Public Defender of Rights
OMBUDSMAN

Annual Report on the Activities of the Public Defender of Rights

2009

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Contents

Contents

Introduction

Introduction

In the submitted annual report, JUDr. Otakar Motejl, the Public Defender of Rights (hereinafter also the "Defender") sums up his inspection activities in the area of public administration in 2009.

The Defender continues the approach he chose in the second term of office and attempts to cover, in particular, general observations he made in individual areas of public administration. In addition to analysing the most important cases where the bodies of public administration are inspected, the Report is also concerned with the Defender's activities in commenting on legal regulations and his activities in proceedings before the Constitutional Court. The Defender deals in more detail this time with cases where he decided to exercise the right to propose that the Supreme Public Prosecutor lodge an action in the public interest.

The Report is divided into seven parts.

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

The second part of the Report is dedicated to the Defender's special powers and his participation in proceedings before the Constitutional Court. Furthermore, the Defender provides information on his activities in amendment procedures.

The third part comprises of statistical data and the presentation of observations from individual areas of public administration. In accordance with Section 2 (4) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended), the Defender has delegated part of his mandate to his deputy, RNDr. Jitka Seitlová (in the area of social security, healthcare, protection against noise, the environment, records of the population, right to information, consumer protection and personal data protection).

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 fifth part focuses specifically on the issue of protection against discrimination, with regard to the adoption of the Anti-Discrimination Act (Act No. 198/2009 Coll.), which has bestowed on the Defender a new mandate concerning the right to equal treatment and protection against discrimination.

The sixth part draws general conclusions on the most severe problems and concurrently the Defender attempts to outline options for their resolution. The Defender also uses this part to respond to the manner in which his legislative recommendations from the previous years have been addressed.

The seventh part is the closing summary.

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

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

- the 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;

- the 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;

- the 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.

The Public Defender of Rights and His Office

01

The Public Defender of Rights and His Office

1 / Budget and Spending in 2009

In 2009 the Office of the Public Defender of Rights functioned with a **97,556 thousand** budget. Of this, **CZK 79,561 thousand** was used in 2009, i.e. 81.55% of the set budget.

CZK 17,995 thousand was **saved** in the 2009 budget, particularly from funds for running costs in the amount of CZK 17,211 thousand, primarily in the salaries of employees and other payments for work carried out, partly from operational expenses and CZK 784 thousand was saved on investment costs. Details of the financial results of the Office are available at the website http://www.ochrance.cz.

2 / The Personnel Situation in 2009

The budget for 2009 determined an obligatory **limit of 97 employees of the Office. The actual** average recalculated **number of staff recorded** was 96.35 employees in 2009, whereby the limit stipulated by the state budget was met. Of the total number of employees, 73 were directly involved in dealing with complaints and making so-called detention visits. The recruitment of new employees commenced during the last quarter of 2009 for activities following from the recently passed Anti-Discrimination Act.

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. Compulsory work experience in legal practice of selected students from the 4th and 5th years of the Master's programme took place in the Office in cooperation with the Faculty of Law of Masaryk University.

3 / Presentation in the Media, International Cooperation, Conferences

Press releases, TV series, website

The Defender organised **12 regular press conferences** and **one extraordinary briefing** in 2009; their topics were always summarisation of observations or current findings from inquiries into cases of social importance. Over 40 press releases, standpoints, announcements and other infor-

mation were provided to journalists during the year. All of these are also available on the Defender's website (http://www.ochrance.cz).

Within the series of collections "**Statements of the Public Defender of Rights**", the Defender published what was already the fourth publication, **Pensions**. The collection of statements and commentaries was welcomed by the authorities as a methodological instrument, as well as by the public. Another miscellany, dealing with the issue of noise, was prepared for printing at the end of the year.

Within the "**Good Administration Series**", the Defender, together with the Ministry of the Interior, released the publication "**Recommendation for Municipalities and Cities for Preventing the Arising and Extension of Socially Excluded Sites, with an Emphasis on Securing Housing**".

Czech Television broadcast 16 new episodes of the fifth series of the "A Case for the Ombudsman" programme.

Interest in information on **the Defender's website** is constantly growing. **722,303 visits were logged**, which is again 100,000 more than in the preceding year. In 2009 the website retained the certificate of maximum accessibility for the blind and partially sighted and is authorised to use the international Blind Friendly Web logo.

International meetings and conferences

- **Participation in the international conference "Freedom of Expression: Striking the difficult balances for the Ombudsman"** (Tbilisi, January 11–12, 2009)
  Theme: the role of the Ombudsman in ensuring freedom of expression

- **Participation in the conference "Access to information: What can the ombudsman do"** (Tirana, March 9–10, 2009)
  Theme: access to information

- **Meeting with the representatives of the Immigration and Refugee Board of Canada** (Brno, March 24, 2009)
  Theme: status of Romani citizens in the Czech Republic

- **Participation in the 7th annual conference of national ombudspersons of the member states of the EU and candidate countries organised by the European Ombudsman** (Paphos, April 5–7, 2009)
  Theme: migration within the EU

- **Meeting with representatives of Ukrainian courts** (Brno, May 5, 2009)
  Theme: the mandate of the Defender and his relationship to courts in the Czech Republic

- **Visit of European Ombudsman P. Nikiforos Diamandouros to the Czech Republic** (Brno, Prague, May 17–20, 2009)
  Theme: cooperation between Czech and European ombudsmen in addressing complaints

- **Participation in the 9th world conference of the IOI (the International Ombudsman Institute) and celebration of the 200th anniversary of the Swedish parliamentary ombudsman** (Stockholm, June 12-13, 2009)
  Theme: differences between ombudsman institutions, the issue of mediation, election of the Board of Directors of the European section of the IOI

- **Participation in the 3rd international Issyk Kul human rights forum** (Bishkek/Issyk Kul, July 15–20, 2009)
  Theme: human rights protection

- **Participation in a summit of the "Visegrád 4" ombudspersons** (Bialowieza, September 7–10, 2009)
  Theme: the provision of legal aid, the financial independence of ombudspersons, the relationship between the ombudsperson and Parliament

- **Acting in the role of the "mentor institution" in supporting establishment of the National Preventive Mechanism under the OPCAT in Macedonia** (Skopje, September–December 2009)
  Theme: a series of conferences and workshops for the implementation of systematic visits to facilities where persons restricted in their freedom may be confined

- **Meeting with Belarusian human rights activists** (Brno, October 5, 2009)
  Theme: role of the ombudsperson in the protection of human rights

- **Workshop for the personnel of the office of the Serbian ombudsman for the future exercise of the role of National Preventive Mechanism under the OPCAT** (Brno, November 11–13, 2009)
  Theme: safeguarding and implementation of systematic visits to facilities where persons restricted in their freedom may be confined

- **Participation in the international conference "Making Rights a Reality for All" organised by the European Union Agency for Fundamental Rights (FRA)** (Stockholm, December 9–11, 2009)
  Theme: human rights protection

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

- **"Current Problems in the Area of the Building Code"** (Brno, January 28, 2009)
  Theme: problems in the application of the Building Code, issuing binding standpoints and their review within appellate proceedings, repeated decision-making on the removal of a construction, omitted party to proceedings and the remedies available to him/her

- **"Social Services, Standards of Social Services"** (Brno, January 29, 2009)
  Theme: progress of inspections by Regional Authorities in social service facilities, contractual relationships in social services, use of means of restraint, addressing complaints of the clients of the facilities

- **"Foster Care and Alternating Custody"** (Brno, March 19, 2009)
  Theme: training of future foster parents and adoptive parents, activities of the bodies of social and legal protection of children, alternating custody

- **"Noise Burden"** (Brno, April 28, 2009)
  Theme: protection of public health against noise, noise mapping, competences of the bodies of public health protection, legislative changes under preparation

- **"Co-operation of the Public Defender of Rights with Regional Authorities – Social Agenda"** (Brno, May 21, 2009)
  Theme: material need and jointly assessed persons, state income support – housing allowance, choice of the manner of drawing parental allowance, problems in proceedings on allowance for care

- **"Common European Asylum System: Infringements of Personal Freedom"** (Brno, June 12, 2009)
  Theme: detention of foreigners – theoretical/legal analysis, international comparison

- **"Hazardous Waste"** (Brno, June 16, 2009)
  Theme: old environmental burden without so-called responsible person, monitoring of deposits, financing of the elimination of old environmental burden, record keeping in the area of waste management, effective control, removal of consent to waste management

- **"Administrative Punishment"** (Kroměříž, June 25-26, 2009)
  Theme: liability for offences and other administrative offences, limits of administrative punishment

- **"Round Table Meeting with the Heads of Facilities for the Mentally Handicapped"** (Brno, September 17, 2009)
  Theme: the Defender's findings from systematic visits to facilities

- **"Permanent Residence"** (Brno, September 24, 2009)
  Theme: administrative proceedings on cancellation of permanent residence data, notification of a change in permanent residence, permanent residence in the seat of the reporting office – the legislature's intention versus reality

- **International conference on the "Transparency of Public Administration"** (Brno, November 26-27, 2009)
  Theme: the right to information in public administration, transparency versus personal data protection, access to information

- **"Local Fees"** (Brno, December 7, 2009
  Theme: types of local fee and determination thereof, fee for municipal waste, proceedings on fees and claiming thereof

Relations with Constitutional Authorities and Special Powers of the Defender

02

Relations with Constitutional Authorities and Special Powers of the Defender

1 / Participation in Meetings of the Bodies of the Chamber of Deputies

In relation to the bodies of the Chamber of Deputies of the Parliament of the Czech Republic (hereinafter the "Chamber of Deputies"), the Defender discussed primarily his newly planned mandate in the area of equal treatment and protection against discrimination. The Defender informed the Constitutional and Legal Committee of progress in discussing the law on equal treatment and on the legal means of protection against discrimination at an external meeting that took place at the Defender's office in Brno in February 2009. The Defender also participated in a meeting of the plenum of the Chamber of Deputies on the Anti-Discrimination Act. On June 17, 2009, the Chamber of Deputies insisted by an absolute majority of votes of all Deputies on the law previously vetoed by the President. The adopted Anti-Discrimination Act was promulgated in the Collection of Laws under No. 198/2009 and came into effect on September 1, 2009.

The Defender also participated in the creation of an amendment to the Code of Civil Court Procedure (amendment No. 218/2009 Coll.), the objective of which was to ensure greater protection of the debtor in case of distrainment on movable assets and distrainment through the assignment of a receivable from an account kept by a financial institution. Based on a number of complaints received in connection with the work of executors, the Defender proposed an amendment to Sections 304b and 322 of the Code of Civil Court Procedure (Act No. 99/1963 Coll., as amended). As for the assignment of a receivable from an account, an amount equal to twice the amount of the minimum living standard should be left in the debtor's account, while in relation to distrainment through the sale of movable assets, the Defender proposed that cash corresponding to twice the amount of the minimum living standard be excluded from the enforcement of the decision.

2 / Comments on Legal Regulations

The Defender made use of the option of commenting on legal regulations (in total, he commented on 15 draft laws and decrees). The Defender submits his comments particularly in cases where he has observed in the exercise of his mandate that the legislation should be amended. In the amendment proceedings 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) that allows him to make recommendations for issuing, amending or annulling a legal or internal regulation.

The Defender commented particularly on the following regulations:

2 / 1 / Comments on the draft law on consumer credit

(Government draft amendment to Act No. 321/2001 Coll., on some conditions of agreeing consumer credit and Act No. 216/1994 Coll., on arbitration proceedings and enforcement of arbitration awards. The draft has not been submitted to the Chamber of Deputies to date)

The Defender welcomed submission of new legislation, which transposes Directive 2008/48/EC of the European Parliament and of the Council of April 23, 2008. Although he agreed with the basic objectives, the Defender pointed out several shortcomings in the draft law. The Defender considers distribution of the supervisory powers between several administrative authorities to be problematic. Furthermore, the Defender proposed that the offering of consumer credit by means of advertising always contain an illustrative example that would make it possible for the consumer to acquaint him/herself with the conditions of the credit in a more thorough and comprehensible manner. As a fundamental comment (which, however, was not accepted by the submitter), the Defender required that arbitration clauses be expressly ruled out in consumer agreements. Arbitration clauses substantially worsen the position of the consumer since a dispute following from such an agreement is usually resolved by an arbitrator determined beforehand by the provider of the credit.

2 / 2 / Comments on the draft strategy for the law on the provision of legal aid

(Government draft strategy of the Act on the Provision of Legal Aid; the draft has not been submitted to the Government to date)
The Defender proposed that in cases where free legal aid is provided also to legal persons that have not been founded for the purpose of the operation of a business, there exist clearly set property and income criteria for the provision of basic and, in particular, extended legal aid. The Defender expressed his opinion that attorneys-at-law, NGOs and universities providing education in master's study programme law and legal science should be allowed to provide free legal aid. The Defender also proposed that the draft strategy for the law be extended with the possibility of assessing in justified cases the actual income and availability of means for individual persons also outside the principle of income of jointly assessed persons.

2 / 3 / Comments on the amendment to the Rules of Criminal Procedure

(Government draft amendment to Act No. 141/1960 Coll., on criminal court proceedings (the Rules of Criminal Procedure), as amended, and Act No. 218/2003 Coll., on the liability of youth for unlawful acts and justice in matters of youth; the draft has not been submitted to the Chamber of Deputies to date)
The Defender expressed fundamental reservations on the proposed amendment to the legal regulation of compulsory defence. In the Defender's opinion, it is impossible to accept the argument of the necessity to economise on funds in the state budget, inter alia because this is a response to a temporary economic situation. In connection with the financial issues related to ex officio defence, it is more appropriate to ask whether the cost of the defence is proportionate to the quality of the legal services provided. Furthermore, the Defender disagreed with restrictions on ex officio defence with respect to juveniles since substantial procedural shortcomings may occur, particularly

in acts preceding commencement of criminal prosecution, where even an adult lay person, not to mention a juvenile, is unable to comprehend the impact of such shortcomings. It is all the more necessary that minors be 'partners' to prosecuting bodies in the sense that they are provided with a qualified defence to defend their legitimate interests.

2 / 4 / Comments on the 8th and 9th Periodic Report on fulfilment of obligations following from the International Convention on the Elimination of All Forms of Racial Discrimination

The Defender expressed his belief that preparatory classes for socially disadvantaged pupils may appear a positive measure at first sight (in the sense of the categories of the right to equal treatment); nevertheless, in practice they are established particularly at practical elementary schools (schools for children with a mental disability) and tend to play the role of a preparatory grade for practical elementary schools and those class(es) in mainstream elementary schools intended specially for children with a slight mental disability (i.e. a disability in the sense of the Schools Act terminology). In the Defender's opinion, it would be more suitable to concentrate on increasing the attractiveness of kindergartens, particularly for Romani children, if there is such a programme.

2 / 5 / Comments on the draft strategy for the law on the defender of children

(Government draft strategy of the law on the defender of children; the draft has not been submitted to the Government to date)
The Defender stated that the draft strategy for the law suffers from a fundamental shortcoming, since the individual categories of children's ombudspersons in Europe have not been studied sufficiently for the making a political decision and choosing one of the available models. The Defender therefore proposed that the draft strategy be supplemented with a detailed analysis of the competences of children's ombudspersons in European countries. Another general comment by the Defender related to the absence of an analysis of the financial costs of individual variants. The Defender does not consider that it would be expedient for the children's ombudsman to have the same powers as the Public Defender of Rights, particularly to perform inquiries into individual complaints. On the contrary, it seems more meaningful for the defender of children's rights to have general powers (the children's ombudsman should play a monitoring and initiating role and act as an advisory institution rather than a body performing individual inquiries).

3 / The Defender and the Constitutional Court

In relation to the Constitutional Court, the Defender most often stands in the position of a so-called enjoined party in proceedings on proposals for the annulment of subordinate legal regulations (as a rule, generally binding decrees of municipalities). In 2009 the Defender opined on 6 proposals and in one case he initiated review proceedings in relation to a decree.

4 / Instigations to the Supreme Public Prosecutor for Lodging an Action for the Protection of the Public Interest

Effective from January 1, 2006, the Defender is authorised, on the basis of Section 22 (3) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended), to propose that the Supreme Public Prosecutor lodge an action for the protection of the public interest. If the Supreme Public Prosecutor does not lodge the action, s/he is obliged to advise the Defender thereof not later than three months from delivery of the proposal. The Supreme Public Prosecutor is to provide justification if s/he does not accept the proposal.

In the Defender's activities, this is an exceptional means of remedy where the unlawful conduct of an authority has not been successfully remedied otherwise. In 2009, the Defender decided to address the Supreme Public Prosecutor in two cases in accordance with Section 22 (3) of the Public Defender of Rights Act.

4 / 1 / High-voltage power lines dangerous to the health and life of inhabitants

The first case was connected with a complaint where, in connection with the restoration of a construction, a municipal office did not insist on the repositioning of high-voltage power lines back to the original route outside a residential area. The high-voltage power lines represented a significant safety hazard to the health and lives of the inhabitants living nearby. Although the complainant together with other inhabitants had advised the responsible authorities, the planning authority, Prague City Hall and the Ministry for Regional Development of these risks, remedy was not ensured.

The planning permission could no longer be reviewed in appellate proceedings or review proceedings since the deadlines stipulated in Section 96 (1) and 97 (2) of the Code of Administrative Procedure had expired. The Defender therefore decided to use his special power and addressed the Supreme Public Prosecutor with a recommendation that she lodge, against the authority concerned, i.e. the Prague 9 Municipal Office, an administrative action in the public interest in the sense of Section 66 (2) of the Code of Administrative Justice (Act No. 150/2002 Coll., as amended).

The Supreme Public Prosecutor informed the Defender that she did not accept the proposal for lodging an action for the protection of the public interest. The Defender did not agree with the provided justification particularly as he did not receive an explanation of how the Supreme Public Prosecutor resolved the question of whether a material public interest existed or not (it did exist, in the Defender's opinion, as the construction puts the health of inhabitants at risk).

4 / 2 / Residential rooms in facilities intended for permanent housing

The second case involved a dispute concerning the interpretation of the term 'residential room' in facilities intended for permanent housing, which is relevant in granting housing allowances and answering the question of whether a private house or apartment building may represent a facility intended for permanent housing. In a broader sense, this is an interpretation dispute on whether in the legal sense only the regulations of public construction law may be taken into considera-

tion in the interpretation of the term flat (residential room). In the area of civil law, the question is whether, and to what extent, the specified purpose of use of the construction in which the subject of the lease is available should be taken into consideration in assessing the validity of a lease contract (contract on lease of a residential room).

Given that the Defender did not reach agreement with the Ministry of Labour and Social Affairs in interpreting the above term, he addressed the Supreme Public Prosecutor with a proposal for lodging an action for the protection of the public interest against the decision of the Regional Authority of the Hradec Králové Region dismissing an appeal against a decision of the Labour Office in Rychnov nad Kněžnou. The latter authority had issued a decision where housing allowance was not granted to the complainant, as the premises occupied by him had not been approved for use as an accommodation facility. In the opinion of the authority, a residential room in a facility intended for permanent housing may be located only in an accommodation facility. In contrast, the Defender considers that it may also be located in a private house or an apartment building.

The Supreme Public Prosecutor informed the Defender that she did not accept the proposal for lodging an action for the protection of the public interest. The Defender again did not agree with the justification provided. The Supreme Public Prosecutor's Office supported its view with the case law of the Supreme Court, from which it follows that residential rooms in a facility intended for permanent housing and flats must be approved for use separately (separately specified in the final building approval).

Complaints Received By The Defender

03

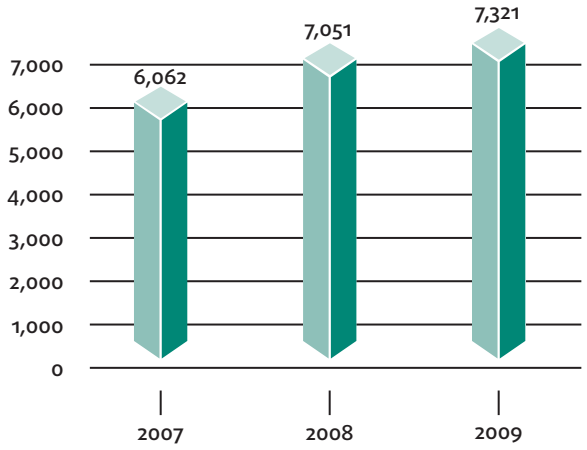
Complaints Received by the Defender

1 / Basic Statistical Data

1 / 1 / Information on complaints received

The Defender received **7,321 complaints** in 2009. The Office of the Public Defender of Rights was **visited by 1,381 individuals** in person, of whom **579** used the option to compile **a complaint orally in a protocol** and **802** obtained **legal advice** on how to deal with a specific problem (such complaints are not incorporated in the overall number of complaints received). It should be noted for completeness' sake that the number of complaints received by the Defender does not include additional filings of a single complainant received by 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.

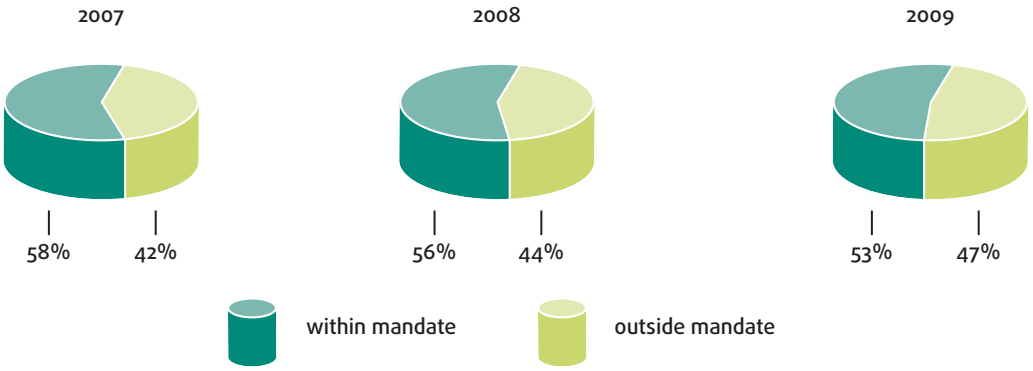
Complaints Received in Individual Years



The **information hotline** available for requests for simple legal advice and queries regarding progress in addressing a complaint was used by **5,433 people** last year.

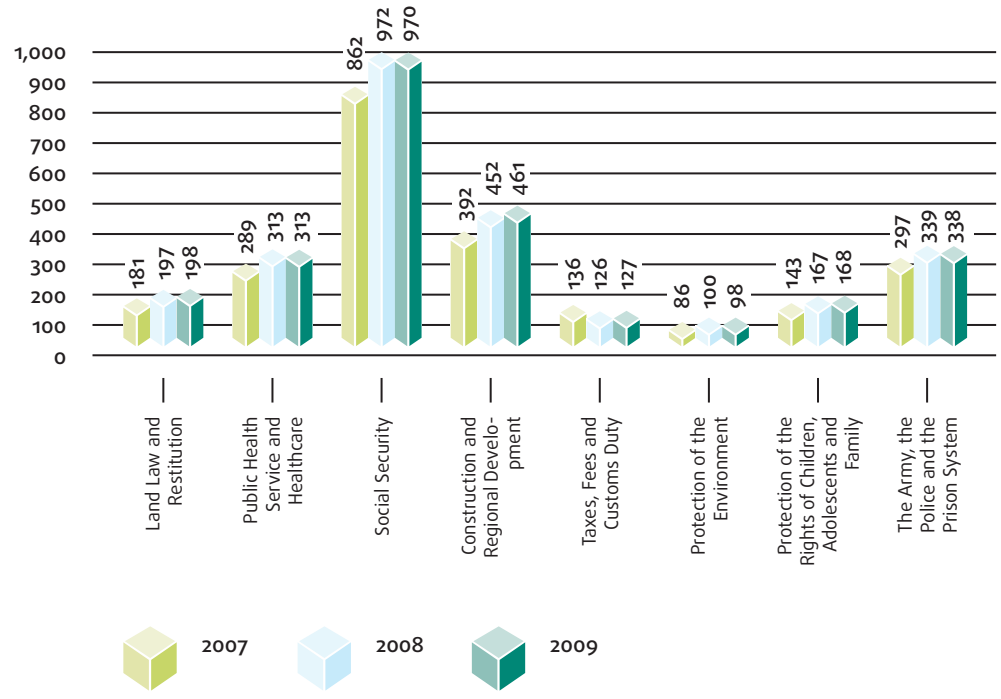
The structure of complaints in terms of the Defender's mandate did not change appreciably in 2009 compared with the preceding years (see graphs). As in past years, complaints within the mandate of the Defender prevailed. **53%** of the total in 2009 fell **within the Defender's mandate**, and **47% of complaints outside**.

