection Act (Act No. 634/1992 Coll., as amended)).

Cooperation of administrative authorities in investigation of unfair business practices

A case involving **the sale of a weapon to a minor via the Internet** unleashed a **negative competence conflict** between the Inspectorate and the Czech Proof House for Arms and Ammunition. The Defender pointed out that, in cases where illegal conduct of an entrepreneur can be investigated by several administrative authorities, he considers it necessary that the **principles of mutual cooperation within good governance** be consistently fulfilled. Administrative authorities must immediately separate the part of the submission which falls under their competence and forward the remaining part to the competent authority with proper explanation. Administrative authorities should also inform each other of their procedure and findings in the sense of Section 8 of the Code of Administrative Procedure. In the interest of protection of minors, the Defender recommended administrative authorities that become aware of the sale of a weapon to a minor to **forward the information without unnecessary delay to the Police of the Czech Republic** for initiating administrative proceedings on the grounds of suspicion of an administrative offence pursuant to Section 76d (1) (o) of the Arms Act (Act No. 119/2002 Coll., as amended).

Amount of penalties imposed by the Czech Trade Inspectorate

The Defender inquired in detail into the procedure of the Czech Trade Inspectorate in imposing fines on entrepreneurs who commit a **continued administrative offence**. He concluded that the Inspectorate should give greater consideration, amongst other things, to the scope of consequences of the illegal conduct, the motivational effects of the fine and its impacts on the entrepreneur's economy. In relation to large business entities (e.g. international retail chains), the Inspectorate should impose fines in such an amount as to motivate the entrepreneur to immediately refrain from the illegal conduct.

Complaint File Ref.: 1614/2011/VOP/IFH

I. If the buyer pays in cash, the seller has the right to round the final total amount of the products sold to the nearest valid nominal value of the legal tender in circulation (Section 3 (c) of the Consumer Protection Act). However, this does not apply to non-cash payments (e.g. card payments).

II. An administrative authority should impose a fine on the party which is guilty of an administrative offence in an amount which would motivate it to immediately refrain from the unlawful conduct. This obligation can be inferred from Section 2 (4) of the Code of Administrative Procedure (the principle of protection of public interest).

The Defender was approached by Mr J. K. with a complaint about the procedure of the Czech Trade Inspectorate, namely the Inspectorate of the Central Bohemian Region and the Capital City of Prague, in processing his complaint about a retail chain selling drugstore goods. The complainant claimed that the retail chain was rounding prices paid by card. The Defender ascertained that the Inspectorate managed to provide for a remedy on the entrepreneur's part with a one-year delay. This was particularly due to a disagreement between the Area Inspectorate and the headquarters regarding interpretation of Section 3 (c) of the Consumer Protection Act. The Defender also found a shortcoming in the Inspectorate's procedure regarding the amount of three imposed fines that were very low given the circumstances of the case (between CZK 5,000 and 20,000). The retail chain finally took remedial measures and the prices are no longer rounded when card payments are made in its outlets.

Disputable aspects of claims of defects of goods

The aspects of claiming liability for defects are constantly present in the complaints delivered to the Defender. Inquiring into the procedure of the Czech Trade Inspectorate, the Defender concluded that a **claim can be considered to be processed within the statutory 30-day period if the consumer is informed of its result within this period**; however, the claimed goods need not necessarily become available to the consumer within the same period. The Defender further found that a warranty liability for defects claimed in writing is effective towards the seller even if the **written document in which the claim is made was addressed to the registered office of the seller or his branch and the seller failed to collect it while it was available for collection.**

At the same time, however, the Defender pointed out the difficulties accompanying violation of the obligation stipulated in Section 19 (3) of the Consumer Protection Act. Indeed, there is no legal regulation that would **require an entrepreneur to retain records of processed claims**, including documentation of the date of receipt and processing of the claim, which makes it considerably more difficult to prove that the given administrative offence was committed. This condition leads to a very absurd situation where the Inspectorate can more easily penalise business entities for non-observance of Section 19 (3) of the Consumer Protection Act if they carefully, fully and truly complete the confirmation under Section 19 (1) of the Act. It is more difficult to impose a penalty when the entrepreneur fails to provide the confirmation in accordance with the law.

The assessment of a claim related to goods whose description on the Internet has changed over time is an equally disputable issue. The Defender is of the view that, in assessing a buyer's claim, it is necessary to take into account the description of the goods that were available to the buyer at the time of conclusion of the purchase contract and any later changes in the description of the goods on the website of the seller have no effect on the assessment of the claim. If an entrepreneur changes the description of the sold goods over time (omitting certain information from the website and inserting it later), it is obvious that it does so in order to influence the consumer in favour of a transactional decision (s)he would otherwise not make (which represents an administrative offence). However, the supervisory bodies have difficulties in proving this conduct (particularly because of modern Internet technology).

Consumer protection in the provision of electronic communications services

In the area of electronic communications services, the Defender seeks to ensure consumer protection through his actions towards the Czech Telecommunication Office, both in addressing individual complaints and in general. Although in 2011, the Office was not authorised to penalise conduct of the providers of electronic communications services in concluding contracts under the Consumer Protection Act, the Defender required that the Office forward every complaint with information about violation of the prohibition of unfair business practices to the Czech Trade Inspectorate. Thus, a complaint about unfair business practices of a provider of electronic communications services has the capacity to initiate supervision by two mutually independent administrative bodies, each of which can deal with the complaint from a different perspective and under different legal regulations. As of 1 January 2012, **supervision over observance of the prohibition of unfair business practices in the area of electronic communications was entrusted to the Czech Telecommunication Office.**

In private-law relationships in the area of electronic communications services, there is an increased degree of inequality of the contractual parties, which is reflected already when the relationship is established – the **consumer is presented with a formalised contract and is usually unable to influence its content.** While the Electronic Communications Act (Act No. 127/2005 Coll., as amended) anticipates that a majority of material contractual arrangements (particularly contractual fines) should be contained directly in the contracts (i.e. in the individually agreed part, which the consumer confirms by his or her signature), the complaints addressed to the Defender show that they are contained only in the general terms and conditions of the service providers. The Defender discussed this issue with the representatives of the Czech Telecommunications Office with the objective of ensuring remedy in respect of the contents of the general terms and conditions of the providers of electronic communications services through Section 63 (5) of the Electronic Communications Act.

The complaints addressed to the Defender further lead to the general conclusion that consumers are not always sufficiently active in spite of doubts regarding the amounts charged for services provided to them. **Consumers do not use their right to claim defects of the received account at the provider of the service** and, when unsuccessful, to defend themselves by lodging a motion with the Czech Telecommunication Office. **A subscription dispute under Section 129 (1) of the Electronic Communications Act constitutes a "contentious" procedure.** In case of a contentious procedure, the principle of substantive truth is applied to a limited extent. In a contentious procedure, the administrative body (authority) may (but need not) also examine other evidence than that proposed by the parties if the need for its examination has become obvious during the proceedings and the administrative body is able to obtain such evidence.

The Defender considers that, in resolving subscription disputes under the Electronic Communications Act, the authority must always ask whether the subscriber actually breached the obligation laid down in Section 64 (1) of the same Act, i.e. to pay the price in the amount applicable at the time of provision of the service. Thus, the authority must **assess whether the monetary claim demanded by the provider of the service in the motion is justified not only in terms of the grounds but also the amount** (i.e. whether the charged price corresponds to the amount applicable at the time of provision of the service). If the concluded contract does not provide objective information for determining whether the subscriber actually breached its obligation to pay for the provided service due to missing information on the agreed type of service and price tariff, then the motion of the service provider may not be satisfied. The Defender also considers it suitable, in the interest of good administrative practice, that a decision on appeal rendered by the Czech Telecommunication Office contain advice of available court protection under Part Five of the Code of Civil Procedure (Act No. 99/1963 Coll., as amended).

2 /18 / State supervision over and control of regional self-government

Limits of supervision

The Constitution guarantees municipalities the right to self-government. **Municipalities do not have any superior body in exercising their independent competence;** they act in legal relationships on their own behalf and bear the responsibility following from these relationships. The exercise of independent competence by municipalities is subject, to a limited extent, to State supervision and control within the limits laid down in Art. 101 (4) of the Constitution of the Czech Republic and Section 7 (1) of the Municipalities Act (Act No. 128/2000 Coll., as amended). Governmental authorities and regional bodies may intervene in independent competence only if this is required by protection of the law and only in a manner laid down by the law, and they are not competent to assess the activities of municipalities from any other viewpoints. The right of municipalities to independently manage their assets and to bear responsibility for the results of the management is an integral part of the right of a municipality to self-government. **The State does not guarantee the economic management and liabilities of municipalities.** The management of a municipality is subject to State control under the Act on Reviewing the Management of Local Governments and Voluntary Associations of Municipalities (Act No. 420/2004 Coll., as amended). It is exclusively the competence of the municipal assembly to remedy any ascertained shortcomings. The disposal of municipal assets may also be assessed by

the Ministry of the Interior within supervision and control of the independent competence of municipalities, except for cases of breach of private-law regulations that are excluded from supervision through Section 124 (6) of the Municipalities Act. The liability of municipalities for breach of private-law regulations is governed by the relevant provisions on liability for damage and these cases are to be examined by courts.

Amendment to the Local Fees Act and request to supplement municipal edicts of municipalities with exemption from a fee

In 2011, the Defender noted an increase in the number of complaints in which citizens who are registered for permanent residence in the Czech Republic and who live abroad in the long term complained that they were forced to pay the local fee for the operation of the system of handling municipal waste. Originally they did not pay the local fee because the administrator of the fee satisfied their request for waiver of the fee under Section 16 of the Local Fees Act (Act No. 565/1990 Coll., as amended), which makes it possible **to waive the fee on the grounds of harshness** in individual cases. The aforementioned provision was **repealed with effect from 1 January 2011**. The payment is demanded by those municipal authorities that did not exempt persons living abroad in the long term from the duty to pay the fee in the municipal edict through which they determined the local fee. The Defender is convinced that the municipalities should respond to the legislative amendment, and if they decide to exempt some groups of payers, they should also exempt persons who live abroad in the long term. He therefore requested the Ministry of the Interior to guide municipalities methodologically so as to ensure that **they exempt, by means of an edict, persons living abroad in the long term from the duty to pay fees** and proposed that this recommendation be incorporated in a methodological standpoint. The Ministry of the Interior agreed with the Defender's view and it methodologically guides municipalities to amend the municipal edicts.

The right of a citizen to make a video and audio recording of a meeting of the municipal assembly and the right of an individual to the protection of personal rights

The issue of making video and audio recordings of a meeting of the municipal assembly and their use is related to the legal regulation of the protection of personal rights. In practice, the right to information on the activities of a municipality may collide with the right to the protection of personal rights under the Civil Code (Act No. 40/1964 Coll., as amended), which is protected only insofar as recordings of personal manifestations are made and used. However, not every manifestation made by a natural person is of personal nature (see the judgment of the Supreme Court of 11 May 2005, File Ref. 30 Cdo 64/2004). The meeting of a municipal assembly has a public nature. The Defender therefore considers that a natural person engages in the administration of public affairs at a meeting of a municipal assembly, whether by attending it as a member of the municipal assembly or as a citizen who exercises his or her citizen rights or merely receives information about the activities of the municipality. **The manifestations of a natural person in these public activities can therefore not be considered as personal manifestations** that are subject to the protection of personal rights.

Methodological assistance by the Ministry of the Interior

The Defender is of the opinion that methodological assistance by the Ministry of the Interior in the area of the independent competence of municipalities, carried out both formally and informally, has a very high standard. The openness and transparency of the website of the Department of Supervision and Control of Public Administration is a good example also for other departments of the Ministry of the Interior.

