Information on activities for the second quarter of 2017

Pursuant to Section 24 (1)(a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, I hereby inform the Chamber of Deputies of the Parliament of the Czech Republic on my activities.

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A. Number of complaints, investigations

A total of **1991** complaints were received in the 2nd quarter of 2017, which is **54** less than in the same period last year. I was approached by 1373 persons in matters falling within my competence under the law, which is 46 more than in the second quarter of the past year. **Thus, the proportion of complaints falling within the Defender's mandate increased to 68%** (the figure for the last year was 66%). Most complaints were related to social security (317 complaints); many complaints (170) concerned the area of construction proceedings and spatial planning and also the prison system, the police and the army (122).

In **68** of the complaints received, the complainants claimed unequal treatment by public administration and private individuals. The number of complaints directed against discrimination within the meaning of the Anti-Discrimination Act reached **56**. In **17** cases, we also provided information and analyses related to discrimination to international parties and national bodies.

In the second quarter, we performed **5** systematic visits to facilities where persons restricted in their freedom are or may be present. In the area of monitoring detention of foreign nationals and the performance of administrative expulsion, we monitored **1989** decisions.

B. Defender's activities

B.1 Public administration

B.1.1 Procedure of bodies of State Heritage Care (File No. 3390/2017/VOP)

My Deputy learned from publicly available information sources about a protest of numerous citizens of Česká Třebová against a structure overshadowing the St. Catherine Rotunda, a protected monument. The citizens complained against the structure by lodging a petition in which they argued that the structure overshadowed the heritage site, which had used to be the dominant feature of the hill. They expected a simple reconstruction of a house, yet the construction works were much larger in scope. Therefore, they wished to restart the construction permit proceedings. Critics of the structure complained that the house under construction did not have the original (more appropriate) hipped roof and that the roof loggias significantly exceed the perimeter walls.

Following investigation in the matter, my Deputy reached a conclusion that the body of State Heritage Care had erred as it had not sufficiently justified its binding opinion in which it had found the construction modifications proposed by the developer to be permissible and it had not duly dealt with all the objections against the project voiced by the National Heritage Institute, especially the objection that the implementation of the construction work would result in direct confrontation with the St. Catherine Rotunda in both the short and long-distance panoramas.

In the report on the results of the inquiry, my Deputy also mentioned that the parties to the planning and construction proceedings had not made timely use of their procedural rights including lodging ordinary remedies. They did not object to the construction during the

procedure, did not acquaint themselves with the contents of the file (including project documentation) and did not even take advantage of the possibility to lodge an appeal against the construction permit.

Given that the final form of the building including the problematic elements of a changed roof shape, massive dormers and loggias exceeding the facade of the building is currently supported by a final and unreviewable construction permit, my Deputy decided to close the case and not pursue the inquiry any further.

B.1.2 Illegal structures located in an allotment garden (File No. 7936/2014/VOP)

The Public Defender of Rights was approached by a complainant who lodged a complaint regarding non-permitted structures located in an allotment garden in Brno-Medlánky. The complainant pointed out the inactivity of a construction authority in relation to illegal structures located in the vicinity and complained about its vexatious procedure towards the complainant in an associated dispute regarding the placement of a caravan and other objects on the complainant's land.

The inquiry led by my Deputy confirmed that the construction authority caused unsubstantiated delays in dealing with non-permitted construction works. The errors were then confirmed also in other aspects of the activities of the construction authority, chiefly in negligence in steps taken against the illegal developer (including the absence of any penalties) and associated lax approach to an official procedure (shortcomings in inspection findings, record keeping and a failure to verify the project documentation) or the rather exaggerated measures taken against the complainant. The Deputy believed that the practices of the construction authority were problematic in dealing with the non-permitted construction activity, which clearly comprises a single construction project of the developer on his land, in multiple separate proceedings including the not yet accentuated possible consequences to spatial planning, use of the territory (landscape) or agricultural fund protection, water protection etc.

