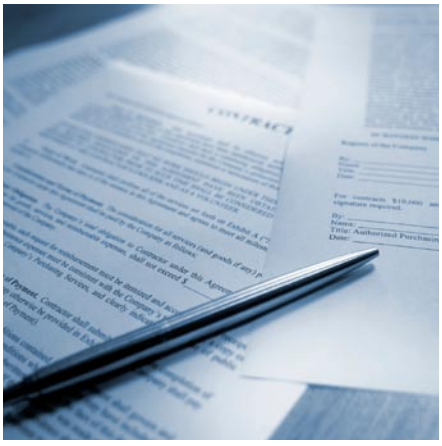
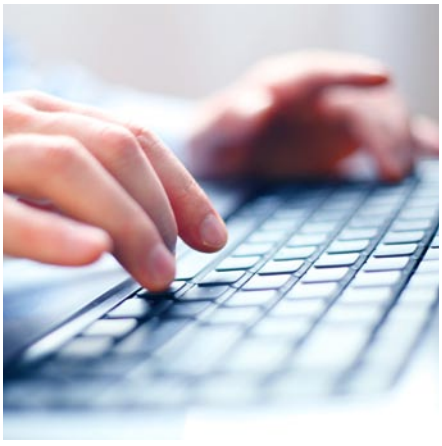
Public Defender of Rights
OMBUDSMAN

Annual Report on the Activities of The Public Defender of Rights





2012

ANNUAL REPORT ON THE ACTIVITIES OF THE PUBLIC DEFENDER OF RIGHTS

2012

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Introduction

In the presented Annual Report, JUDr. Pavel Varvařovský, the Public Defender of Rights (hereinafter also the "Defender"), sums up his control activities in the area of public administration, detention agenda, discrimination agenda and supervision over the expulsion of foreigners in 2012.

In this Annual Report, the Defender places emphasis particularly on the general observations following from his activities. As in 2011, the Report is therefore more detailed especially in the parts dedicated to the Defender's legislative recommendations to the Chamber of Deputies or his commenting on legal regulations, while a more concise and illustrative approach was adopted in the part dealing with inquiries into specific cases, whether in the area of control of public administrative authorities, systematic visits to facilities where persons restricted in their freedom are held and in the area of non-discrimination law.

The Report is divided into eight parts.

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

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

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

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

The fifth part focuses on protection against discrimination under the Antidiscrimination Act, as it is called, (Act No. 198/2009 Coll., as amended).

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

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

The eighth part is the closing summary.

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

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

- a summary report within the meaning of Article 13(2) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;

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

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

1 General Observations – Recommendations to the Chamber of Deputies

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

The Defender first briefly evaluates the fulfilment of his 2010 and 2011 recommendations addressed to the Chamber of Deputies.

The Defender then attaches new recommendations that followed from his activities in 2012. **He again concentrates only on those recommendations that he considers absolutely essential**. The Defender would welcome it if the Chamber of Deputies itself ensured that the recommendations are reflected in the applicable legal regulations in the form of an MPs' initiative and, to this end, the Defender will yet again strive to make sure that the individual recommendations are examined by the relevant committees of the Chamber of Deputies. In those cases where a legislative recommendation requires a substantial intervention in the legal system, the Defender would welcome it if the Chamber of Deputies adopted a resolution (as common in the past years) requesting that the Government addresses the recommendations in question.

1 / Evaluation of the Recommendations for 2010

The Defender is pleased to note that some progress has been achieved even as to his last two unheeded recommendations to the Chamber of Deputies from 2010.

Firstly, he had proposed that the competence of **highway administrative authorities be entrusted solely to the municipal authorities of municipalities with extended competence.** In the course of 2012, the corresponding amendment, which should reflect the Defender's recommendation, was submitted for consultation to stakeholders outside the Parliament (including the Defender who submitted his comments in due course). For more detail, see "Submission of comments by the Defender", page 28.

Similar evaluation can be made as for the recommendation to **adopt a new Heritage Preservation Act,** which would stipulate in particular the possibility of compensation for the costs of renovation and maintenance of heritage values of premises in heritage reserves and zones that are not listed as cultural heritage and which would unify the exercise of heritage preservation under a single institution whose standpoint on heritage preservation would be binding. In 2012, the substantive intent of the National Heritage List Act, which is intended to replace the existing legislation and partly implement the Defender's recommendations, was submitted.

2 / Evaluation of the Recommendations for 2011

With regret, the Defender notes that his recommendations to the Chamber of Deputies from **2011 were not implemented at all, with only one exception**.

The only recommendation that was heeded concerns an amendment to the **Value Added Tax Act** (Act No. 235/2004 Coll., as amended); with effect as of 1 January 2013, the words "with the place of performance in the Czech Republic" were repealed from the relevant provision of the law. For more detail, see "Submission of comments by the Defender", page 28.

As to the recommendation to stipulate the territorial competence of distrainors, a proposal to this effect was indeed submitted within the legislative process pertaining to the amended Code of Civil Procedure (Act No. 99/1963 Coll., as amended) and other related Acts (parliamentary print No. 537) through a draft amendment introduced by the Senate; however, **the Chamber of Deputies subsequently voted against the possibility to stipulate territorial competence of distrainors**.