2 / 19 / Other administrative authorities

Ministry of Finance and the regulation of gambling

The Defender ascertained a **long-lasting illegal decision-making practice of the Ministry of Finance** consisting in non-observance of the Lotteries Act (Act No. 202/1990 Coll.) and municipal edicts in permitting betting

games operated through so-called other technical gaming equipment similar to gaming machines (GM). This includes, for example, interactive video lottery terminals (IVT), electromechanical roulettes, electromechanical dice and triplexes.

With consideration to the objectives of the Lotteries Act, **the Ministry was obliged to fully apply all the provisions of Part Two of the Lotteries Act** (impacting especially GMs), unless this was rendered impossible by the nature of the case.

It therefore erred when it permitted betting games whose **parameters, in terms of the highest possible bet per game or the highest loss per hour, are at variance with the limits** for GMs laid down in Section 17 (4) and (6) of the Lotteries Act. For a certain period of time, the Ministry even failed to check whether an approved installation of technical equipment will violate the prohibition of such installations in schools, school facilities, social care and medical facilities, buildings of governmental authorities and churches, and in the neighbourhood of these buildings (Section 17 (11) of the Lotteries Act). Although permits to operate GMs are to be issued for a maximum of one year (Section 18 (3) of the Lotteries Act), the Ministry **was permitting** betting games **for 10 and more years**. In addition, the Ministry erred when it permitted (and continues to permit), instead of municipalities, the operation of betting games using technical equipment which in fact amounts to multiplayer GMs (electromechanical roulette and dice in the form of compact equipment and the so-called triplexes). In these cases, the Ministry also breached the provisions of the Lotteries Act by failing to respect the rules applicable to GMs (maximum bet, win, loss, place of installation, term of permit).

In addition to non-observance of the legal requirements, the Ministry also **interfered with the right of municipalities to territorial self-government in that it failed to respect their municipal edicts that regulate gambling**, both at the time of issuing the permit and later when it was due to commence proceedings aimed at annulment of the permit due to variance with a later edict. The authorisation of municipalities to regulate gambling and the above obligations of the Ministry were confirmed by the Constitutional Court (see page 28).

The Ministry did not admit its shortcomings and refused remedy under Section 43 (1) and (5) of the Lotteries Act (enabling annulment or change of a permit). The Defender met in person with the Minister of Finance and the Ministry promised to reflect the existing edicts of municipalities; the Ministry is prepared to examine complaints delivered to it and review the issued permits on the basis of these complaints. However, the Ministry still does not admit that the issued permits are at variance with the law. The Defender therefore addressed the Government of the Czech Republic. The material had not been discussed by the Government at the time when this Annual Report was closed.

On the future regulation of gambling (the prepared Act on Operation of Betting Games), see page 25.

The Fire Rescue Service and fire supervision

The Public Defender of Rights addressed a complaint concerning the exercise of **State fire supervision** in connection with the explosion of gas and subsequent fire in a family home.

The State fire supervision should, ***inter alia***, explain the causes of a fire. To this end, the bodies of State fire supervision have relatively extensive powers. It is hence desirable that the conclusion on the cause of the fire be supported by as many facts and as much evidence as can be obtained on the site. In case of a gas explosion, it is evident that determining the leakage point in the gas distribution system is the key aspect. The Fire Rescue Service should therefore ensure that the distribution system can be examined for tightness as thoroughly as possible after the fire is extinguished and the site secured. It should therefore be **avoided that the gas meter or some other component of the distribution system is taken away by an employee of the gas works or some other party** which could have an interest in the result of the investigation of the cause of the fire.

The Office for Government Representation in Property Affairs

The Defender is often approached by citizens with complaints about the procedure of the Office for the Government Representation in Property Affairs (hereinafter the "Office") in claiming repayment of a State contribution for private residential housing due to breach of a contractual obligation. In some cases, the Defender found that the **Office acted in a manner contravening the principles of good governance towards the complainants**, thus creating among them a negative image of the State. These are cases of conduct which is objectively near to variance with good morals (particularly when receivables are claimed that are obviously long time-barred or when default interest is demanded on grounds of delays that were in fact caused by the authority rather than the citizen).

The Defender respects the fact that the Office deals with private-law relationships. He also acknowledges that the main mission of the Defender is to protect persons in the area of public law rather than private law. Despite this, in the above cases, the Defender **finds reasons for exercising his competence towards the Office with a view to protecting the complainants**. In doing so, he relies on interpretation of the term "other administrative authority with competence for the entire territory of the State" under Section 1 (2) of the Public Defender of Rights Act as a category including all administrative bodies representing the authority of the State. The activities of the Office for the Government Representation in Property Affairs have a public aspect even though they do not amount to "public power". The Office must communicate with citizens and process their complaints.

Ministry for Regional Development and funeral services

The Public Defender of Rights is occasionally approached by complainants in matters concerning funeral services. Although the core of the complaint is usually outside his mandate, the Defender provides at least basic legal guidance even in these cases.

Public-law and private-law aspects have been reflected in cemetery and burial law since the 19th century. The public-law level is represented by the State, which lays down the rules representing the interest of the State in proper burial (health and hygiene aspects). In this respect, through the Funeral Services Act (Act No. 256/2001 Coll., as amended), the State transferred the responsibility for proper burial to public-law corporations recognised by the State, i.e. municipalities and registered churches and religious societies that are authorised to operate burial grounds. The Ministry for Regional Development is the central body of governmental authority for funeral services and it is authorised to streamline this agenda. Private-law relationships are found in the relationships related to the use of a grave plot (lease contracts and similar).

Complaint Ref. No. 6380/2011/VOP/MH

Contracts for lease of a grave plot "for eternity" or "for the term of existence of the cemetery" continue to be valid. The lessor who lets the grave plot must respect this legal state.

Should an amendment or a new contract be required, the original provisions on the term of the lease "for eternity" or "for the term of existence of the cemetery" should be preserved because they are not at variance with the applicable Funeral Services Act.

The Defender was approached by Mr P. S. with a request for help concerning the use of a grave plot at the Soběslav cemetery, which had been purchased by his grandfather in 1944. The complainant pointed out in his letter that the grave plot had been paid for, according to the receipt issued by the Soběslav municipality, for the term of existence of the cemetery, in other words "for eternity".

In connection with the Funeral Services Act, the municipality required that the complainant conclude a new contract for lease of the grave plot and demanded payment of new rent for the grave plot. It threatened to remove the grave plot if the payment were not made.

The complaint was concerned with the private-law aspect of cemetery and burial law, i.e. outside the Defender's mandate. On the other hand, it criticised legislation in respect of which the Defender may recommend an amendment. Because this was not the only complaint of its kind, the Defender decided to address it in more detail.

Already in 2005, the Defender addressed the Ministry for Regional Development, which was responsible for the preparation of the Funeral Services Act. The Ministry informed the Defender at that time that, in their opinion, old contracts concluded before the effective date of the Funeral Services Act continued to be valid. (Insofar as they "technically" comply with the existing Funeral Services Act.) If the technical aspects do not comply, this shortcoming can be addressed between the lessor and the lessee in the form of an amendment to the contract, or a new contract, where the fundaments of the contract remain unchanged. However, the lessee must prove that the grave plot was indeed leased for a certain amount without any time limitation, i.e. "for eternity" or "for the term of existence of the cemetery".

The Defender also prefers the legal view that contracts for lease of a grave plot "for eternity" or "for the term of existence of the cemetery" concluded in the past continue to be valid. The lessor who lets a grave plot should therefore respect this legal state, and if an amendment or a new contract is required, the original provisions on the term of the lease "for eternity" or "for the term of existence of the cemetery" should be preserved because they are not at variance with the applicable Funeral Services Act.

The Defender recommended to the complainant that he request remedy at the council of the municipality (city), to which the conclusion of contracts for the lease of grave plots is entrusted under the Municipalities Act.

2 / 20 / Indemnification

Ministries and the examination of claims for indemnification under the Act on Liability for Damage Caused within the Performance of Public Authority

Again in 2011, the Defender examined how the Ministries processed claims for indemnification under the Liability for Damage Act (Act No. 82/1998 Coll., on liability for damage caused within the performance of public authority, as amended) and whether they fulfil the ombudsman's "Ten Rules of Good Governance in Assessing Claims for Indemnification", with which the Defender acquainted the public at a press conference on 10 November 2010 (available at www.ochrance.cz). In 2010, the Defender inquired, on his own initiative, into the procedural steps of the Ministry of Justice, the Ministry of Labour and Social Affairs and the Ministry of Transport. He continued in 2011 and inquired into the procedure of the Ministry of Industry and Trade, the Ministry of Finance, the Ministry of Agriculture, the Ministry of the Interior, the Ministry for Regional Development and the Ministry of Foreign Affairs.

A **working meeting** was held in the Office of the Public Defender of Rights on 20 September 2011 on the processing of claims for indemnification. The objective of the meeting was to discuss the practice prevailing at the Ministries, elimination of questionable interpretations, debate on the manner of methodological guidance in the administrative practice of indemnification and on amendment to the Act on Liability for Damage.

In general, the results of the inquiry, the working meeting and the most common problems can be summarised as follows:

Nature of the procedure in processing claims for indemnification

According to the Defender, the procedure in the preliminary assessment of claims does not follow purely private-law principles; instead, **it has quite many public-law elements**. A similar philosophy can be found in the award of the Constitutional Court of 23 February 2010, File Ref. II ÚS 1612/09. It should also be borne in mind that many changes have occurred in the organisation of public administration since the effective date of the Act on Liability for Damage (reform of public administration); a new Code of Administrative Procedure

and Code of Administrative Justice have been released. The Act on Liability for Damage itself underwent changes in response to the case-law of the European Court of Human Rights.

The Ministry of the Interior, the Ministry of Justice (except that the subject they assess – inactivity in court proceedings – differs from the substance of other administrative activities) and the Ministry of Transport have arrived at the same conclusions as the Defender. The Ministry of Industry and Trade and the Ministry of Agriculture agree with the formulated principles; they intend to implement them in practice and the public-law nature of the procedure is not decisive for them. The view of the Ministry of Labour and Social Affairs and of the Ministry of Finance is that there are not any public-law elements in the process. However, both Ministries stated that they would also implement the principles formulated by the Defender in practice. The Ministry for Regional Development also disagrees with the existence of public-law elements in the process of indemnification (it refers to the specification of deadlines and time-barring, i.e. elements typical of private law, as well as the fact that the Act on Liability for Damage is a civil-law regulation, as suggested by the opinion of the Legislative Council of the Government and the explanatory report). Those Ministries that admitted the existence of public-law elements in the process of preliminary exercise of a claim for indemnification relied on the applicability of Section 117 of the Code of Administrative Procedure (applicability of basic principles of activities of administrative bodies).

Indemnification and appropriate satisfaction for non-proprietary damage

Most Ministries accept and take into account the differences between a claim for indemnification and a claim for appropriate satisfaction for non-proprietary damage. The Ministries also accept that **unreasonable length of proceedings is a form of a wrong administrative procedure.** Only the Ministry for Regional Development takes a negative standpoint on this matter as it emphasises, in relation to the processing of claims for appropriate satisfaction for failure to issue a decision within the statutory (or reasonable) period of time, that the term ***"unreasonable length of proceedings"*** is not contained in the Act on Liability for Damage. According to the Ministry, inactivity means only failure to comply with deadlines for issuing decisions laid down by the Code of Administrative Procedure. It insists that unreasonable length of proceedings may not be included among wrong official procedures and it therefore refuses to apply the case-law of the European Court of Human Rights and the ruling of the Supreme Court of 13 April 2011 (Cpjn 206/2010) on unreasonably lengthy administrative proceedings. The Ministry states that it has been successful in litigations. In fact, however, the applicability of the standpoint of the Supreme Court to the procedure of administrative bodies can be inferred from its substantiation. ***("Reasonability of the length of court proceedings (other proceedings held by the bodies of the State or regional self-governing units) is part of the right to a fair trial..."*** or ***"Delays in proceedings are a phenomenon where the court (other body of governmental authority) fails to act within the period stipulated by law or other reasonable period, and thus the cause usually (but not always) consists in unreasonably lengthy proceedings.")***

Voluntary indemnification

If a Ministry ascertains that an authority has erred, it does not need a court decision for indemnification. Both parties economise on the costs of court proceedings and courts are not burdened without a reason. A pre-court examination of the claim by the Ministry is appropriate only if it can bring effective remedy.