The complaints received by the Defender

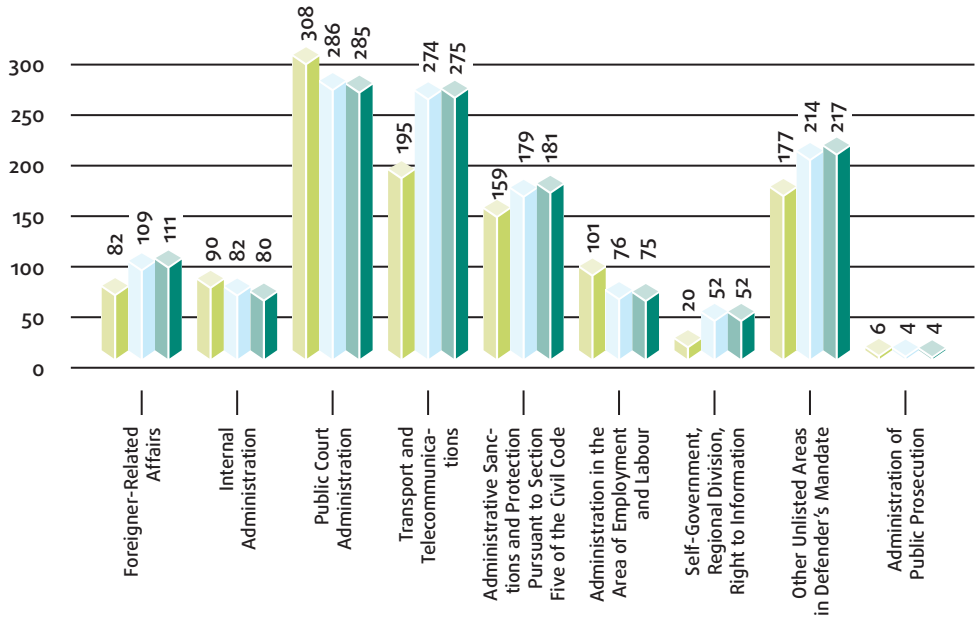


The complaints received by the Defender are classified not only in terms of his mandate, but also in terms of individual public administration sectors. The graph on the next page shows that **most individuals** address the Defender **in the fields of social security, the Building Code, the prison system, healthcare and public court administration.**

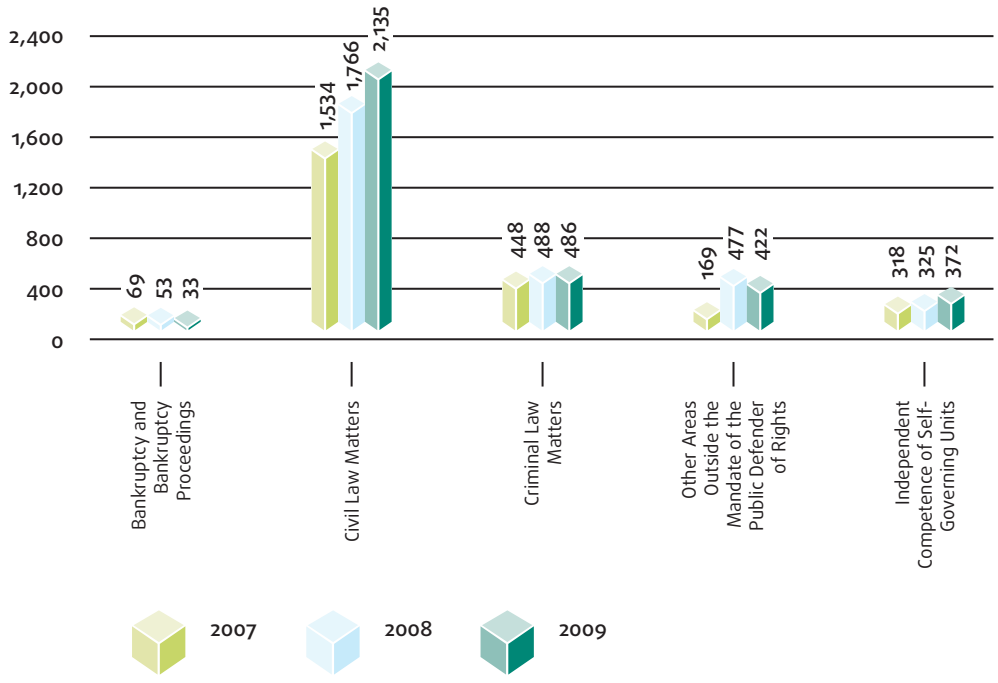
Complaints Received Within the Mandate in Individual Years by Area



Complaints Received Within the Mandate in Individual Years by Area

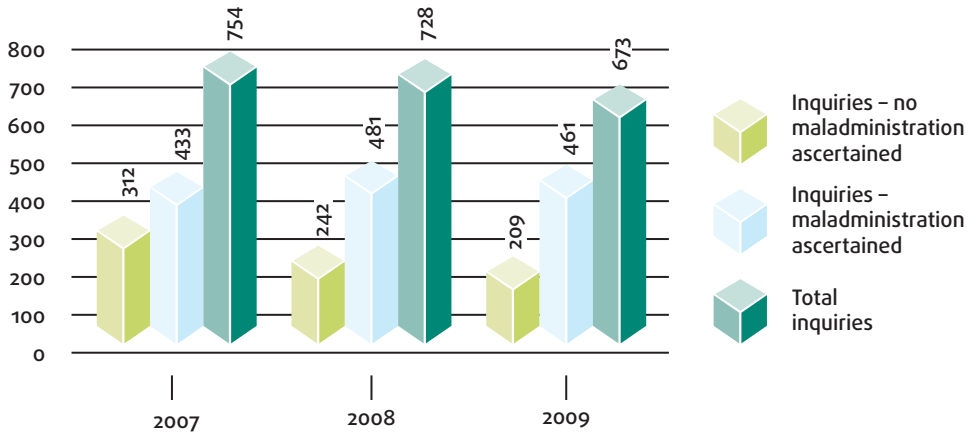


Complaints Received Outside the Mandate in Individual Years by Area



The Defender opened **673 inquiries** in 2009, whilst using his authorisation to **open an inquiry on his own initiative in 29 cases**. The number of such inquiries remained the same as in 2008 (also 29 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.

Number of Inquiries, Number of Cases of Maladministration



1 / 2 / Information on complaints handled

The Defender **handled 7,413 complaints** in 2009. Of the complaints handled:

- **575** were suspended. Suspension was primarily due to lack of a mandate. Fewer complaints were suspended as a result of failure to furnish the prerequisites of a complaint or as a result of an obvious lack of substantiation;

- **6,076** 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 that he had opened a general inquiry on his own initiative on the basis of some similar complaints.

The Defender closed **673** inquiries in 2009:

- **209** were closed stating that the Defender had not ascertained any maladministration in the procedure of the authority concerned;

- **461** were closed stating maladministration by the pertinent authority, of these

  - the authorities took remedial measures following the **inquiry report** issued by the Defender in **379** cases;

  - authorities failed to take remedial measures and the Defender had to issue a **final statement**, including a proposal for remedial measures, in **66** cases (authorities' maladministration was thus remedied only upon the final statement);

- the authority failed to remedy their maladministration even after a final statement was issued in **17** cases and the Defender therefore used his **power to penalise** and notified a superior authority of the maladministration and informed the public.

The number of complaints handled in 2009 also includes **83 cases** where the complainants withdrew their complaints and **6 filings** where the complaint was in itself a **remedy** by its content pursuant to regulations in administrative or judicial matters (Section 13 of the Public Defender of Rights Act).

The Defender also closed **four** so-called **inquiries of particular significance** in 2009, which should result in a change in the administrative practice in certain areas or creation of a legislative recommendation to the Government and the Chamber of Deputies. Information ensuing from this type of inquiry is contained inter alia in the commentaries on the individual areas of public administration and in Part VI of this Report (Recommendations to the Chamber of Deputies).

2 / Selected Complaints and Commentaries

2 / 1 / Social security

Benefits of assistance in material need

The Defender again received a considerable number of complaints concerning benefits of assistance in material need. These included, in particular, complaints concerning the **joint assessment of persons** or complaints responding to a **decrease in benefits** for reasons specified in the Assistance in Material Need Act (Act No. 111/2006 Coll., as amended), for example a change in income. The Defender also dealt with several complaints that responded to the change in legislation (amendment No. 259/2008 Coll.), which enables, effective from September 1, 2008, a decrease in benefits to subsistence level due to failure to pay child maintenance. Far more numerous were responses to the amendment to the Assistance in Material Need Act (amendment No. 382/2008 Coll.) which introduced, effective from January 1, 2009, a "penalty" decrease in the subsistence amount for persons who have received subsistence allowance for over 6 months and **do not perform a public service, voluntary service** or a **short-term employment**.

The Defender criticised the impact of the new legislation, particularly on persons with a disability in need of dietary nutrition. He considers it a shortcoming of the new legislation that the benefit is decreased regardless of the fact that the recipient may be unable to find an appropriate public service, voluntary service or short-term employment given his/her health limitations or the situation in the region. Thus, within the penalty decrease in the subsistence amount, persons in need of dietary nutrition are deprived even of the part of the benefit intended for dietary nutrition that is necessary for them due to their health condition. The Defender considers the new legislation to be inappropriately harsh in this respect, potentially weakening the constitutionally guaranteed right to assistance in material need (Art. 30 (2) of the Charter of Fundamental Rights and Basic Freedoms). The Defender therefore opened intense negotiations with the Ministry of Labour and Social Affairs on **amendment to the Assistance in Material Need Act** that would eliminate the above adverse consequences.

State Income Support Benefits

The disparate system of social benefits

The Defender still notes that the system of social benefits is **excessively complex** and that citizens are **unable to find their way in it**. State income support benefits (10 different benefits), benefits of assistance in material need (subsistence allowance, contribution for housing and extraordinary instant assistance) and benefits for the disabled (7 benefits under the Social Security Act and the so-called allowance for care) are not paid at a single location. Decisions on them are made by various authorities, usually located in different municipalities and with different territorial competences. Thus, for example, the delegated municipal authorities provide benefits of assistance in material need, while applications for benefits for the disabled must be addressed to municipal authorities with extended competence. Unemployment benefits and state income support are addressed by labour offices in the former district towns.

In spite of the efforts of individual social workers to direct applicants to the correct authority, the Defender is addressed by people who do not know what benefit they can apply for or are entirely unaware of the existence of some benefits. In addition, social benefits are often used by elderly people or the disabled who, given their health, are unable to travel to all the relevant authorities and apply for benefits.

The Defender would therefore welcome a **significant simplification of the system of social benefits**, which the Defender believes would contribute to greater specificity of the benefits on the one hand and represent a considerable saving for the state budget on the other hand.

Parental allowances

The Defender has encountered a greater number of complaints concerning the parental allowance that, as in the past year, were connected with the introduction of so-called **three-speed parental leave**.

The Defender has repeatedly noted that applicants were unable to find their way properly in the system of social benefits. In addition, they were often **not duly advised** by the labour office or did not understand the advice. As a consequence, the application for the parental allowance was not submitted at all or the applicant did not choose the rate of drawing the parental allowance that s/he originally intended to apply for.

Complaint File Ref.: 5369/2008/MJR

The state income support authority is obliged to accept an application for parental allowance even if it does not contain all the necessary requisites

Mrs A. V. addressed the Defender with a complaint where she pointed out, among other things, insufficient advice from the labour office. After giving birth to her son, the complainant appeared at the Brno-city Labour Office to apply for childbirth allowance and parental allowance. Since she did not have confirmation of entitlement to benefits influencing the entitlement to the parental allowance and its amount (usually pecuniary assistance in maternity), only the application form for childbirth allowance was accepted from her. As regards the parental allowance, her application was not accepted and she was orally informed what other documents she should provide. The complainant left the labour office without lodging the application or receiving a written protocol with advice on what other specific steps should be taken for to obtain the parental allowance. By a further coincidence, the application was lodged much later. As a result, the applicant lost a part of the benefit.

The Defender is aware of the difficulty of providing advice in the normal operation of a labour office where personnel have a limited time for each applicant and it is impossible to draw up a written protocol from each meeting. In spite of this, the Defender considers it a necessary minimum for compliance with the principle of responsiveness of a body of public administration that labour offices accept applications for parental allowance (or other benefits, as appropriate) even if they do not have all the necessary requisites and invite citizens to supplement them only after opening the administrative proceedings (or that they draw up a protocol on the necessity to provide additional documents and hand it over to the applicant).

Given that the head of the labour office admitted maladministration, pledged to ensure that even incomplete applications would be accepted in the future and began to train the personnel specialised in benefits to this effect, the Defender closed the inquiry.

Foster Care and State Income Support Benefits

The Defender dealt with the issue of **benefit consultancy by the bodies of social and legal protection** and concluded that social workers should advise people who assume the care of a child on how to receive the social benefits associated with the care.

Benefits for the disabled

In the area of benefits for the disabled, the Defender received in particular complaints concerning the **non-granting of the claimed degree of extraordinary benefits and the non-granting of benefits** dependent on an adverse health condition (allowance for motor vehicle use, etc.).

Within inquiries into several cases and, subsequently, in connection with the amendment procedure to the amendment to the decree implementing the Social Security Act (Decree No. 182/1991 Coll.), the Defender dealt with the term "**motor vehicle user**". The Defender did not agree with the practice of the Ministry of Labour and Social Affairs that was to be incorporated in the wording of the decree, where the party registered in the register of road vehicles is considered to be the owner and user. The Defender pointed out in this context that the register of road vehicles does not have a constitutive nature (it does not constitute, modify or cancel the ownership of a motor vehicle). The term "owner" should be interpreted primarily according to the Civil Code.

Allowance for care under the Social Services Act

Delays in issuing expert reports on the degree of dependence at invalidity boards of the Ministry of Labour and Social Affairs

In the annual report for 2008, the Defender pointed out that the invalidity boards of the Ministry of Labour and Social Affairs often exceed the legal deadline for processing an application for health assessment. The Defender further dealt with the issue of **delays by invalidity boards of the Ministry of Labour and Social Affairs** within an inquiry on his own initiative. Thus, the issue of delays was repeatedly discussed in meetings with the representatives of the said Ministry. In spite of this, the length of the proceedings on the allowance for care remains unsatisfactory.

The Ministry of Labour and Social Affairs attempted to deal with the unfortunate situation at individual invalidity boards through a number of personnel-related measures in 2009 (for example through support from other sites, an increase in the number of dedicated posts and salary incentives). In addition to this, the procedures in assessing the health condition in appellate proceedings were changed by introducing the method of reviewing the assessment conclusions of labour offices.

In this respect, the Defender asked whether this procedure represents an infringement of the basic principles of administrative proceedings, particularly the principle of ascertaining the state of affairs beyond reasonable doubt (the principle of limited material truth). Before introducing the review method, the procedure of invalidity boards in assessing the health condition for the purposes of appellate proceedings was such that they always assessed the current condition existing as of the date of their meeting, i.e. the applicant's health condition before issue of a decision on the appeal. The review method represents the opposite procedure. At present, the invalidity boards of the Ministry assess only the condition that existed as of the date of issue of the contested decision and **comment on the current condition only if the administrative body of appeal (the regional authority) explicitly requests this.** After discussing this issue with the advisory board of the Minister of the Interior for the Code of Administrative Procedure, the Ministry of Labour and Social Affairs changed the practice by broadening the situations in which the invalidity boards perform a new assessment as of the current date.

In the area of allowance for care, the Defender continued to encounter many cases of **inadequate justification of assessments on the degree of dependence,** as well as substantive maladministration (particularly faulty application of Section 9 (4) of the Social Services Act (Act No. 108/2006 Coll., as amended) and the decree implementing certain provisions of the Social Services Act (Act No. 505/2006 Coll.)).

Allowance for care in relation to mentally ill individuals

In dealing with specific complaints, the Defender also dealt with several cases of non-granted allowance for care to mentally ill individuals (for example people with chronic paranoid schizophrenia) or individuals with similar disabilities (for example brain herpes).

In these cases, the Defender repeatedly ascertained that both the social workers performing the social inquiry and the assessment bodies tend to **underestimate mental difficulties while overestimating physical and sensory aspects**. Assessment bodies often do not deal with the health condition of the assessed individual from the psychological viewpoint and do not ask whether the individual is able to recognise the need for caring for themselves (while they are physically fully capable of the care). Thus, allowance for care is often not granted to mentally ill individuals or it is granted in a lower degree in spite of the fact that permanent oversight and assistance by another person is required.

Pension Insurance

Fundamental changes occurred in the area of pension insurance effective as of January 1, 2010. While the legislation was subject to the legislative process already in 2008, the implementing regulations were adopted as late as in 2009. The Defender actively participated in the amendment procedure on the decree on assessing invalidity (published in the Collection of Laws under No. 359/2009), where he attempted to promote, in particular, that **an applicant for a pension benefit be acquainted with the assessment of his/her health condition by the review doctor of the social security administration.** The Ministry of Labour and Social Affairs complied with this fundamental comment: thus, from January 1, 2010, the bodies of social security administration will send to applicants for benefits the assessment of the state of their health, describing not only the medical reports referred to by the review doctor, but also the facts ascertained by the doctor and how s/he evaluated them. From the Defender's viewpoint, this step represents a considerable improvement of the legal position of addressees of public administration and broadens their possibilities in effectively defending themselves against potential incorrect decisions of the Czech Social Security Administration (hereinafter also the "CSSA").

Proceedings on pension insurance benefits

Within inquiries into the procedures of the Czech Social Security Administration, the Defender often encounters procedural shortcomings in the work of authorities. The most frequent one consists of **inadequate justification of a decision** or even failure to issue a decision, particularly when additional periods of insurance are inquired into on the basis of a submission by a policy holder.

The Defender has also repeatedly encountered **refusal to issue a record** (assessment) **of a policy holder's health condition** by the competent District Social Security Administration.

Orphans' pensions

The Defender was addressed by several citizens in the matter of a dismissed application for an orphan's pension for children entrusted into their custody by the court. These were grandparents whose children (the parents of the children in their custody) were for various reasons unable to raise their offspring. After the death of one such grandparent, the CSSA dismissed the application for an orphan's pension, considering that the conditions for recognising entitlement had not been met. The Pension Insurance Act (Act No. 155/1995 Coll., on pension insurance, as amended) requires that, for entitlement to arise to an orphan's pension after the death of a person who assumed a child's care substituting for the parents' care, the child was mainly dependent on that person at the time of the latter's death. The CSSA interprets the aforementioned condition in that it adds up all the income of the family, divides it by two, and if the income of the deceased person did not exceed one half of the total income, the CSSA does not grant the orphan's pension. **Thus, the surviving grandparent finds him/herself in a very complicated financial situation upon the non-granting of the orphan's pension as s/he must secure one or several juveniles from his/her income** (mostly the old-age pension and the reversionary pension paid in the amount of one half of the percentage assessment).

The Defender considers the above interpretation of the Pension Insurance Act by the Czech Social Security Administration to be wrong, particularly as it negates the purpose of the benefit. The objective of an orphan's pension is to partly compensate for the parent's income in relation to a child who was dependent on that parent's income. In addition, by summing up the entire income of the family, the CSSA interpretation virtually rules out entitlement to an orphan's pension after the death of the relevant persons as the income of one such individual only rarely exceeds one half of the entire income of the family.

Since the Defender's negotiations with the CSSA did not lead to remedy of this situation, the Defender negotiated with the Minister of Labour and Social Affairs. In the subsequent written standpoint, the Minister admitted the vagueness of the legislation and the necessity of a legislative amendment. He also made a decision, pursuant to Section 4 (3) of the Act on Organisation and Implementation of Social Security (Act No. 582/1991 Coll., as amended) on **alleviating harshness in specific cases.** However, the Defender does not consider the aforementioned solution to be optimal given the uncertain result of the proceedings (there is no legal entitlement to approval of an application for alleviating harshness), their length and, last but not least, the fact that the decision is financially effective as of the date of submission of the application or the session of the Benefit Committee of the Minister, rather than as of the date of incurrence of entitlement to a pension.

Pensions with a foreign element

The number of complaints concerning pensions with a foreign element considerably increased in 2009. Most of them were pensions provided while taking into account participation in pension insurance in a member state of the European Union. In these pension benefits, the Defender most often dealt with the **disproportionate length of proceedings** to grant the partial Czech pension and

complaints about the low amount of the pension due to **non-inclusion of average indexed earnings for the period of employment in another member state of the EU.**

In the provision of pension benefits with a foreign element, the Defender also noted that the **CSSA does not adequately cooperate with foreign pension insurance institutions.**

Complaint File Ref.: 6224/2008/VOP/JŠL

Another procedural defect occurs when the Czech Social Security Administration does not conduct administrative proceedings on a pension benefit and does not respond for more than three months to the application of a foreign pension insurance institution for the sending a certificate of the period of pension insurance completed by a policyholder in the Czech Republic.

The Defender was addressed by Mrs I.S. with a complaint about failure of the Czech Social Security Administration to cooperate with the German pension insurance institution. The complainant had applied for a pension in Germany and the German pension insurance institution asked the CSSA to send it a certificate of the complainant's period of pension insurance in the Czech Republic. The German authority had urged them to deal with its request five times. The CSSA had responded to these requests after one and a half years through a letter informing the complainant that the German pension insurance institution had requested the CSSA to send an application for a German pension. It had asked the complainant to appear at the competent CSSA office to draw up an application for the German pension with specification of the period of insurance completed in the Czech Republic.

The Defender concluded on the basis of the above facts that the CSSA had caused delays as it had failed to respond for a period exceeding one year to the requests of the German pension insurance institution for sending a certificate of the Czech periods of pension insurance. Without the certificate, the German pension insurance institution was not able to make a decision on the complainant's pension.

The certificate was issued on the basis of the Defender's inquiry. The Defender also criticised the fact that the CSSA had invited the complainant to appear at the competent CSSA to draw up an application for a pension. The CSSA should draw up a certificate of the period of insurance in the Czech Republic without requiring the policyholder's cooperation.

2 / 2 / Work and employment

Amendment to the Employment Act

The Defender welcomed adoption of the amendment to the Employment Act (amendment No. 382/2008 Coll.) in that it incorporated some of his requirements for a **more precise specification of the data** that are considered to be **facts decisive for inclusion and keeping in the records of a labour office**, where failure to provide these data by the set deadline by the applicant causes him/her to be excluded from the jobseekers register. Furthermore, the amendment satisfied the Defender's requirement for **shortening the period** during which the applicant is excluded from the register due to the failure to fulfil this notification duty (currently three months rather than the previous six). The amendment has also stipulated the possibility of proving the existence of decisive facts through **an affirmation**.

The Defender also dealt with several complaints concerning the exclusion of individuals from the jobseekers register because they failed to give notice of a fact decisive for keeping them in the register – **the discharge of the office of executive or shareholder in a limited liability company.** The complainants objected in their complaints that they had been excluded illegitimately since at the time of lodging the application for placement in employment, they were kept as executives or shareholders only formally and did not receive any remuneration for the discharge of their office. The Defender did not ascertain any specific shortcomings on the part of labour offices since the discharge of the office of executive or shareholder in a business company is a fact preventing being kept in the register regardless of whether remuneration is received or not. However, the Defender also ascertained that the phrase in the application for placement in employment reading "I discharge/do not discharge the office (of an executive/of a shareholder)" is somewhat misleading. He therefore drew the attention of the Ministry of Labour and Social Affairs to this fact. **The application form** for placement in employment was subsequently **changed** in that the phrase was modified to "I am/I am not (a shareholder, executive)" so that it is more comprehensible for jobseekers.