Thus, the following recommendations of the Public Defender of Rights for 2011 remain unheeded:

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

The Defender is convinced that, in order to ensure a truly effective exercise of the right to claim one's right before an independent and impartial court, all second-instance administrative decisions should contain an advice about the possibility to file an action against an administrative decision in order to prevent forfeiture of entitlement to judicial protection due to ignorance of the law.

The Defender recommended that the Chamber of Deputies stipulate in the Code of Administrative Procedure (Act No. 500/2004 Coll., as amended), through an MPs' initiative (Article 41 (2) of the Constitution), the duty of administrative authorities to advise the parties to proceedings of their right to file an administrative action against an administrative decision.

The Government responded to this recommendation by stating that the present shortcomings of the Code of Administrative Procedure or of provisions whose modification would make the interpretation and application of law easier would be dealt with during some future amendment of the Code.

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

The Defender believes that part of the existing Employment Act (Act No. 435/2004 Coll., as amended) is in violation of Article 2 of the Charter of Fundamental Rights and Freedoms.

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

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

The Government disagreed with the Defender's position. On the basis of subsequent discussions on the matter, however, the Defender was informed that the "DONEZ project" had been designed for a limited period of time, would be phased out over the first half of 2013, and should be discontinued as of September 2013.

2 / 3 / Lotteries

The Defender does not consider the transitional provision (Article II (4) of Act No. 300/2011 Coll.) of the amended Lotteries Act (Act No. 202/1990 Coll., as amended) applicable to cases of already existing regulatory authority of municipalities as this would amount to retroactive infringement of the municipalities' right to self-government.

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

The Government responded to this recommendation by stating that it would submit a draft amendment which would considerably shorten the so-called "three-year protection period"; at the same time, it stated that a petition to abolish the above Article would be tested by the Constitutional Court upon a municipal complaint filed by the municipality of Klatovy. For more on the Constitutional Court proceedings and the Defender's comments, see The Defender and the Constitutional Court, page 32.

2 / 4 / Health insurance for foreigners

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

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

At present the Government is preparing a new bill, which will regulate the entry and stay of foreigners on the territory of the Czech Republic and which should also comprehensively deal with the issue of health insurance of foreigners. The bill, however, does not anticipate automatic access of all categories of foreigners, as mentioned by the Defender in his recommendation, to the system of public health insurance. It should be noted, however, that further discussions with the Ministry of Health on the subject are in progress.

2 / 5 / Public Service Act

The Defender has been consistently criticizing over a long period the failure to implement Article 79 (2) of the Constitution, which anticipates a legal regime applicable to employees exercising governmental authority in administrative authorities differing from the Labour Code (Act No. 262/2006 Col., as amended).

The Defender recommended to the Chamber of Deputies to request that the Government remedy the unfavourable situation consisting in the lack of an effective legal regulation that would govern the status of employees exercising governmental authority.

The government responded to this recommendation by stating that a new law was being prepared, designed to replace the existing Public Service Act (Act No. 218/2002 Coll., as amended), which has never come into effect. While being aware of the ongoing work on the new law, the Defender has repeatedly emphasised that the intended private-law design of a industrial relations is not suitable, as, according to the above-quoted Article of the Constitution, at least a portion of civil servants should be in a public-law relationship with the State. Moreover, the draft as prepared by the Government might be in violation of obligations in respect of the European Union.

3 / New Recommendations of the Defender for 2012

3 / 1 / Provision of free legal aid

Ensuring legal aid to people who are unable to obtain it on their own for financial or other reasons is insufficient, in the Defender's opinion. The State fully delegated this responsibility to the Czech Bar Association, without setting up any instruments that would substantially motivate legal counsels to provide pro bono legal assistance. There is no comprehensive legal framework that would provide for free legal aid in connection with judicial proceedings or administrative proceedings.

However, the Czech Republic's obligation to provide legal aid also arises from its international obligations (the right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by subsequent Protocols, and the right to an effective remedy and to a fair trial under Article 47 (3) of the Charter of Fundamental Rights of the European Union). Article 37 (2) of the Charter of Fundamental Rights and Freedoms also makes it clear that legal entitlement to free legal aid exists, subject to the terms and conditions provided by individual regulations of procedural law.

The Defender welcomed the effort of the Ministry of Justice to deal with the issue of free legal aid in a comprehensive manner and submitted his comments on the draft substantive intent of the law. Nevertheless, after the Government Legislative Council suspended consideration of the draft substantive intent in 2011, all preparatory work on the law was discontinued.

The Defender recommends to the Chamber of Deputies to request that the Government regulate the provision of free legal aid.

3 / 2 / Housing for people threatened by social exclusion (social housing)

Since 2005, the Defender has been pointing out the absence of legal regulation of social housing, an increasingly serious issue, which contributes to further decline of socially disadvantaged people into poverty and increases social tensions within the society. The economic recession that the Czech Republic has been facing for the past few years exacerbates the problem even more and the number of people threatened by poverty and loss of housing has been growing.

Despite the Government's statement, in their response to the Annual report on the activities of the Public Defender of Rights for 2006, that the draft substantive intent of a law would be submitted in April 2008, this did not happen. On the contrary, in 2008, the draft was taken off the Government's legislative work plan. At present, according to the Housing Policy Strategy of the Czech Republic until 2020 (adopted through Government Resolution No. 524 of 13 July 2011), an analysis of the present legislative environment in the area of assistance to socially disadvantaged population groups has been prepared; this analysis also indicates the necessity of a legislative solution.