If a Ministry concludes that a shortcoming has actually occurred, a pre-court examination of the claim cannot result in the conclusion that the raised claim will not be satisfied. Indeed, if the claimant is fully successful in the subsequent court proceedings, the costs of the State increase and the time of payment of the due indemnification (or satisfaction) is only delayed, which runs counter to the very purpose of the concept of pre-court examination of a claim under the Act on Liability for Damage. The examination of a claim for indemnification in court proceedings should be reserved only for clearly questionable cases. The rejection of claims that the Ministry considers to be justified (even partly) may significantly reduce the possibility of protection of the Czech Republic before the European Court of Human Rights where our State promotes the system of voluntary performance as an effective means of compensation (Vokurka v. Czech Republic, final decision as to the admissibility of Application No. 40552/02 of 16 October 2007, par. 25 et seq.).

The Ministries adopted a reserved attitude towards voluntary indemnification under preliminary examination of a claim despite the fact that most of them provide voluntary indemnification in practice. The practice of voluntary indemnification is entirely common and systematic at the Ministry of Justice and the Ministry of the Interior. The practice of analysing the likelihood of success at the Ministry of Justice and the approach to clients by the Ministry of the Interior, consisting in apology, acknowledgement of violation of the law and proposed agreement on full satisfaction of the claim, can be regarded as good governance. The Ministry of Finance stated that, where they consider it proven that damage (including non-properietary) was caused through an incorrect official procedure, they provide voluntary indemnification.

In relation to voluntary performance under the Act on Liability for Damage, most Ministries noted that this practice was not supported by the Supreme Audit Office, which regarded it as problematic from the viewpoint of proper management of the State budget.

Advice of the option to turn to the court

Since the Defender views the activities of the Ministries in examining claims for indemnification from the public-law perspective (see above), he considers **advising the claimant of this option not only as a display of good administrative practice and a positive approach, but in fact an obligation of the Ministries.**

Some Ministries disagree with this obligation. The Ministry for Regional Development advises claimants of the option to turn to the court only if the claimant addresses it repeatedly (the motivation is rather to discourage the claimant from further correspondence). The Ministry of Agriculture does not provide such advice based on the assumption that the claimant is aware that (s)he is making a pre-litigation motion and the advice is therefore not necessary. The Ministry of Finance referred to the substance of the indemnification relationship, which is of private-law nature, and the counterparty therefore need not be advised of this option.

Indemnification for an incorrect official procedure of the Czech Social Security Administration in distrainment deductions from pensions

Incorrectly performed deductions from pension insurance benefits by the Czech Social Security Administration (hereinafter the "CSSA") have adverse impacts on the persons concerned (particularly liable persons) in terms of their property. In case of **delayed deductions** or **unauthorised disposal of the amounts deducted under distrainment** under the Rules of Distrainment, the court distrainer in charge may select an additional form of distrainment which has considerably stronger legal impacts on the liable person (e.g. sale of immovable assets or, in an extreme case, distrainment through the sale of real estate). The consequences of the incorrect procedure of the CSSA are indeed catastrophic for the liable person.

The Defender therefore applies the following approach in administering complaints about an incorrect procedure in making deductions from pension insurance benefits:

- he acts towards the CSSA to ensure that it brings its procedure into accord with the legal regulations;

- he informs the liable person (pension recipient) of the option to claim indemnification or appropriate satisfaction from the CSSA under the Act on Liability for Damage (Act No. 82/1998 Coll., on liability for damage caused within the performance of public authority..., as amended); decisions on claims for indemnification/appropriate satisfaction are made, within the so-called preliminary exercise of a claim, by the Ministry of Labour and Social Affairs.

In 2011, the Defender dealt with cases where a person affected by an incorrect official procedure of the CSSA in making deductions from pension insurance benefits turned, based on the Defender's recommendation, to the Ministry with a request for appropriate satisfaction under Section 31a of the Act on Liability for Damage. However, the Ministry refused the complainant, claiming that the CSSA had not made the deductions from pension in a public-law relationship (the case concerned did not involve the exercise of public power).

In contrast, the Public Defender of Rights holds the view that an **incorrect procedure of the CSSA in making deductions from pensions does give rise to liability under the Act on Liability for Damage**, because, in such a case, the CSSA acts in the position of public power towards the liable party. It is clear from Section 5 of the Act on Organisation and Implementation of Social Security (Act No. 582/1991 Coll., as amended) that, in paying pensions, the CSSA performs its obligations under public-law regulations, exercises its competence and power, and hence acts in the position of public power towards the pension recipient. The position of public power on the part of the CSSA does not change in any respect when it grants and pays a pension (where the conditions for entitlement to a pension would not be fulfilled, the CSSA should initiate proceedings ***ex officio*** and remove the pension. It is also obliged to suspend the payment of the pension in cases anticipated by law).

Even in cases where the CSSA makes deductions from a pension on the basis of a decision of the court, a court distrainer, tax administrator or some other public administrative body (hereinafter "distrainment proceedings"), it does not find itself in an equal position with the pension recipient (the liable party). The CSSA cannot be deemed identical with any "common" wage payer (employer). While private-law relationship is the primary legal relationship between the wage payer and the employee in cases where the wage is paid by the employer (and hence the relationship in distrainment proceedings is equal), this is not so in cases where some other income substituting wage (typically pension, sickness insurance benefits, unemployment benefits, etc.) is paid by an administrative authority. In these cases, the primary relationship between the recipient of the benefit (the liable party) and the administrative authority is a relationship based on public power and the incurrence of the obligation of the administrative authority to make distrainment deductions does not change anything in the nature of the relationship.

Since there is a persisting disagreement between the Defender and the Ministry of Labour and Social Affairs on this matter, the Defender released, in June 2011, the "Statement of the Public Defender of Rights on the option to apply Act No. 82/1998 Coll. to the procedures of the Czech Social Security Administration in making deductions from pension based on a court resolution on ordering distrainment or a distrainment order", available on the website of the Defender, and recommended several complainants to turn to the court with an action for indemnification/appropriate satisfaction for an incorrect official procedure of the CSSA in making deductions from their pensions. A decision on the actions is yet to be made.



POLI






4 | The Defender and Detention Facilities

In 2011, as part of the performance of systematic visits under Section 1 (3) and (4) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended), the Defender commenced a long-term project aimed at mapping the circumstances in Czech facilities where children are placed. Visits were made to facilities falling under various jurisdictions, serving both ***de iure*** and ***de facto*** detention. 23 visits were thus performed in 2011 to **school facilities**, including one diagnostic institution for children, 5 visits and one follow-up visit to **in-patient psychiatric facilities for children**, 4 visits to **infant homes** and one visit to a **facility for children – foreign nationals**. The systematic visits to facilities for children will continue in 2012.

The Defender further continued to perform systematic visits to **police cells**; more specifically, he visited four workplaces of the Police of the Czech Republic. The ascertained shortcomings do not require any systemic or legislative remedial measures. The most frequent shortcomings found were non-observance of the existing legal regulations, particularly in terms of the three main safeguards against maltreatment in police detention, i.e. provision of cooperation in exercising the right of a person restricted in his or her freedom to obtain legal aid at his or her own expenses and to speak with a legal counsel without the presence of a third person, advising a third person of the situation of a person restricted in his or her freedom and provision of cooperation for exercising the right to be examined or treated by a doctor of the person's choice. While the system anticipates that the person will be advised of his or her rights and obligations (special forms in several language versions), in practice the advice is not always provided sufficiently (advice in writing is not left in the cell, a foreigner does not receive a foreign language version of the form), which the Defender must repeatedly point out.

A follow-up visit was performed to a women's prison. The Defender continuously monitors the observance of rights in prisons by inquiring into individual complaints. In many cases, he adopted standpoints that have a general effect on the prevention of maltreatment. These are discussed in more detail on page 59.

Several visits were dedicated to issues which the Defender perceives as cross-cutting and topical. The aspect of **malnutrition** was followed during visits to five facilities and the aspect of the **exercise of guardianship** during visits to geriatric psychiatric wards of psychiatric hospitals and in addressing the procedure of the so-called public guardians.

One thematic visit to **a facility for the detention of foreigners** was held with a focus on the performance of security searches of foreigners and their items, placement of foreigners in the so-called strict regime and the method and conditions applicable to the escorting of foreigners.

In terms of the method of the Defender's work in performing systematic visits, the Defender decided to make use of the observations he made and offer them to the public in the form of standards, i.e. description of the desirable procedures, practice and results whose achievement amounts to the prevention of maltreatment, including a description of desirable treatment. The Defender is formulating these standards for the first time as part of his evaluation of the visits to school facilities (see the following section of this Report); in relation to the visits to medical facilities for children, he will do so in the future summary reports. This method does not mean abandonment of the formulation of recommendations; these will remain in place as an instrument of directed action towards influencing the practice of facilities and authorities with a view to ensuring compliance with general standards.

1 / School Facilities for the Exercise of Institutional and Protective Education

The employees of the Office of the Public Defender of Rights visited a total of **23 school facilities** where institutional or protective education is performed. The children were placed there especially because institutional education was ordered to them (727 children), 82 children were placed in these facilities on the basis of a preliminary ruling, while protective education was ordered to a mere 12 children. 64 children were subject to a contract for a prolonged stay.

The systematic visits were held at the Kutná Hora Reformatory and School Canteen; Černovice Reformatory, Education Centre, Secondary School and School Canteen; Jindřichův Hradec Reformatory, Secondary School and School Canteen; Zbytiny-Koryto Children's Home; Moravský Krumlov Reformatory, Children's Home with School, Secondary School, Elementary School and Canteen; Prague 9 Klánovice Children's Home; Radkov-Dubová Children's Home; Ústí nad Labem – Střekov Children's Home; Pardubice Children's Home; Terešov Reformatory; Boskovice Children's Home; Klíčov Reformatory and Education Centre; Budkov Children's Home; Broumov Children's Home; Dlažkovice Children's Home; Valašské Klobouky Children's Home; Polanka Reformatory; Jeseník Children's Home; Ostrov and Karlovy Vary Children's Home; Měcholupy Children's Home with School; Slaný Children's Home with School; Žulová Reformatory; Brno-Hlinky Diagnostic Institution; and the Permon Facility for Children-Foreign Nationals.

Children's homes, children's homes with schools, reformatories

General system standards

1) The entire policy of protection of children's right is to be conceptually managed by a single Ministry

The concept of substitute care for children and youth is currently scattered and often uncoordinated. It falls within the competence of the Ministry of Education, Youth and Sports, the Ministry of Health and the Ministry of Labour and Social Affairs. The Committee on the Rights of the Child has called on the Czech Republic to create an effective mechanism (or to substantially strengthen the existing mechanism) aimed at co-ordination of children rights policies. The Public Defender of Rights already called for unification of the concept of substitute care for minors in his 2007 report on visits to facilities where institutional and protective education is performed. No progress has been made since then towards concentrating protection of the rights of children under a single Ministry and a single authority. The Defender must therefore emphatically reiterate his recommendation.

2) The removal of a child from the family solely on social grounds is an inadmissible interference with the right to family life.

In visits to facilities where institutional and protective education is performed, the inquiry was also concerned with the legal title on the basis of which children were placed in the facilities. It was ascertained that 11 % of the decisions were based on purely social reasons. Situations where the family lacked appropriate housing or had financial difficulties (typically due to unemployment or excessive debts) were considered to be social reasons. Inappropriate housing or no housing at all was the reason in 95 cases (of the total of 543 decisions under examination). In total, social reasons were the second most frequent reason for ordering institutional education. This practice is at variance with the established case-law of the European Court of Human Rights (see, for example, Wallová and Walla v. Czech Republic, judgment of 26 October 2006, Application No. 23848/04, Havelka and others v. Czech Republic, judgment of 21 June 2007, Application No. 23499/06).