Employment of foreigners

The Defender continued the inquiry opened on his own initiative concerning the employment of foreigners. The inquiry focused on inspections of compliance with labour-law regulations by labour inspectorates (see the following case).

Inquiry on the Defender's own initiative, complaint File Ref.: 2884/2008/VOP/JH

An inspection authority is obliged to use all legal means for remedying ascertained shortcomings on the employer's part in cooperation with other inspection entities so that the inspection inquiry fulfils its objective.

On the basis of the findings from an inquiry that had ascertained an extensive breach of labour-law regulations and based on information from a civic association concerned with foreigner-related issues, the Defender opened an inquiry on his own initiative concerning inspections of compliance with labour-law regulations by the company S. The Defender was advised that the company was probably employing a large number of Mongolian citizens to whom the agreed salary was not paid or else they were paid only a negligible amount. A coordinated inspection took place in the company S., carried out by the Area Inspectorate for the Capital City of Prague, the Labour Office for the Capital City of Prague – the Prague 6 branch and the Labour Office in Opava. The Defender monitored the entire inspection inquiry.

The inspection authorities ascertained that employment contracts had not been concluded with some employees, that they lacked permission for employment, that the employer had paid some salaries below the statutory minimum, and that breaks in work were not complied with, etc. For these reasons the authorities opened administrative proceedings based on suspicion of several administrative offences (enabling illegal employment, failure to fulfil the notification duty towards the labour office, administrative offences in the sector of remuneration, etc.), for which penalties were imposed in the total amount of CZK 300,000. The inspection authorities also imposed a procedural fine on the executive of the company for failure to cooperate with the authority. During the administrative proceedings, the employer gradually remedied the breach of the labour-law regulations and employment regulations found by the inspection authority.

The Defender concluded that the administrative authorities made decisions in accordance with the law in relation to the S. company and sufficiently used all procedural remedies to enforce fulfilment of the employer's obligation. Consequently, the Defender closed his inquiry.

Labour inspectorates and discrimination

The Defender encountered several cases where area labour inspectorates performed **inspections inconsistently** in matters of discrimination in labour-law relationships. In addition, the person who lodged the complaint had been informed only generally that an inspection had taken place at the employer that had not ascertained any breach of the Labour Code (Act No. 262/2006 Coll., as amended). However, the notifier had not learned whether the inspection had indeed been concerned with the discrimination claimed by him.

The labour inspectorates argued that informing the notifier of non-demonstrated discrimination would cause the employers' rights and interests protected by law as well as the rights of other parties to protection of personal rights and protection of other data to be infringed (in spite of the fact that the parties involved were legal entities and natural persons operating a business who are not subject to personal data protection). The Defender does not share this view of the authorities and refers to the **right of the complainant to be advised as to whether the inspection was concerned with discrimination and whether the latter was demonstrated**.

The Defender maintains that the inspectorates have adequate means of inquiring into claimed discrimination in labour-law relationships, but that these means (particularly the possibility of asking other employees questions without the presence of third parties) are not sufficiently utilised.

Complaint File Ref.: 3723/2009/VOP/LD

I. In ascertaining whether an employer discriminates against an employee, the personnel of the labour inspectorate should choose questions that will lead to ascertaining the state of affairs beyond reasonable doubt.

II. In carrying out an inspection concerning discrimination, the inspector should consider whether it is necessary to advise the employer of the inspection beforehand and whether this is in accordance with the objective of the inspection.

Mr M. K. addressed the Defender with a request for an inquiry into discrimination in the workplace on grounds of his sexual orientation, on the basis of which he had allegedly been forced to accept employment termination by agreement. The employer's procedure from the viewpoint of the prohibition of discrimination was inquired into by the Area Labour Inspectorate for the South Moravian Region and the Zlín Region based in Brno. The Inspectorate concluded that discrimination at the complainant's workplace on grounds of sexual orientation had not been demonstrated. The inspector who carried out the inspection had utilised his authority to ask employees in the absence of other individuals whether discrimination had taken place at the workplace, but in the Defender's opinion, he had not chosen appropriate questions (he had asked the employees suggestive questions: "Have you encountered discrimination in your workplace?", "Who would you address if you encountered discrimination?", "How do you see the fulfilment of his working duties by Mr M.K.?") In addition, the inspection at the employer had been announced beforehand.

After carrying out the inquiry, the Defender reached the conclusion that the inspector had phrased the questions inappropriately and it was impossible to adequately fulfil the objective of the inspection as it had been announced beforehand. As for the questions asked, the Defender stated that the inspector should have asked more specific questions as the complainant's waiver of confidentiality had been available to him and he had had the possibility of verifying all the decisive facts stated by the complainant.

The Defender reprehended the labour inspectorate for the aforementioned shortcomings, but could not propose remedial measures as the inspection could not be repeated.

2 / 3 / Family and child

Placing a child into the care of the wider family

The Defender often encounters cases where grandparents assume the care of grandchildren whose biological parents are unable to properly care for them. In order to prevent the potential ordering of institutional education, the grandparents seek assistance at the competent bodies of social and legal protection of children, asking them to rule on the grandchildren's education. However, the competent bodies of social and legal protection of children often do not inform the grandparents that the latter have the option of assuming foster care, i.e. that the authority may make a decision in administrative proceedings on **so-called pre-foster care** (for entrusting a child into pre-foster care by its relatives, it is not necessary that the relatives obtain a notification of the regional authority or the Ministry of Labour and Social Affairs that they were selected as suitable foster parents for the child within foster care mediation). The decision on entrusting the child into the grandparents' pre-foster care immediately settles the minor's situation and, in addition, both the grandparents and the child are secured materially by means of foster care benefits.

Cases where the body of social and legal protection of children fails to provide legal consultancy on the forms of foster care and refuses to make a decision on pre-foster care provided by grandparents with the justification that the applicable legislation does not make this possible are viewed by the Defender as incorrect official procedure, but also a breach of the right to protection against unauthorised interference with personal and family life (Art. 10 (2) of the Charter of Fundamental Rights and Basic Freedoms).

Alternating custody

A child has the right to be raised by both parents; nevertheless, the medical and psychological needs of the child must be respected in making decisions on alternating custody. According to the Family Act, in pursuing the interests of the child, the child's personality, its abilities and development capabilities should also be taken into consideration. **Proper mental development of the child should be a priority in proposing alternating custody.** The Defender holds the view that alternating custody is not suitable in the early stage of development of the child (up to the age of three), provided that the parent on parental leave provides proper care. Regard must be given to the child's mental development and contact with the other parent must be regulated accordingly. In these cases, social workers should refer to the findings of the developmental psychology of children. Where court experts opine negatively on the suitability of alternating custody, the body of social and legal protection of children should not propose it, not even as an interim settlement of the situation until the court rules on the substance of the matter.

If one of the parents disagrees with alternating custody, it is not suitable to order it authoritatively. This procedure could be **harmful to the child's interests.** Alternating custody against the will of one of the parents is uncertain in terms of quality and positive effects on the child. Should alternating custody not prove successful, the child would face repeated proceedings on settlement of the parents' relations to the child. Alternating custody should not be a compromise proposed, in case of the parents' dispute, by the body of social and legal protection of children without taking account of the actual interests of the child (see also the judgement of the Constitutional Court of January 27, 2005, File Ref. I. ÚS 48/04).

In an extreme form of alternating custody, the child almost never meets its parent who is so busy at work that the child is in fact cared for by third persons (partner, nurse, etc.)

Thus, according to the Defender, facts precluding alternating custody include early age of the child, disagreement of one of the parents, poor communication between the parents, one parent turning the child against the other or excessive workload on the part of one parent to a degree where care for the child is in fact provided by third persons.

Complaint File Ref.: 74/2008/VOP/HVZ

It is not in the best interest of the child to promote alternating custody for a toddler and against the will of one of the parents.

Mrs R. H. addressed the Defender with a complaint against the procedure of the body of social and legal protection of children at the Prague 4 municipal office (hereinafter the "BSLPC") in exercising the social and legal protection of her daughter. When the child was 15 months old, the BSLPC proposed alternating custody at 14-day intervals against the mother's will. The court did not accept the proposal but it ruled granting very extensive contact of the father with the child, close to alternating custody. The court regarded alternating custody as inappropriate for such a young child, particularly if it were to be at 14-day intervals as proposed by the guardian. The court of appeal referred the case back to the court of first instance as it held that unusually extensive contact of the child with the father had been set, close to alternating custody. In the opinion of the court of appeal, the court of first instance had not taken into consideration that the child was at an age where there is a strong bond to the mother as the closest person, depended on this and had spent substantially less time with the father so far (two days a week). The child began to show sleep disorders; it woke up every hour at night, cried and called for its mother. According to a child psychiatrist, the child was at an age where there still persists a fixation on the closest person in family, i.e. the mother in this particular case. Forcible breaking of these bonds may represent a risk of damage to the mental development of a young child (usually below three years of age). In a new hearing of the case by the court, the BSLPC again proposed, with the child being two, extensive contact with the father approaching alternating custody. The court eventually ruled giving less extensive contact with regard to the low age of the child.

The superior administrative authority (Prague City Hall, hereinafter "City Hall") did not find the mother's complaint against the procedure of the social workers justified. In doing so, it did not deal with the issue of impartiality of the social workers and suitability of the alternating custody, proposed by the BSLPC, for a toddler.

The Defender concluded in this case that the BSLPC had not acted in the best interests of the child when it proposed alternating custody for a 15-month old child at 14-day intervals and later

promoted too extensive contact approaching alternating custody, without taking account of experts' reports and the child's age. The procedure of the BSLPC had been unprofessional, had not corresponded with the findings of developmental psychology and had been capable of causing psychological damage to the child.

The Defender also noted that the City Hall had not addressed the complaint sufficiently. It had not discussed all the components of the complaint, particularly concerning the proposal for alternating custody without consideration of expert assessment. In the Defender's opinion, the complaints mechanism had failed in this case as the superior administrative authority had decided the complaint was unjustified and had failed to reveal the fundamental maladministration by the BSLPC which had proposed alternating custody for a toddler and against the mother's will.

Given the disapproving attitude of the authorities concerned (particularly City Hall still insists that alternating custody is suitable even for the youngest children), the Defender had to issue a final statement where he proposed that the BSLPC adopt a measure ensuring that social workers considering alternating custody assess the psychological needs of toddlers. In relation to City Hall, the Defender required steps to be taken against the person responsible for the failure of the complaints mechanism and adoption of measures ensuring that all items are discussed when inquiring into a complaint.

Given that the authorities concerned did not change their attitude even after the final statement was issued, the Defender must inform the superior authority of the case.

Foster care and state income support benefits

On the basis of a notice from the Defender, guidance by the Ministry of Labour and Social Affairs towards the bodies of social and legal protection of children was strengthened. It was once again stressed that **consultancy by the bodies of social and legal protection of children should include not only regulation of the regime in raising the child, but also basic information concerning provision for the child's needs through social benefits.** The bodies of social and legal protection of children should fulfil their duty to provide information especially in cases where grandparents assume the care for a child instead of its parents who are unable to care, without being aware that in order to receive social benefits (child allowances, social allowance), it is necessary that they legalise the actual state of affairs by opening proceedings on placement of the child into their custody (they are not entitled to any benefits until the date of legal force of the decision through which the child is placed in their custody).

2 / 4 / Healthcare

Procedure of regional authorities in processing complaints about healthcare

In dealing with complaints concerning the processing of complaints about non-state healthcare facilities by regional authorities, the Defender encounters the problem of the still pending legal regulation of administrative punishment.

When maladministration is ascertained, a complaint is considered to have been handled only when remedial measures are taken. Pursuant to Section 14 of the Act on Healthcare in Non-State Healthcare Facilities (Act No. 160/1992 Coll., as amended) the competent regional authority as

the registration body may impose a penalty on the operator of a healthcare facility for breach of an obligation following from the aforementioned Act and the Act on Care of People's Health (Act No. 20/1966 Coll., as amended). However, the **regulation does not specify the amount of the penalty** and does not refer to any other general regulation that would stipulate the extent of the penalty. In this situation, **no penalty can be imposed**. The Defender has repeatedly advised the Ministry of Health of this fact, and the management of the Ministry pledged to take it into account in the preparation of legislative amendments. However, no remedy has yet been made.

Procedure of regional authorities in registering non-state healthcare facilities

According to the applicable legislation, the competent registration authority (the regional authority, Prague City Hall or the Ministry of Health) registers a non-state healthcare facility on the basis of an application from the operator of the facility. In addition to other essential requisites specified in the law, the application must contain **consent of the competent registration authority** to the personnel and material resources and the type and scope of healthcare provided by the non-state facility.

In connection with the foregoing, the Ministry of Health is authorised to issue an **implementing legal regulation** stipulating, inter alia, requirements for technical and material resources of healthcare facilities. At present, this is represented by Decree No. 49/1993 Coll., on technical and substantive requirements on equipment of healthcare facilities, as amended, which in its contents **no longer corresponds to the current state of affairs** and does not reflect some new types of (non-state) healthcare facility.

Fee for studying medical records

The Defender dealt with the procedure of the Ministry of Health in addressing complaints about the **amount** charged by healthcare facilities for **making copies of medical records**.

Under the applicable legislation, a patient has the right to make a copy of the medical records kept about his/her person as well as to make other entries related to his/her state of health. If the making of a copy is not paid from public health insurance (for example, the patient demands copies of the records for several years of prior treatment), the healthcare facility is authorised to charge a payment which, however, **may not exceed the cost of making such copies.**

Complaint File Ref.: 2743/2008/VOP/EH

In addressing complaints about the amount charged by a healthcare facility for making copies of medical records, the Ministry of Health is obliged to evaluate the correctness of the account with knowledge of the scope and content of the relevant medical records.

Based on a complaint from Mr M. H., the Defender inquired into the procedure of the Ministry of Health in addressing a complaint about the procedure of a faculty hospital in providing copies of medical records. Mr M. H. considered the amount for making copies of his medical records unreasonably high (he considered particularly illegitimate the amount charged for the doctor's work in studying the records for the purpose of making a copy).

In this case, the Defender perceived as legitimate not only the cost charged for making copies of the medical records, but also that for the work of the doctor who had studied the records. The records contained entries on authorised psychological methods and the description of treatment

using psychotherapeutic means, i.e. data to which a patient is not entitled, where evaluation of the data that may be provided to a patient cannot be entrusted to a person lacking the relevant expertise.

However the Defender concluded based on an inquiry that the Ministry had erred in administering the complaint of Mr M. H. by failing to verify the scope and content of the medical records. The Ministry of Health subsequently ascertained by repeatedly inquiring into the case, including a physical check of the records, that the healthcare facility had incorrectly charged the work of an administrative employee and the total amount for making copies of the records should have been lower.

Given that the Ministry tasked the management of the healthcare facility with remedying the case and decreasing the amount charged, the Defender closed the inquiry.

2 / 5 / Courts

Delays in court proceedings

In the agenda of state administration of courts, the Defender dealt with, in particular, complaints about the length of proceedings and delays in court proceedings. A condition persists in the administration of complaints about delays in court proceedings pursuant to the Act on Courts and Judges (Act No. 6/2002 Coll., as amended) where some presiding judges of courts administer complaints with the conclusion that they are unfounded, in spite of ascertained delays (although objective delays may be concerned, for example due to an overburdened judge or senate, replacement of a judge, etc.). On the other hand, the Defender has repeatedly encountered delays caused by parties to the proceedings, particularly through failure to appear at the ordered hearings, obstructions in the delivery of documents, etc. In terms of the subject of the court proceedings where citizens object to delays or unreasonable length, **civil-law proceedings again prevailed**: proceedings on settlement of the common assets of spouses (accompanied by delays connected, among other things, with the drawing up of expert reports), guardianship proceedings, labour-law disputes and probate proceedings. The Defender dealt with fewer complaints about delays in bankruptcy and business proceedings than in preceding years.

In 2009 the Defender noted a greater number of complaints about **delays** in **review proceedings before the Supreme Court of the Czech Republic.** The Defender regards the situation of the appellate review agenda at the Court, particularly in civil-law cases, as unfortunate since he has repeatedly encountered delays lasting almost two years. The Defender therefore asked the Chair of the Supreme Court to submit a report on the state of the appellate review agenda, the average length of review proceedings and measures taken to prevent an increase in the number of pending cases and prolongation of review proceedings.

The Defender learned from the statement of the Chair that the Court kept records of 5,734 appellate reviews in civil cases as of August 31, 2009. The average length of review proceedings in this agenda had reached 372 days by May 2009. The Chair of the Supreme Court stated that she was aware of the increase in the number of pending cases and the prolongation of review proceedings. In this context, the Defender welcomed the measures taken by the Chair in an attempt to deal with this situation (strengthening the overburdened senates, ordering schedules for the administration of cases lasting over two years, adoption of "measures in the area of administration of individual cases",

and checking the work of individual senates). In spite of this, the Defender considers the information on the average length of review proceedings and the general burden on the court competent for appellate reviews to be unsatisfactory. He therefore intends to further deal with the situation of the appellate review agenda at this court (at the end of the year he requested another report concerning the burden on the individual senates of the Supreme Court and the number of pending cases).

Court experts and interpreters

The growing number of complaints concerning the work of court experts led the Defender to summarise the most frequent problems encountered by him in this area and to submit an analysis of these problems to the Chamber of Deputies (see the information on the work of the Public Defender of Rights for the third quarter of 2009). The Defender addressed the same document to the Minister of Justice. The Defender encounters both complaints of the parties (emphasising particularly the **effect of expert evidence on the length of proceedings** and the **impossibility of effectively checking the professional qualification of experts**), as well as those by court experts and interpreters themselves, mostly concerned with shortcomings in the appointment and recall procedure.

A considerable problem lies in the obsolete and inadequate legislation on expert and interpreting work. The Defender therefore welcomed the initiative of the former Minister of Justice JUDr. Jiří Pospíšil, who submitted an extensive draft **amendment to the Experts and Interpreters Act** to the Government in autumn 2008**.** The current Minister of Justice decided to withdraw this draft, claiming that adoption of an entirely new regulation would be more effective. The Ministry therefore commenced work on the **draft strategy for a new law on experts and interpreters**, where the personnel of the Office of the Public Defender of Rights should also be involved in its preparation. The Defender expects the new legislation, in particular, to detail the criteria for appointment as an expert, as well as uniform and transparent regulation of the appointment procedure, detailing of the conditions for exercising expert work, and to define methods of checking expertise and oversight over the actual exercise of experts' work.

Public nature of court hearings

The Defender has already criticised the practice where during a hearing a judge required that persons present in the courtroom among the public **prove their identity** (as a rule, this happened after they announced their intention to make an audio recording of the hearing), **under the penalty of excluding the public from the hearing.** The Defender is aware that this problem is often present due to individuals who intentionally visit court hearings to provoke controversy, and their conduct may disconcert an inexperienced judge. However, even this is not enough to justify the requirement for proving the identity of these persons or even additional exclusion of the public from the hearing. The Defender therefore acquainted the presiding judges of courts with his findings and asked them to oversee the conduct of judges in accordance with the applicable laws and preventively contribute to ensuring that the exclusion of the public is used only in justified cases.

Delays in administering requests for appropriate satisfaction for non-proprietary damage under the Act on Liability for Damage Caused during the Performance of Public Authority

The Defender received several complaints about inactivity of the Ministry of Justice in administering **requests for appropriate satisfaction for non-proprietary damage** under the Act on Liability for Damage Caused during the Performance of Public Authority (Act No. 82/1998 Coll., as amended), where the Ministry **did not advise** the applicant **within six months of the standpoint on the lodged request** (the Defender holds that although the law does not specify a deadline for administering

applications with respect to the Ministry and the Ministry does not issue a standpoint within the regime of administrative proceedings, the Ministry of Justice should issue a standpoint within six months of delivery of the request since this would correspond to the set period of limitation – Section 35 of the cited Act). If the Ministry is unable to observe the aforementioned deadline due to a high number of requests to be processed or other objective grounds, it is necessary that it advise the applicant of this fact. Where the Ministry in specific cases failed to advise the applicant of its standpoint within one year from submission of the request and did not respond to reminders, the Defender stated that this procedure was at variance with the principles of good administration.

The Defender considers the time taken to administer requests for satisfaction for non-proprietary damage to be one of the important issues the Ministry should deal with and he therefore intends to discuss this matter further with the Ministry of Justice.

State supervision over distrainment

The Defender regularly encounters complaints against the procedure of court executors. However, the Defender cannot act directly against executors (or the Czech Chamber of Executors). Given that the state supervision over distrainment is in the competence of the Ministry of Justice or (since June 26, 2009) the presiding judge of the district court within whose jurisdiction the executor is appointed, or the presiding judge of the district court which authorised to executor to carry out the distrainment, the Defender can deal only with their supervisory activities. The above-specified bodies of state supervision are authorised to assess the legality of the executor's procedure, compliance with the office rules and the length/smoothness of the distrainment proceedings. The Defender evaluates in specific cases whether the supervision is carried out in accordance with the law and the principles of good administration.

Administration of the Public Prosecutor's Office

The Defender's mandate was extended to the administrative bodies of the Public Prosecutor's Office in early 2006. However, in contrast to the agenda of the state administration of courts, complaints about the exercise of the administration of the Public Prosecutor's Office are rather infrequent. The problems dealt with by the Defender in the past year in this area include the **provision of information by the administrative bodies of the Public Prosecutor's Office.** In this respect, the Defender encountered shortcomings associated with **incorrect interpretation of substantive and procedural provisions of the Act on Free Access to Information** (Act No. 106/1999 Coll., as amended).

Following the results of the inquiry, the Defender used his authorisation pursuant to Section 22 (2) of the Public Defender of Rights Act and **proposed to the Minister of Justice a modification of the Instruction of the Ministry of Justice**, which (at variance with the Act on Free Access to Information) ruled out the provision of information on criminal proceedings.

2 / 6 / Land Law

Land-use measures

In the area of land-use measures, the Defender received several complaints that are mostly not targeted against specific maladministration within proceedings but rather against land-use measures as a whole. The Defender therefore explains particularly the sense of land-use measures, differences from "traditional" administrative proceedings and defence options.

Complaint File Ref.: 215/2009/VOP/DV

A land settlement office is obliged to submit to the land registry office a list of plots of land affected by land-use measures, for the purpose of marking commencement of land-use measures in the land register.

Mr P. N. acquired a private house with a plot of land which was included in comprehensive land-use measures in the cadastral area of Těšetice u Bochova, where this fact was not obvious from the extract from the land register. Pursuant to the Land-Use Measures Act (Act No. 139/2002 Coll., as amended), the competent land registry office should be informed of commencement of land-use measures. Based on the notification, the land registry office should make a note in part D (other records) of the Title Sheets in which plots of land affected by the commenced land-use measure are registered.

The Defender ascertained on the basis of the inquiry carried out that the Karlovy Vary Land Settlement Office, which conducted the proceedings on land-use measures, had not informed the competent land registry office. The Karlovy Vary Land Settlement Office subsequently admitted and remedied its maladministration.

Restitution

There have been uninterrupted restitutions of agricultural property since mid 1991 and an overwhelming majority of restitution cases have been closed (less than 1% of the restitution claims made remain pending). Given the decreasing frequency of complaints in this area, the Defender noted a rather infrequent issue in the course of 2009 in connection with the formal aspect of administrative proceedings conducted by land settlement offices. At the time when the quantity of restitution applications culminated, some land settlement offices (obviously in an attempt to speed up the administration of restitution submissions that in their content did not fall within the regime of the Land Act) **administered** the **submission in the form of simple advice**, indicating that the land settlement office is not the authority having substantive jurisdiction to address the applicant's problem and advised him/her of the place s/he should address (e.g. a court). However, if the application to the land settlement office was submitted in the manner and with the requisites pursuant to the Land Act (Act No. 229/1991 Coll., as amended), then, in order to proceed correctly, the authority should have issued a decision with a statement on dismissal of the application/proposal. Where no decision is issued (or it is issued only based on repeated applications of the applicant, sometimes after as many as ten years after commencement of the proceedings), the Defender must consider this to be unjustified delays in proceedings.