The Defender recommends to the Chamber of Deputies to request that the Government prepare and submit a draft substantive intent of a law or other legislative solution regulating social housing.

3 / 3 / Social Systems Card (sKarta)

By Act No. 366/2011 Coll. (Social Reform I) a new method of paying out benefits through a social systems card (hereinafter also "sKarta") was implemented despite the Defender's reservations (for details, see the Public Defender of Rights' Report for the second quarter of 2012). Due to the sketchiness of the legal regulation, benefit recipients learned a number of essential facts only from the terms and conditions of Česká spořitelna, a. s., including the following:

- cash payment of benefits through sKarta actually means payment through an ATM;
- a number of services provided by Česká spořitelna, a.s., will be subject to charge (such as any ATM withdrawal beyond the first one, withdrawal from an ATM of another bank, or withdrawal at a bank counter);
- certain existing methods of payment (money order, cash payment at the Labour Office) are no longer possible.

The contract executed between the Ministry of Labour and Social Affairs and Česká spořitelna, a. s., enabled transfers of personal data of clients. Since the functions of sKarta as a payment card and as a disability card were merged, the right of disabled persons to privacy was disproportionally interfered with. In terms of personal data protection, moreover, personal data processed for the purpose of issuing an sKarta as a public document were governed only by a decree, not by a law. A portion of the data still remains governed by a decree. In addition, the question whether taking delivery of an sKarta was compulsory and whether failure to do so might be penalised was discussed (for more detail, see Social Security, page 39).

The Defender found the applicable legal regulation insufficient with respect to the protection of privacy and personal data of benefit recipients, especially in case of disabled persons. At the same time, he found it incomplete and vague in terms of defining conditions for the exercise of public authority.

The Defender recommends that, within the legislative process pertaining to the upcoming amendment of the Act on the Labour Office of the Czech Republic and to certain other acts, the Chamber of Deputies adopt a legal regulation enacting mainly the following:

- a disability card consistent with the right of disabled persons to information self-determination;
- clear identification of the entities to which personal data from the Unified Information System of Labour and Social Affairs can be transferred, and the scope of such data;
- payment of benefits to their recipients in a manner that will respect their will and prevent their being placed at a disadvantage due to age or disability;
- a clear definition of conditions for the exercise of public authority in the context of benefit payments**.**

3 / 4 / The absence of express prioritisation of integration in the Education Act

The Defender conducted research to determine the ethnic structure of pupils in former "special schools". The results showed a disproportionate percentage of Romany pupils as compared to non-Romany pupils in these schools in comparison to the proportion of Romany people in Czech population. In the Defender's opinion, insufficient legal regulation of integrated education of pupils with special educational needs is one of the causes. According to the Education Act (Act No. 561/2004 Coll., as amended) and the Decree on the Education of Pupils with Special Educational Needs (Decree No. 73/2005 Coll., as amended), education of pupils with special educational needs should be carried out through individual integration, group integration or in a special school, or, if appropriate, these methods may be combined. Although individual integration often appears to be the most suitable method, the existing education regulations do not expressly stipulate

such preference. The necessity to expressly regulate this preference may also be inferred from international obligations of the Czech Republic; moreover, the Czech legislator must follow the principles stated in Article 24 of the UN Convention on the Rights of Persons with Disabilities of 13 December 2006, which is binding on the Czech Republic.

In connection with the performed research, the Defender recommended, pursuant to the provisions of Sec. 22 (1) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended), that the Government submit a draft amendment to the Chamber of Deputies which would clearly and without ambiguity stipulate the priority of individual integration of pupils with special educational needs in mainstream schools. According to the Prime Minister, the proposed amendment is included in crucial conceptual documents pertaining to changes in the educational system. However, the date when, and whether at all, these plans will be implemented, is impossible to estimate.

The Defender recommends to the Chamber of Deputies to request that the Government amend the Education Act so that it expressly stipulates the priority of individual integration of pupils with special educational needs in mainstream elementary schools.

3 / 5 / Modification of the amount of court fee for filing a discrimination complaint

According to items 3 and 4 of the tariff contained in the Court Fees Act (Act No. 549/1991 Coll., as amended), the fee for a motion to commence proceedings seeking monetary compensation for immaterial harm amounts to CZK 2,000. If a victim of discrimination claims monetary compensation in excess of CZK 200,000, the fee amounts to 1% of the amount claimed. If the victim asserts other claims (termination of discrimination, remedy of its consequences, adequate satisfaction), he/she will also be required to pay CZK 2,000.

In the Defender's opinion, the present amount of court fee for filing a discrimination complaint is one of the reasons victims seldom turn to civil courts. What also needs to be taken into account are persisting problems finding qualified (and free) legal aid, uncertainty of the parties as to the outcome of the proceedings, their length, and often difficult establishment of evidence. Such state of affairs is contrary to Art. 7 (1) of Council Directive 2000/43, and Art. 9 (1) of Council Directive 2000/78, according to which effective protection against discrimination must be available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

For people facing or having faced discrimination at work or in their access to goods, services, housing or education, reducing the court fee and abandoning the assessment of the fee as a percentage of the claimed compensation for immaterial harm would mean removing one of the barriers in asserting the right to equal treatment.