3) A child has the right to be heard by the court in proceedings on ordering institutional education.

The right of a child to be heard is stipulated in the Convention on the Rights of the Child and also in the Family Act (Act No. 94/1963 Coll., as amended). The Constitutional Court has also ruled that there is no reason why a 12-year old child should not be heard in proceedings on ordering institutional education (decision of 2 April 2009, File Ref. II ÚS 1945/08). It pointed out *"... the general fundamental right to be heard before a court which is making a decision on the restriction of freedom, at any time when such decision-making is taking*

place. In principle, there is no reason for a child not to have the fundamental right to be heard directly before a court when a decision is being passed on restricting the child's personal freedom whilst an adult has such a right in the same circumstances." It followed from the studied legal titles that 80 % of children aged 12 and older were not heard by the court in the proceedings on ordering institutional education.

4) In proceedings on institutional education, a child is not to be represented by the same body of social and legal protection of children as that which proposed the ordering of institutional education and the preceding preliminary ruling, if any.

In the analysed decisions, a body of social and legal protection of children several times acted as the party proposing institutional education and, at the same time, as the child's guardian ***ad litem*** in the proceedings. It is thus anticipated, even before the court decides, that the decision is in the interest of the child, and the child's right to a fair trial is not adequately guaranteed.

Standards of treatment of a child

5) Facilities for the exercise of institutional education and protective education should be family-type establishments and should be situated in an agglomeration.

Small facilities that resemble as much as possible the family environment are more suitable than large-scale institutions. An isolated location where children do not have regular contacts with the outside world (including children of the same age of the opposite sex) is inappropriate. Most of the facilities visited are intended for more than 30 children, and facilities for as many as 60 children were no exception. Especially some reformatories, as well as children's homes with a school, are intended for girls or boys only, or the two groups are separated in the facility.

6) Educational measures in the form of penalties (punishments) may only be imposed on a child placed in a school facility for the exercise of institutional or protective education for proved violation of the obligations defined by the Act on the Exercise of Institutional Education or Protective Education (Act No. 109/2002 Coll., as amended).

Penalties must be imposed in such a way as to respect the principle of legality, predictability, individualisation and reasonability and the right of the child to be heard must be observed. Some facilities imposed punishments that involved, for example, ban on wearing jewellery, use of make-up by girls, dying hair, etc.; some punishments were imposed for an indefinite period of time (until revocation); the same punishments were imposed for violation of the ban on smoking and for physical assaults. A statement of the child on the imposed punishment (if at all required or permitted) was treated in a purely formalistic manner.

7) The possibility of spending time with the family may not be used as a motivational element as it represents exercise of the right to family life.

In some cases, leave to spend a weekend with the parents is used as one of the most significant motivations available. A child's stay with the parents is subject to permission from the head of the facility, which is bound to written consent of the municipal authority of a municipality with extended competence. In fact, however, it is only permissible to deny the stay with the family on the grounds of an inappropriate environment where the child would stay rather than a lack of merits or poor school marks.

8) A child has the right to be in contact with its sibling and to joint placement in the same facility.

The right to family life of a child includes bonds among siblings (see, for example, Judgment of the European Court of Human Rights in Ollson v. Sweden of 24 March 1988, Application No. 10465/83, Judgment in Boughanemi v. France of 24 April 1996, Application No. 22070/93). Unless this is prevented by serious reasons, siblings must be placed together. Otherwise, it is necessary to provide for regular personal contact among them. The Defender encountered many cases where siblings were separated and their mutual bonds were severed (placement in different facilities, separation in connection with substitute family care or unprofessional exercise of foster care accompanied by inactivity of a body of social and legal protection of children), sometimes irreversibly (although the siblings were together in the family or in a facility, they never meet again or they are even unaware of one another). In the light of the above decisions, a practice failing to provide for joint cohabitation of siblings and development of their relationships after removal from the family

can be regarded as violation of the right to family life. The family of a child does not include just the parents but also siblings and other relatives, even more distant ones.

Facility for Children – Foreign Nationals

The Facility for Children – Foreign Nationals, as a specialised school facility for the exercise of institutional and protective education, is to provide for substitute educational care for these children. The "child-foreigner" category is not directly specified by the legal regulations; nevertheless, it can be deduced that it involves particularly **minor unaccompanied asylum seekers** or **children with a language barrier** coming from a culturally different environment in need of education.

The Facility for Children – Foreign Nationals in Prague has a nationwide competence. It consists of a diagnostic institution, a children's home with a school, a reformatory, a centre of educational care, an elementary school and a practical school. The children's home with a school and the reformatory that were subject to the systematic visit are situated in a sparsely populated location near Příbram, at a site called Permon. The site serves for the long-term stays of children who do not return to the family or are not placed in some other facility after being diagnosed.

Almost one half of the capacity of the children's home with a school and reformatory was occupied by children from Slovakia and a large group of children who are not citizens of the Czech Republic but have stayed here in the long term. **The Defender recommended that children who no longer stay in our territory for a long term and children who come from similar cultural or social environments be placed in the network of normal school facilities for the exercise of institutional and protective education.** According to the Defender's recommendation, the Facility for Children – Foreign Nationals should be intended only for a specific group of children who are foreign nationals, and hence State nationality should not be the only criterion for placement.

As a result of the system of placement of children – foreign nationals applied by the diagnostic institution, fully integrated children (although formally foreign nationals) with problematic behaviour have been put together with children – foreign nationals who are asylum seekers as well as other children – foreign nationals who come from a culturally different environment and need specific care (language teaching, integration into society). **The Defender recommended that all the parties involved, i.e. the Ministry of Education, Youth and Sport; the Ministry of Labour and Social Affairs; the Ministry of the Interior; non-governmental non-profit organisations, and the Facility for Children-Foreign Nationals, commence negotiations on a new concept of the operation of the Facility for Children – Foreign Nationals.**

The very location of the Permon site in a recreational area on the shore of the Slapy water reservoir is problematic. This location prevents integration and considerably limits support for the children's social bonds and activities.

The dire living conditions in some parts of the home were also criticised. Although they resulted to a considerable degree from the children's own conduct, the underlying cause was the motivation and educational activities. The Defender also pointed out the inappropriateness of internal education of children – foreign nationals, i.e. at the elementary and practical school established at the facility. Specialised care, especially psychotherapy, was neglected considering the gravity of some children's fate. The Defender further found it inadmissible to use the so-called separated room (Section 22 of the Act on the Exercise of Institutional Education or Protective Education) as the statutory conditions regarding the reasons for and term of placement of children in it were not fulfilled. **The Defender sent the report on the visit to the facility, with the observation of maltreatment, to the head of the Facility for Children – Foreign Nationals; however, taking into consideration the gravity of the findings, he also discussed the matter with the representatives of the Ministry of Education, Youth and Sports as the founder of the facility, the Ministry of Labour and Social Affairs, the Ministry of the Interior and the representatives of the Supreme State Attorney's Office.** The repeated meetings with the representatives of the competent Ministries should result in a comprehensive concept of care for minor children – foreign nationals, which should prioritise the placement of children in the normal network of school facilities.

2 / Medical Facilities for Children

Infant homes

In 2011, the Defender visited **4 medical facilities for children up to three years of age, known as "infant homes"**. These were the Children's Centre at the Thomayer Teaching Hospital with Policlinic; the Children's Home for Children up to 3 Years of Age at the Area Hospital in Mladá Boleslav; the Svitavy Infant Home and Children's Home; and the Ústí nad Labem Region Infant Homes in Most.

Although the public will be acquainted with the Defender's conclusions only in 2012 in the form of a summary report, the Defender can already now state that he has found the following most serious shortcomings:

In spite of experts' recommendation that children should not stay in these facilities for more than six months, it was found that 43 to 72 % of the children **had been staying for more than a half year** in the facilities visited and **some had been there for more than three years**. Of this number, only very few were children with a disability. In addition, the future of many long-staying children was unclear; i.e. it was not certain whether they would return to the biological family, whether substitute family care would be mediated or whether they would leave for some other institutional facility.

Although relatively many children return to their original families (about 25 to 70 %), a multidisciplinary support for the biological family is absent. There is little cooperation between the facilities and the bodies of social and legal protection of children, courts and the very few non-profit organisations that exist (especially those that provide social services). Bonds among siblings are not purposefully supported. Records are not kept on the course of visits by parents (changes in interactions between parents and children, emphasis on positive moments, etc.).

If the facilities approach all children in the same way, it is rather in that they go on the pot and are fed all at the same time. A nurse who is in charge of 4 to 8 children at once becomes a mere attendant and lacks time for physical and formative contacts with children.

In-patient psychiatric facilities for children

The Defender visited **5 in-patient psychiatric facilities for children** in 2011. These were the children's ward of the Psychiatric Hospital in Opava; the children's ward of the Psychiatric Hospital in Havlíčkův Brod; the Children's Psychiatric Hospital in Opařany; the Children's Psychiatric Hospital in Velká Bíteš; and the Children' Psychiatic Hospital in Louny. The Defender performed a follow-up visit in one of these facilities. A child psychiatrist participated in five of the visits. The Defender will acquaint the public with his conclusions in 2012 in the form of a summary report. However, he can already now provide some of the observations that will lead to the formulation of recommendations in the individual reports.

While each of the visited facilities seeks to obtain the **written consent of a statutory representative to the child's hospitalisation**, the procedures of the facilities and the forms used are very little concerned with the question of whether the consent was obtained from a statutory representative present at the time of admission (and hence informed of the reasons and nature of the hospitalisation) or whether it was obtained remotely (for example through social workers in the case of a child who is cared for by a school facility). If a statutory representative was not present, the medical facilities did not actively inform him or her but merely waited whether any interest would be shown. The Defender doubts whether such consent can be considered as informed consent. The Defender has, in rare cases, encountered an inadmissible practice where the consent to hospitalisation was granted by the head of a school facility.

The Defender noted exceptional cases where the **use of means of restraint** was not reported to the court as an additional restriction on a patient's movement and, at the same time, the consent of a statutory representative to the restrain was not obtained.

The Defender criticised some forms of excessive **limitation of contacts between child patients and their parents.** He expressed a fundamental disagreement with an absolute elimination of contacts or contacts only through an intermediary, which was applied in a facility in the treatment of specific disorders. He further criticised unreasonable limitations on the answering of phone calls by child patients in a facility which provided the time between 7.15 PM and 8.45 PM for this purpose and offered only one telephone for 25 children (it was permanently busy). In this respect, the Defender also criticised the general ban on the use of mobile phones in some facilities. He did not agree with the therapeutic justification of this measure and recommended that the children be provided with a safe storage for their telephones and allowed to use them every day.

In connection with the hospitalisation of **children with mental disorders and autism**, the Defender pointed out the specific needs of these patients. Taking into account the need to provide these children with professional care, it is necessary that the personnel be trained in work with them and employ, or at least hire externally, a pediatric psychologist.

3 / Follow-up Visit to the Světlá nad Sázavou Prison

The follow-up visit concentrated especially on implementation of the recommendations that the Defender addressed to the facility in 2010. It was ascertained that the prison had made considerable efforts, as a result of which **most of the recommendations had been implemented**. The prison was advised of certain shortcomings (e.g. different approach of the individual departments to permitting telephone calls in the Romani language at different wards) and it promised to provide for a remedy. The Defender previously criticised the undesirable practice of placing together convicts assigned to various types of prisons in a specialised department for prisoners who are permanently unfit to work; this practice is still in place. Some new recommendations were made, for example that a telephone card, as an item classifiable under the prisoner development programme, should be included in the items that are permitted to be sent in the "one-kilogramme parcel"; the prison accepted the recommendation.