2 / 7 / Construction and regional development

Activities of planning authorities

The Defender organised a professional conference in January 2009 focused on the application of the Building Act. The main objective of the conference was to gain an overview of the problems that were not eliminated through adoption of the new Building Act. At the conference the Defender presented his existing conclusions in the area of public construction law and offered an opportunity for planning authorities to present their views. The Defender intends to organise a mutual exchange of views in the form of a round table meeting also in 2010.

Delivery in zoning proceedings

Since the effective date of the Building Act (Act No. 183/2006 Coll., as amended), the Defender has often encountered complaints about the method of delivery in zoning proceedings through a public decree if a zoning plan or regulatory plan was issued in the territory. There are repeated objections that for the parties to the proceedings, **it is not easy to monitor the official notice board of the authority** which is often located far from the building site and the parties' place of residence. Citizens also point out that **blind or immobile individuals may be placed at a considerable disadvantage by this method of delivery.** The Defender can only refer to the fact that this method is in accordance with the law and planning authorities cannot proceed in any other manner. The Defender also states that in order to provide for the best possible awareness of the public and the parties to the proceedings, the Building Act has stipulated the obligation to publish information on a planned project directly at the future construction site, where the information includes a graphical representation of the planned project or some other source of reference to the architectonic and urban solution of the planned project. In spite of this, it is obvious that the new method of delivery causes difficulties for citizens and the Defender therefore recommended that the Ministry for Regional Development evaluate the positives and the negatives of the chosen legislative solution.

Personnel, material and financial resources for performance of the activities of planning authorities

By inquiring into complaints, the Defender ascertained that inadequate material and personnel resources in some municipalities cause defects in proceedings conducted by the planning authority (especially **inactivity** and **unlawfulness**). The Defender found shortcomings particularly as regards the number of professionally qualified employees of a planning authority required given the extent and complexity of zoning and construction activities. This results in negative interventions into the rights of the parties to proceedings and their interests protected by law. This issue is particularly pressing in suburban development surrounding large settlements, especially near Prague.

The Defender therefore appealed to the management of certain municipal authorities to create **personnel**, but also **material and financial resources for the proper performance of activities of planning authorities**.

Alternative enforcement of a decision

The Defender continued to encounter inactivity of planning authorities in the alternative enforcement of a decision. This involved situations where the authority ordered the owner of a construction maintenance work to undertake necessary structural alterations or remove the a construction, but the owner did not comply with the decision. The authorities claimed that they **lacked financial means for execution**, since the costs incurred during the execution are borne by the municipality, which is the competent planning authority. Special cases involved inactivity related to maintenance work or necessary structural alterations on immovable cultural heritage. The Defender considers this condition to be particularly alarming, since inactivity in these cases may threaten or even cause irrecoverable loss of the heritage. In 2009, the Defender inquired into **the state of non-performed executions in all regions.** Although a slight improvement was noted compared to the preceding years, problems with the financing of executions still persist. The Defender therefore decided to address the Ministry for Regional Development, the Ministry of the Interior and the Ministry of Finance with a request for explanation, since only cooperation of these institutions can contribute to a general improvement in the current situation.

Penalties imposed for unauthorised illuminated advertising installations

The Defender conducted several inquiries concerning unauthorised illuminated advertising and found that the **Building Act does not make it possible to impose a penalty on an entity operating advertising** and the **owner of an advertising structure** for use of an advertising structure at variance with a decision of the planning authority or at variance with a notification. In this respect, the Defender considers that the legislation has a serious shortcoming that should be legislatively remedied through an amendment to the Building Act.

The Defender also considers it suitable to stipulate the obligation of the planning authority to provide for covering of the advertisement (or its disconnection from the supply of electricity) so that it cannot serve its purpose if it is a structure built and used at variance with the Building Act. In addition, an appeal against a decision prohibiting the use of the advertisement structure and advertising installation should not have suspensory effect.

Barrier-free constructions

The Defender dealt with the structural and technical aspects of permitting and use of constructions by people with a disability. These included in particular the permitting of superstructures and structural alterations of completed constructions where the planning authorities did not respect the requirements stipulated in the **barrier-free decree** (Decree No. 369/2001 Coll., on technical requirements providing for use of structures by persons with limited locomotive abilities and orientation, as amended).

The problematic aspect in the application of the barrier-free decree appears to lie in the assessment of what degree it is necessary to insist on compliance with the decree in the performance of structural alterations on certain types of completed constructions, particularly civic amenities and the construction of multi-floor apartment buildings. These are most often constructions located in areas subject to heritage preservation or older constructions where compliance with the requirements of the barrier-free decree would involve considerable expenditure. Difficulties are caused also by the fact that there are a number of organisations and civic associations that represent handicapped people but are usually focused only on groups with a certain disadvantage (for example associations defending only the interests of the blind or partially sighted or only the interests of the deaf). Their comments brought before the planning authority are in conflict and harmonising them is sometimes problematic. This is magnified by the fact that the barrier-free Decree No. 369/2001 Coll. used a terminology different from the Building Act and its further implementing regulations (particularly the general technical requirements for construction).

The Defender therefore **welcomed adoption of the new Decree** No. 398/2009 Coll., on the general technical requirements providing for barrier-free use of structures, which was prepared by the Ministry for Regional Development in cooperation with the organisations defending the interests of the handicapped. It brings an unquestionable benefit in that it uses a uniform terminology as regards the procedures in permitting and implementing constructions and corresponds to the Building Act.

Complaint File Ref.: 3939/2008/VOP/JSV

In permitting constructions, alterations thereof and maintenance work, the planning authority is obliged to respect, in addition to the general technical requirements for construction, the requirements for barrier-free use of structures.

Based on a complaint from an organisation defending the interests of the partially sighted and the blind, the Defender conducted an inquiry concerning structural alterations to roads in Jindřichův Hradec.

The Defender reprehended the Planning Authority in Jindřichův Hradec for permitting structural alterations to local roads at variance with the "barrier-free decree" (Decree No. 369/2001 Coll., as amended). The Defender stated that a planning authority is responsible for ensuring that constructions, alterations to constructions and maintenance work permitted by it correspond to the general technical requirements for constructions including the requirements for barrier-free use of constructions. The planning authority may not relieve itself of this responsibility by obtaining, during planning permission proceedings, a favourable standpoint of an independent professional organisation concerned with the barrier-free use of constructions.

The planning authority in Jindřichův Hradec accepted the Defender's objections and the investor carried out the alterations to the local roads in Jindřichův Hradec in accordance with the requirements of the barrier-free decree.

ČSN standards

The Defender dealt with the issue of the accessibility of ČSN standards. It is stated in the Building Act that if the Act or some other legal regulation issued for its implementation stipulates the obligation to follow a technical standard (ČSN, ČSN EN), that **technical standard must be publicly accessible free of charge.** There was a situation for a certain time after January 2007 where Building Act No. 183/2006 Coll. was already effective, but the implementing regulations for it came from previous legislation. These implementing regulations referred to a number of technical standards that were not publicly accessible free of charge. The Defender also asked during the inquiry whether it is admissible at all that legal regulations generally refer to technical standards and stipulate the obligation to follow them without any exceptions. Technical standards should be recommendatory by their nature and a different approach should always be possible insofar as it preserves the basic requirements for the safety and quality of products or constructions.

The Defender stated in this respect that the **principle of the free public nature of binding rules of conduct are some of the essential elements of a democratic legal state** and, thus, it is not limited only to the specific text of Section 196 (2) of the Building Act ["if this Act or some other legal regulation issued for its implementation stipulates the obligation to follow a technical standard (ČSN, ČSN EN), that technical standard must be publicly accessible free of charge"]. The Defender also believes that if the Ministry for Regional Development prepares legal regulations and stipulates in them the obligation to follow a technical standard, it should do so in a manner, which will take into consideration the fact that the legal regulation should set an objective, which however, may be achieved by various means. This means that a demonstrable use of the relevant technical standards relieves the addressee only of the obligation to further demonstrate compliance with the requirements for the protection of health and safety defined in the legal regulation or an annex thereto. If the addressee uses a different procedure, s/he becomes obliged to demonstrate that the procedure results in compliance with the basic requirements for the protection of health and safety, but s/he may achieve the objective **by alternative means**.

The Defender also considers that the stipulation of the obligation to proceed exclusively according to a technical standard is at **variance with the obligations of the Czech Republic towards the European Union**, specifically Arts. 28 to 30 of the Treaty establishing the European Community

concerning the free movement of goods within the internal market (Art. 34 to 36 of the Treaty on the Functioning of the European Union on the basis of the Lisbon Treaty).

Noise burden

Proceedings on constructions are closely related to the issue of the noise burden associated with construction activities. The Defender therefore organised a professional conference in April 2009 on the theme of noise burden. The main objective of the conference was to gain an overview of the greatest problems in this area. The Defender also presented his existing legal conclusions in the area of protection of public health against noise and listened to the relevant comments from the representatives of state administration.

On the basis of the results of the conference and dealing with other cases concerning the threatening of public health by noise, the Defender published in electronic form another document in the series of **collections of his standpoints**, this time on "**Noise Burden**". The collection was published in a print version in January 2010.

The objective of the collection is to acquaint the professional and lay public with the Defender's legal conclusions and case law relating to the protection of public health against noise.

Noise from restaurants

The Defender again noted a number of complaints where citizens complained about noise from music performed in restaurants and bars as well as in public areas. After inquiring into several cases, the Defender stated inactivity or other maladministration by planning authorities. In other cases, there is still a **competence conflict between the bodies of public health protection and planning authorities**, where one authority refers the complainant to the other authority, stating that they are not substantively competent to deal with noise burden.

The Defender's view in this matter is that if the regional health authority learns that the noise burden from premises that were not permitted and approved for organising musical performances has not decreased and persists even after the matter was dealt with by the planning authority, it is inadmissible that the regional health authority merely refers the complainant to the planning authority again, claiming a lack of competence. Instead, it must consider measures for remedy of the defective state of affairs.

Heritage preservation

The Defender found that the bodies of state heritage preservation make inadequate use the powers conferred on them, thereby indirectly enabling the owners of cultural heritage to neglect their obligations (particularly the obligation to care for the preservation of cultural heritage and maintain it in a good condition). The bodies of state heritage preservation have the power to **order** the owner of heritage to **perform a specific measure for the preservation of the heritage** within the set deadline. If the owner of the cultural heritage does not perform the imposed measures, the body of heritage preservation may decide that the measures for preservation of the heritage will be performed at the owner's cost.

However, the Defender's experience suggests that the **bodies of heritage preservation do not impose measures** directly aimed at preserving heritage and **do not perform alternative enforcement of imposed measures.** Thus, in practice, the exercise of heritage preservation is narrowed down mainly to issuing binding standpoints and decision-making on penalties for non-compliance therewith. In some cases this approach thwarts the objective of heritage preservation, which is to

preserve cultural heritage for the generations to come. Thus, effective protection of cultural heritage in a situation where the owner does not fulfil his/her obligations is not ensured.

2 / 8 / Public routes

The geometric plan as part of a decision on the existence of a purpose-built road

The Defender has, in the past, managed to get the Ministry of Transport to accept that highway administrative authorities should issue on request **declaratory decisions on the existence of a purpose-built road** pursuant to Section 142 of the Code of Administrative Procedure. This resulted in a guidance document distributed to the regional authorities.

In a case dealt with in 2009, the Defender opined on the question of whether such a decision should include a geometric plan that would accurately specify where the road is located. This was a response to the opinion of the Regional Authority of the Central Bohemian Region that a decision declaring the existence of a road must always include a geometric plan depicting the accurate route, shape and width of the road; otherwise, the decision is vague.

Referring to the case law of the Supreme Court of the Czech Republic concerning the definition of easements, the Defender stated that a **geometric plan may constitute part of the decision; however, this need not always be so.** If the aforementioned parameters of the road can be described in sufficiently definite words, the geometric plan is not required.

Necessary communication requirement

Highway administrative authorities are beginning to be familiar with **assessment of the four elements** required by the constant case law that must be fulfilled in order to consider **that a road exists**. (The following requirements are concerned: (1) a transport route obvious in the terrain, (2) access to certain real estate or access for the purpose of property management, (3) the existence of consent, including implicit, of the owner of the plot of land for public use of the route, (4) the existence of a necessary communication requirement).

Within his inquiries, the Defender attempted to define the aspects that must be taken into consideration by highway administrative authorities in assessing necessary communication requirement, where these must be assessed in their mutual relationships. By taking into account all aspects, the highway administrative authority may reach a fair conclusion on the **necessary communication requirement with respect to a specific route**, which is a prerequisite for stating that a publicly accessible purpose-built road is concerned. In the Defender's opinion, the authorities should particularly take into account: (1) the length of the route under assessment and the length of the alternative access, (2) the quality of both routes, their surface and gradient, (3) necessity of alterations of the plots of land or constructions that are made accessible and (4) the type of construction or property the accessibility of which is dealt with.

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

Prejudice of the members of a body dealing with offences

There have recently been an increasing number of cases where the personnel of administrative authorities call a municipal or state police patrol to manage problematic clients (often accused persons and other persons involved in the hearing of an offence). If a **service action** indeed happens, it could be expected that the body dealing with offences receives a notification of offence (as a rule, concerning the person against whom the action was performed, but sometimes also the municipal police officers or police officers). The Defender considers that **if the offence is to be heard by the body dealing with offences from the same administrative authority** where the alleged offence occurred, **it is not reasonable to expect** that the personnel of the body dealing with offences will **proceed impartially** towards the person on whom the action was performed and towards the municipal police officers or police officers who performed the action. The Defender recommends submitting a proposal to the superior administrative body that it authorise some other substantively competent subordinate body to hear the case and make a decision on it due to the prejudice of all members of the body dealing with offences.

Duty to provide advice on "offences based on proposal"

The Defender dealt in detail with the division of roles between the police body and the administrative authority in providing **advice** to those concerned in **"offences based on proposal"** (Section 4 (2) of the Code of Administrative Procedure in conjunction with Section 68 of the Offences Act). The Defender stated that the provision of advice to the parties to offence proceedings is mainly the role of the administrative body competent to conduct the proceedings. If, when proceeding pursuant to Section 66 of the Offences Act (suspension of a case), the administrative body refers only to the official record of the Police, suggesting that the potential claimant has been advised of the option to lodge a proposal, but the record is not signed by that person in his/her own hand, the Defender considers that maladministration is involved. **The requirements for reasonable advice are fulfilled particularly by advice in written form with the appropriate content** or the handing over of a printed form confirmed by the relevant person with his/her signature. **Advice provided orally** by the Police of the Czech Republic in the field (and a record thereof) **is not sufficient** for further procedure of the administrative body in the proceedings.

The Defender communicated on this matter also with the Police Presidium of the Czech Republic and agreed with him that the police body will in justified cases advise persons who appear directly at a police station of the option to lodge a proposal for hearing the offence. This will be done using a form (a written record on advising the person of the "offence based on proposal"), which is directly available in the information system of the Police of the Czech Republic. The person concerned should confirm receipt of the form by signature in his/her own hand. In addition, the **form was supplemented** based on the Defender's proposal **with information on the consequences of failure to lodge the proposal within the set deadline** (suspension of the matter and the impossibility of hearing it within offence proceedings) and, particularly, of the potential order to pay the costs of the proceedings in cases where the proceedings are discontinued pursuant to Section 76 (1) (a), (b), (c), (j) of the Offences Act.

2 / 10 / The Environment

Expert reports

In proceedings connected with the protection of the environment and its individual components, the Defender often deals with the question of the quality and subsequent evaluation of expert reports. He encounters cases where different expert reports, entirely identical as to the specification and subject of assessment, brought diametrically different conclusions. The Defender repeatedly encounters a situation where authorities refer, without further evaluation, to the conclusions of an expert report and to the authority of the expert that they are not authorised to question. The Defender therefore always emphasises that an **expert report is only one of the underlying documents in proceedings** and it is subject to the principle of free evaluation in the same sense as other obtained evidence, i.e. it is necessary to make it subject to at least logical evaluation and comparison with other evidence.

Waste management

The Defender considers it necessary to point out once again that an amendment to legislation that would make it possible to prevent and more effectively deal with illegal waste management has not yet been adopted. Thus, a situation persists where **records in the sector of waste management do not fulfil the role of a means enabling detection of discrepancies in the flow of waste** since they are not linked with the records of transfer of hazardous waste and records of other hazardous substances (pharmaceuticals, dependency producing substances and chemical substances). The Defender also notes that there is a lack of regulation of the conditions for business in the area of management of hazardous waste that would ensure financial means immediately available and utilisable when it is ascertained that lives, health or the environment were put at risk as a consequence of the activities of a party managing waste (whether intentionally or otherwise).

Reclamation of a landfill vs. illegal deposition of waste

The Defender has again encountered cases where **under the cover of reclaiming, additional waste was illegally delivered** to landfills intended for reclamation**.** This was not detected in time, particularly, in the cases under inquiry, due to a lack of coordination in the procedures of planning/water-law authorities and authorities in the area of waste management. While planning permission or water-law permission (the latter to the extent to which the reclaiming was concerned with securing the landfill in water management terms against the leakage of defective substances into groundwater and surface water) clearly prohibited the deposition of additional waste, the personnel of the bodies in charge of waste management performing an inspection were satisfied with the explanation from the operator of the landfill that the delivered waste was part of the reclamation project. In his reports, the Defender appealed for consistent checking of these allegations and requesting complete underlying documents from the competent planning authority, including the reclamation plan. Where maladministration is ascertained, both the authorities in charge of waste and planning authorities are authorised to impose remedial measures (in the part where the planning permission is breached, the planning authorities must commence proceedings on the removal of construction performed at variance with the issued permission).

Environmental Impact Assessment (EIA)

In the area of environmental impact assessment, the Defender encounters cases of non-compliance with the requirements for the assessment of impacts in extension of activities already operating or a change in the technology used. In some cases, the **activities of an entrepreneur** that

are not subject to environmental impact assessment **reach, through gradual changes, an extent that is already subject to the assessment of impact.** The lacking process of environmental impact assessment leads to a situation where the specific operational activity is not assessed in all its impacts and only individual characteristics of the operation are evaluated within the individual proceedings conducted by the administrative authorities, e.g. noise levels or authorisation to operate a source of air pollution. However, an isolated evaluation of individual characteristics is not a full substitute for environmental impact assessment, including lack of participation of the public in the process.

Mining legislation

The Defender referred already in previous annual reports to the persisting problems associated with mining activities, the procedure of the state mining administration and mining organisations that adversely affect the rights and obligations of citizens living in the territory and landscape affected by mining. It can be stated that the applicable legislation, which stipulates the conditions, rights and obligations for mining activities and geological works, concentrates on the relationships between mining or surveying organisations and the state. **The principles of protection of ownership rights, transparent process and participation in decision-making have not been fully implemented in this area to date.** Thus, problems persist as regards participation in proceedings on permitting mining and neglect of the secondary adverse impact of mining on health and the environment.

In previous annual reports, the Defender also recommended that the Chamber of Deputies request the government submit a draft amendment to the Mining Activities Act that would impose an obligation on mining organisations to submit agreements on the settlement of conflict of interest also with the owners of the affected premises in cases where the latter request this in writing. **The legislation has not been amended to date.**

Complaint File Ref.: 5675/2007/VOP/JPL

Where it is found that the expert reports that were part of the underlying documents for the decision of a mining authority permitting extension of a mining area were based on erroneous primary data and erroneously determined groundwater levels, this constitutes grounds for renewal of proceedings.

The Defender inquired into a complaint through which the owner of a plot of land opposed to the decision of a district mining authority and, subsequently, the Czech Mining Authority against extension of a mining area. The complainant referred, among other things, to adverse impact of the mining activity (the consequences of undermining of properties). It followed from the decision of the district mining authority that the mining authority had dismissed certain objections of the owners of the properties on the grounds that according to the assessment of hydrogeological properties, the anticipated subsidence would not endanger the terrain by flooding or waterlogging.

The Defender opened an inquiry, within which he had an expert standpoint drawn up aimed at assessing whether the conclusions of the expert reports used by the bodies of mining administration were based on sufficiently exact underlying documents, whether the evaluations were based on the claimed content of the assessment and whether the interpretation of the expert reports indicated in the authorities' decisions were fully in accordance with the conclusions and recommendations of the reports.

According to the Defender's findings, the expert reports and reports that were the underlying documents for the decisions of the bodies of mining administration had used erroneous primary data and erroneously determined groundwater levels. Furthermore, methodological and conceptual shortcomings appeared in the interpretation of the data. According to the Defender, the bodies of mining administration could not make qualified decisions on the objections of the parties to the proceedings regarding the impact of the future mining area, including a change in groundwater level, on the parties' property. In general, reliability of the results of the process of decision-making by bodies of public administration can be considered to be in the public interest. The Defender stated that the above-mentioned findings suggested unreliability of the underlying documents for the administrative decision, which constitutes grounds for renewal of proceedings on the delimitation of a mining area.

Given that the Czech Mining Authority refused to renew the proceedings, the Defender is considering further steps (informing the government).

2 / 11 / The work of the prison service

Overcrowding of prisons, numbers of prison personnel

The Defender has long perceived the situation in prisons as unsatisfactory and he has informed the Chamber of Deputies of this fact in his annual reports since 2006. **Inadequate capacity of prisons** and their **overcrowding** is perceived as the most serious issue. The Defender also points out that another decrease in the number of personnel of the Prison Service of the Czech Republic (hereinafter the "prison service") who provide for the actual service of imprisonment may have an adverse impact on the fulfilment of the very purpose of the service of imprisonment.

Relocation to a different prison

As in previous years, the Defender was addressed by convicts serving imprisonment with their objections against dismissal of a **request for relocation to a different prison** (the requests were most often justified by an effort to make visits by relatives less complicated). Given the uneven distribution of prisons in the Czech Republic, the complaints most often related to dismissal of relocation to a prison in Moravia where there are substantially less prisons than in Bohemia. Apart from this acceptable reason, the Defender considers that prisoners are also not relocated due to the aforementioned adverse phenomenon of worsening capacity situation in prisons in the Czech Republic. This factor also significantly contributes to the fact that a prisoner cannot be relocated even in justified cases.

In requests for relocation that were not satisfied, the Defender has several times encountered **inadequate justification by the head of the prison** to which the convict wished to be relocated or a situation where the **complainant was not demonstrably acquainted with the justification of the dismissal of the request.** For this reason, the heads of all prisons in the Czech Republic were addressed, with emphasis on the practical importance of demonstrable acquaintance of the applicant with the reason for dismissing the request (including in cases where the application is dismissed due to low capacity).

Disciplinary punishments

Imprisoned individuals also repeatedly addressed the Defender with **reservations against disciplinary punishment.** The objections were to punishments for minor disciplinary offences (the complainants considered the disciplinary punishments to be unreasonably harsh) and the Defender also encountered objections against disciplinary punishments imposed on the basis of positive results from urine tests for addictive substances, particularly methamphetamine (i.e. pervitin). As in previous years, convicts objected to the imposition of a disciplinary punishment as such, denying the conduct in question. The disciplinary punishments, about the imposition of which the convicts complained, represent a wide range of misconduct at variance with the internal rules of prisons or against the rules of the service of imprisonment (holding a mobile telephone, improper conduct, failure to follow an instruction of a member of the prison service, or the detection of prohibited items, cash, etc.). **The inquiry performed proved the complaint unjustified in approximately 85% of cases.**

Use of telephones

The Defender encountered disparities in the conditions of prisoners who wished to make a telephone call with their relatives in a language other than Czech (namely Romani – see the following case.

Complaint File Ref.: 464/2009/VOP/MČ

I. Direct tapping of a telephone call of an imprisoned convict is possible only exceptionally according to the existing legislation; as a rule, the call should be controlled by means of a recording.