The Defender recommends that the Chamber of Deputies modify the amount of court fee for filing a discrimination complaint so that it no longer includes a percentage amount of the monetary compensation claimed for immaterial harm, and reduce the flat court fee to CZK 1,000.

3 / 6 / Exemption from court fees for administrative actions concerning employment and foster care allowance

Section 11 (1) (b) of the Court Fees Act (Act No. 549/1991 Coll., as amended) provides for exemption from court fees in proceedings concerning pension insurance, public health insurance, sickness insurance, State social support, social care, assistance in material need and State benefits. This provision clearly aims at ensuring judicial protection against decisions of public administrative authorities within the provision of Art. 36 (2) of the Charter of Fundamental Rights and Freedoms. With respect to the casuistic approach adopted to

enumerate proceedings that are exempt from court fees, some proceedings – similar in their nature – have been left out, and the imposition of a fee for filing an administrative action in effect means limitation of the right to judicial protection guaranteed by the Charter. This undesirable situation has been made worse still as a result of changes in the organisational structure of labour offices. As of 1 April 2011, a single Labour Office was established, now deciding on all benefits (including unemployment benefits), with the Ministry of Labour and Social Affairs being now the only appellate body. While proceedings on unemployment benefits are subject to court fees, other benefits for which these bodies are responsible, are not.

Unemployment benefits constitute implementation of the constitutional right to adequate support in case of loss of employment, just as pensions do. Therefore, there are no reasonable grounds for applying different rules to them. A decision to exclude a person from the job seekers register has fatal consequences (loss of all benefits of assistance in material need for 6 months, obligation to pay health insurance contributions). Therefore, the position of a person defending himself/herself against such consequences is comparable to that of a person who has not been awarded benefits and who would not be required to pay a court fee in judicial proceedings. The case-law of administrative courts in these matters may contribute to improving the quality of public administration, however, the Defender sees the major obstacle to extending such case-law in the court fee, which at present totals CZK 3,000. The option to exempt a specific participant to a proceeding from fees has proven to be an insufficient guarantee of the right of access to court.

As to foster care allowances, the Defender considers it important to emphasise that as a result of the amended Social and Legal Protection of Children Act (Act No. 359/1999 Coll., as amended), effective as of 1 January 2013, these cannot be classified under any of the benefit categories defined in the provision of Sec. 11 (1) (b) of the Court Fees Act.

For the sake of completeness the Defender would like to add that in connection with the above mentioned adjustment, it would also be necessary to change the territorial jurisdiction of courts to avoid excessive caseload for the Municipal Court in Prague.

The Defender recommends that the Chamber of Deputies:

- **amend the provision of Sec. 11 (1) (b) of the Court Fees Act by inserting the words: „unemployment benefits and foster care allowances";**

- **at the same time, amend the provision of Sec. 7 (3) of the Administrative Procedure Code (Act No. 150/2002 Coll., as amended) regarding territorial jurisdiction.**

3 / 7 / Entitlement to unemployment benefits following long-term sick-leave

Effective from 1 January 2012, the Employment Act (Act No. 435/2004 Coll., as amended) was amended, stipulating that the reference period for assessing entitlement to unemployment benefits and vocational retraining allowance is the last two years preceding registration in the job seekers register (previously 3 years). Shortening of the reference period negatively impacted employees who became temporarily unfit to work, pursuant to the Sickness Insurance Act (Act No. 187/2006 Coll.), within a 7-day "protection period" following the termination of employment or just before the termination, and remained unfit to work for one year or more (even if by only a few days). This period equals to the period of pension insurance. However, it cannot be taken into account for the purpose of entitlement to unemployment benefits; to earn such an entitlement, the period of pension insurance needs to be earned through employment or other gainful activity performed for at least 12 months over the last 2 years preceding registration in the job seekers register.

In practice, an applicant for unemployment benefit only needs to have been temporarily unfit to work for 366 days immediately preceding registration in the job seekers register (while the applicable law provides for a period of 380 days, which can be extended by additional 350 days) and the entitlement to unemployment benefits thus fails to arise. As a result of shortening the reference period from 3 to 2 years, such job seekers

remain deprived of unemployment benefits despite the fact that they had often worked for many years and paid social security insurance contributions.

In the Defender's opinion, leaving these people just on benefits from the system of assistance in material need is not an adequate solution (moreover, these people do not necessarily have to be in material need).

The Defender recommends that the Chamber of Deputies remove the undesirable consequence of the shorter reference period for assessing the entitlement to unemployment benefits of people on long-term sickness insurance benefits, either by including an additional period counting as a "substitute" period of employment within the provision of Sec. 41 (3) of the Employment Act or in another suitable manner (e.g. by introducing the institute of mitigation of the harshness, etc.).

3 / 8 / Methodological direction and guidance the in exercise of governmental authority

The Defender repeatedly encounters shortcomings in the activities of Ministries as to the methodological guidance in the exercise of delegated competence and the direct exercise of governmental authority. Methodological guidance and direction within the hierarchic structure is, however, an inseparable part of the exercise of governmental authority, aimed above all at ensuring its coherence.

Individual inquiries conducted by the Defender show that consistent exercise of governmental authority is often not ensured, especially in areas difficult from the point of interpretation. Difficulties also arise in connection with passing new legal regulations or extensive amendments of existing regulations. For municipalities and regions exercising delegated competence, Government Bulletin for Regional and Local Government Bodies was founded for this purpose; however, it is being implemented inadequately and it thus fails to perform its function. Inadequate methodological guidance has been pointed out to the Defender even by regional authorities.