My Deputy also pointed out that the spatial planning in the city of Brno in general showed signs of certain long-term deficiencies (inflexibility, lack of preparedness to react to changes in the society) causing issues in practice. As emphasised by the Deputy, the City Hall is responsible for co-creation of prerequisites for universal development of the relevant territorial unit (see Section 5 (6) of the Construction Code) and also for checking the adequacy of the conditions for a balanced development of all activities in the territory (including necessary acceleration of a balanced construction development in order to prevent "construction pressure" on recreational areas of the municipality and its immediate vicinity).

Following the issuance of the inquiry report, both the construction authority and the City Hall as the body of superior instance reflected the criticised errors in the existing approach and promised to avoid said errors in the future. In relation to the unjustifiably contested structures located on land owned by the complainant, no further steps shall be taken against the complainant; to the contrary, the administrative proceedings regarding the neighbouring non-permitted structures continue and the authorities are taking necessary

procedural steps, where the complainant is a party to the proceedings with all the related rights. Therefore, my Deputy closed his inquiry.

B.1.3 Admissibility of audio recordings in infraction proceedings (File No. 4346/2016/VOP)

A complainant did not agree with the procedure of the Šlapanice Infraction Committee and the Regional Authority of the South Moravian Region in infraction proceedings concerning the complainant's wife (defamation, wilful acts and another form of gross misconduct); the complainant acted in the position of an applicant in the proceedings. The Infraction Committee discontinued the proceedings regarding most of the acts due to a lack of proof of the commitment of said acts as it did not find the audio recordings through which the complainant wanted to prove the alleged unlawful conduct of his wife to be admissible.

During his inquiry, my Deputy focused on the issue of (in)admissibility of recordings made by the complainant as evidence in the infraction proceedings. In his report on the inquiry, the Deputy summarised the practice applied in accordance with the old Civil Code (performance of the three-step proportionality test) and compared it to the currently applicable legal regulation providing for protection of personal rights in accordance with the new Civil Code. He inferred that the new Civil Code explicitly stipulated the possibility of an exception from the right to privacy, *inter alia*, by taking audio or video recordings without the recorded person's consent and the use thereof to exercise or protect other rights or legally protected interests of other persons. This should include the use of said recordings, *inter alia*, for the purposes of evidence in various proceedings including infraction proceedings. However, such an infringement on privacy must not disproportionally interfere with anyone's legitimate interests.

The Deputy criticised the Infraction Committee (and the Regional Authority which accepted the argument of the Infraction Committee regarding non-admission of the recordings as evidence and dismissed the complainant's appeal) for general non-admission of recordings as evidence, referring to a large number of the recordings (11 recordings) and their length (the longest recording is almost 40 minutes long). According to the Deputy, the infraction committee should primarily ascertain if the recordings serve to protect rights or legally protected interests of other persons (the complainant) and if so, whether or not the recordings disproportionally interfere with legitimate interests of another person (other members of the complainant's family) in specific situations. My Deputy inferred that the number of recordings in itself did not constitute disproportionate interference with said legitimate interests; on the other hand, length of the recording could, in some cases constitute such an interference. However, in these cases, it would be possible to admit as evidence just the portion of the recording directly related to the relevant unlawful conduct. The Deputy also noted that the issue of admissibility of a recording must be separated from the issue of proving unlawful conduct on the basis of such a recording (risk of tampering with the recording, proving of place and time of committing an offence). Last, but not least, the Deputy inferred that if the complainant monitored all private calls of the members of his family without their knowledge and without there being a relevant reason to do so at the moment, this could constitute infraction against civil cohabitation through another form of gross misconduct.

The authorities had certain objections to conclusions of the inquiry report. Nonetheless, they promised that, in the future, they will pay more attention to the reasons for admission or non-admission of evidence through a recording in individual cases according to the criteria set out in the inquiry report. My Deputy subsequently closed the inquiry.