II. The telephone call of a convict serving imprisonment may be interrupted if it gives rise to suspicion of a crime being prepared or committed. The very fact that the convict uses a language other than Czech does not give rise to a suspicion of a crime being prepared, particularly if the convict communicates with a pre-school-age child. Interrupting the calls of convicts who use a language other than Czech constitutes unlawful unequal treatment, i.e. discrimination, in comparison with convicts who use Czech.

A complainant serving imprisonment in the Horní Slavkov prison stated that he had not been allowed to use the Romani language in a telephone call with his pre-school-age daughter and the warder ended the call. The complainant stated that his daughter could speak only the Romani language. It followed from an interview with the head of the service of imprisonment in the prison concerned that when a convict uses a language other than Czech while the personnel of the Prison Service are aware that he also speaks Czech, the convict is advised that he should use Czech. Otherwise, his call is ended.

A telephone call of a convict with his/her family is a specific realisation of the right to family and personal life of a convict in the sense of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The exercise of the right to personal and family life is partly limited by the fact that the convict is imprisoned. However, no person may be entirely deprived of a fundamental right or basic freedom in a legal state; instead, it may be limited under defined circumstances (the limitation must be in accordance with the law, follow a legitimate objective and meet the condition of necessity). If one or several of these conditions are not met, an illegitimate infringement of the convict's right is concerned. In making a decision on whether a convict's telephone call should be allowed, disallowed or ended, an employee of the Prison Service is bound by the conditions that are stipulated, on statutory basis, by the decree publishing the rules of the service of imprisonment (De-

cree No. 345/1999 Coll., as amended). The latter stipulates in Section 25 (3) that "if the content of the telephone call gives rise to suspicion of a crime being prepared or committed, the Prison Service shall... in case of direct tapping, interrupt the call and report the event".

In the case concerned, the complainant's call was not interrupted based on suspicion of a crime being prepared, but rather because the ward did not understand the call and he therefore preventively interrupted it. However, this procedure is not in accordance with Art. 2 (2) and (3) (2) and Art. 7 of the Charter of Fundamental Rights and Basic Freedoms and with Art. 3 of the European Prison Rules. It also follows from the situation in the case that interrupting calls to convicts who speak a language other than Czech, for example Romani, gives rise to unlawful unequal treatment in comparison with convicts who speak Czech, namely on the basis of Art. 3 (1) (prohibition of discrimination) in conjunction with Art. 7 of the Charter of Fundamental Right sand Basic Freedoms and Art. 14 (prohibition of discrimination) in conjunction with Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Discrimination is an act or omission where one person is treated less favourably than another in a comparable situation on grounds that are prohibited by law and, simultaneously, where such an act does not follow a legitimate objective or is being achieved using inappropriate means. In the complainant's case, but also in the potential cases of other Romani convicts, the prohibited discriminatory grounds were language or ethnic origin.

The Defender acquainted the head of the prison with his findings. The latter did not agree with the Defender's conclusions and the problem of interrupting calls will therefore be discussed with the general directorate of the Prison Service.

2 / 12 / Transport

Noise from air transport

Noise levels from air transport are a persisting and intensifying problem. For example, the Defender received complaints about noise from the training of the air force of the Army of the Czech Republic and inquired into the possibility of organising training so as to mitigate the burden on public health. The possibility of **eliminating these negative phenomena are limited by the efficiency of military machinery, the objectives of the training** (low level flight training) and **territorial limits** (it is impossible to place all training in military areas as these are too small). In spite of this, the Defender requested documents from the Ministry of Defence on the specific steps taken by the Army of the Czech Republic in reducing the impact of flight training on civilian population. The Defender continues to monitor this issue.

The Defender considers that more could be done in the area of reducing the impact of civil air transport. The Defender believes that a better organisation of flight transport and stricter limitations than those that exist could reduce the impact of civil aviation operations, particularly at night, on human health.

Transport infrastructure

The Defender's findings from inquiries into large transport investment plans (such as, for example, linear transport infrastructure) still suggest problematic public administration procedures and a certain degree of "chaos" prevailing within approval procedures. The Defender repeatedly points out that authorities **are inconsistent in providing for the required rights to all properties required**

for the implementation of these complicated construction projects. The impact on the smoothness of traffic due to inconsistent preparation of a specific investment plan (particularly unreasonable prolonging of proceedings) are considered as very serious by the Defender.

2 / 13 / Taxes, fees, customs

Overly specific tax regulation

The Defender repeatedly encounters cases of taxation affected by the consequences of the case-based nature of current tax legislation. This results in various forms of injustice that cannot be prevented even by constant amendments to legislation. **An example of tax-related injustice consists in the taxation of income resulting from the sale of a co-ownership share in an apartment building, to which is attached the use of one of the flats.** Although the legislation aims at stipulating tax relief on income from the transfer of property through which the taxpayer provides for his/her housing needs, the case concerned cannot be included under any subparagraph of Section 4 of the Income Tax Act (Act No. 586/1992 Coll., as amended) intended to fulfil the legislature's intention. Although the income is comparable in its nature with income exempt from tax, the legislation (due to its case-based nature) does not allow for exemption in the sale of a co-ownership share.

Taxation of non-existent amounts

The Defender must state in spite of repeated correspondence with the Minister of Finance that the Ministry as the organisation responsible for tax legislation does not intend to address the **unsustainable taxation of non-existent amounts** occurring in relation to **employees falling within foreign compulsory insurance systems**. The taxable amount of such employees is increased by premiums that would otherwise be contributed by the employer into the Czech system. Foreign premiums paid by employers are in most cases lower than Czech premiums; it therefore holds in general that amounts corresponding to a non-existent contribution obligation of the employer, or more specifically, amounts corresponding to the difference between the actual premiums contributed by the employer into the foreign insurance system and fictitious Czech premiums become subject to taxation. The Ministry argues that there is no discrimination at all, referring to the identical taxation of gross salary. Gross salary itself is indeed taxed identically (about 20%); however, the fact remains that if the tax rate in 2009 is 15% of the tax basis, taxation should not exceed this rate. This in fact happens in the described case through taxation of non-existent amounts. The Defender considers this situation to be untenable and discriminatory (also in comparison with the taxation of other types of income).

Claiming of public-law payments

The Defender does not question the option of administrative authorities under certain circumstances not to claim public-law receivables using their own resources and to lodge a proposal for ordering distrainment or enforcement of a decision by a court. However, the Defender must condemn the practice of using attorneys-at-law for lodging such proposals. The Defender considers that an **administrative authority which is bestowed with the power to perform distrainment on its own does not need legal assistance in drawing up a proposal even during further proceedings**. Thus, the Defender does not consider the legal fees and expenses to be reasonably expended in the described cases. Given that the Defender is not authorised to intervene in distrainment proceedings and proceedings on the enforcement of a decision, he recommends that the liable parties defend themselves against the imposition of the duty to reimburse costs in such proceedings.

Entry to a customs area

The Defender also dealt with the issue of fees for entry to the customs area where proceedings are held on the granting of customs-approved treatment. It was ascertained in a specific case that **participation in customs proceedings** (entry of a vehicle with goods) was **permitted only after paying a fee to the owner of the plot of land** (a private company) **on which the customs area is located.** The Defender concluded that access to the customs authority was limited as a result of the absence of an agreement on the specific conditions of access to the customs area. Thus, the payment for entry, although it was not collected by the customs authority, can be regarded as an administrative fee of its sort as it is a precondition for access to the customs area.

2 / 14 / Foreigner-related agenda

Websites of embassies

In the past year the Defender concentrated on the availability and quality of information on the visa process provided by consular authorities. Given that the Internet is currently one of the most frequent methods for the provision of information, the Defender concentrated on the **contents of consulates' websites.** In this respect, he ascertained a number of serious shortcomings: some websites of consulates were not available at all, there were outages or the information on visa issues was incomplete or obsolete, and even basic information was often missing.

The Defender acquainted the Minister of the Interior and the Minister of Foreign Affairs with these facts at a joint meeting in the Office of the Public Defender of Rights. The Ministers found the Defender's comments justified and expressed preparedness to participate in resolving the issue. They also acquainted the Defender with the measures their Ministries had implemented in this matter so far.

In mid-2009 the Defender noted a significant **positive shift in the new design and content of the website** operated by the Ministry of Foreign Affairs. The website of the Ministry currently includes a separate section entitled "Information for Foreigners" with basic information. In addition, the website is interlinked with the relevant website of the Ministry of the Interior. Information on the visa process is to be provided in several language versions in the future (only the English version is available at present).

The Defender also sees positively the launching of the pilot project of the electronic registration system for lodging an application for a visa to the Czech Republic – VISAPOINT, which should increase the effectiveness and comfort of the visa process. The VISAPOINT system is currently run at the embassies in Albania, Belarus, Bosnia and Herzegovina, China, Georgia, Kazakhstan, Mongolia, Serbia, Thailand, Uzbekistan, Vietnam, Moldova, Turkey, Macedonia and the Ukraine.

Visa process

The Defender ascertained in connection with inquiries into complaints concerning the visa process that the procedure of consular authorities does not always conform to the requirements following from the rules stipulated by the law of the European Communities for the free movement of EU citizens and their family members (Directive 2004/38/EC). In the Defender's opinion, **an application for a visa lodged by the family members of an EU citizen represents a qualitatively new situation**. In contrast to other foreigners, the family members of EU citizens **are entitled to the granting of a visa**. Entry to the territory of the Czech Republic may be denied only in expressly

specified cases (see Art. 27 (1) and Art. 35 of the Directive) and on the basis of the law. The possibility of administrative and court review of a decision on the non-granting of a visa represents a significant deviation from the general regulation.

The Defender also inquired into shortcomings in the conduct and recording of interviews in the visa process. As a result of the inquiry into a complaint which pointed out a shortcoming in the proceedings on the granting of a visa for a stay of up to 90 days (a short-term visa), several measures were taken that are seen by the Defender as a positive shift towards further deepening of the principle of legality in this type of the visa process. In early 2009, the then Deputy Minister of Foreign Affairs, PhDr. Jan Kohout, informed the Defender that he had instructed all embassies through a methodological instruction to **consistently complete the relevant columns of the visa application form** (date of submission, drawn up by, additional documents, type of visa, date of denial/granting of the visa with signature of the competent officer, etc.).

Deportation of family members of EU/CR citizens

Given that the Defender has in the past dealt with shortcomings in the administrative deportation of family members of Czech citizens and citizens of member states of the EU, he welcomed **updating of the methodological instruction of the Head Office of the Foreign Police** concerning the **relationship between administrative deportation and the requirement for appropriateness of an infringement of the private and family life of a foreigner**. The Defender appreciated that in addition to the case law of domestic administrative courts, the methodological instruction also took into account the relevant case law of the European Court of Human Rights and the Court of Justice of the European Union (formerly the European Court of Justice). In relation to foreigners from third countries, it transparently presents criteria for assessment of the appropriateness of deportation based on two decisions of the European Court of Human Rights, Boultif v. Switzerland, (application No. 54273/00), and Ünner v. the Netherlands (application No. 46410/99). In particular the nature and seriousness of the act committed, the length of the foreigner's stay in the territory of the Czech Republic, etc. are to be taken into account. It is emphasised in the methodological instruction in relation to EU citizens and their family members that the public policy exception represents derogation from the fundamental principle of freedom of movement for persons which must be interpreted strictly. The methodological instruction further details the criteria set up by the key case law of the Court of Justice of the European Union (e.g. judgments in Case C-48/75 Royer of April 8, 1976, C-459/99 MRAX of July 25, 2002 and C-60/00 Mary Carpenter of July 11, 2002).

The Defender has also long endeavoured to improve the legal status of foreigners on whom administrative deportation was imposed in the past, but who have created **family bonds** in the territory of the Czech Republic (often over a period of 10 years and more) and, thus, reasons preventing the leaving of the territory in the sense of Section 179 of the Act on the Residence of Foreigners were found with respect to them within the proceedings under Section 120a (2) of the Act on the Residence of Foreigners. In practice, these include particularly husbands/wives of the citizens of the Czech Republic/the EU whose departure would be at variance with the right to protection of personal and family life or the right to free movement of family members of EU citizens. The Defender sees the problem particularly in the fact that on the one hand, these foreigners **are not obliged to leave the territory of the state**, but on the other hand they may stay in the territory only on the basis of a visa for permission to remain (or, subsequently, a long-term residence permit for the same purpose) and it is **impossible for them to obtain any stronger residence status** (temporary and subsequently permanent residence). The granting of asylum or complementary protection remains the only legal way of achieving expiry of the deportation. However, it is an uncertain way for foreigners and systemically unsuitable for similar cases.

The Defender is convinced that if reasons preventing the leaving of the territory are found in a family member of an EU/CR citizen, the Act on the Residence of Foreigners should enable such person to **benefit from the right to free movement of family members of EU citizens** (the case law of the Court of Justice of the European Union is also important in this context, particularly the most recent in case C-127/08 Metock of July 25, 2008). In relation to other foreigners, the Act on the Residence of Foreigners should enable expiry of deportation also in the case of a stay based on a visa/long-term residence for the purpose of the permission to remain. The above-described condition should be remedied by the prepared 2010 amendment to the Act on the Residence of Foreigners.

Unequal access of the family members of Czech citizens to public health insurance

As for the family members of Czech citizens coming from third countries, the Defender considers that they are **unjustifiably disadvantaged** (during their temporary stay in our territory) **in comparison with other citizens of the member states of the EU staying in the Czech Republic**. Since December 21, 2007 (when Act No. 379/2007 Coll., amending the Act on the Residence of Foreigners, came into effect), a family member of a Czech citizen (for example a wife of a Czech citizen who is a citizen of the Ukraine) may no longer apply for permanent residence immediately after receiving the status of a family member, but only after two years "... of continuous temporary residence in the territory, if s/he has been for at least one year a family member of a Czech citizen who is registered for permanent residence in the territory, or a family member of a citizen of some other member state of the European Union to whom permission for permanent residence in the territory has been issued" (Section 87h (1) (b) of the Act on the Residence of Foreigners). In general, a family member of a Czech citizen may stay in the territory during the initial two years only on the basis of **permission for permanent residence** and **s/he does not have access** (except for employees) **to the system of public health insurance during this period**. Thus, such person depends on commercial health insurance, with all its risks and drawbacks during these initial two years.

In contrast, **a family member** (a citizen of a third country) **of some other citizen of an EU member state carrying out gainful activities in the territory of the Czech Republic, who also stays in our territory on the basis of a permission for temporary residence, participates in the system of public health insurance** (for example a Ukrainian national who is the wife of a Polish national employed in the Czech Republic). During the period when a citizen of the EU who provides for the maintenance of his/her family members carries out gainful activities in the Czech Republic, the dependent persons are not obliged to pay insurance into the system of Czech health insurance. On the basis of Council Regulation (EEC) No. 1408/71, these persons are entitled to healthcare both in the Czech Republic and in the country where they have their place of residence. In other words, insurance premiums for the family members of EU citizens (except for the family members of the citizens of the Czech Republic), who meet the criteria of Section 7 (1) of the Public Health Insurance Act (Act No. 48/1997 Coll., as amended) are paid by the state. The Defender is convinced that **the status of family members of citizens of the Czech Republic should be equalised with the status of family members of other citizens of the EU** and that there are no compelling reasons for a difference in treatment of the two categories of foreigners in the area of access to public health insurance.

Health insurance of foreigners from third countries

As regards foreigners from third countries (except for citizens included in the system of public health insurance, i.e. particularly employees), the Defender sees the most serious shortcomings in their exclusion from the system of public health insurance. In these people, the criterion of the

length of the foreigner's stay in the territory and the degree to which his/her family members contribute to the covering of the costs of healthcare are not taken into consideration. Thus, the same approach is taken to a foreigner who stays in the territory for the first year on the basis of a visa for a stay in excess of 90 days to unite the family and to a person who has been staying in the territory for the same purpose for five years on the basis of a long-term residence permit. This applies particularly to children and other family members of foreigners staying in the territory on the basis of a long-term residence permit for the purpose of employment. These **must use commercial health insurance,** which covers a smaller range of healthcare than public health insurance, **there is no legal entitlement to it** and commercial health insurance companies refuse to conclude the corresponding health insurance with many foreigners (particularly individuals with long-term health problems and individuals over the age of 70).

This condition is **at variance with the Updated Strategy of Integration of Foreigners in the Czech Republic** which identified already in 2005 the "impossibility of participation in the public system of health insurance for third country nationals or their family members (particularly children)" as one of the main obstacles in the area of social and economic integration.

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

The need for change in the existing concept of permanent residence

The Defender has, over a long period, dealt with the issue of permanent residence; he therefore organised a round table meeting in September 2009 with the representatives of the Ministry of the Interior, regional authorities, municipalities and the Office for Personal Data Protection. **According to the applicable legislation, data on the place of permanent residence of citizens need not correspond to their actual place of residence.** It is alarming, for example, that as of January 1, 2009, as many as 164,891 people were registered at reporting offices and the number continues to increase. **The regulations using the term "permanent residence" for stipulating various rights and obligations anticipate that the citizen has his/her registered office at the place where s/he actually stays.**

The Defender shares the view of the participants in the round table meeting that the significance of permanent residence will drop in the e-government era, particularly as regards the determination of local competence. The Defender continues to insist on his recommendation to the Chamber of Deputies for 2008 that it request the Government to perform a comprehensive analysis of the laws that refer to the institute of permanent residence and subsequently submit draft amendments to the laws that use the institute of permanent residence for stipulating rights and obligations.

Reporting a change in the place of permanent residence

It follows from the Defender's findings that authorities generally take acceptance of a report on a change in the place of permanent residence informally, particularly as regards the procedure in the elimination of shortcomings in the submitted documents. In these cases, authorities should request citizens (ideally in writing) and make notes on these acts in the registration cards (Section 18 (2) of the Act on Records of the Population). In practice, the citizen is requested only orally and there is no record of his/her visit to the authority. Thus, the Defender encounters cases where citizens attempting to register a permanent residence repeatedly appear at the reporting office and the residence is still not recorded. **If a reporting office did not accept notification and did not issue a decision on non-registration of permanent residence** (Section 10 (9) of the Act on Records of

the Population), against which these citizens could defend themselves by appeal, **maladministration is involved**.

The Defender points out that compliance with the statutory procedure (making a request for elimination of shortcomings within the set deadline or issuing a disapproving administrative decision if the shortcomings have not been eliminated) is a primary protection of citizens against the arbitrary conduct of the authorities. At the same time, this **strengthens the principle of legality in the exercise of state administration** and guarantees more effective protection of the right to choose a place of permanent residence.

2 / 16 / The right to information

The Defender has repeatedly encountered **non-provision of information on state inspections** and the **administrative offences of entrepreneurs ascertained** within them, particularly from the administrative authorities within the competence of the Ministry of Industry and Trade. These cases were not unique, but rather show a systematic failure to provide this type of information. According to the Defender, there are no legal and substantive grounds for such an information embargo.

The provision of information is regulated by the Act on Free Access to Information (Act No. 106/1999 Coll., as amended), which expressly tasks the liable party, in Section 11 (3), with providing "information produced through its activities" in the fulfilment of tasks within inspection, supervision, oversight or similar activities. The content of inspection protocols created by the personnel of authorities in performing inspections, as well as information on penalties, represents information produced directly through official activities **that should be provided at anyone's request**.

2 / 17 / Consumer protection

Unfair practices in presentation events and shopping tours

The Defender repeatedly encountered complaints regarding the practices of sellers within "presentation and shopping tours". The problem of unfair practices occurring during various presentation events and tours consists in the fact that they occur mainly in oral form in the pre-contractual phase and there is no written document on them.

The Defender acquainted the Czech Trade Inspection Authority with his findings. He was subsequently informed that **inspectors had increased the number of inspections concentrating on this type of business** already in 2009. The inspectors take part in the entire event among the public and subsequently, in administrative proceedings, they deal with the unfair practices which they ascertained on the spot. The Trade Inspection Authority will continue these thematic inspections in 2010 at the Defender's request.

Unsolicited consignments

This year the Defender again encountered requests for assistance from citizens who were victims of aggressive business practices in the form of sending unsolicited consignments from abroad and subsequent claiming of the "purchase price". In this respect, the Defender dealt with the options of Czech authorities to punish a party that provides for the supply of goods for a foreign business entity where this activity corresponds to the elements of aggressive business practice.

Complaint File Ref.: 1979/2009/VOP/DS

Goods delivered to a consumer without an order need not be paid or returned to traders from the European Union as well as traders with their registered office in the Swiss Confederation.

The Defender was addressed with a request for help by a consumer to whom a Swiss business company had delivered goods (socks) that he had not ordered in any way. Third parties hired by the Swiss company had subsequently sent reminders and claimed payment by threatening with court proceedings.

The Defender advised the complainant of the Czech legal regulation contained in Section 53 (9) of the Civil Code, which frees consumers from the obligation to return unsolicited performance (goods sent without an order directly to a specific consumer). Goods delivered in this manner need not be paid as no contract (written, oral or implicit) was concluded between the consumer and the supplier. A similar legal regulation applies in the Swiss Confederation where the business company had its registered office. However, the Defender emphasised that it must be evaluated whether an order by telephone was made within the marketing strategies of some sellers.

The Defender found that from the viewpoint of public law, these aggressive practices should be combated not only by the Swiss Confederation where the seller has its registered office, but also by the Czech Republic where the goods are delivered ad where the client service of the Swiss company is seated.

The Defender opened an inquiry addressing the Czech Trade Inspection Authority with a request regarding the possibilities of international cooperation in punishing aggressive business practices and the competence of the Czech Trade Inspection Authority towards the Czech distributor. The Defender pointed out in it that Article 2 of Directive of the European Parliament and of the Council 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market defines a trader as a "natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader". However, in Section 24 (1), the Czech Consumer Protection Act (Act No. 634/1992 Coll., as amended) determines that only a manufacturer, importer, supplier or seller is a person responsible for committing an administrative offence, and the definition is therefore narrower than that in European regulations.

In spite of the original objections of the Czech Trade Inspection Authority on the impossibility of punishing a client service due to inadequacies in Czech legislation, the Defender was eventually advised by the Ministry of Industry and Trade that a broader interpretation of the applicable regulation makes it possible to also punish the distributor (the client service) so that the Czech Republic complies with the obligations following from the European directive.

Given that the matter was inquired into by Czech authorities for potential committing of the offence of aggressive business practice by the Czech client service, the Defender closed his inquiry.

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

Citizens addressed the Defender with complaints concerning the right to participate in the administration of public affairs (Art. 21 (1) of the Charter of Fundamental Rights and Basic Freedoms). Two cases related to direct administration of public affairs through the **institute of local referendums**, others to **the right of a citizen of a municipality to express** their standpoints on the discussed matters **at meetings of the municipal assembly** in accordance with the rules of procedure.

2 / 19 / Personal data protection

In the past year the Defender noted increased interest among citizens in the protection of privacy and personal data. He found in this respect that people lack information on this issue, which means that the Defender is addressed by unadvised complainants who are unable to exercise their rights. For this reason, the Defender began to pay particular attention to personal data protection.

Personal data protection represents a relatively new legal area which **accompanies a number of human activities in both the public** (records of the population, archiving, administrative proceedings, health insurance, financial administration and the police) and **private sectors** (banking, marketing, telecommunications, securities market, housing and employment).

Therefore, when dealing with complaints, the Defender mostly informs complainants of the applicable legislation and their rights. He also invites them to address, under Section 21 of the Personal Data Protection Act, either the personal data controller or processor or directly the Office for Personal Data Protection (hereinafter also the "Office"), which performs supervision over compliance with the obligations stipulated by the law in personal data processing. If a complainant is dissatisfied with the work of the Office, the Defender may open an inquiry.

Length of state inspections performed by the Office for Personal Data Protection

The length of state inspections performed by the Office is one of the subjects that the Defender began to address in more detail. The Defender received several complaints from people who had addressed the Office with a complaint about a breach of the Act on Personal Data Protection because they had not been advised of the result of their complaint.