The Defender recommends that the Chamber of Deputies expressly stipulate in the Act on Establishment of Ministries and other Institutions of Central Government of the Czech Republic (Act No. 2/69 Coll., as amended) a duty of the Ministries and other bodies of central administration to provide methodological guidance and to direct with a binding effect the exercise of governmental authority in the sections for which they are responsible.

3 / 9 / Transparent economic management of business entities

The Defender found that in general only a low percentage of business entities required to file their financial statements with the Commercial Register actually do so – more than 2/3 of financial statements are absent. According to the Defender, this is primarily caused by current legal regulation and insufficient staffing and equipment of the Companies Registration Office (CRO) in charge of the Commercial Register. Therefore he recommended legislative measures to the Minister of Justice, aiming, on the one hand, at removing the present "double" filing of financial statements – with the Tax Administrator (for tax purposes) and, at the same time, with the Commercial Register (to make the economic results public). It seems to be more suitable for a business entity to file the financial statements only once (either with the Tax Administrator or with the CRO). The Defender proposed that financial statements, which are already attached to tax filings, be filed with the Commercial Register directly by the Tax Authority. However, the Ministry of Justice believes that tax returns of legal entities should contain, instead of the financial statements, a declaration that the financial statements have been filed with the Commercial Register. A failure to file the financial statements would be considered a breach of tax obligations.

The Defender also aims at improving the enforceability of the statutory duty to file financial results with the Commercial Register as the existing regulations on penalties are insufficient to make business entities fulfil their duties.

The Defender recommends that the Chamber of Deputies eliminate the obligation to file the financial statements twice with two different entities and provide for a more effective penalty mechanism in cases of a failure to file the financial statements with the Commercial Court.

3 / 10 / Continuity of game management

The Defender has repeatedly addressed the issue of disruption of game management in hunting areas whose legal future is uncertain (e.g., the original hunting area ceases to exist and a new one is not immediately established). The Ministry of Agriculture maintains that game management cannot be performed in such territory. The Defender believes that this interpretation is incorrect and notes possible consequences of such approach, such as uncontrolled game stock increase, deterioration in its quality but also extensive damage to both forestry and agriculture. At the same time, there is no one against whom compensation for damage caused to game in "legally uncertain" hunting areas could be claimed because, according to the Game Management Act (Act No. 449/2001 Coll., as amended), it is the hunting-area user who is liable if adequate measures to prevent damage were not adopted.

The core of the problem resides in two provisions of the Game Management Act: Section 17 (1) stipulates that game management activities can only be operated within an approved hunting area; Section 29 (4) then provides that until a decision establishing a hunting area comes into legal force, the area is operated by its existing user. It is the Section 29 from which the Defender infers that the Game Management Act does not anticipate a situation where a hunting area would not be subject to game management. This provision has the only aim: to cover any periods when the legal future of a hunting ground remains uncertain in order to prevent discontinuity of game management and thus to prevent damage to the environment and property. However, the Ministry of Agriculture refuses to apply this interpretation in practice.

The Defender recommends that the Chamber of Deputies amend the provision of Section 69 of the Game Management Act by inserting a Paragraph 7: "In hunting areas belonging to the hunting grounds or game preserves approved under existing regulations and in respect of which it is not apparent whether they have been brought into compliance with this Act or whether they have ceased to exist, game management rights shall be exercised by the existing user until the issue has been resolved."

3 / 11 / Waste management records

The Defender has long pointed out shortcomings in the legislation pertaining to waste management. With respect to the prevention of unlawful waste disposal, measures that the Defender considers crucial include real-time monitoring of waste movement and waste handling and, most of all, interconnection of waste management records and the records of individual waste-disposal facilities with the records of hazardous-waste transport, and continuous comparison and evaluation of data from these records.

Government Resolution No. 1076 of 27 August 2008, adopted on the basis of the Defender's inquiry into illegal storage of hazardous waste, defines an objective to establish an online information system for monitoring the movement of hazardous substances and waste around the Czech Republic and to ensure its interconnection with existing systems in other EU countries. Despite the National Security Council's recommendation that such a system be implemented, the objective has not been fulfilled.

The Defender recommends to the Chamber of Deputies to request that the Government submit a new law on waste (or alternatively an entirely new legal regulation) which would regulate the issue of monitoring the movement and handling of waste in real time.

2 Relations with Constitutional Authorities and Special Powers of the Defender

1 / The Defender and the Chamber of Deputies

In 2012, the Defender continued to cooperate and communicate with the Chamber of Deputies of the Parliament of the Czech Republic (hereinafter the "Chamber of Deputies"), mainly through its committees. He appeared in person in some of the committees and promoted his legislative suggestions or requested the MPs to push for them in the form of a draft amendment or MPs' draft law. In addition to personal appearances, he sent his written standpoints to the chairpersons of the committees with a request for taking them into account when discussing laws and bills.

The Defender was regularly appearing before the Petition Committee, under whose agenda the Defender's activities fall. In spite of the long-lasting successful cooperation with the Petition Committee, the Defender suggested in the Annual Report on activities in 2011 that his regular quarterly reports and special information on systemic failures of the authorities might also be provided to and examined by the Constitutional and Legal Committee. The reason is that the Defender's observations are often related to the exercise of the fundamental rights and basic freedoms guaranteed to every individual, to the protection of which he contributes by his activities. The Defender's activities in this area naturally became more profound as his mandate was extended in 2006 to also include supervision over places where persons restricted in their freedom are held and at the end of 2009, when he became an equality body.