B.1.4 Unfair business practice in the form of advertising in daily press (File No. 3964/2016/VOP)

The Defender was approached by a complainant objecting to the procedure of a City Hall in dealing with his complaint about advertising in daily press constituting an unfair business practice. This was an advertisement for a cosmetic product promising permanent removal of varicose veins (the advertisement contained no further information except for a phone number for ordering the product). In his inquiry, my Deputy reached the conclusion that the City Hall had erred when it had imposed no penalty on the disseminator of the advertising, who, together with the creator of the advertisement and the client who had ordered it, was not only responsible for the manner of dissemination of the advertisement but also for ensuring that said advertisement did not constitute unfair business practice.

The conclusions contained in the report were accepted by the Director of the City Hall. The City Hall learned from the statement of the disseminator of advertising that if the disseminator is not able to assess the contents of the advertisement, it requires indemnity from the client ordering the advertisement, including a declaration on the accuracy of the contents of the advertisement and a confirmation that the advertisement complies with the applicable legal regulations of the Czech Republic. In case of the advertisement for said cosmetic product, the disseminator noted that it had received indemnity from a company with its registered office in the United States of America, in which the company had declared the facts stated in the advertisement were true and in accordance with legal regulation of advertising. According to the head of the department, indemnify is not sufficient to exonerate the disseminator from any liability for disseminating advertisements for the product in question. The City Hall subsequently initiated administrative proceedings against the disseminator, which can be considered a sufficient measure; therefore, my Deputy closed his inquiry.

B.2 Supervision over restrictions of personal freedom and monitoring of expulsions

Within the scope of prevention of ill-treatment and supervision over restrictions of personal freedom, authorised employees of the Office of the Public Defender of Rights (hereinafter the “Office”) performed a total of **5** systematic visits to facilities and **6** expulsion monitoring trips during the second quarter of 2017.

By carrying out systematic visits to the **Psychiatric Hospitals in Kroměříž and Kosmonosy**, I completed a series of systematic visits to psychiatric hospitals specialised in protective treatment. After evaluating all documents, I will prepare a summary report on my visits to a number of psychiatric hospitals. The authorised employees of the Office also carried out a systematic visit to the **Olomouc Remand Prison** specialised in convicts serving imprisonment, **Burešov Retirement Home in Zlín** specialised in care for patients with dementia and **Police cells** in Jičín.

The authorised employees also carried out monitoring of expulsions (both administrative expulsion and expulsion based on criminal law) of foreign nationals detained in the Brno Remand Prison, Prague-Ruzyně Remand Prison, Facility for Detention of Foreigners in Vyšní Lhoty and Facility for Detention of Foreigners in Bálková to the borders of the Czech Republic. In one case, they monitored the course of transfer of a foreign national from the Reception Centre Zastávka u Brna pursuant to the Dublin III Regulation and his departure from the country at the Václav Havel Airport in Prague.

I organised a **seminar for public curators** from the Plzeň and Hradec Králové Regions, to whom the Office's employees presented best practice in the area of curatorship. Furthermore, I organised a **seminar for employees in social services** from the Plzeň and Hradec Králové regions, who care for clients of retirement homes and special regime homes.

The employees of the Monitoring Department also provided prevention of ill-treatment through **their presentations on the prison service intended for students** of the Faculty of Law of Charles University (Summer School on the Prison System) and Masaryk University (Human Rights School). The employees of the Monitoring Department presented their findings also on other seminars **related to provision of social services** (e.g. violence in social services) or **institutional care for children** (facilities for children requiring immediate assistance).

The employees of the Monitoring Department also **gained new experience** in the area of institutional and protective care, specifically during their stay in the Educational Institution in Moravský Krumlov, and in the area of social services in the Petrklíč Home for People with Disabilities in Olomouc. Later, they attended the meeting of European network of national preventive mechanisms in Strasbourg and Belgrade.

B.3 Protection against discrimination

B.3.1 Provision of financial bonuses to employees voluntarily terminating their employment after becoming entitled to old-age pension (File No. 84/2016/DIS)

I was approached by the Director of a Regional Authority (hereinafter "RA") who asked me for a statement on whether RA's planned measure for employees consisting in the implementation of a system of provision of bonuses to employees who will voluntarily terminate their employment after becoming entitled to an old-age pension can constitute a breach of the right to equal treatment and violation of the prohibition of discrimination pursuant to the Anti-Discrimination Act.