4 / Thematic Visit to a Facility for the Detention of Foreigners

The Defender continued his monitoring of treatment in facilities for the detention of foreigners in 2011 by visiting the Bělá – Jezová Facility for the Detention of Foreigners. His visit concentrated one some specific issues.

In relation to the **performance of security searches**, in some cases they were found to be unreasonably harsh (e.g. the obligation to stand in the corridor during the search, facing the wall, with hands put against the wall), failure to provide advice of the extent and reasons for the search and failure to allow those foreigners who were found (partly) undressed to put the dress on. All the police officers who performed searches were advised that any rude behaviour towards the detained foreigners would not be tolerated. They were also advised of the obligation to perform the search reasonably and the necessity to bring the foreigners' rooms into a condition suitable for normal use after the search. All the police officers who performed searches were informed with particular emphasis that any destruction of the foreigners' items would not be tolerated and is punishable.

In relation to the **placement in the strict regime**, the Defender requires the Police to consistently ensure that a foreigner who does not understand Czech receives the advice form in a language version (s)he will sufficiently understand. The Defender further recommended that the period of 48 hours applicable to the placement of a foreigner in the strict regime should be consistently monitored and the complaint procedure should be better communicated. He also pointed out that, if the period of placement of a foreigner in the strict regime exceeds 48 hours, a decision on the placement must be issued in administrative proceedings. In terms of the **handcuffing of foreigners during escorts**, the Defender recommended that the Police consistently indicate in the decisions on escorting whether handcuffing is to be used or not; in decisions on escorting involving several foreigners together, it should be indicated who of them will be handcuffed and who will not; and the reasons for handcuffing should be specified in more detail in the decisions.

5 / Malnutrition

The Public Defender of Rights performed **5 systematic visits focusing on identification and evaluation of the risk of malnutrition** in 2011: two inquiries were performed in institutions for long-term ill patients (institution at the Valtice Hospital, limited liability company, and institution at the Municipal Hospital in Litoměřice, contributory organisation); two at geriatric psychiatric wards of psychiatric hospitals (Brno Psychiatric Hospital and Psychiatric Hospital in Kroměříž); and one in a social service facility serving as a home with special regime (in Jevišovka, operated by Seniorprojekt, limited liability company). A nutritionist/gastroenterologist participated in three of the visits as an invited expert.

The home with special regime (a private facility whose clients are mostly elderly people suffering from the dementia syndrome) falls outside the usual results of the inquiry. The care in this facility was in many respects against the regulations and was insufficient also in terms of nutrition. **The Defender regards this as maltreatment.**

No shortcoming that could be seen as maltreatment was found in the remaining medical facilities, and the situation at two sites – the Brno Psychiatric Hospital and the Institution for Long-term Ill Patients at the Municipal Hospital In Litoměřice – **was rated as very good practice.**

In cooperation with the invited specialist, the Defender formulated several recommendations for increasing the standard of the care provided:

1) A simple nutrition screening should be introduced for each patient/client.

Information on weight, height, BMI, ingestion of food should be recorded at the time of admission. The perimeter of the arm should be recorded instead of body weight for persons who are unable to stand up.

2) Where the risk of malnutrition or actual malnutrition is found, professional examination should be ensured and a nutrition plan, nutrition intervention and plan of checks should be determined.

If the BMI drops below 20 and/or less than three quarters of the provided rations are ingested and/or the weight drop amounts to 5 % per month, examination by a dietitian or internist should be ordered. An appropriate response should follow, for example by changing the diet, including snacks, and possibly sipping. Based on the doctor's indication, intubation may be introduced. The recommendations (orders) of the specialists should be recorded since verbal recommendations may be forgotten.

3) The risk of malnutrition should be regularly evaluated and nutrition entries should be introduced.

The above figures should be continuously monitored with the aim of identifying high-risk patients/clients. Documentation – nutrition entries should be made in order to create records on the ingestion of food, weight, diet, sipping, etc. The documentation can often be simplified using several well-prepared forms. The ingestion of food can be monitored using a simple checklist (by the member of staff who removes the plate and the report is subsequently filed in the records). After training, these procedures are within the capabilities of nurses, junior healthcare personnel and social service workers. However, in an ideal situation a bedside nutrition therapist is employed. It is important that the records be relevant (objectivised).

4) It should be determined who should be fed, receive supplementary feeding, who should receive crushed or ground food.

These decisions should be documented. A decision to feed need not be made by a doctor.

5) A sufficient number of staff for feeding should be ensured.

Feeding must not be done too quickly; ground food must not be used only to simplify work if there is a lack of personnel. A plate with left-over food is a signal for the staff.

6) A standard of maintenance should be created for the nasogastric tube and application of nutrition into the tube.

7) The personnel should be educated in the importance, diagnostics and ways of combating malnutrition.

6 / Guardianship

Municipalities fall within the Defender's mandate in their exercise of the so-called public guardianship under Section 27 (3) of the Civil Code (Act No. 40/1964 Coll., as amended), which the Constitutional Court considers to be the exercise of **delegated competence**. According to the Resolution of the Constitutional Court of 10 July 2007, File Ref. II ÚS 995/07, public guardianship is not subject to the general rule laid down in Section 8 of the Municipalities Act (Act No. 128/2000 Coll., as amended), stipulating that, if a special law regulates the competence of municipalities without determining that its competence is delegated, the competence is always independent. Legal incapacitation is always a decision of the State, whereby the State enters the autonomy of an individual, and it is the State that is fully responsible for ensuring that the status or "quality" of the individual's legal acts will not worsen in any respect while incapacitation is in place. The Constitutional Court inferred from the above that it is again the State that is primarily obliged to exercise guardianship towards legally incapacitated persons insofar as it is unable to find a suitable person among the relatives of the person lacking capacity or other private individuals. The above provision should be understood in the future as meaning that, **under Section 27 (3) of the Civil Code, "local authority" means the municipality which performs the role of a guardian as an organisational unit of the State rather than a corporation bestowed with territorial self-government**.

Given that the exercise of public guardianship was long considered to be the exercise of independent competence, it was not and still is not regulated in any manner by the central bodies and bodies providing methodological guidance. Thus, apart from the brief text of the Civil Code, the only corrective consists in the decision-making and supervisory activities of district courts, which are exempted from the Defender's mandate. However, there is a lack of uniformity in some fundamental aspects.

In his activities, the Defender addressed various aspects of the exercise of guardianship, from the conclusion of contracts on the provision of social services to the granting of consent to other legal acts, including non-proprietary acts (for example, a substitute consent to medical operations), issues of due supervision over a client and legal representation of the client, to court supervision over restrictions on personal freedom. The Defender repeatedly stated in the inquiries that, if the person lacking capacity is the client of a residential social service facility, due supervision is to be performed primarily by the facility concerned. In order to protect the rights and justified interests of the person lacking capacity, the guardian may cooperate with the facility in planning the provision of the social service and evaluation of its course (e.g. through individual planning, plan of risk situations, etc.). **However, the guardian does not have the right to prohibit free movement of the person lacking capacity.** The guardian may not violate, or unreasonably interfere with, the fundamental rights of this person. The guardian may interfere with the fundamental rights of the person lacking capacity only in accordance with the purpose and sense of guardianship. However, even in that case, the rights of the person lacking capacity must be respected to the maximum possible extent. If the guardian's role is to administer all affairs for this person and represent him or her in acts defined by the court, the guardian must always act in the interest of the person. In order to do so, the guardian must know the needs, wishes, views and life circumstances of the person lacking capacity and respect his or her will to the maximum extent insofar as this is not contrary to the guardian's own interests.

Complaint File Ref.: 2355/2011/VOP/JF

The legal act made by a guardian on the basis of which the person lacking capacity is to be placed at a home with a special regime which exercises a regime interfering with constitutionally guaranteed rights, namely the right to personal freedom guaranteed by Art. 8 (1) of the Charter of Fundamental Rights and Basic Freedoms and Art. 5 (1) of the Convention for the Protection of Human Rights and Freedoms (Communication No. 209/1992 Coll.), must be approved by the court.

If a person who is legally incapacitated or restricted in legal capacity expresses disagreement with his or her placement in a facility while (s)he is staying there and it is impossible to release him or her from the facility, it is necessary to initiate proceedings on statement of permissibility of admission or holding in a healthcare institution under Section 191a et seq. of the Code of Civil Procedure (Act No. 99/1963 Coll., as amended).

Based on a contract concluded by the Authority of Prague 11 Municipal Ward as the public guardian, a legally incapacitated complainant was placed in a residential social service at a home with special regime where he was subject a regime (outings and shopping only when accompanied by the staff) and treatment he had not been receiving before. The complainant demanded release in letters addressed to the guardian court competent based on the seat of the social service provider and to the State Attorney's Office.

The Defender considers that a contract for the provision of residential social services is a legal act which, in order to be valid, needs to be approved by the court as it affects not only the disposal of a person's property but also interferes with the protected personal freedom of an individual protected by a constitutional guarantee.

The Defender found that the complainant was de iure deprived of his personal freedom in the sense of Art. 5 (1) (e) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In that case, the proceedings in the sense of Art. 5 (4) of the Convention should be available to him; however, in Czech law, under Section 191a et seq. of the Code of Civil Procedure, such proceedings are exercised only in medical facilities and not in social service facilities. The Defender proposed an interpretation alternative to the term "institution exercising medical care" in the Code of Civil Procedure, which would make it possible to extend detention proceedings also to the provision of a residential social service. Otherwise, it would be necessary to directly apply Art. 5 (4) of the Convention. Given that decision-making by the courts is outside the Defender's mandate, the report on the inquiry was provided, via the Ministry of Justice, to individual guardian courts and "detention" courts to study it in detail and it will be reflected in the amendment of the relevant regulations according to the legislative plan of the Government.









5 | The Defender and Discrimination

The Defender noted an increase in the number of complaints concerning protection of persons against discrimination. At the same time, the scope and nature of his activities made him one of the standard European bodies providing protection to the discrimination victims (the so-called Equality Bodies) associated in the Equinet network (the Defender is a member of the network). All this means that the requirements of EU Directives on discrimination (e.g. 2000/43/EC, 2000/78/EC, etc.) are fulfilled.

The Public Defender of Rights seeks cooperation which would enable him to intermediate free legal aid to discrimination victims.

1 / Recommendations and Research

The Public Defender of Rights Act (No. 349/1999 Coll., as amended) tasks the Defender, in addition to the provision of methodological aid (addressing individual complaints), with giving general recommendations and carrying out research relating to the aspects of discrimination. The Defender regards these recommendations as a key instrument intended for the public, which can be used to act preventively against the occurrence of discriminatory conduct. Research serves for the collection of relevant data that make it possible to draw conclusions required for the Defender's activities in non-discrimination law. In 2011, the Defender gave **3 recommendations** and performed **1 research activity.**

Recommendation on the requirement for a "clean" extract from the criminal register

Refusal to recruit a jobseeker exclusively because (s)he was previously convicted for a crime may represent violation of the employer's legal obligations. An employer has the right to request presentation of an extract from the criminal record for the selection procedure only in justified cases.

The Defender has repeatedly encountered complaints of persons released from the service of imprisonment because, after completing their sentence, they are unable to present an extract from the criminal register without an entry, which is a condition given by most employers in selection procedures. The Public Defender of Rights therefore decided to examine this issue in greater detail. His conclusions can be summarised as follows:

Legal regulations do not allow for requiring a certificate of a lack of criminal record for all types of work. The requirement for a lack of criminal record is stipulated by law for the exercise of some professions. For other professions, the potential employer should carefully consider whether it is necessary and reasonable to request the presentation of an extract from the criminal register in the selection procedure. Under the labour-law regulations, a lack of criminal record should be taken into consideration in context with the nature of the work to be performed. Refusal to recruit a jobseeker exclusively because (s)he was previously convicted for a crime may represent violation of the employer's legal obligations. Before employment begins, an employer may not require a jobseeker to provide information which is not directly related to the conclusion of the employment contract. Thus, the employer should consider particularly the gravity of the criminal activities and the nature of the work in which the jobseeker is interested. Requiring a lack of criminal record from a jobseeker, i.e. presentation of a clean extract, is not appropriate for an absolute majority of unqualified

manual professions. Requiring an extract without a reason may be penalised as an offence by the Office for Personal Data Protection under the Act on Personal Data Protection.