The Defender ascertained that this was in most cases because the state inspection of the controller or processor against whom the person's original complaint was directed had not been completed as yet. Although this is a correct procedure given the statutory obligation of confidentiality of inspectors, the Defender initiated a dialogue with the Office for the purpose of ensuring smoothness of state inspection and promoting the principle of procedural economy in the Office's work (some of the inspections had lasted more than one year).

Although the Defender is aware that the Act on Personal Data Protection and the State Inspection Act (Act No. 552/1991 Coll., as amended) does not stipulate any deadlines for performing an inspection, he generally considers that a **long state inspection may have an adverse impact on the rights of data subjects, controllers and processors, as well as in the area of administrative punishment** (expiry of liability for an offence or administrative offence).

Bank and non-bank registers

Based on complaints against the Office, the Defender dealt with the issue of personal data processing in the banking and non-banking sectors. He ascertained that rather than against the procedure of the Office, the dissatisfaction of the clients of banks and credit and leasing companies was directed against the **legislation** (particularly Act No. 21/1992 Coll., on banks, as amended, and Act No. 253/2008 Coll., on certain measures against legalising the proceeds of crime and financing terrorism, as amended), which is complicated, ambiguous and favours financial institutions as against clients.

From the viewpoint of the protection of privacy, the Defender identified several problematic aspects of the current legislation.

With reference to the prudence required by law, banks deliver to the **Bank Register of Client Information (BRCI)** "information on bank details, identification data of account holders and matters giving account of the solvency and trustworthiness of their clients". **However, these types of data are not defined in detail in the law.** The Defender therefore considers that an amendment to the Banks Act could specify what personal data and financial operations may be delivered to the register without people's consent.

It is common that even the data of people who have not become clients of a bank or clients who have duly fulfilled their obligations also get onto the register. With respect to the former, it is difficult to clearly identify whether their registration in the BRCI is in accordance with the law and the set objective of processing (however, the protection of persons rather than banks should prevail where there is doubt). The Defender holds the view that in the case of delivery of data on clients who have fulfilled their obligations, a condition stipulated by law is not fulfilled, namely that interbank exchange of information may take place only provided that the obligation to "proceed prudently in the exercise of its activities" is met.

The Defender considers the interlinking of the BRCI with the Non-bank Register of Client Information (NRCI) to be problematic. Although this exchange of personal data takes place on the basis of consent of the bank's client, this consent is not free as banks make granting of the consent conditional on the provision of the relevant service. In this manner, non-bank entities access data that is in fact subject to banking secrecy.

The Defender therefore addressed the Czech National Bank and the Office to discuss with them the possibility of amending banking legislation and the problems of the current practice (the bank's duty to provide information, access of the client to his/her personal data).

2 / 20 / Other state administrative bodies

The Office for the Protection of Competition

The Defender dealt with the procedure of the Office for the Protection of Competition (hereinafter also the "Office") with respect to the **architectonic competition for the design of a new building of the National Library** (the Office initially refused to inquire into the procedure of the contracting authority and then arbitrarily changed its standpoints). The Defender concluded based on an analysis of the case that the Office was competent to assess the actions of the National Library. The Defender also criticised the Office in that although it had reached conclusions on irregularities

in the design competition based on the documentation gathered, it had not issued an administrative decision on this finding.

Complaint File Ref.: 4699/2008/VOP/BK

The Office for the Protection of Competition was substantively competent to assess the actions of the management of the National Library of the Czech Republic within the international architectonic competition concerning the design of a new building of the National Library: it could make a decision on their unlawfulness and adopt additional measures.

The Office for the Protection of Competition discontinued the proceedings commenced based on a proposal of HŠH architekti, s.r.o., concerning the acts of the National Library of the Czech Republic within the international architectonic design competition for a design of a new building of the National Library, due to an alleged lack of substantive competence.

The Defender concluded that the Office was and is substantively competent to assess the actions of the contracting authority within the competition for design, to make a decision on their legality and to adopt additional measures, if appropriate, at least where a design competition is directed towards awarding a public contract (in the narrow sense), as was the case in the procedure of the National Library. The Defender therefore considers the decision of the Office on discontinuation of the proceedings to be unlawful.

In the Defender's opinion, the Office also illogically changed its opinions and conducted additional inquiries in the matter of the competition within an unclear extent and with an unclear result and, on the basis of the gathered documentation, reached conclusions it did not justify in detail; in addition, it did not include these conclusions in a decision that could be subject to a proper review.

Refusal to exercise supervision over compliance with the Public Procurement Act led to long-term (permanent) uncertainty on the part of the contracting authority and the participants in the competition, including the winner.

As regards the effect of the Office on the media image of the case, the Defender considers that in some cases the media output of the Office did not correspond to reality. The Defender was also in doubt about the appropriateness of substantive comments on the regularity of the competition in a situation where the Office refused its substantive competence in spite of proposals by architects and refused to make a decision.

The Office insisted on its original opinion in its standpoint on the Defender's report, without responding to the Defender's arguments. On the other hand, the Office informed the Defender of an amendment aiming to stipulate competence for reviewing the procedure of a contracting authority in a design competition. This amendment came into effect on January 1, 2010.

Consular protection

Based on complaints from Czech nationals who face adverse circumstances abroad (for example detention and arrest, hospitalisation), the Defender began to deal in more detail with the issue of consular protection provided to Czech citizens by embassies.

Although the Defender is aware that under the applicable legislation, there is no legal entitlement to consular protection and consular officials must ensure that they are not in conflict with the law of the host state (in addition, the use of many means is subject to consent of the host state), the Defender generally considers that once the state exercises consular protection of its citizen, its procedure should **meet certain standards**. The consular authority should always make reasonable efforts to provide proper assistance in difficult circumstances. Only in this way can the embassy effectively protect the rights of Czech citizens abroad in accordance with the principles of good administration.

As the Defender ascertained, the Ministry of Foreign Affairs has drawn up internal methodology for providing consular protection, but the latter is scattered among several separate old instructions and directives (most of them published before the Czech Republic's accession to the EU). The present methodology **does not provide such a high standard of consular protection as that provided to the citizens of EU member states in their stays in third countries** in the sense of Decision No. 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council regarding protection for citizens of the European Union by diplomatic and consular representations. It follows from the logic of the matter that the minimum standard to be provided to EU citizens during their stays in third countries should be provided also to Czech citizens during their stays within the EU.

The Defender therefore initiated a dialogue with the Ministry of Foreign Affairs aimed at changing the internal methodology of the Ministry intended for embassies.

Systematic Visits to Facilities Where Persons Restricted in Their Freedom are Confined

04

Systematic Visits to Facilities Where Persons Restricted in Their Freedom are Confined

In 2009 the Defender continued to carry out systematic visits (Section 1 (3) and (4) of the Public Defender of Rights Act), concentrating on **homes for people with disabilities** and **private homes for elderly people**. The Defender also performed follow-up visits in selected psychiatric institutions that he had visited in 2008.

1 / Homes for People with Disabilities

The Defender chose homes for persons with disabilities (hereinafter also "homes" or "facilities") for the period from January to June 2009. These represent social service facilities in the sense of Section 48 of the Social Services Act (Act No. 108/2006 Coll., as amended). The unannounced visits lasting one or two days, concentrating on homes whose **target group** consisted of **persons with mental** or combined disabilities, particularly clients **up to 26 years of age**.

An inpatient social service is provided in homes for people with disabilities on the basis of a social service contract. The latter is concluded either by the clients themselves or by their legal representatives if the clients are minors or restricted in their legal capacity. The clients in almost all of the facilities visited were entirely dependent on assistance from another individual (84% clients of the facilities visited were officially recognised as dependent on the assistance of another individual in degree III or IV).

The Defender invited on the visits **experts including quality inspectors**, specialist teachers and selected heads of service providers. 25 facilities were selected for the visits. The table below shows the facilities visited by the employees of the Office. Facilities in both Bohemia and Moravia were visited, both large and small. Most of the homes were founded by the regions.

People age 26 or under made up about 34% of occupants of the homes visited. As for children, the Defender was interested to learn about their chances for placement in foster care. He therefore addressed the Ministry of Labour and Social Affairs and regional authorities with a request that they provide information on the number of children kept in homes for people with disabilities included in the list of children suitable for foster care. The regional authorities stated in an overwhelming majority of cases that it is very difficult to find a foster family for children with mental disabilities. If the child is kept in foster care records, foster care rather than adoption is usually concerned.

The Defender paid special attention during the visits to care for clients with heavier, often combined, forms of disabilities for whom so-called **nursing departments** are established. The Defender inquired how often these clients spend time outside their bed/department, what activities/stimuli are offered to them, etc. The Defender inquired whether these clients are approached only in terms of their physiological needs (a severely disabled person should not spend all day in bed, his/her activities should change and his/her environment should support the ability to perform daily rituals if s/he is capable of performing them).

Since the Defender, in spite of all the negative findings given below, also found many examples of good practice and truly good care, he newly included these specific examples of good practice in his Report from Visits to Homes for People with Disabilities in order to encourage service providers and bring proofs that the recommended conditions can be achieved.

The Defender's recommendations

Facilities and their buildings

Twenty of the facilities visited had a capacity exceeding 50 places. In spite of the declaredly launched transformation and humanisation of social services, most of the homes visited were very large, whereby people with disabilities are concentrated in a single location. This hardly creates a natural environment; the chance for inclusion in the life of the majority community decreases. In the Defender's opinion a part of the clients could, following proper training and well-managed transition, benefit from a service with less intense assistance.

In several cases the Defender criticised material obstacles to the free movement of clients due to the structural and technical design of the homes. These included, for example, overly complex premises, dangerous terrain in the garden, and difficult exits for wheelchairs or beds. In one case immobile clients were placed on a floor without a lift.

The Defender therefore recommended that founders prefer the building of small integrated facilities and adapt the structural and technical conditions of facilities to the disability of the clients.

Personnel situation

The personnel resources available for the services provided considerably differed between the facilities visited, where some facilities were understaffed to an alarming degree. These were large facilities where the lack of personnel clearly resulted in the collective rather than individual treatment of the clients, with the impossibility of providing excursions with a single accompanying person or the prescribing of excessive medication for the night. A service provided to large groups is less safe. Just enough personnel are assigned for each shift to ensure oversight at departments; the personnel are unable to manage any other tasks. Due to the lack of personnel, the clients in some facilities must constantly stay together; they receive no individual support apart from nursing care and have no chance of spending at least some time in privacy. The Defender was particularly alarmed when he learned that the management of these facilities was not interested in improving the dissatisfactory situation.

The Defender recommended that facilities short of personnel advise their founder of this. The Defender also sees a solution in greater use of volunteers and NGOs. However, it is necessary not to rely only on help offered, but to actively look for volunteers and cooperate with the non-profit sector.

Many facilities are not prepared to provide high-quality care to people with specific needs (autism or Alzheimer's disease). The lack of personnel makes it impossible to respond to the individuality and needs of these clients. They are sent to psychiatric institutions where care is even less specialised and patients with disabilities are massively restricted in their freedom of movement. If psychiatric hospitalisation (and the related restriction of free movement) results from a lack of personnel in the social service facility where the patient stayed before, responsibility for interference in the disabled person's integrity is not borne solely by the psychiatric institution, which is not intended for the long-term residence of mentally disabled people. The primary responsibility is with the service providers and their founders.

The Defender recommended endeavouring to take a special approach to clients with autism or suffering from dementia. If a home is unable to provide care, the Defender recommended that it address the founder and request a solution either by increasing the number of personnel or establishing a social service dealing specifically with these clients.

The Defender recommended that the founders of social service facilities actively respond to the requirements of the services established by them concerning an increase in the number of personnel, particularly where a lack of personnel may lead to hospitalisation of clients in psychiatric institutions.

Free movement

Lack of personnel, organisational and material inadequacies, various regime measures and non-provision of assistance are frequent obstacles to the free movement of clients outside the department or home. This is particularly true in cases where clients need active support. In some homes the Defender even repeatedly ascertained summary prohibition of independent movement of clients due to potential risks.

The Defender recommended analysing and evaluating the risk potentially represented by independent movement of specific clients outside the premises. The Defender recommended that if the risk is unreasonably high, work should be done to minimise risk and a certain standard of accompanied excursions should be ensured. The evaluation should be regular and repeated. The Defender also recommended that the rights and obligations of personnel of the home and the clients in connection with excursions and stays outside the home be specified in detail.

Independence of movement was, in some facilities, related to the issue of legal capacity. Responsibility for risk assessment, as well as decisions on situations where the client's condition requires oversight, is often passed on to specialised doctors or the patient's legal representatives. The clients in one facility were required to sign a form on the assumption of liability for potential damage before leaving the facility. The current trend of changing activities and spaces, which is common among people without a disability, has been promoted only gradually so far; thus, clients capable of at least crawling or rolling spend the whole day in bed in many facilities.

The Defender recommended that all clients be approached in the same way, regardless of their legal capacity, without introducing unreasonable formal constraints on their free movement. According to the Defender, the entire professional team should assess whether the disabled person may move outside the facility without an unreasonably high risk. The Defender also repeatedly pointed out that legal capacity is not decisive for independent movement. He also recommended that it be evaluated for each client who has been permanently placed in the bed whether s/he can benefit from movement outside the bed and, if yes, make this possible. A

suitable environment for individual activities should be prepared for clients who are capable of some movement.

If clients need accompaniment and assistance for movement outside the facility, the Defender lacked any guarantee in some facilities that a group of individual excursion will be enabled once per week (or even once per month or at a longer interval). The reason lies in established understanding of the clients' needs and a lack of personnel.

The Defender recommended inclusion of accompaniment in the clients' individual plans. For clients who do not leave the facility independently, the Defender recommended that it be indicated in the individual plan how often the client will stay "in the open" and how often s/he gets outside the facility to meet other people, taking into account the client's age and needs. The Defender also recommended that the work of personnel be organised so that accompaniment can be provided as much as possible and, where appropriate, that volunteers and NGOs be utilised for this purpose.

Most homes use various mechanical measures where the free movement of a client is considered to be a risk even within a room. These measures are not primarily aimed at restricting the client in his/her rights or evading the law. Where non-walking users are concerned who are capable of crawling and could fall down from bed, or walking users who have either motor problems and uncertainty or a deep mental disorder, mechanical restraint is applied at times when a worker cannot attend to the client individually. In rare cases, this may also apply to people with problematic behaviour.

Specifically, the Defender encountered a locked department, high grills around the bed, railing enclosing an area within the department, railings for enclosing an individual in a room, for example a game room, closing people in a room without a handle or even locking them in a room, netted beds and lowered netted beds, and straitjackets. These measures were encountered in more than one half of the facilities visited: their restricting effect is not reflected upon by the personnel – they are used intuitively, without any rules.

The Defender recommended using measures that have the potential to restrict a person only when evaluating the impact on a specific client and under clearly set rules. The law is not breached only when the client, given his mobility, is not restricted in free movement using specific means.

The most serious restraints are used on clients who show some form of agitation. For example, they do not sleep at night and would disturb other clients by walking and banging or they constantly demand something they cannot obtain.

The only legal regulation of measures restricting movement is currently concentrated in Section 89 of the Social Services Act, which generally stipulates that "measures restricting the movement of persons may not be used in the provision of social services". Thus, the use of netted beds, high railings, etc. due to mere sleeplessness or locomotive unrest of clients is illegal. The Defender is aware of the difficult situation of facilities that do not ignore this problem but currently have no means of eliminating restraints. However, a lack of personnel cannot justify regular use of restrictions, particularly if the situation can demonstrably be dealt with in some other way.

The Defender recommended avoiding illegal means and commencement of the process of elimination of mechanical means used in the long term. Specific cases must be addressed with the help of a supervisor with experience in the area of problematic behaviour and it is necessary to

utilise all the options for addressing the situation without using restrictions. The Defender also recommended that the founder of the service be informed in the case that the provider is currently unable to provide the service without use of illegal restraints.

Agitation control medication as a measure restricting movement is not used in only five of the facilities visited. An amendment to the Social Services Act came into effect after the visits; it is currently required that sedatives to address a situation endangering life or health be administered only in the presence of a doctor. The ascertained practice did not correspond to the requirements of the amended law; medication was administered without the doctor's presence on the basis of previous prescriptions pro futuro. It remains open for the future whether the stricter conditions will be in favour of the clients (lower risk of excessive or arbitrary restriction of clients) or not (increase in the number of hospitalisations in psychiatric institutions, overloaded rescue service, etc.).

The Defender recommended that the applicable legislation be respected and sedatives applied only in the presence of a doctor.

Autonomy of will

A systematic approach to non-verbal communication with clients, many of whom are unable to communicate using speech, is not in place or has only begun to be used in many facilities. For the client to be able to express and accomplish his/her will, s/he must have the ability to understand. The training of personnel in this area tends to be unsystematic, the approach of the personnel to clients is intuitive, relying on empathy. Thus, clients cannot be understood in excess of communicating the most essential requirements.

The Defender recommended service providers intensify efforts for increasing the personnel's ability to use alternative and augmentative communication.

The autonomy of the clients' will is endangered by frequent conflicts of interest. The standard of regulation of the conflict of interests differs between facilities; the requirement for a quality standard was often fulfilled just formally. Legal regulations require that internal rules exist for preventing situations where fundamental human rights are infringed and conflict of interest occurs. However, the providers have difficulty even to differentiate between these concepts. There is a prevailing apprehension to admit that there are any conflicts at all or the personnel have memorised several examples but in fact do not understand the subject.

The Defender recommended defining conflicts of interest and the areas of potential infringement of the clients' rights in the internal rules of the homes, including specific procedures and a case-based approach.

The life of clients in many facilities is very distant from a normal private lifestyle. This is due to excessive care (in terms of clothing or choosing clothes), unnatural rhythm of the day (early getting up and early going to bed, staying constantly in the same place), prohibition of activities that can be regulated only in a certain manner within the home rules (alcohol or smoking); the instrumental approach to human sexuality should also be mentioned.

The Defender recommended respecting the biorhythm of clients and creating conditions for respecting the clients' wishes regarding the daily regime by hiring and properly organising personnel.

Privacy

Although some of the facilities visited were built to offer a certain standard of privacy, in others it was necessary, for the protection of the clients' right to privacy, to criticise multi-bed rooms and the impossibility of obtaining keys to the rooms even under favourable circumstances. Clients in many facilities still do not have a reserved lockable space for keeping their personal items; personal items were kept in shared cabinets in one facility. The Defender also criticised the glazed walls of rooms and inspection holes from the corridor.

The Defender recommended reducing the capacity of rooms, creating single- or double-bed rooms as far as possible and eliminating walk-through rooms. Inspection holes should be eliminated in order to ensure privacy in the rooms. The age of the clients should be taken into account in allocating rooms. The Defender also recommended that clients have their cabinets in the rooms and that each client has "his/her" (even hospital) clothing.

Privacy in the performing of hygiene is not respected in many facilities. The users perform personal hygiene in public. It was ascertained that the doors to bathrooms are open when assistance or support in the performing of hygiene is provided, and anyone present in the corridor can witnesses this, even unwillingly. Privacy screens are available in some facilities, but they are in fact not used by personnel. The right to privacy is ignored, and human decency and the need to perform personal hygiene separately and individually are not respected. Sanitary facilities cannot be closed, and in rare cases the toilets were even not separated by partitions or the cubicles lacked doors.

The Defender recommended ensuring privacy in toilets and bathrooms; toilets should be separated by partitions, cubicles provided with doors and locks should be installed where the clients are capable of learning how to use them. The Defender recommended that the doors of bathrooms and toilets be closed and privacy screens used in the performing of personal hygiene of clients.

The Defender regards as controversial the use of cameras, which was ascertained in four of the facilities visited. Generally speaking, cameras in two of the facilities are installed in more public areas (monitoring the main entrance, the corridor at the entrance door, or the building from the outside), while in two other premises they are also installed in areas of a private nature where clients are normally present (a department corridor). Some facilities use cameras only at night so that the personnel have oversight of those parts of the facility where they cannot be present. No recordings were obtained in the observed cases.

According to the Defender, clients in a facility, like anyone else at home, have the right to privacy in the space where they move as though at home. Corridors are a questionable issue. In the Defender's opinion, whether they are part of the "household" should be examined (clients walk through them from the bedroom to the living room or to the toilet). It is necessary to bear in mind the potential misuse of the images, for example for spying, and ensure that the inhabitants of the facility are informed where and under what regime the cameras are used.

For interior cameras that enable recognition of monitored persons, the Defender recommended giving due weight to the degree of infringement of privacy and the degree of need for these cameras. For example, it is conceivable that the cameras are on for the night when the personnel are not present in a part of the premises. The Defender therefore recommended stipulating rules for the use of cameras or the installation of switches. A notice must be installed in all circumstances in the places monitored by cameras and the clients should also be advised of the cameras.

Care

Professional nursing care was noted in all facilities, which should be highlighted and appreciated given the difficulty of this task. In spite of this, in several cases the Defender had to criticise the care provided to clients with the severest disabilities. Emphasis is placed on the nursing aspect of care while the clients are not always provided with at least some sensual activities (visual stimuli, more frequent interactions initiated by the personnel) and changing environments. The Defender considers it to be deprivation when, apart from regular nursing interventions and short planned activities with the therapist, clients were constantly left alone in beds with high barriers, always two of them in a bedroom. However, the Defender also criticised a nursing department where the beds were placed in rooms with half-glazed walls, but the clients were still left in beds almost without exceptions.

The Defender recommended ensuring as many sensual activities as possible and naturally changing environments for clients with severe forms of mental disability, e.g. a combined disability.

It is very difficult to ensure psychiatric care for the clients of homes for persons with a disability. The facilities have difficulties in finding an expert who would regularly and often visit patients and sufficiently cooperate with the entire nursing team. This results in unreasonably high doses of medication administered to clients (obviously excessive medication was ascertained in rare cases, in one case administered summarily to all patients); the clients' problems escalate and the number of psychiatric hospitalisations increases.

The Defender recommended including a psychiatrist in the nursing team. If the doctor is unwilling to attend to a patient frequently or no doctor can be found, the Defender recommended advising the founder or the health insurance company so that the client can use his/her right as a policy holder if s/he is not provided with proper medical care.

The Defender noted difficulties in the facilities visited in the provision of care to clients with autism and disorders on the autistic spectrum. These people are placed at a significant disadvantage due to their specific symptoms. A personal assistant is necessary for a certain percentage of people with disabilities and the facilities are unable to provide care to these clients. The long-term stays of people with such disabilities in a psychiatric institution, as encountered by the Defender, suggests the inability of social service providers to provide for professional and individualised care taking account of the specific type of disability.

The Defender recommended trying to take a special approach to clients with autism or suffering from dementia. If the home is unable to provide the care and there is a danger of harm to the client (through long-term hospitalisation, or restraining free movement), the Defender recommended informing the founder of the service. The Defender also recommended that the homes directly address the regional authorities and request the resolving of these clients' situation. If there are several such cases in the region, the regional authority should respond by establishing a special social service specialised in these clients. The Defender repeatedly (already within the report from visits to psychiatric institutions in 2008) recommended to the regional authorities that they begin to actively deal with the situation of clients with specific needs.

Although the Social Services Act requires planning of the course of provision of the social service based on the personal aims, needs and abilities of individuals, as well as keeping written individualised records on the course and evaluation of the course of provision of the service, in most facilities individualised planning still represents a great problem. This results in plans that are only formal.

The Defender recommended proceeding according to the requirements of the law, i.e. planning the service individually for individual clients and regularly evaluating the course of provision of the service. The Defender also recommended that the personnel in charge of individualised planning be given the opportunity to acquaint themselves more thoroughly with the given method in order to avoid planning which is only formal.

Education

No cooperation, and certainly no close cooperation, took place between the school, or a school consultancy facility, and the home itself in an overwhelming majority of the facilities visited. Individualised school education plans were not available in most facilities to the personnel planning provision of the social service.

The Defender recommended establishing cooperation with a school facility that provides children's education. He also recommends re-evaluating the content of the personnel's work so that it also includes active preparation of children for learning. The facilities should also request parts of individualised plans from the school facility and include them in the client's file so that the personnel can work with them.