The Defender's request was partially satisfied in 2012, as the Annual Report on activities in 2011 as well as the Report for the 2nd and 3rd quarter of 2012 were discussed by the Sub-committee of the Constitutional and Legal Committee on Human Rights.

1 / 1 / Petition Committee

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

The Defender also submits to the Petition Committee his reports on individual matters where remedy has not been achieved even after exhausting all means envisaged by law (Section 24 (1) (b) of the same Act). In 2012, the Defender informed the Petition Committee of a shortcoming by the **Ministry of Environment** avoiding its duty to regulate odours. Another case he reported on was long-term non-observance of the Lotteries Act (Act No. 202/1990 Coll., as amended) and of adopted general ordinances regulating gambling on the part of the **Ministry of Finance**. The last matter the Defender reported on were **shortcomings by individual Ministries** concerning compensation for unlawful decisions or incorrect official procedures.

Through one of his quarterly reports, the Defender also acquainted Deputies with his findings from cases pertaining to the so-called "**social reform**."

Regulating odours

When dealing with environment-related complaints, the Defender found that the applicable air-protection legislation did not protect citizens from excessive odours. The legal regulation in force and effect until 1 September 2012 imposed a duty on the Ministry of Environment to define emission limits for odorous substances. However, a relevant legal regulation was not adopted.

In the course of 2012, however, a completely new law on air protection was passed (Act No. 201/2012 Coll.), which, effective from 1 September 2012, again only declares protection against odours without providing for the manner of its application. The issue is not dealt with in implementing decrees either.

Lotteries

The Defender informed the Chamber of Deputies that the Ministry of Finance had failed to remedy its earlier unlawful procedures in permitting betting games operated through so-called other technical gaming equipment (i.e. video lottery terminals).

For regulation of gambling, see also "The Defender and the Government," page 26.

Compensation

During an over two-year inquiry the Defender found inappropriate practice by a number of Ministries and other central administrative bodies in handling claims for damages or just satisfaction for unlawful decisions or maladministration (including a failure to act). As the Defender did not achieve remedy in respect of all Ministries within the inquiry, he brought the issue before the Government in accordance with the Public Defender of Rights Act, requesting that the Government oblige all Ministries to comply with the so-called **Ten Rules of Good Practice for the Assessment of Compensation Claims**, a document prepared by the Defender on the basis of his findings with an aim to unify non-uniform administrative practice.

Nevertheless, the Government only acknowledged this document through its Resolution No. 593 of 15 August, 2012 and issued only a non-binding recommendation to Ministries to proceed according to "Ten Rules'". Since the Defender did not consider this measure adequate, he informed the Chamber of Deputies thereof.

For compensation, see also "Compensation", page 82.

Social Reform – findings from cases

In 2011 the Defender became involved in discussions on the so-called "Social Reform I" package (Acts No. 329/2011 Coll., 366/2011 Coll., 375/2011 Coll.), formulating legislative suggestions, which were not heeded for the most part, however.

On the basis of an increased number of complaints at the end of 2011 and over the first quarter of 2012, as well as other findings related to the legal regulation of **non-insurance social benefits**, the Defender commenced an inquiry on his own initiative. The results of his inquiry led to the following **legislative recommendations, attached to the Report for the first quarter of 2012**:

- He proposed that the Chamber of Deputies respond, by means of an MPs' initiative, to the negative impact of Social Reform I on families with disabled children (while also proposing possible solutions);

- He proposed that the Chamber of Deputies respond, by means of an MPs' initiative, to the negative impact of Social Reform I on people staying in residential social service facilities who repeatedly use transport but are not entitled to mobility allowance;

– He recommended that the Chamber of Deputies submit, by means of an MPs' initiative, a draft amendment to the Labour Office Act (Act No. 73/2011 Coll., as amended), which would regulate the so-called territorial competence in a more appropriate manner.

1 / 2 / The Budget Committee

Just as other "Parliament-related" chapters (Chamber of Deputies, Senate, Office of the President of the Republic, Constitutional Court, Supreme Audit Office), the **Defender didn't agree with the draft amendment of the Budgetary Rules Act** (Act No. 218/2000 Coll., as amended), parliamentary print No. 660, and acquainted the members of the Budget Committee with his reservations.

The proposed amendment stipulated that a proposal of total revenues and total expenditures of the mentioned chapters (including the Public Defender of Rights chapter) should be submitted by administrators of the relevant chapters or by bodies of the Chamber of Deputies and Senate to the Budget Committee, which would then decide on the proposals by 20 June of the current year. **If a decision is not made by the given date, the Ministry of Finance shall decide for the given administrators of chapters on the proposal of total revenues and expenditures.**

Thus, under certain (and not unlikely) circumstances, the given legal regulation puts "Parliament-related" chapters in an entirely subordinate position with respect to the Ministry of Finance, which would determine budgets for "Parliament-related" chapters directly if the Budget Committee failed to make a decision by 20 June of the current year (even for purely organizational or other reasons, such as elections in progress). Budgetary independence of these privileged institutions, discussed in professional publications and held up as an example abroad, for instance to the transforming legal systems, would be substantially violated if the proposed amendment were passed.