Recommendation on fulfilment of the right to equal treatment in access to early childhood education

The primary role of kindergartens is to provide children with education. If a kindergarten sets criteria for the admission of children, these criteria must not be discriminatory or otherwise at variance with the legal regulations. It is the child who is vested with the right to education, and therefore only those criteria that are directly related to the child may be applied.

By giving his recommendation, the Defender responded to numerous complaints from dissatisfied parents who had not succeeded in registering their children for early childhood education in kindergartens. In the recommendation, the Public Defender of Rights attempted to provide the heads of kindergartens with an instruction on how to proceed in admitting children so as to avoid discrimination or other violations of the legal regulations. The recommendations of the Public Defender of Rights can be summarised as follows:

The Defender concluded that favouring certain children based on their age legitimate and generally non-discriminatory. With increasing age, the child's need to participate in early childhood education logically increases, and it is therefore not discriminatory when an older child is advantaged. On the other hand, a criterion based on which children of a certain age would not be admitted to the kindergarten at all could be discriminatory.

In terms of criteria bound to the health of a child, it would be discriminatory to entirely exclude children with disabilities.

Although the secondary effect of education in kindergartens is to look after children, they still represent an educational institution. Criteria that are not related to the child who seeks admission were therefore found to be absolutely inappropriate by the Defender. The criterion of parents in employment (having a gainful activity) is a typical example.

A criterion which favours the children of employees in public administration and admission of children "in the interest of the municipality" are among the most problematic criteria. These criteria represent violation of the general principle of equality (Section 7 (1) of the Code of Administrative Procedure) and may provide room for clientelism or corruption.

According to the Defender, the criterion of permanent residence in the municipality where the kindergarten operates may be a criterion favouring certain children, because in admitting them, the head of the kindergarten should not entirely omit that the municipality as the founder performs obligations towards its citizens. However, this criterion must not be unconditional. The advantage must also relate to citizens of the Member States of the EU and long-term residents who are registered for residence in the municipality.

The Defender pointed out a serious problem consisting in unlawful interference in the decision-making of the heads of kindergartens by the founders (mostly municipalities). The head of a kindergarten is authorised and obliged to make decisions on the admission of children for education independently without any influence from self-governing bodies.

Recommendations on price differentiation

Unjustified price differentiation on grounds prohibited by law constitutes prohibited discrimination. The determination of different prices may not interfere with the dignity of consumers; thus, members of consumer groups delimited by the prohibited discriminatory grounds may not be treated as if they were inferior.

Following complaints, the Defender decided to issue a recommendation which would comprehensively treat the issue of discounts or price differentiation from the viewpoint of the right to equal treatment. The recommendation contains the following conclusions:

The determination of different prices and discounts for certain groups of consumers is essentially possible and permitted given its economic objectives. If a good or a service is offered to the public, the price may not place at an unjustified disadvantage a group of consumers delimited by any of the grounds laid down in the Antidiscrimination Act. For price differentiation, it is necessary that it be justified by a legitimate objective and the means for attaining the objective must be reasonable and necessary. The provision of discounts is legitimate for members of a group of consumers who are under-represented in the total sum of consumers. The determination of a higher price may not be directed towards excluding members of a group of consumers who are seen as unwelcome for reasons beyond their control. In relation to the citizens of the Member States of the EU, price differentiation based on State nationality is at variance with EU law. Persons with disabilities who use compensation aids (including specially trained dogs) may not be burdened with a special fee for using these aids.

Research of discriminatory advertising of vacancies

As part of his research activities, the Defender studied the aspects of discriminatory advertising of vacancies, because in addition to unequal treatment of specific jobseekers in the selection procedure, the very formulation of the advertising of vacancies may be at variance with the prohibition of discrimination. The research team studied more than **12,000 advertisements** for vacancies published on the web portal www.prace.cz in the period between 1 April and 7 April 2011, examining their compliance with non-discrimination law. In the sample under survey, **17 % of advertisements contained a discriminatory requirement** for jobseekers. Age- and gender-related requirements were the most common ones. The results of the research led the Defender to the following conclusion:

Despite the fact that discriminatory grounds include gender, the so-called generic masculine (where the masculine gender is used to designate both genders) appears in both common parlance and regulations. Thus, it may not be concluded without further consideration and exclusively from the name of a vacancy which is given only in the masculine gender that the advertisement is discriminatory. However, the same does not apply ***vice versa*** as the generic feminine gender is not used in common parlance. The context of the whole advertisement is therefore important. It should make it clear that both men and women are welcome for the vacancy. An employer may ask for a man (or woman) exclusively if the requirement for gender is relevant for the post.

Specifying a minimum or maximum age limit for candidates is also discriminatory because age is among the identified discriminatory grounds. Even the requirement for an unreasonably long experience is indirectly discriminatory as it disqualifies young candidates from the selection procedure. Similarly, an advertised vacancy indicating a young team among the benefits is illegitimate as it makes it clear that candidates of a higher age are not welcome.

Requiring excellent health for positions where this requirement is not essential (for example, it is legitimate to require good physical condition from a general labourer but not from a software designer) also represents breach of the prohibition of discrimination. A strict requirement for excellent health may be discriminatory towards candidates with a disability.

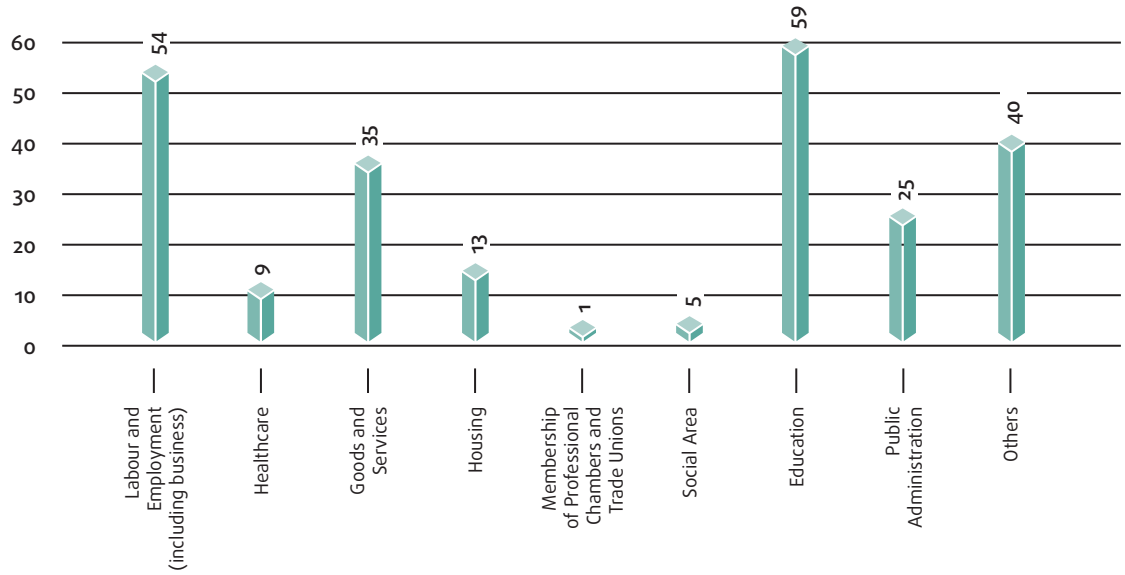
In filling vacancies, an employer may not differentiate between candidates of different (State) nationalities. The free movement of labour is among the main purposes of European integration. The text of an advertisement which prioritises candidates of a specific (State) nationality violates both EU law and Czech antidiscrimination provisions. The requirement for excellent command of a language may also be problematic, especially in relation to professions where this is not essential (e.g. manual work).

2 / Statistical Information on Complaints

The Defender **received 271** and **handled 221** complaints as part of his antidiscrimination mandate in 2011. **In 70 cases he found discrimination.** In the other cases, the Defender provided the complainants with an analysis of the topic and advice as to the further steps to be taken in protecting their rights.

The following graph shows that **education (59), labour and employment (54) and access to goods and services (35)** are the most common areas where discrimination is claimed.

Claimed Areas of Discriminatory Conduct



3 / Selected Complaints and Commentaries

Labour and employment (including business)

Age, disability, ethnicity and gender are the discriminatory grounds that were claimed most often in the area of labour and employment. Other grounds such as (State) nationality and religion appeared rarely.

The complainants claimed discrimination in several types of situations. Jobseekers encounter discrimination already when monitoring advertisements for vacancies and later during the **selection procedure**. The Defender generally assumes that, in selecting candidates for employment, the employer undoubtedly has room for applying its preferences. However, the employer is restricted by the prohibition of discrimination contained in the Employment Act and Antidiscrimination Act. Thus, access to a certain employment may not be refused without further consideration to women (e.g. because of the assumption that they are physically weaker), employees with a disability (rather the opposite, the employer must actively take appropriate measures towards them); it is not allowed to require a specific age, etc.

Another group of complaints claimed discriminatory conduct of an employer in the performance of **work in employment**. These included, in particular, remuneration, working conditions and bullying. In several cases, harassment at the workplace was claimed (offensive language directing the employee) in connection with some

of the discriminatory grounds (specifically, in the cases concerned, the complainant's disability and ethnicity), which is explicitly prohibited by the Antidiscrimination Act. Here, the Defender concluded that the employer must prevent a harassing environment at the workplace and act actively against the harassing employees.

Under the Antidiscrimination Act, the prohibition of discrimination in labour law also applies to all **remuneration** for work in employment. This involves not only the fixed part of the salary, but also all other performances. Consequently, discrimination may be found to have been committed by an employer who makes decisions on the amount of remuneration for individual performances or bonuses on the basis of discriminatory criteria.

The Antidiscrimination Act does not prohibit discrimination on the grounds of illness or health condition. It does protect people with a disability against discrimination (and contains a special definition of disability). The Defender's findings suggest that there are persisting **difficulties with differentiation between the categories of illness and disability** as well as with the employment of people with a disability in general. The dismissal of an employee due to his or her disability may be found to be discriminatory, but illness is not protected by the Antidiscrimination Act (but this does not prejudice other labour-law obligations of employers).

The Defender was repeatedly approached by people who contended discriminatory **termination of employment.** Redundancy was a frequent reason for dismissal. The Defender pointed out that, in dismissal due to redundancy, i.e. based on organisational changes, the employer must respect the prohibition of discrimination. If the changes may impact several employees, it is up to the employer to determine the reasons for redundancy with respect to individual employees; however, the reasons must not be discriminatory (e.g. attainment of retirement age).

Complaint File Ref. 176/2010/DIS/JKV

The employer must fulfil the special requirements of employees having a particular religion to the extent that the employer's operating conditions allow for this. However, there are limits to this obligation. It is necessary that the employees also take positive steps. If the employer adopts reasonable measures in relation to the inclusion of persons of a particular religion without fully accommodating their requirement (e.g. for time off), it is up to the employees to decide whether they give priority to their religious principles or employment.

The Defender was approached by two members of the Seventh-day Adventist Church with a complaint against discrimination on the grounds of religion. They had a dispute with their employer after the latter ceased to respect their requirement for time off on Saturdays, i.e. their rest days. The problems occurred when the employer transferred them to uninterrupted operation and began to order them Saturday shifts.

The Defender reflects the fact that the Antidiscrimination Act does not explicitly oblige employers to actively create conditions and take into consideration the limitations that are imposed on employees by the rules of individual churches and religious societies. On the other hand, employers must not engage in indirect discrimination (application of seemingly neutral criteria that would have an unreasonably adverse impact on a group of persons having a particular religion).