In my statement, I informed the Director that in order for a specific conduct to be evaluated as discriminatory, it must constitute less favourable treatment of a group of people defined by a discrimination ground (in this case, age). It can be justifiably assumed that the planned measure will not constitute a less favourable treatment of employees who have become entitled to old-age pension, but choose not to terminate their employment, as compared to those, who voluntarily terminate their employment and in doing so, meet the conditions for severance payment. In my opinion, the

implementation of a measure in the form of a severance is not at variance with the constitutional principle of equal treatment, nor with the Anti-Discrimination Act.

B.3.2 Travel insurance for pregnant women (File No. 3939/2015/VOP)

I dealt with the pleading of a complainant who called attention to the practice of Czech insurance companies, which refuse to provide travel insurance for pregnant women. The complainant wished for a future change as she had solved her situation by taking out an insurance policy with a foreign insurance company. During the inquiry, I learned that the issue did not lie in refusing to insure pregnant women, but in the insurance terms and conditions which stipulate exclusions for pregnant women based on all risks related to pregnancy following the 24th, 26th or 28th week of pregnancy; in one case, the insurance company covers all risks until two months prior to the estimated due date.

I reached the conclusion that although the legal regulation does not indicate the obligation of insurance companies to create special insurance products targeted at pregnant women, exclusions stipulated for risks related to pregnancy must be justified by a legitimate objective and the adequacy and necessity of the means used to achieve said objective. Therefore, it is necessary for the insurance companies to submit specific details from which the increased risk for insurance companies can be inferred. The insurance companies justified their practice only in general. Because no specific data are available, it cannot be concluded with certainty whether the practice constitutes discrimination. In the future, this matter could be resolved by courts, including the Court of Justice of the European Union.

Since for some insurance companies, the exclusions for risks related to pregnancy include future pregnancies or pregnancies that become detectable only after the insurance policy is taken out, I dealt with this issue as well. I reached the conclusion that such cases constitute direct discrimination based on gender. Because travel insurance regularly covers any other sudden changes of the medical condition, sudden medical complications related to pregnancy would constitute a disadvantage directly related to the insured person's gender.

I approached the Czech National Bank with questions regarding the matter; the Czech National Bank does not see any problem with the practice of insurance companies. Furthermore, I decided to organise a round table with insurance companies, which focused on fair setting of insurance terms and conditions not only for pregnant women but also for persons with disabilities and the elderly. At the round table, we discussed cases of alleged discrimination in provision of insurance with representatives of insurance companies.

B.3.3 Provision of dental care to a person with mental disability (File No. 6130/2015/VOP)

I dealt with a complaint by a mother–guardian of a young man with a severe mental disability. In her complaint, she expressed her disagreement with the procedure of a medical facility – a Faculty Hospital (hereinafter the "FH") in provision of medical care to her son. The complainant's son was sent to the FH to have his tooth extracted under anaesthesia after he had not let his dentist treat him. During the procedure under

general anaesthesia, the dentists extracted the man six teeth in total, which, according to the complainant's statement, they did without her prior consent.

Because the complainant's pleading gave rise to a suspicion of less favourable treatment of her son on the grounds of disability, I decided to examine the matter. Because, despite being notified, the complainant did not pursue the opportunity to address her complaint against the procedure of the medical facility to the Regional Authority, I focused my inquiry solely on the matter of possible discrimination by the FH and I asked the Director of the FH to provide a statement. The Director stated that in case of "non-cooperating" patients, such as the complainant's son, the detailed examination and determination of the final treatment plan is only possible after the patient is under general anaesthesia. In case of the complainant's son, preliminary clinical examination was performed prior to the surgery; the need to extract more teeth only became apparent during the detailed examination in the operating room. According to the Director of the FH, it is not allowed, both from the medical and organisational viewpoints, for the doctor to put the patient under anaesthesia, examine him, consult the procedure plan with a legal representative and then proceed to put the patient under anaesthesia once more and finally treat him. Because of this, the legal representative only receives information on the probable scope of the treatment prior to the surgery, with an emphasis put on the necessity of a more radical treatment aimed at elimination of the risk of subsequent complications. According to the Director's statement, the complainant received necessary information both in person and in writing.