The Defender's arguments were not taken into account, however; the amendment was subsequently passed and promulgated in the Collection of Laws under No. 501/2012 Coll.

The Defender addressed the Budget Committee again during discussion of a bill amending tax-related or insurance-related laws and other laws in connection with reduction of public budgets deficits (parliamentary print No. 695), and involving, among others, a **draft legal provision pertaining to housing benefits**. The Budget Committee, which the bill in question was referred to for discussion within the second reading, was informed by the Public Defender of Rights that the **intended change**, consisting in abolishing the two existing benefits and replacing them with a single benefit, to which substantially fewer people (about a half) would be entitled, **could result in pushing thousands of senior citizens and families with young children below the poverty threshold.** At the time of an economic crisis, associated with a natural increase in housing expenses, such changes can impact not only the most socially vulnerable and exposed population groups but they can also worsen the social situation of the existing middle class.

Despite the above mentioned reservations, the Chamber of Deputies passed the bill at first. In the subsequent legislative process, nevertheless, the bill was rejected by the Senate and since the Chamber of Deputies did not override the rejection, the bill was not adopted in the end. The provision relating to housing benefits was left out from the subsequently submitted "Tax Package" (parliamentary print 801) upon amendments of the draft bill.

1 / 3 / Constitutional and Legal Committee

The agenda of the 39th meeting of the Constitutional and Legal Committee, held in January 2012, included, among other things, **three bills examined in depth** or repeatedly commented on **by the Defender**. Therefore the Defender **sent his statements concerning the documents to the Committee's Chairperson** [Government draft of the Mediation Act and Amendments to certain related Acts (parliamentary print No. 426); an MPs'

draft law amending Act No. 200/1990 Coll., on Misdemeanours, as amended (parliamentary print No. 431); and Government draft amending Act No. 99/1963 Coll., the Civil Procedure Code, as amended, and other related Acts (parliamentary print No. 537)], asking him to **acquaint the members of** the Constitutional and Legal Committee with the statements. He left it at their discretion, or at the discretion of the Committee as a whole, whether they would endorse any of the statements.

The Constitutional and Legal Committee subsequently adopted a comprehensive draft amendment to parliamentary print No. 537, **endorsing the Defender's proposal**. The proposal consisted in amending the relevant provision of the Rules of Distrainment (Act No. 120/2001 Coll., as amended), which would, by the stipulation of a statutory advice, de facto ensure the functionality of an earlier provision aiming at one-off protection of the liable party against the risk of sudden shortage of funds for providing for basic needs.

The Defender welcomed the fact that his legislative recommendation – to provide for the **merging of distrainments** (whether in case of identical parties or generally in case of so-called negligible debts) – was also incorporated into the comprehensive draft amendment. However, the Defender regarded as a practical obstacle the fact that **distrainments relating to negligible debts should be merged solely upon application by the liable party**. He therefore requested that the members of the Constitutional and Legal Committee consider endorsing his legislative suggestion to impose a **duty to merge** distrainments relating to negligible debts not upon application but **by virtue of office**. No MP pushed for this proposal.

2 / The Defender and the Government

In early 2011, the Public Defender of Rights and the Prime Minister of the Czech Republic (hereinafter as the "Government") agreed on details regarding the exercise of the Defender's powers in relation to the Government. The procedure thus established proved its merits in 2012, too. Under the law, the Defender addresses the Government in three groups of cases:

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

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

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

2 / 1 / Advising the Government of unlawful administrative practice

Regulation of gambling

The Ministry of Finance refused to remedy its **unlawful practice of issuing decisions in violation of the Lotteries Act** (Act No. 202/1990 Coll., as amended), i.e., failing to comply with the parameters for the highest

possible bet, the highest possible win per game, the highest possible loss per hour, the place of installation, the maximum 1-year licensing period; acting beyond its subject-matter jurisdiction by permitting betting games operated through certain multi-terminal gaming equipment; and, above all, of **interfering with the constitutional right of municipalities to territorial self-government by failing to respect their municipal ordinances** that regulate gambling at the time of permitting the installation of respective technical gaming equipment.

The Ministry did not admit its shortcomings, without dealing with the detailed argumentation of the Defender. Moreover, as to issuing permits in violation of municipal ordinances, it pleaded the impossibility of a remedy in view of the transitional provision of the amendment to the Lotteries Act (Article II (4) of Act No. 300/2011 Coll.). Having discussed the matter with the Minister of Finance in person on 17 February 2012, the Defender got the impression, however, that the Ministry was ready to annul all permits issued in violation of municipal edicts.

Therefore, the Defender subsequently **requested that the Government** instruct the Minister of Finance to immediately open administrative proceedings aimed at **amending the issued permits** to bring them into compliance with the Lotteries Act and to **apply** in the subsequent decision-making **all provisions contained in the second part of the Lotteries Act,** unless rendered impossible by the nature of the case.

The **Government** acted on the Defender's recommendations at first (Resolution No. 156 of 14 March 2012); in the end, however, it **did not accept the Defender's recommendations** through Resolution No. 347 of 16 May 2012, voicing its disagreement with the general review of all issued permits for the purpose of bringing them into compliance with the Lotteries Act.