In this case, however, the Defender did not find even indirect discrimination as the employer did not prevent exchanges of shifts between the complainants and employers having other religions, whereby the employer sufficiently accommodated the requirements of the complainants. It was not the employer's obligation to actively reflect their requirements in the schedule of shifts.

Goods and services (including housing)

In the area of the provision of goods and services, the Defender encountered discrimination particularly in the form of refusal of a service to a defined group of persons. Discrimination may also occur in the form of determination of different conditions or differently determined prices. However, differentiation in this area does not always reach the intensity of discriminatory conduct. The legal relationships in the provision of goods and

services where differentiation exists include, for example, the operation of sports and social events, provision of accommodation, catering services and ensuring access to historic and cultural monuments.

In the area of provision of services offered to the public, differentiation is present in **the provision of reserved parking for persons with a disability**. Decisions on the establishment of reserved parking are made by highway administrative authorities; however, the consent of the owner of the road must be obtained. When addressing specific cases, the Defender found that the owner of a road is not directly obliged to give its consent to the establishment of reserved parking; however, it must also respect the prohibition of discrimination. A highway administrative authority may disallow the establishment of reserved parking (e.g. where there is a lack of parking places), but it must examine the need for reserved parking in relation to the nature of the applicant's disability. In doing so, it must again make sure that the right to equal treatment is observed. It is therefore necessary to assess carefully and credibly the degree of benefit from reserved parking for a person with a disability with regard to the nature of the disability. When making a decision on permitting reserved parking, a highway administrative authority should take into account, to the best of its knowledge, the actual facts regarding the disability.

Housing represents a special area in the provision of goods and services. As in previous years, the Defender was approached by many complainants who claimed discrimination in the **lease of municipal housing** (in an overwhelming majority of cases based on ethnicity). When inquiring into these complaints, the Defender had to cope with the difficult demonstrability of discriminatory conduct. In his opinion, the worsening availability of housing for the socially vulnerable and absence of a law on social housing pose a problem.

The Public Defender of Rights also dealt with the case of non-granting the so-called **student fares to students who are foreign nationals**, where he used his special power to recommend an amendment to laws and other regulations (see below). He also addressed the non-granting of entitlement to aid for **construction savings to foreign nationals**, which constituted discrimination against a national of another Member State of the EU.

In relation to the provision of services, the increase in the number of complaints pointing out discrimination against elderly people is very alarming. Thus, for example, the Public Defender of Rights dealt with cases where **a telecommunications service was not provided to clients over the age of 70**. The Public Defender of Rights also received several complaints concerning discrimination against elderly clients in access to banking services.

Complaint File Ref. 149/2010/DIS/JKV

The exclusion of persons interested in credit cards because they exceeded the age of 70 years interferes with human dignity; such a procedure may not be justified by referring to elimination of the credit risk without also examining (in addition to age) other information relevant for making a decision on the client's credibility.

Based on information in an advertising leaflet, Mr O. showed interest in the provision of a credit card. He was denied the service with the substantiation that he had exceeded the upper age limit of 70 years.

Since the exclusion of persons older than 70 years represents a considerable interference with their dignity (the assumption that they will be unable to meet their obligation is humiliating for them), the Defender concluded that this is an unreasonable requirement.

The bank did not respond to the Defender's request for elimination of the discrimination and the Defender therefore advised the Governor of the Czech National Bank of this conduct. The Czech National Bank subsequently exercised its supervisory power and the bank refrained from this discriminatory practice.

Education

In 2011, the Defender encountered relatively many claims of discrimination made by parents in relation to admission of their children to kindergartens. While the parents claim discrimination, in fact most of the cases do

not amount to discrimination under the Antidiscrimination Act. On the other hand, the Defender ascertained, while inquiring into the individual kindergartens' admission procedures, that the self-government unlawfully interferes, in a massive scale, with the administrative decision-making by the heads of kindergartens.

Complaint File Ref. 138/2011/DIS/JŠK

Under the Schools Act, in admission to kindergartens, preference is given to children in their last year before commencement of compulsory school attendance. This absolute statutory preference may not be made conditional on the fulfilment of any other condition, such as permanent residence in the municipality.

An inquiry concerned with the kindergarten in Nymburk was initiated on the basis of a complaint from Mrs Č. It was stated in the complaint that the head of the kindergarten had made the admission of a child conditional on permanent residence in Nymburk. She required permanent residence even in relation to children in their last year before commencement of the compulsory school attendance. The application of this criterion was confirmed during the inquiry. It was also found that the mayor or deputy mayor of the municipality could grant an exemption.

The Defender stated that the criterion which entirely prevents children who do not have their permanent residence in Nymburk from being admitted to the kindergarten was illegitimate. Moreover, its application to children in their last year before commencement of compulsory school attendance was in violation of the Schools Act. This was a strong limitation of the right to education as guaranteed by Art. 33 (1) of the Charter of Fundamental Rights and Basic Freedoms. In addition, self-government may not make a decision of the head of a kindergarten conditional on the consent of its own bodies.

4 / Special Powers of the Defender

In his antidiscrimination agenda in 2011, the Defender applied, in relation to the Ministry of Finance, his special power to recommend an amendment to a legal or internal regulation and requested that the Ministry amend its assessment which regulated student fares. The reason for this step was the discriminatory nature of the assessment.

Complaint File Ref. 114/2011/DIS/JKV

Limiting the entitlement to student fares only to persons with their permanent residence in the territory of the Czech Republic amounts to indirect discrimination on the grounds of nationality of pupils and students who regularly travel to the Czech Republic and other persons who exercise the right to free movement and freedom of establishment.

The Public Defender of Rights was advised of the disadvantages following from the assessment of the Ministry of Finance establishing a list of goods with regulated prices (No. 01/2010 of 8 December 2009). According to the assessment, pupils and students with their permanent residence outside the territory of the Czech Republic were not entitled to special fares for the pupils and students of schools ("student fares").

Given that the primary law of the EU (Art. 18 of the Treaty on the Functioning of the European Union) prohibits discrimination on the grounds of nationality, it was necessary to examine whether the differentiation on the basis of the place of residence had an adverse effect on the citizens of other Member States of the EU. The Defender concluded that limiting the entitlement to student fares only to persons with their permanent residence in the territory of the Czech Republic does amount to indirect discrimination on grounds of nationality of other Member States of the EU. Students who regularly travelled to the Czech Republic and students established in the Czech Republic who travelled to study (e.g. to another city) were excluded from entitlement to student fares without a legitimate justification.

Following these findings, the Public Defender of Rights exercised his special power and recommended an amendment to the assessment of the Ministry of Finance so as to bring it into accord with the law of the EU, the Act on Free Movement of Services (No. 222/2009 Coll., as amended) and the Consumer Protection Act (No. 634/1992 Coll., as amended).

The Ministry of Finance subsequently issued a new assessment (No. 01/2012 of 28 November 2011). The conditions for granting special fares for pupils and students were adjusted so that the entitlement to these fares was no longer bound to permanent residence in the territory of the Czech Republic. In travelling abroad and from abroad, the entitlement to special fares is granted up to and from the border point. Thus, the Ministry of Finance fully complied with the recommendation of the Public Defender of Rights.









6 | Supervision over the Expulsion of Foreigners

On 1 January 2011, the Defender's mandate was extended to include a new field of competence following the transposition of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the "Returns Directive"), which requires the Member States, in Art. 8 (6), to introduce an effective forced-return monitoring system. In the Czech Republic, the Public Defender of Rights became the body entrusted with supervision over observance of the rights of foreigners laid down in the Returns Directive.

According to Section 1 (6) of the Public Defender of Rights Act, the Defender "monitors the exercise of the detention of foreigners, the exercise of administrative expulsion, surrender or transit of detained foreigners and the penalty of expulsion of foreigners who were placed in pre-expulsion custody or are serving imprisonment". The Police must inform the Defender reasonably in advance of every exercise of administrative expulsion, surrender or transit of a foreigner. The Defender also receives copies of all decisions "on administrative expulsion, decisions on detention, decisions on extension of the period of detention, decisions on discontinuation of detention, decisions on the placement of a detained foreigner in a section with the strict regime and decisions on extension of the period of placement of a detained foreigner in the ***"strict regime section"***, as well as court judgments concerning actions against detention lodged by foreigners.

1 / Monitoring of Administrative Decisions and Court Decisions

In 2011, the Defender received and analysed a total of **1,715** decisions on administrative expulsion, **334** decisions on detention or extension thereof, **3** decisions on placement under the strict regime and **71** judgments of administrative courts. The Defender appreciates that, in connection with the stricter criteria for the detention of foreigners and the obligation to impose a special measure in order to achieve a foreigner's departure, as well as the so-called alternatives to detention (these alternatives – in the Czech Republic, the obligation to report and the financial guarantee – must always precede the foreigner's detention), the number of detained foreigners significantly dropped in comparison with the previous years. At the same time, the Defender noted that, especially in the first half of 2011, the decisions on detention were at variance with Section 124 (1) of the Foreigners Residence Act (Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic, as amended) in that by no means all of them dealt with the option to impose one of the alternatives to detention (this consideration was absent in 61 of the 96 decisions delivered to the Office of the Public Defender of Rights from the beginning of 2011 to 19 May 2011). In addition, the financial guarantee proved to be unviable as it was imposed in none of the 58 alternatives to detention in 2011. After analysing these decisions, the Defender decided to open three inquiries on his own initiative concerning the **decision-making on expulsion at the Prague-Ruzyně airport** and access to legal aid, **use of alternatives to detention** and **issue of binding standpoints by the Ministry of the Interior in proceedings on expulsion** concerning the possibility of a foreigner's departure. In the first of these inquiries, the Defender made the following conclusions (the remaining inquiries are still pending).

Decision-making on the expulsion of foreigners at the Prague-Ruzyně airport

The Defender made serious conclusions when he analysed the decision-making on the expulsion of foreigners at the Prague-Ruzyně airport. These were related, in addition to the very decisions, also to 80 complete administrative files. The decision-making on expulsion at the airport very often takes a simplified form of issuing the so-called **orders on site** under Section 150 (5) of the Code of Administrative Procedure (Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended). In these cases, the substantiation of the decision may be replaced by a declaration of the party that (s)he agrees with the imposition of the obligation with his or her handwritten signature. The order becomes a final and enforceable decision upon signing of the declaration. This means that the foreigner may no longer oppose the expulsion using standard appeals and (s)he may be immediately expelled. However, the foreigner must be demonstrably advised of these consequences in advance. The Defender ascertained that, in many cases, at variance with Section 24 (1) (c) of the Experts and Interpreters Act (Act No. 36/1967 Coll., on experts and interpreters, as amended), interpreting was provided by a so-called interpreter under oath rather than an interpreter registered in the list of experts and interpreters. What is far more serious, in some cases, the proceedings on expulsion **were interpreted by police officers**, which the Defender considers to be an absolutely clear violation of Section 11 of the Experts and Interpreters Act and Section 14 of the Code of Administrative Procedure. In such cases, the entire proceedings on expulsion can be regarded as unlawful. Moreover, the Defender has fundamental doubts as to whether the foreigners are actually demonstrably advised, before an order on site is issued, about the consequences of the decision in the form of an order on site. It was further found that, in a majority of cases, before issuing the decision on expulsion, the Foreign Police **failed to request a binding standpoint from the Ministry of the Interior** on the possibilities of the foreigner's departure that would exclude the risk that the expulsion could violate the international legal obligations of the Czech Republic (for example, that the foreigner does not face the threat of being tortured in the country of his or her origin, etc.). The foreigners expelled at the airport are also not advised of the option of voluntary return. The Defender further considers it very serious that the foreigners subject to pending proceedings on administrative expulsion at the airport **are not provided with effective access to legal aid** (for example, a foreigner being expelled was not allowed to contact a legal counsel). Even non-governmental organisations that provide foreigners with free legal advice are not allowed to provide legal advice in the transit areas of the airport where the foreigners are restricted in free movement and subject to pending proceedings on expulsion.