In the case at hand, it remains unclear just how was the complainant informed about the expected scope of treatment prior to her son's surgery (Statements of the complainant and the Director of the FH vary; I do not have the medical documentation at my disposal). Some statements by the Director of the FH can also be doubted (it is especially doubtful whether it is actually impossible to keep the patient's guardian informed in a situation when the necessity of a more invasive procedure arises during the surgery – for example by means of a short phone call during the surgery, without the need to interrupt the anaesthesia). However, it was not possible to prove from the collected underlying documents that the FH's procedure towards the complainant's son had been motivated by his disability and that the FH was demonstrably guilty of discrimination.

Based on the complaint, I decided to focus more on the difficulties encountered by people with disabilities in access to healthcare. I would like to reveal the most pressing issues through negotiations with selected NGOs, representatives of the Czech Dental Chamber, insurance companies, Regional Authorities or the Ministry of Health and work towards their gradual mitigation/remediation.

C. Legislative recommendations and special powers of the Defender

C.1 Confirmation of non-functionality of the VISAPOINT system by rulings of the Supreme Administrative Court

The Supreme Administrative Court utilised findings from the Defender's activities in a number of its rulings.

In its judgement of 26 April 2017, File No. 3 Azs 237/2016, the Supreme Administrative Court referred to the results of the monitoring of operation of the VISAPOINT system in Vietnam, which is a long-term undertaking of the employees of the Office of the Public Defender of Rights and, used them to substantiate its conclusion regarding the long-term impossibility of registration in the Visapoint system in order to file an application for a long-term residence with the purpose of family reunification at the Embassy of the Czech Republic in Hanoi.

The **most recent instance when the Supreme Administrative Court referred to the Defender's findings regarding the operation of the Visapoint system occurred in the judgment of the Extended Chamber of the Supreme Administrative Court** of 30 May 2017, File No. 10 Azs 153/2016. The Extended Chamber of the Supreme Administrative Court stated that **the core of the problem lay with the Visapoint system itself**, through which it was not possible to get an appointment date for filing an application. The Ministry of Foreign Affairs and Embassies in Vietnam and Ukraine prevent applicants from filing applications for long-term residence permits. The Visapoint system basically forces the applicants to turn to the black market. The Defender has been pointing out this issue for several years.

C.2 Comments on the draft systemic solution for ensuring social security of relocated compatriots

Compatriots are **foreigners with proven Czech descent** who came to the Czech Republic predominantly from the post-Soviet republics and their relocation was carried out by the Government of the Czech Republic as part of humanitarian aid. Simultaneously with the offer of relocation, Czech governmental authorities promised the compatriots a reasonable standard of living including social security in old age, disability or in loss of the "breadwinner" which, at the time of relocation of the second and third wave of compatriots from the successor states of the Soviet Union, was governed by the Agreement between the Czechoslovak Republic and the Union of Soviet Socialist Republics No. 116/1960 Coll. Said compatriots thus expected, based on the then-applicable laws, that they would be eligible to Czech pensions for the entirety of their periods of insurance both in the Czech Republic and the Soviet Union. However, since the Czech Republic has ceased to apply the agreement in question to individual successor states, it did not provide for social security of persons concerned (and affected) by its cessation. It is necessary to emphasise that based on the information given to them by the governmental authorities of the Czech Republic prior to their relocation, **the compatriots had legitimate expectations** that the Czech Republic would provide them with reasonable security in unfavourable social situations. However, this did not happen.

Thereby, I welcome that the Ministry of Labour and Social Affairs, in co-operation with the Ministry of the Interior, **has prepared a material proposal of a systemic solution** of reasonable social security in old age and disability for the compatriots, as their current social situation is rather dire. **In general, I am regarding the proposed concept favourably.**

Nevertheless, I submitted my comments to the amount of the "Compatriot Support" and some conditions for entitlement thereto.

Brno, 21 July 2017

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