Social inclusion

Strengthening the social inclusion of clients is one of the main objectives of social service, according to the law (Section 2 (2) of the Social Services Act). The Defender noted considerable room for improvement in the homes visited. Endeavouring to transfer clients with light disabilities from inpatient service to field and outpatient services was not ascertained in many facilities. There was no preparation for a more independent life, training of common activities or, for clients with severe disabilities, at least attempts to reinforce self-service skills.

The Defender recommended perceiving as a priority the strengthening of clients' ability (even in minor aspects) to care for themselves and preparation of clients with light disabilities for transition to a follow-up service.

The high degree of support provided by the facilities does not suit many existing clients or their condition does not require this. The Defender criticised that the facilities respond to this by establishing special, more independent housing within the premises or by establishing new, seemingly more relaxed services within the existing facility. This creates sheltered housing without sufficient integration. In fact, another form of institutionalised environment arises.

The Defender recommended that the facilities inform municipalities and regional authorities of specific need for follow-up services for people living in the home. The development plans of the facilities should concentrate on building small residential units or leasing suitable premises in various locations as part of normal housing development (substantial investments in existing buildings or constructing groups of houses near the institution does not seem reasonable). With regard to the amendment to Section 94 (e) of the Social Services Act, the Defender recommended that municipalities actively examine the needs of their inhabitants and attempt to satisfy them within medium-term development plans. The Defender also recommended that municipalities cooperate in satisfying the needs of the inhabitants of their regions.

Social service contract

All the facilities visited had established the practice of concluding contracts. Given that this private-law issue is governed by the principle of autonomy of will of the contracting parties, the Defender provided most of his recommendations only for consideration.

Since the Social Services Act includes mandatory provisions on the requisites of contracts, the Defender recommended that social service contracts be individualised in terms of the extent of the agreed services, including specification of the client's personal targets. The Defender also recommended that the rules for returning a part of the payment for an unutilised service be included in the contract.

Legal capacity, guardianship

The actual capacity of a client to undertake legal acts very often does not correspond to the regulation of the capacity stipulated by a court decision. A client is seriously harmed if his/her capacity is restricted to a degree which exceeds the actual need arising from the client's mental deficit; yet the Defender has encountered the attitude that the disabled should receive greater "protection".

The Defender recommended that, where necessary, active steps be taken towards restitution of legal capacity (or restricting legal capacity instead of incapacitation).

The Defender sees a negative phenomenon in the persisting high proportion of clients with the facility, or an employee of the facility, as their guardian or custodian. This represents a persisting conflict of interest. However, the Defender is aware that in some cases there is no ideal solution for a disabled person in the given circumstances. The standard of "public guardianship", i.e. guardianship performed by a local administrative body, is very low. The Defender has made this finding repeatedly in visits to various types of facilities.

The Defender recommended that the situation where the employees of the home act as the guardians of their client be included in an internal regulation also specifying the conflict of interest and the potential infringement of the clients' rights. Taking into account ratification of the Convention on the Rights of Persons with Disabilities (the Chamber of Deputies, 2009, parliamentary print 812) and preparation of the new Civil Code, the Defender recommended that the Ministry of Justice open a professional discussion on the preparation of a system of guardianship and supported decision-making.

2 / Systematic Visits to Private Homes for Elderly People

Systematic visits to six private homes for elderly people that are registered as social service providers pursuant to the Social Services Act (Act No. 108/2006 Coll., as amended) were made in late 2008 and early 2009. The following facilities were visited: home with special regime Sanatorium Lotos, s.r.o. in Ostředek, Lada home for elderly people in Ostrava, charity home of St. Zdislava in Litoměřice, Dům naděje home for elderly people in Brno, Nemocnice Počátky s.r.o. hospital in Počátky and Prácheňské sanatorium o.p.s., in Bosňany.

It can be generally stated that the homes for elderly people visited had not yet introduced all the measures that are required for fulfilment of the quality standards under the Social Services Act. The Defender discusses only the **most serious findings** in the following text.

Personal freedom

The degree of personal freedom of the users differed in the facilities visited; the limitations depended on their health condition. This applied particularly to the option to leave the facility independently or with accompaniment, for example for a walk or to do some shopping. Even fully oriented clients who had not been incapacitated were prevented from leaving the facility independently in some of the homes visited. The Defender criticised this condition and advised of this the body that inspects social service provision.

It is expected that a provider of an inpatient social service will provide support to the user of the service in the form of accompaniment. The possibility of spending time outside the facility, for example to go for a walk or to go shopping, depended on the time schedules of the personnel in the facilities visited; nevertheless, in the Defender's opinion, a lack of personnel must not lead to these activities being entirely abandoned.

The Defender recommended that homes look for solutions enabling clients to stay outside the facility if they want. In addition to personnel measures, the Defender proposed that the situation be resolved, for example, in the form of cooperation with volunteers, NGOs, etc. For a client who needs accompaniment for leaving the home, the Defender recommended inclusion of stays outside the facility in the individualised plan of provision of social service.

In connection with the issue of measures restricting the movement of clients, the Defender also dealt with the use of measures that are not explicitly specified in the Social Services Act but are capable of restricting the free movement of the client. Measures with a restraining potential include sideboards on beds. Sideboards obviously have an irreplaceable role in nursing, but the Defender considers that they are used extensively in many facilities, with negative consequences such as clients climbing over the sideboards and incontinence problems. Decisions on the use of sideboards should be made by a team of workers separately for each client. The Defender paid special attention to the administration of extra medication for agitation control. In this respect the Defender evaluated particularly the procedural rules for using this measure (in one facility the Defender ascertained that the rules for the application of sedatives were set too broadly and, as a result, hypnotic drugs were very often administered).

The Defender recommended that for high-risk clients, the use of restrictive measures be included in the individualised plan of provision of the service.

The Social Services Act requires the keeping of records of all cases where measures restricting movements are used. The quality of these records varied from home to home, but none of the homes kept central records enabling systematic work.

The Defender recommended the facilities introduce central records of measures restricting the movement of clients.

Privacy of clients

The technical condition of the facilities visited, as well as lack of barriers, depends on the building where the home is located. These are mostly refurbished buildings that originally served a different purpose (for example hotels) and are therefore not entirely fit for the provision of social services. The standard of protection of privacy differs from facility to facility but it mostly does not differ considerably from facilities established by public-law entities.

The Defender recommended that a higher degree of privacy be ensured, particularly in the performing of personal hygiene (for example by installing privacy screens, "occupied/vacant" signalling in toilets, etc.). The Defender also proposed that self-sufficient clients have a lockable space for keeping their personal items (for example a bedside table, cabinet or key to the room).

Care provided

Nursing care, in particular, was provided to clients in the homes visited, while the provision of individualised social care was still at an early stage. The provision of nursing is related to cooperation with the doctor. The medical records of some clients showed that some on regular medication had been written with ordinary pencil, dates were missing or they had been rewritten.

The Defender recommended that entries in medical records be made demonstrably and legibly.

Not all of the facilities visited had produced the documents required by quality standards, including home rules and rules for lodging complaints and other documents, in spite of the fact that clients showed interest in this kind of information. The clients' responses in one of the facilities suggested that the daily regime was rather strict, and the Defender objected to general removal of documents from all clients, including oriented ones, in the facility concerned.

The Defender recommended drawing up internal rules of the facilities to correspond to the Social Services Act and quality standards.

In some homes the Defender noted inadequate support for employee training or lack of independent supervision. This may have practical impact for example in communication with clients suffering from dementia who loose communication skills due to their illness and require a special approach (alternative means of communication).

The Defender recommended that the management of the facilities pay attention to support for personnel in the area of training, particularly as regards the attainment of abilities for alternative methods of communication.

Social service contracts and negotiation with applicants for the service

Some facilities did not have written rules for the evaluation of the applications of those interested in the service or else these rules were disregarded in administering the application of an elderly person the facility preferred.

The Defender recommended non-discriminatory criteria so that vacancies in the home are assigned to those who most urgently need the social service.

The Defender ascertained that social service contracts are usually designed as a form without taking into account the individual requirements and needs of the applicant. The Defender also noted that the responsible employees of many of the facilities visited had difficulty formulating the scope of the provided care. The latter is a requisite of the contract pursuant to Section 91 (2) (c) of the Social Services Act (agreeing the scope is also expected in Section 73 (1) of the Act). The law is copied in the contract without the necessary individualisation.

The Defender therefore recommended that the scope of the provided service (care) be sufficiently stipulated in the contract. It is also possible to utilise the option of determining a personal target with reference to the individualised plan, which will specify the scope in detail.

The requirement for specificity of contracts is connected with the issue of clear definition of the rights and obligations of the parties. It is often specified in the contracts that the clients are obliged to comply with internal rules, without clearly specifying these rules. The use of the general concept of "compliance with internal rules" could, in an extreme case, constitute grounds for invalidity of the contract on grounds of vagueness.

The Defender recommended that the content of binding rules be clearly defined in the contracts, or that reference to them be made in the contract and the text used as an annex to the contract.

The final price of the provided service was not clear from the set of contracts in some facilities. The payment for the stay and the services exceeded the statutory limit in several facilities visited, either directly in the set amount or in a hidden manner by introducing additional fees (for example for above-standard accommodation which, however, was provided to all clients), provision of "facultative services" that were in fact basic services from the viewpoint of the law, etc.

The Defender recommended compliance with the statutory regulation of prices. The Defender also proposed that basic services should not be presented as facultative.

3 / Follow-up visits to psychiatric institutions

The Defender carried out follow-up visits to seven psychiatric institutions to verify fulfilment of the recommendations he had made to the management of the psychiatric institutions after the 2008 visits, as well as the recommendations he had published in the Report from Visits to Psychiatric Institutions that were also addressed to the Ministry of Health and the representatives of regional self-government bodies. The follow-up visits took place in the following psychiatric institutions: Dobřany, Havlíčkův Brod, Horní Beřkovice, Kosmonosy, Kroměříž, Opava and Šternberk.

Fulfilment of recommendations by the psychiatric institutions

Recommendations entirely or partly fulfilled

After the original visits, the Defender recommended refurbishment or decreasing the capacity of 15 departments. The reason for this followed from the unfortunate and undignified internal arrangement of the departments and an inadequate structural and technical design leading to a high accumulation of patients and an inappropriate regime.

The desired alterations had been made in ten of the departments (however, neither of the homes received a subsidy from the Ministry of Health for the refurbishments in spite of applying for them; thus, the institutions restored pavilions at their own expense).

The Defender criticised the fact that patients with a wide range of diagnoses, all of them showing agitation, are placed in admission units. The diversity of the patients places considerable demands on their management and the cohabitation of patients with different diagnoses is very problematic.

The institutions took the Defender's criticism responsibly in that they attempt to prevent the negative consequences of the division of patients into bedrooms in admission departments, endeavour to identify potential socially pathological phenomena (for example bullying), identify potential subjects of abuse, etc. However, entire fulfilment of the Defender's recommendation will be difficult without further investment in refurbishment and rebuilding of the departments.

The Defender criticised, as a stigmatising and undignified condition, the fact that patients in the institutions wore mainly pyjamas or other undignified hospital clothing. There is no justification for this, except for a short period of time after admission to the institution; it is rather an established regime without support in legislation.

A positive shift occurred with respect to clothing. The institutions allow patients to wear plain clothes and create operational conditions for the laundering and drying of clothes. They also install cabinets for storing personal items. The Kroměříž psychiatric institution continues to be an exception, as conditions have not been created there for patients to maintain and launder their clothes at their department.

The fact that patients were prevented from entering bedrooms during the day was evaluated by the Defender as another regime measure without support in legislation (the institutions justify this with organisational rather than therapeutic reasons). As a result, the patients typically gathered in busy common walk-through premises within the department without any privacy and spent time lying on chairs and on the floors.

The follow-up visits ascertained a partial improvement. The bedrooms were accessible all day in two facilities, while another two introduced times during the day when the bedrooms are freely accessible; the bedrooms in one institution are accessible on request. The Kroměříž psychiatric institution improved only one department and the Defender invited its management again to carry out changes. These were promised.

Unfulfilled recommendations and partly fulfilled recommendations

In two institutions (Dobřany and Horní Beřkovice), **excursions** of incapacitated patients/patients restricted in their legal capacity outside the institution (for example permits for stays outside the psychiatric institution) are still **conditional on the guardians' consent, although these excursions do not represent legal acts**.

A persisting problem consists in the fact that not all patients by far have the possibility of spending time "in the open" due to structural and technical barriers and lack of personnel in the department. The problem will be dealt with only after completion of the ongoing refurbishment in the Horní Beřkovice psychiatric institution (with respect to patients subject to the regime of protective treatment). **The situation of patients with reduced mobility and those in the agitation control department was problematic in all the facilities visited**.

In several cases the Defender had to repeat the **recommendation for respect for privacy in using the toilet** (absent locks or arresters in toilets or at least a mechanism signalling that the toilet is occupied). The Kroměříž psychiatric institution had not fulfilled the recommendation to provide toilet cubicles with doors by the time of the follow-up visit; however, remedy by a specific date was promised. In this respect, the Defender considers it to be a particularly significant infringement of privacy when **toilets are monitored by cameras** as was noted in three institutions in the follow-up visits. Cameras were constantly monitoring toilet cubicles that were not even provided with doors in the Kroměříž psychiatric institution.

It was again ascertained that three institutions (Kroměříž, Horní Beřkovice and Opava) had not fulfilled the notification duty imposed by the Act on Personal Data Protection (Act No. 101/2000 Coll.) with respect to the operation of a camera surveillance system making recordings (this includes camera surveillance systems installed in the departments).

The Dobřany and Horní Beřkovice psychiatric institutions still do not provide a space where visitors could meet with patients quietly and privately.

Within consent to hospitalisation, three institutions (Kosmonosy, Šternberk and Dobřany) still require **consent to all therapeutic and examination acts and operations** from patients admitted to the institution on a voluntary basis. Thus, they still do not differentiate between consent to hospitalisation and consent to treatment. Good practice was ascertained in one institution (Horní Beřkovice), which however had not yet been incorporated in the relevant forms. The Defender noted fulfilment of the recommendation in the other institutions.

As for the use of means of restraint, it was ascertained that the institutions pay more attention to this issue and have implemented many of the Defender's recommendations. So far they can refer only to a Methodological Instruction of the Ministry of Health, since the use of means of restraint is not regulated by law. There persists a difference in opinion between the Defender and the Havlíčkův Brod psychiatric institution where extraordinary administration of sedating psychopharmaceuticals is not perceived as a means of restraint and a stricter regime of use, documentation and evaluation is not applied.

As a result of an absence of legal regulation, there persist great differences in the indication of restrictive measures. This leads the Defender to reiterate his legislative recommendation to the Ministry of Health.

None of the institutions systematically evaluates the use of means of restraint.

Detention proceedings and visits to district courts

Within the follow-up visits, the Defender interested himself more deeply in the rights of patients in cases where proceedings are pending on statement of the permissibility of admission or holding in a healthcare institution (Section 191a to 191g of the Code of Civil Court Procedure). The authorised personnel therefore visited seven competent district courts.

It was ascertained that, after an institution notifies a court within 24 hours in accordance with Section 191a (2) of the Code of Civil Court Procedure that a patient who expressed consent to his/her admission into the institution and is subsequently restricted in free movement in the course of treatment (for example using straps, by placement in an isolation room or netted bed), **courts in some cases do not open proceedings as they do not consider these restrictions to be an actual restriction of free movement**. Courts generally consider only placement in an enclosed unit to be restriction. The existing practice of non-uniform understanding of restriction of the free movement of patients hospitalised on a voluntary basis causes that institutions do not fulfil the obligation to report these restrictions to the court.

Among other things, the court is obliged to hear the ill person in the proceedings on statement of the permissibility of admission (Section 191b (3) of the Code of Civil Court Procedure). It was ascertained that the ill person is not always heard and the court is satisfied with information provided by the examining doctor that the patient's health condition precludes the hearing. In that case, there is no evidence in the proceedings other than examination by the doctor. In contrast,

some courts insist on fulfilment of this obligation and make sure themselves that the hearing cannot take place.

Where a patient is admitted into an institution without giving written consent to his/her placement there, the court must make a decision on admissibility of admission within seven days from the date of admission. The institutions were not certain about whether and based on what grounds they are allowed to keep a patient even after expiry of this period if the decision is not delivered to them by the deadline. However, the decision is usually not delivered by the deadline and the institutions are not officially aware of the court's decision. Some institutions can rely on oral announcement of the resolution made by the court in the institution.

It was ascertained that only a minimal number of patients admitted into an institution without their consent independently appoint a representative for detention proceedings. If a patient fails to select a representative, the court is obliged to appoint for him/her a guardian from amongst attorneys-at-law. It was confirmed through interviews with the personnel of the institutions and courts that guardians from amongst attorneys-at-law often do not fulfil the obligations of guardians and do not properly defend the interests of the persons entrusted to them; they usually do not even visit them, are not involved in any acts in the proceedings and do not acquaint themselves with the file. They undertake only formal acts such as acceptance of deeds. In these cases, the patients' rights are protected inadequately and the guaranteed right to legal aid is not implemented. Given that the representation is usually entirely formal, the Defender considers that an appointed guardian who obviously does not fulfil his obligations should be recalled by court and this conduct should no longer be tolerated (see also judgement of the Constitutional Court of January 11, 2007, File Ref. IV. ÚS 273/2005).

The Defender concluded that the **entire proceedings appear to be very much a formality**. It followed from interviews with court personnel on the common procedure that the question of whether the admission was based on legal grounds (Section 23 (4) of the Act on Care of People's Health) is in fact **assessed by a doctor rather than by the court**, namely the same doctor who previously decided on the admission. The court does not examine in detail the specific behaviour ensuing from a mental disorder or the degree of danger to health and life (examination of witnesses or evidence provided by submitting medical records are rather rare).

Discriminaton

05

Discriminaton

Before adoption of Act No. 198/2009 Coll., on equal treatment and on the legal means of protection against discrimination (the Anti-Discrimination Act), which established the Defender's mandate in providing assistance to the victims of discrimination, the Defender was encountering the issue of discrimination within his mandate **towards public administrative bodies**. This included in particular inquiries into the work of labour offices and area labour inspectorates. The original mandate of the Defender remains preserved and the Defender is therefore further authorised to inquire into whether authorities discriminate in their work and whether they adequately apply their inspection authority.

Since December 1, 2009, the Defender became the Czech institution for equal treatment (the "equality body"). Thus, the Defender may currently assess even in **private-law cases** whether discrimination takes place and issue a standpoint thereon. The most important element in the new power and mandate consists of **methodological assistance** from the Defender to victims of discrimination in lodging their proposals for the commencement of proceedings on grounds of discrimination. Within the provision of methodological assistance, the Defender instructs the client particularly of the suitable options for further steps. Depending on the circumstances of the case, the Defender may also decide whether it is appropriate to mediate between the parties to the dispute or whether basic legal aid should be provided.

In administering complaints connected with his new mandate, the Defender dealt with the issue of procedural aspects of protection against discrimination, discrimination in the assignment of municipal flats, discrimination on grounds of the nationality of citizens of the Member States of the EU (the latter area is not covered by the Anti-Discrimination Act, but falls within the Employment Act and the EU legal rules) and discrimination in the area of access to employment.

1 / Standpoint on the Procedural Aspects of the Anti-Discrimination Act

The Defender adopted a standpoint on certain procedural aspects of the Anti-Discrimination Act. The Defender dealt with the issues of **substantial jurisdiction of courts** in relation to actions for protection against discrimination, the relationship between an action for the protection of personal rights and actions for discrimination, courts' duty to provide advice, the shared burden of proof under Section 133a of the Code of Civil Court Procedure (Act No. 99/1963 Coll., as amended) and its potential application in administrative justice.

According to the basic rule contained in Section 9 of the Code of Civil Court Procedure, district courts have substantive jurisdiction unless substantive jurisdiction of regional courts is further stipulated by law. Thus, the competent district courts have jurisdiction in the first instance in cases involving an action for discrimination in civil actions (protection under the Anti-Discrimination Act

must not be confused with entitlements following from the protection of personal rights under the Civil Code).

Regional courts will have substantive jurisdiction in **cases of administrative law**. In this way, it is possible to achieve annulment of a discriminatory decision, but not, for example, satisfaction of a claim for appropriate satisfaction (such a claim must be brought by the plaintiff in civil proceedings before a district court).

In actions for protection against discrimination, the injured natural persons may raise the same forms of order sought as **in cases of protection of personality rights,** i.e. a claim for injunction, elimination or satisfaction. It is up to the court to assess whether the heart of the dispute concerns unequal treatment in the sense of the Anti-Discrimination Act or protection of personal rights under the Civil Code. Where unequal treatment pursuant to the Anti-Discrimination Act is concerned, there can be no question of the court deciding according to the residual regulation of the protection of personal rights in the Civil Code. Where unequal treatment outside the scope of the Anti-Discrimination Act is concerned, the procedure pursuant to the Civil Code shall be observed.

Section 133a of the Code of Civil Court Procedure stipulates the **sharing of the burden of proof** between both parties to the dispute. A person who considers that s/he has been discriminated against must not only allege the decisive facts but also demonstrate them to a certain degree. The plaintiff, i.e. the potential victim of discrimination, must demonstrate in the first place that s/he was treated less favourably than another person in a comparable situation on discriminatory grounds. However, the plaintiff does not have the duty to provide evidence regarding the alleged discriminatory grounds. If the plaintiff bears the burden of allegation and the burden of proof, the burden of proof passes on to the defendant who must then allege and demonstrate that the discrimination did not occur and that the conduct resulting in the alleged discrimination had a legitimate reason and aim, and the means of achieving that aim were appropriate. Should the defendant fulfil this burden of proof, the court cannot hold that discrimination took place.

Given that the Code of Civil Court Procedure does not include any detailed provisions regarding the burden of proof in discrimination cases, the provisions of parts one and three of the Code of Civil Court Procedure are to apply analogously to proceedings in administrative justice, i.e. including Section 133a.

As regards civil proceedings governed by the **investigation principle** (Section 120 of the Code of Civil Court Procedure), the obligation of the court is to clarify all decisive facts; therefore, the procedural stipulation of the sharing of the burden of proof is not applied.

2 / Assignment of municipal flats

The issue of assignment of municipal flats falls within access to services (housing). The Defender has noted several times that a municipality chose directly and indirectly discriminatory principles for the assignment of flats.

Complaint File Ref.: 834/2009/VOP/JH/MČ

A provision that excludes from bidding an interested person who receives pecuniary assistance in maternity or parental allowance as the sole source of income is indirectly discriminatory.

Mrs V. addressed the Defender with an objection to discrimination that she had found in the conduct of the Bohumín municipality. The Defender did not find discrimination in her case, but Mrs V. referred him to certain rules that the Defender examined and ascertained that a provision appeared in Annex No. 1 to the Principles of the Bohumín Municipality for the Conclusion of Contracts for Municipal Flats which excluded an interested person from bidding if s/he receives pecuniary assistance in maternity or parental allowance as the sole source of income except for those who worked before they began to receive these benefits or were self-employed persons paying social insurance.

The Defender found this provision to be indirectly discriminatory on grounds of sex since a majority of persons who receive pecuniary assistance in maternity or parental allowance are women. Simultaneously, this is not a legitimate requirement which would ensure proper payment of the rent (the fact that such a person may have other resources s/he could use for payment of the rent was not taken into account).

The provision is indirectly discriminatory on grounds of sex since it is primarily mothers (often self-supporting) who run into circumstances where they receive pecuniary assistance in maternity or parental allowance without working before.

Simultaneously, indirect discrimination on grounds of ethnicity can be inferred. The mothers in the above-described circumstances are often of Romani origin. In some cases, multiple discrimination of women belonging to the Romani minority in the area of access to housing could be inferred.