2 / Escorts

The Police of the Czech Republic and the Ministry of the Interior are obliged to advise the Defender in advance of any surrender, transit and expulsion (both administrative and punitive) of foreigners from the territory of the Czech Republic. On the basis of this advice, the Defender **monitored 6 expulsion cases** in 2011. Three of the cases involved expulsion or surrender by air (in one case the escort was carried out only to the Prague-Ruzyně airport due to cancellation of the flight), two involved transit of foreigners across the territory of the Czech Republic and one case involved expulsion from the territory of the Czech Republic by land. In total, the Defender supervised the expulsion, surrender or transit of **24 persons.**

Disagreements were initially appearing in the process of monitoring expulsions regarding the presence of an employee authorised by the Defender in the escort vehicles of the Police of the Czech Republic. The conflict was settled through negotiations; nevertheless, the verbal agreement on legitimacy of and need for the presence of an employee authorised by the Defender was not reflected in the internal regulations of the Police of the Czech Republic, which is a source of practical difficulties. For monitoring expulsions, the employees of the Office of the Public Defender of Rights were also granted entitlement to enter the transit area of the Prague-Ruzyně airport and two service passports were issued to them.

Summarising the escorts carried out to date, it can be stated that the foreigners were always advised of the matters related to their expulsion, transit or surrender, were provided with good material conditions and the escorting police officers acted politely and accommodatingly. However, it should be pointed out in the above context that the Defender pays increased attention to the justification of handcuffing of foreigners in the escort vehicles.









7 | The Public Defender of Rights and his Office

1 / Budget and Spending in 2011

The Office of the Public Defender of Rights functioned with an approved budget in the amount of CZK 93,800 thousand from the beginning of 2011. Effective from 23 March 2011, the budget was raised by CZK 1,464 thousand to the **total amount of CZK 95,264 thousand** in connection with the extension of the mandate of the Public Defender of Rights to include duties following from an amendment to Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic. Of the above amount, **CZK 79,292 thousand** was used in 2011, i.e. **a total of 83.23 %** of the adjusted budget.

CZK 15,972 thousand was saved in the adjusted 2011 budget, particularly from funds for running costs in the amount of CZK 15,835 thousand, namely on the salaries of employees and other payments for work carried out, including accessions, in the amount of CZK 4,491 thousand; by economising on energy in the amount of CZK 500 thousand; savings on fuels in the amount of approx. CZK 580 thousand; savings on postal and banking services in the amount of approx. CZK 700 thousand, etc. A saving of CZK 137 thousand was achieved on investment expenditures.

Details of the financial results of the Office are available on the website at http://www.ochrance.cz.

2 / Personnel in 2011

The budget for 2011 determined an obligatory limit of 111 employees of the Office. Effective from 28 March 2011, the limit was raised to **113 employees** in connection with the extension of the Defender's mandate. The actual average recalculated number of staff recorded was **108.05** employees in 2011, whereby the limit stipulated by the State budget was met. Of the total number of employees, 85 directly processed complaints, carried out detention visits and performed activities following from the Antidiscrimination Act and the Act on the Residence of Foreigners in the Territory of the Czech Republic.

Due to the need for comprehensive assessment of some important cases, cooperation with external experts continued, mainly with those from the law faculties of Masaryk University in Brno, Charles University in Prague and Palacký University in Olomouc.

The Office of the Public Defender of Rights was a partner in projects promoting innovative approaches to studies in relation to the Faculty of Law and the Faculty of Economics and Administration of Masaryk University.

3 / Annual Report on the Provision of Information Pursuant to Act No. 106/1999 Coll., on Free Access to Information

In 2011, the Office of the Public Defender of Rights, which is the liable party under Act No. 106/1999 Coll., on free access to information, as amended, received and handled a total of **12 requests** for the provision of information pursuant to the Act. All of them were received in writing, by electronic mail or via a data box.

The information was provided in **11** cases, where most of the cases involved requests for extracts from statistics of the received complaints classified by individual areas, requests about general observations from the Defender's inquiries and his positions on individual agendas, requests concerning the internal regulations of the Office, requests for the provision of documents from the complainants' files, etc. One complainant lodged a complaint under Section 16a of the Act based on disagreement with the person administering the request for information.

In **1** case, the information was not provided (the request was refused with reference to observance of legal regulations). This was a request by a third person for a statement of the Office on its inquiry into the complaint of another person. The applicant did not lodge an appeal.

A decision of the Regional Court in Brno was delivered in 2011 (File Ref. 31A 2/2010-130) which annulled the decision of the Office on refusing the provision of information issued already in 2009 and the case was referred back to the Office for further proceedings. The Office incurred the costs of CZK 2,000 in connection with these court proceedings.

	Total Number of Requests for the Provision of Information	12
Section 18 (1) (a)	Number of issued decisions refusing a request (or its part)	1
Section 18 (1) (b)	Number of appeals lodged against decisions	0
Section 18 (1) (c)	Copy of relevant parts of each court judgment	0
Section 18 (1) (d)	List of exclusive licences granted	0
Section 18 (1) (e)	Number of complaints lodged under Section 16a of the Act	1
Section 18 (1) (f)	Other information relating to the application of the Act	0

4 / Presentation in the Media, International Cooperation, Conferences

4 / 1 / Press releases, TV series, website

In 2011, the Defender organised **12 press conferences**, where he acquainted the public with his findings from inquiries into cases important for society, findings from the systematic preventive visits to facilities where persons restricted in their freedom are held and recommendations in the area of equal treatment. These included, in particular, the following:

- criticism of inconsistency among construction authorities in removing illegal structures and shortcomings in the legal regulation of the activities of chartered inspectors

- findings and recommendations on equal treatment in the admission of children to kindergartens, analysis of discrimination in advertisements for vacancies, recommendations on price differentiation and information on the commencement of a survey of the ethnic structure of pupils in practical elementary schools

- findings from the systematic visits to facilities for children

- criticism of the shortcomings of new laws in the social area, particularly postponement of the payment of unemployment benefits in case of entitlement to a severance pay where the severance pay was not provided

- summarisation of findings concerning the determination of contacts between parents and a child and resolution of parents' disputes in the course of the contact

- areas of personal data protection and punitive publication of a case where medical records were lost in a non-State medical facility

- findings from the transport administration agenda, with criticism of the excess of powers by the Municipal Police in the imposition of fines for certain misdemeanours.

More than **60** press releases, statements and information were presented during the year and they are available on the website of the Defender (www.ochrance.cz).

As part of the Statement series, the Defender published the **second updated edition of the Public Routes publication**. As part of the Good Governance edition, the Defender published, together with the Ministry of the Interior, the publication **Recommendations for Municipalities and Cities – Citizens' Rights.**

In cooperation with Czech Television, the Defender prepared a new programme entitled **"The Defender"**, the first series of which included 16 episodes and was broadcast for the first time by Czech Television from September to December. The programme explains to viewers in a comprehensible form how they should proceed in certain life situations and what rights they can rely on.

Media interest in the Defender's activities is documented by the 4,034 printed or broadcast news, articles and reports. Television stations paid attention to the Defender's activities in 341 cases, the Czech Press Agency and Mediafax in 392 news items. Internet media considerably participated in the media presentation of the Defender's statements and findings by releasing a total of 2,093 news items and articles. The Defender and his deputy appeared in television and radio broadcasting, provided a number of interviews, participated in live broadcasting and answered citizens' questions in online interviews.

The Defender continued to extensively publish the reports and statements from inquiries on his website in 2011. Almost 430,000 visits were logged on the website during the year. The website retains the certificate of accessibility for blind and partially sighted users.

4 / 2 / International meetings and conferences

- **Visit of the Slovak Public Defender of Rights (Brno, 22 February 2011)**
  Theme: experience with supervision over facilities where persons restricted in their freedom are held.

- **Meeting of the ombudspersons from the countries of the Visegrad Four (Budapest, 9 to 11 May 2011)**
  Theme: topical themes in the activities of the ombudsman, communication with the parliament

- **Visit of representatives of the Council of Europe (Brno, 15 June 2011)**
  Theme: the mandate of the Defender and his status in the Czech Republic

- Meeting with the Ombudsman of the Russian Federation (Brno, 22 August 2011)
  Theme: topical themes in the activities of the ombudsman, extension of mandate

- Participation in the 8th annual conference of national ombudspersons of the member states of the EU and candidate countries organised by the European Ombudsman (Copenhagen, 22 – 23 October 2011)
  Theme: communication between ombudspersons and the government, parliament and courts, extension of the ombudsman's mandate

- Visits of judges from the Supreme Administrative Court of Poland (Brno, 30 November 2011)
  Theme: Defender's mandate in relation to courts

- Active involvement of the Defender in the project of cooperation among the European National Preventive Mechanisms led by the Council of Europe's Human Rights Commissioner, bringing together national bodies for the promotion of equal treatment under the European EQUINET network
  Discussion with the ambassadors of the USA, Liechtenstein, the Netherlands and Slovenia.

4 / 3 / Conferences and round table meetings organised by the Public Defender of Rights

- "Bodies of public administration and limits in the provision of information" (Brno, 19 April 2011)
  Theme: Results of State controls and administrative proceedings in relation to natural persons operating a business, personal data protection. Enforcement of decisions on the provision of information.

- "6th international summer conference Inactivity in Public Administration" (Kroměříž, 23 – 24 June 2011)
  Theme: inactivity as the most frequent maladministration in the practice of authorities, effective means of defence, right to reasonable length of proceedings.

- "Enforcement of contact between parent and child" (Brno, 28 June 2011)
  Theme: Mediation possibilities and placement of the child in a neutral environment.

- "Indemnification" (Brno, 20 September 2011)
  Theme: Evaluation of the approach of individual Ministries to the processing of claims for indemnification.

- "Returns Directive (2008/115/EC: year one)" (Brno, 20 October 2011)
  Theme: Evaluation of compliance with the required standards in the detention and expulsion of foreigners.

- "Exercise of institutional and protective education" (Brno, 25 – 26 October 2011)
  Theme: Evaluation of the Defender's findings from systematic visits to children's homes, children's homes with a school and reformatories.

- "Defender's activities in relation to human rights and freedoms" (Prague, 13 December 2011)
  Theme: Joint conference of the Defender and the Senate on human rights protection.



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8 Summary

I would like to begin the conclusion of the annual report for the past year by briefly recalling the two wishes I expressed in the conclusion of the last year's report.

First of all, I asked for an accommodating stance towards the proposed legislative recommendations. I am glad that a large part of them was listened to, even if not always entirely. My second plea, asking for restraint in potential plans for entrusting the Public Defender of Rights and his Office with additional competences, was also heeded.

Repetition is the mother of wisdom. My wishes therefore remain the same. Nevertheless, I would like to add one more. It is a general reflection rather than a wish.

The legal status of the Czech ombudsman is not very different from that of his colleagues in other countries. They too do not have any powers to issue orders or to impose penalties. Their outputs also have the nature of recommendations – mainly towards the executive branch, but also in relation to judicial and legislative branches. What is different is the culture of the environment to which these recommendations are addressed. In other words – the more "established" foreign colleagues very seldom encounter unwillingness of the addressees to accept recommendations from the person elected by the Parliament with confidence in his qualification, impartiality and independence. This greater responsiveness undoubtedly stems from the fact that, in their home countries, law is not regarded as a vehicle for struggles and escalation of disputes, but rather as an invention of humans which enables them to live together decently and orderly. This must become an imperative not only for lawmaking, but also for the application of its nonliving rules to concrete human stories and fates. Where it is no longer required that disputable cases be resolved both in formally legal terms and in a way which can be perceived as decent and fair, the whole "enterprise" of law becomes problematic.

I do hope that we too are taking little steps towards perceiving law (and the role of the ombudsman) in the way they do. The progress so far has not been very smooth.

In Brno, on 22 March 2012

JUDr. Pavel Varvařovský
Public Defender of Rights

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