3 / Citizens of the European Union

Discrimination between the citizens of the Czech Republic and the citizens of the member states of the European Union has occurred in the area of access to housing and access to employment. These areas are covered by the Treaty establishing the European Community and Regulation (EEC) No 1612/68 of the Council of the European Communities of 15 October 1968 on freedom of movement for workers within the Community (hereinafter also the "Regulation"). The provisions of the Treaty establishing the European Community regulating this area and the provisions of the Regulation are directly applicable; they are also implemented in Czech laws. The citizens of the member states of the European Union should have the same conditions as the citizens of the Czech Republic in access to housing and access to employment. Otherwise, the Treaty establishing the European Community and the Regulation would be breached.

Complaint File Ref. 1927/2009/VOP/PP

The citizens of the member states of the European Union have the same rights as the citizens of the Czech Republic in the area of access to housing. It is necessary to differentiate between foreigners from within the EU and foreigners from third countries.

Mr H. addressed the Defender with a complaint about the conduct of a housing cooperative in the municipality of Vyškov which made consent to a sublease conditional on a fee. This fee differed depending on whether the subtenant is a citizen of the Czech Republic or a foreigner, without distinguishing between EU citizens and those of third countries.

The prohibition of restrictions on the right of establishment of citizens of the member states of the European Union is stipulated already in Art. 43 of the Treaty establishing the European Community (Art. 49 of the Treaty on the Functioning of the European Union). This article has both horizontal and vertical direct effects. This means that the provision is binding not only upon the state (the Czech Republic), but every individual citizen may directly rely on it both in relation to the state and in relation to any other private entity.

Regulation (EEC) No. 1612/68 of the Council of the European Communities of 15 October 1968 on freedom of movement for workers within the Community builds on the standards for the free movement of workers within the European Union. The Regulation is a legal regulation of the European Communitie,s which is directly effective in the member states and takes precedence over national laws. In accordance with Art. 9 of the Regulation, a worker who is a national of a member state and who is employed in the territory of another member state shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

Given that the Defender lacked a mandate in discrimination matters at the time of receiving the complaint (March 2009), Mr H. was provided with basic legal advice and recommended to cooperate in his further steps with a non-profit organisation concerned with discrimination.

4 / Employment

The Defender received several complaints concerning discrimination in employment. These involved cases of discrimination in access to employment and unlawful termination of employment based on discriminatory grounds. Based on the existing mandate, the Defender several times inquired into the activities of **labour offices** and **labour inspectorates**. For more on this issue, see the chapter Work and Employment.

5 / Other Areas Related to the Right to Equal Treatment and Protection against Discrimination

The Defender also dealt with the issue of protection against discrimination in relation to the **interrupting of telephone calls of prisoners** (see page XXX). The Defender also encountered the right to equal treatment in relation to the **permitting of barrier-free constructions** (page XXX) and in relation to **access of family members of citizens of the Czech Republic to public health insurance** (page XXX).

Given that legislation in the area of healthcare has not been amended as yet, the Defender must reiterate that implementation of Art. 6 (3) and Art. 7 of the Convention on Human Rights and Biomedicine is absent in Czech legislation (Communication of the Ministry of Foreign Affairs No. 96/2001 Coll. Int. Tr.). Although the Act on Care of People's Health (Act No. 20/1966 Coll., as amended) provides for the patient's consent to treatment in Section 23, it does not adequately respond to situations where a person is unable to give qualified consent to treatment due to his/her mental condition and has no legal representative (Art. 6 (3)) or when the person does not wish to give such consent and, in all likelihood, his/her health would be seriously harmed without intervention aimed at treating his/her mental disorder (Art. 7).vv

General Observations – Recommendations to the Chamber of Deputies

06

General Observations – Recommendations to the Chamber of Deputies

In this part of the Annual Report the Defender recapitulates his previous recommendations pointing out the required amendments to the legislation that he addressed to the Chamber of Deputies in previous years. The Defender simultaneously attaches new recommendations that followed from his activities in 2009.

1 / Recommendations of the Public Defender of Rights for Amendments to Legislation Specified in the Annual Reports on the Activities of the Public Defender of Rights for the Years 2007 and 2008

In discussing the Annual Reports of the Public Defender of Rights for 2007 and 2008, the Chamber of Deputies adopted resolutions in 2009 (Nos. 1303 and 1304) requesting the government deal with legislative suggestions indicated in the conclusions of the Annual Report and submit to the Chamber of Deputies by the end of 2009 a report on the use of these suggestions. Given that the **government did not submit the report to the Chamber of Deputies by the end of the year and has not even discussed it as of the date of this Report**, it is impossible to evaluate how the government dealt with the legislative recommendations. Only preparatory material is available at present, which was submitted by the Office of the Government for the amendment procedure (Ref. No. 01383/10 – KML); nevertheless, the comments of the individual ministries have not been dealt with to date.

Given the absence of government material for evaluation and, if appropriate, agreeing with the reasons for which the government has not begun to deal with the problems, the Defender will limit himself to only a brief **list of the legislative recommendations from previous years that have not been fulfilled:**

Unfulfilled recommendations from the Annual Report for 2007

– submission of a draft law settling ownership relations to real estate registered in the Land Register without an owner or with an unknown owner;

- submission of a draft amendment to the Mining Activities Act that would task mining organisations with an obligation to submit agreements on the settlement of conflict of interest also with the owners of the affected premises in cases where the latter request this in writing;

- approval of a draft strategy for a new law on experts and interpreters and submission of a draft law on experts and interpreters;

- approval of a draft strategy for a law on social housing and submission of a draft law on social housing;

- submission of an amendment to the Pension Insurance Act that would stipulate entitlement to an orphan's pension at least in the minimum guaranteed amount also to those orphaned children whose parents did not qualify for entitlement to old-age or disability pensions (guaranteed orphan's pension) at the time of their death, or to submit an amendment to the State Income Support Act that would introduce a new benefit within the non-insurance systems, similar in its purpose to the guaranteed orphan's pension;

- submission of an amendment to the Family Act in such a way that a decision on the removal of a child is always issued for a definite term after which, if the causes for the removal of the child continued to exist, they would have to be specified in a new decision;

- adoption of a draft strategy for a new law on heritage preservation and submission of a new law on heritage preservation that would 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 cultural heritage.

Unfulfilled recommendations from the Annual Report for 2008

- submission of an amendment to the Local Fees Act that would stipulate the legal liability of persons obliged to maintain minor payers of the local fee for the operation of the system of gathering, collection, transport, sorting, use and disposal of municipal waste;

- submission of an amendment to the Minimum Living and Subsistence Standard Act that would eliminate the disadvantaging of single parents and the parents of a single parent for the purposes of joint assessment of persons in the system of material need benefits;

- submission of an amendment to the Building Act and Asylum Act so as to fully ensure the right of a party to proceedings to make the copies of documents from a file;

- submission of an amendment to the Administrative Fees Act that would stipulate the regime of charging copies from administrative files in a manner similar to that in Section 17 of the Act on Free Access to Information;

- submission of an amendment to the Police Act that would clearly settle the relation of handcuffing (Section 25) to coercive means (Section 52 et seq.) and would prohibit the use of handcuffing in police cells;

- submission of an amendment to the Rules of Criminal Procedure that would stipulate a deadline by which the court must make a decision on a proposal of a healthcare facility for the termination of protective treatment;

– performing a comprehensive analysis of the laws that refer to the institute of permanent residence and subsequent submission of draft amendments to the laws that use the institute of permanent residence for stipulating rights and obligations, while replacing "place of permanent residence" with "place of usual residence".

2 / New Legislative Recommendations of the Defender

2 / 1 / Heritage preservation

The Defender has long pointed out shortcomings in the legislation on heritage protection. In this respect the Defender points out particularly 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 cultural heritage. A condition has existed for a long time where the owners of real estate in heritage zones and reserves are obliged to comply with the requirements of heritage preservation in repairing these buildings, 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 also accompany the duplication of heritage preservation where two independent institutions (national institutes of cultural heritage and heritage authorities) exist in parallel and many times view a planned construction project in entirely different ways.

The Defender therefore again recommends that the Chamber of Deputies request the government submit a new law on heritage preservation that would

(1) 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 cultural heritage and

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

2 / 2 / Unification of payments for the provision of copies of documents

Citizens can currently request authorities to provide a copy of an official document under a number of legal regulations. This typically takes place under the Code of Administrative Procedure (the party to the proceedings and a person who demonstrates a legal interest in studying the file may apply) and under the Act on Free Access to Information (anyone may apply). To avoid unreasonable burdening of authorities, payments for the provision of copies were introduced so that the applicant him/herself is motivated to consider responsibly what documents s/he really needs. Experience from other areas shows that a fee corresponding to the costs of the given act is sufficient.

Unfortunately, only the Act on Free Access to Information deals with the payment of costs. In contrast, the fee stipulated in the Administrative Fees Act (Act No. 634/2004 Coll., as amended) in the amount of CZK 15 for an A4 page exceeds several-fold the costs of making a copy of a document. Where a copy of extensive material is required (for example an expert report), the total amount may be hundreds of crowns. In addition, authorities currently charge this fee even to parties to pending administrative proceedings, with respect to whom the possibility of opining in a qualified manner on the underlying documents for decisions represents one of the guarantees of the right to a fair hearing.

The Defender received a letter from the Minister of Finance relating to the issue of making copies from administrative files subject to a fee, agreeing with the conclusion that a comprehensive legislative amendment should be carried out since a mere amendment to the Administrative Fees Act (Act No. 634/2004 Coll., as amended) would not suffice.

The Defender recommends the Chamber of Deputies request the government to submit a legal regulation that would unify the amount of all payments for the provision of copies of documents kept by public administration regardless of the legal regime in which copies are provided so that the amount corresponds to the actual costs of making the copy.

2 / 3 / Decreasing the subsistence amount as a penalty for persons who do not perform public service and disabled persons in degree III without entitlement to disability pension

Since the date of effect of an amendment to the Assistance in Material Need Act (amendment No. 382/2008 Coll.), the Defender has encountered a negative response concerning the decrease in the subsistence amount to the subsistence level due to failure to perform public service in the required extent. The Defender regards as the most serious the "penalty" decrease in the subsistence amount by the amount intended for dietary nutrition, which particularly has an impact on the disabled.

Refusal to perform a public service because the public service offered is incompatible with the health limitation of the person concerned cannot be taken into account since the law does not enable bodies of assistance in material need to take account of the reasons for which the person is unable to perform the work. The Defender discussed the excessive harshness of the provision with the Minister of Labour and Social Affairs and reached agreement on omitting the provision on the penalty decreasing the subsistence amount intended for dietary nutrition.

Another amendment to the legal regulation to the detriment of the disabled occurs as of January 1, 2010. From the aforementioned date, the amount of subsistence was decreased to the subsistence level with respect to persons fully disabled in degree III with the justification that the Assistance in Material Need Act evaluates the activities of the recipient of the benefit also retrospectively, and these persons did not take sufficient initiative to increase their income on their own. The Defender expressed fundamental disagreement with the proposed regulation since failure to complete a qualifying period of insurance by fully disabled people mostly occurs due to limited work potential at the time when they were found to be fully disabled. Decreasing benefits to subsistence level means a substantial drop in their living standard which they are not able to increase through gainful activities. It follows from the nature of the matter that the benefits of assistance in material need cannot be increased through performing a public service. Thus, disabled people face considerably worse circumstances than those whose working potential is not limited, without there being a legitimate aim of the disadvantage.

The Defender recommends the Chamber of Deputies adopt an amendment to the Assistance in Material Need Act that would cancel the decrease in subsistence amount due to failure to perform public service by disabled people.

2 / 4 / Unavailability of public service in benefits of assistance in material need

The benefit of assistance in material need is decreased to subsistence level from July 1, 2009, for people in material need who do not perform at least 20 hours a month of a short-term employment or unpaid work for a municipality. These employment opportunities are often not available and these people are objectively unable to fulfil this condition stipulated by law. Although the Defender agrees with the principle of public service and the idea of motivating people for employment, the system has yet to be resolved since the required working activities are often not provided by municipalities. It should be noted that if a person who has been in material need for over six months fails to work the required number of hours, his/her benefit is automatically decreased to subsistence level (CZK 2,020 for an individual).

The Defender therefore recommends the Chamber of Deputies request the government submit an amendment to the Assistance in Material Need Act (Act No. 111/2006 Coll., as amended) that would eliminate the requirement for performing a public service for the purpose of provision of subsistence allowance in cases where the municipality does not provide a public service or where the current capacity of the public service precludes satisfaction of all applicants.

2 / 5 / Use of means of restraint in healthcare facilities

The Act on Care of People's Health (Act No. 20/1966 Coll., as amended), currently regulates only some legal aspects of hospitalisation of a patient in a healthcare facility against his/her will. It does not regulate the conditions of the stay at all. The legal aspects of hospitalisation of patients were to be partly remedied by the proposed new healthcare legislation (particularly the Health Services Act), which however did not pass the legislative process.

The involuntary stay of patients in healthcare facilities represents a very significant infringement of personal freedom, sometimes comparable to the regime of imprisonment. Given that it was ascertained in visits to psychiatric institutions that the life of patients considerably differs in individual institutions, it would be useful to regulate this area by a law. This applies particularly to the use of means of restraint (it is currently regulated only by Methodological Instruction of the Ministry of Health No. 37800/2009) and the issue of regime measures and the living conditions of patients.

The Defender recommends the Chamber of Deputies request the government to submit an amendment to the Act on Care of People's Health (or an entirely new legal regulation) that would incorporate the issue of the use of means of restraint and stipulate in general terms the living conditions of patients in psychiatric institutions.

2 / 6 / The patient's consent to treatment in psychiatric hospitals

Given that legislation in the area of healthcare has not been amended as yet, the Defender must reiterate that implementation of Art. 6 (3) and Art. 7 of the Convention on Human Rights and Biomedicine is absent in Czech legislation (Communication of the Ministry of Foreign Affairs No. 96/2001 Coll. Int. Tr.). Although the Act on Care of People's Health (Act No. 20/1966 Coll., as amended) provides for the patient's consent to treatment in Section 23, it does not adequately respond to situations where a person is unable to give qualified consent to treatment due to his/her mental condition and has no legal representative (Art. 6 (3)) or when the person does not

wish to give such consent and, in all likelihood, his/her health would be seriously harmed without intervention aimed at treating his/her mental disorder (Art. 7).

Given that the statutory exemptions from the requirement for performing a medical operation without informed consent (Section 23 (4) of the Act on Care of People's Health) do not cover all situations of patients placed in psychiatric institutions, it would be expedient to adopt a legal regulation that would provide for the cases of psychiatric treatment contemplated in Art. 6 (3) and Art. 7 of the Convention on Human Rights and Biomedicine.

The Defender recommends the Chamber of Deputies request the government submit an amendment to the Act on Care of People's Health (or an entirely new legal regulation of the provision of health services) that would regulate the treatment of psychiatric patients in a manner in accordance with Art. 6 (3) and Art. 7 of the Convention on Human Rights and Biomedicine.

2 / 7 / Standards for assessing registration of non-state healthcare facilities

According to the applicable legislation, a regional authority, the Prague City Hall or the Ministry of Health is to register a non-state healthcare facility on the basis of an application from the operator of the facility. The application must include, among other things, consent of the competent registration authority to the personnel and material resources and the type and scope of healthcare provided by the non-state facility. The Defender dealt with a case on his own initiative where the relevant requirements for material, technical and personnel resources are not regulated in legislation with respect to one type of non-state healthcare facility (in this specific case, the provision of healthcare by midwives, including natural childbirth). Some administrative authorities competent for registration "replace" the absent legal regulation with their own discretion. As a result of this situation, the administrative bodies competent for registration make distinctions in their approach to applicants for registration, resulting in a level of arbitrary conduct of the administrative body.

The Ministry of Health is authorised to issue an implementing legal regulation stipulating, inter alia, requirements for technical and material equipment of healthcare facilities. At present, this is represented by Decree No. 49/1993 Coll., on technical and substantive requirements on the equipment of healthcare facilities, as amended, which in its contents no longer corresponds to the current state of affairs in the area concerned and does not reflect some new types of (non-state) healthcare facility.

The Defender recommends the Chamber of Deputies request the government oblige the Minister of Health to draw up an amendment to Decree No. 49/1993 Coll., on technical and substantive requirements on equipment of healthcare facilities, that would respond to the recent developments in the area of healthcare and specify in detail the conditions (personnel, substantive and technical) that must be met by an applicant for registration of a healthcare facility.

2 / 8 / Penalties imposed on non-state healthcare facilities

In dealing with complaints concerning the processing of complaints about non-state healthcare facilities by regional authorities, the Defender has repeatedly encountered the problem of the still pending legal regulation of administrative punishment.

Pursuant to Section 14 of the Act on Healthcare in Non-State Healthcare Facilities (Act No. 160/1992 Coll., as amended), the competent regional authority as the body competent for reg-

istration may impose a penalty on an operator of a healthcare facility for breach of an obligation following from the aforementioned Act and the Act on Care of People's Health (Act No. 20/1966 Coll., as amended). However, the regulation does not specify the amount of the penalty and does not refer to any other general regulation that would stipulate the extent of the penalty. The amount of the penalty also cannot be determined by administrative discretion. In this situation, the penalty cannot be imposed. The Defender has repeatedly advised the Ministry of Health of this fact, where the management of the Ministry pledged to take it into account in the preparation of legislative amendments. However, no remedy has yet been made.

The Defender recommends the Chamber of Deputies request the government to submit an amendment to the Act on Healthcare in Non-State Healthcare Facilities that would specify in detail the conditions for administrative punishment for breach of the obligations following from the aforementioned Act.

2 / 9 / Records of waste management

The Defender has long pointed out shortcomings in the legislation on waste management. From the perspective of prevention of illegal waste management and cases like those in Libčany, Chvaletice and Nalžovice (and the costly elimination of their consequences), the Defender considers it crucial that the movement of waste be monitored, the waste managed in real time and particularly that the records of waste management and the records of the operated facilities be interlinked with the records kept in the shipment of hazardous waste; the data from these records must be continuously compared and evaluated.

The Defender also points out that creation of a Central Waste Management Information System in a uniform data standard should be a prerequisite for proper and high-quality monitoring of waste movement; the Information System should include information on the cross-border transfer of waste as well as waste transfers within the Czech Republic; information on hazardous waste transfer should be a minimum.

The Defender therefore recommends the Chamber of Deputies request that the government submit an amendment to the Waste Act (or an entirely new legal regulation) that would regulate the issue of the real-time monitoring of waste flow and waste management.

2 / 10 / Expiry of credit agreements for consumers

The Defender points out that a credit agreement concluded by a consumer in connection with the purchase of goods/provision of a service remains valid even if the consumer has withdrawn from the purchase agreement (Section 5 (7) and (8), Section 57 of the Commercial Code (Act No. 40/1964 Coll. as amended)) and continues to be "binding" upon the consumer (unless the consumer has withdrawn from it). Thus, the non-bank entity providing the credit claims its receivables under the credit agreement for consumers regardless of the fact that the purchase agreement, due to which the credit agreement for consumers was agreed, is terminated ex tunc upon withdrawal. In contrast to this, Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements with consumers stipulates automatic expiry of the credit agreement for the aforementioned cases.

This problem could have been resolved by adoption of the Consumer Credit Act (the Defender participated in preparing the part on "bound credits"), which however has not to date been submitted to the Chamber of Deputies.

The Defender recommends that the Chamber of Deputies request the government submit an amendment to the Act on Some Conditions of Agreeing Consumer Credits which would stipulate expiry of the credit agreement in that case that it is agreed on in connection with the conclusion of a credit agreement which is subsequently terminated due to the consumer's withdrawal.

2 / 11 / Prohibition of arbitration clauses in consumer agreements

The Defender has long encountered complaints of consumers about unfair arbitration proceedings initiated by entrepreneurs. The Defender considers the stipulation of preliminary arbitration clauses in most present-day agreements intended for consumers to be problematic. In the present legal practice in a number of industries (consumer credits, used-car dealerships, real estate transactions), this in fact represents unconstitutional denial of the right to a fair hearing on a massive scale.

Although the Defender holds that these preliminarily agreed arbitration clauses can be considered invalid, according to the information available, courts still do not accept this legal view. The Defender is also aware that in the overwhelming majority of instances the case does not even reach the court due to the complicated process of questioning consumer arbitration clauses.

The Defender has therefore long called for a conceptual approach to the issue of arbitration clauses in consumer agreements and proposes, following the model of the Slovak legal regulation, that an express prohibition of preliminary arbitration clauses be stipulated in the Civil Code with respect to all consumer agreements. This solution guarantees court protection to consumers, without negating the trend of out-of-court resolution of disputes as such. The very prohibition of preliminary arbitration clauses does not preclude utilisation of the existing system of out-of-court resolution of disputes (or Alternative Dispute Resolution – ADR), since the latter is based on agreement of the parties on bringing the specific dispute before an arbitrator (or mediator) only when a dispute arises. The proposed solution does not prevent the activities of financial arbitrators whose power is considered to be broadened to disputes following from credit agreement for consumers.

The Defender proposes the Chamber of Deputies adopt an amendment to the Civil Code prohibiting preliminary arbitration clauses in all credit agreements for consumers.

2 / 12 / Entitlement to an orphan's pension after the death of persons who assumed the care for a child substituting for the parents' care

The Pension Insurance Act (Act No. 155/1995 Coll., on pension insurance, as amended), makes entitlement to orphan's pension after the death of a person who assumed the care for a child substituting for the parents' care conditional on the fact that the child was mainly dependent on that person at the time of the latter's death. Practice has shown that the relevant condition is ambiguous and social security bodies interpret it in an inappropriately restrictive manner in making decisions on the arising of entitlement to an orphan's pension. As a result, applications for an orphan's pension after the death of the aforementioned persons are dismissed. Remedy (granting the pension) is made through alleviating harshness by the Minister of Labour and Social Affairs, which the Defender does not consider to be an optimal solution.

The Defender therefore recommends that the Chamber of Deputies request the government to submit an amendment to the Pension Insurance Act (Act No. 155/1995 Coll., as amended), which would unambiguously stipulate entitlements to an orphan's pension after the death of a person who assumed the care for a child, substituting for parental care, where the child was mainly dependent on that person at the time of the latter's death.

Closing Summary

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Closing Summary

The fact that this Annual Report on the Activities of the Public Defender of Rights closes the first decade of the existence of the Public Defender of Rights justifies something of a special evaluation and reflection. The previous nine reports mainly told success stories and for the most part met with a positive response.

If we disregard these somewhat subjective views, we realise that the Public Defender of Rights in 2009 is not what he was in 2000. Some changes are natural and follow from the processes of maturing and gaining experience. Apart from these, other changes occurred that were not always clearly conceptual and shared the feature of bestowing the Defender with additional tasks and responsibilities.

I believe that where the legislature broadened the competences of the Public Defender of Rights with additional tasks, the point generally was to reduce the load on executive bodies. However, the legislature may be wrong in considering that complicated and fundamental problems should be entrusted to a relatively small and financially undemanding body, located in distant Brno, whose findings may be insignificant and unimportant for the centre. Paradoxically, in a large majority of cases (the detention and discrimination agenda), fundamental issues implemented on the basis of obligations under international agreements or European directives are concerned. I consider that not every broadening of the competence of the Public Defender of Rights must necessarily be perceived as a pleasing expression of respect for this institution. Evaluating the present situation from this perspective is a matter of degree of conceit, and nothing more.

However, it is important that through the transfer and broadening of competences the Public Defender of Rights seems to constantly converge in his roles with the general executive, which may represent a certain danger for the independence of this institution in the future. Power is always very tempting.

On the contrary, the ombudsman's position in the original conception is exceptional if not indeed charming. Free of any executive powers, the Czech ombudsman became a place of hopes not always fulfilled, a place of attempts at a last appeal, and although he was no longer able to help in a large majority of cases, his authority in society grew.

I dare say that this is to a major degree thanks to my team of colleagues, who are bravely tilting at the windmills of maladministration and lawlessness. Last but not least, I would like to thank my deputy, RNDr. Jitka Seitlová, who I have authorised to exercise a part of my mandate.

I hope that the institution of Public Defender of Rights will preserve the mark of the ombudsman's purity, and benefit from its powerlessness, because this is what makes it strong.

Brno, March 21, 2010

JUDr. Otakar Motejl
Public Defender of Rights

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