In view of the Ministry's continuing practice, as subsequently established, the Defender had no other option but to recommend that municipalities consider filing a **constitutional complaint in municipal matters with the Constitutional Court** (for more on the subject, see also "The Defender and the Constitutional Court", page 32).

Failure to fulfil the right to a fair trial

The Defender turned to the Government concerning long-term case-overload at courts and their insufficient staffing and equipment, which leads to the infringement of the right to a fair trial guaranteed by the Constitution, especially the right to have a case dealt with within a reasonable time.

Based on the Defender's 12-year experience, undue delays in proceedings are mainly caused by objective reasons, preventing speedy decision-making by courts. **According to the European Court of Human Rights and the Constitutional Court, these delays are fully attributable to the State.** When inquiring into complaints pertaining to governmental administration of courts, the Defender always pays special attention to making all remedies for procedural delays as efficient as possible. In his activities, he endeavours to influence both the handling of complaints about delays in court proceedings and the practice of deciding on a motion to set a time limit for the performance of a procedural act. He also deals with compensation proceedings (damages or adequate satisfaction). The given legal means of remedying delays should be used to resolve exceptional cases of courts' failures. Based on the Defender's experience, however, it can be concluded that in a vast majority of cases, delays are not due to judge's subjective fault but due to **objective circumstances that do not allow the right (justice) based on law to be dispensed within a reasonable time**. Presidents of courts rightly justify delays in proceedings by an **increasing number of filings** (often made worse by excessive backlog from previous years), and by **insufficient staffing and equipment of courts** (mainly long-term **shortage of administrative staff**). Presidents of courts cannot properly fulfil their supervisory duties if delays in proceedings are due to objective causes and remedy is limited by court's financial capacity. Therefore, it is only up to the State, or the central body of the governmental administration of courts, i.e. the Ministry of Justice, to search for systemic solutions to deal with the unfavourable state of the judiciary.

In the submitted material, the Defender expressed his support of the Ministry of Justice's proposal to increase the staff numbers and the mandatory volume of funds for staff salaries and related expenses in the justice department in 2012-2014 as a partial step in addressing the issue of staffing in the justice system. At the same time, however, he called for a comprehensive solution to the long-term problem of underequipped and understaffed justice system so as to prevent massive denial of the right to have a case dealt with within a reasonable time in the process of exercise of judicial power.

An analysis of the Ministry of Justice dated 24 September 2012, prepared upon the Defender's advice, provides an overview of the measures implemented in the areas of systematisation, legislation, supervisory activities, IT and budget (ensuring that the 2013 draft budget includes a proposal that temporarily available funds from the salaries of judges and public prosecutors be used for increasing salaries of the employees of courts and public prosecutor offices). It also provides a summary of European programmes and measures in the area of insufficient capacities of court buildings. The Defender agrees with its concluding note stating that shortening the duration of court proceedings, limiting delays in proceedings caused by courts' activities, and making the judicial system more efficient in general will only be possible if the given measures are implemented over the long term, in a systematic manner, in parallel and close cooperation with courts, and if the measures are supported by appropriate budgetary measures.

2 / 2 / Submission of comments by the Defender

The Defender used the option of commenting on draft legal regulations and other materials submitted to the Government of the Czech Republic on **41 occasions**. The Defender submits his comments particularly in cases where he has observed, in the exercise of his mandate, that legislation should be amended. Thus, he exercises a simplified form of his authorisation stipulated in Section 22 of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended) – to submit to the Government recommendations for issuing, amending or repealing a legal or internal regulation.

In this context, it is necessary to mention that the Government approved, through its resolution No. 820 of 14 November 2012, an amendment to the Legislative Rules of the Government, which – among others – formalizes **the Defender's status, enabling him to participate in comment procedures**, as of 1st January 2013.

The most important comments submitted were the following:

Comments on the amendment to the Electronic Communications Act

The Government's draft amendment to the Act on Electronic Communications and on Amendment to Certain Other Laws (Act No. 127/2005 Coll., as amended); the Chamber of Deputies, 2012, 6th electoral term, parliamentary print 712. **The Defender's comments were not accepted.**

In view of the current unfavourable situation in the judiciary, the Defender does not agree with the targeted purpose of the draft, i.e., to **transfer the competence to adjudicate subscription disputes concerning monetary performance** from the Czech Telecommunication Office to general courts. The Defender is of the opinion that **transferring this agenda to courts is not necessary** and is not even manageable for courts. He believes that the long-term unsatisfactory situation in the area of deciding subscription disputes needs to be addressed within the existing mechanism, whether by increasing staff of the Czech Telecommunications Office or through possible amendments to the Electronic Communications Act. The same opinion had been expressed by the Defender already in December 2010 within the commentary procedure with respect to a bill amending the Electronic Communications Act (when the adjudication of disputes involving monetary performance was to be referred to the Arbitration Court attached to the Chamber of Commerce).

Comments on the amendment to the Value Added Tax Act

The Government's draft amendment to the Value Added Tax Act (Act No. 235/2004 Coll., as amended); promulgated in the Collection of Laws under No. 502/2012 Coll. **The Defender's comments were accepted.**

The Defender concluded that the provision of Section 85 (1) of the Value Added Tax Act **was incompatible with EU law** to the extent of the condition applicable for the purchase of a passenger vehicle, or its delivery with the place of performance in the Czech Republic. It followed from the quoted provision that if a disabled person considered making use of a benefit consisting in the possibility to apply for a VAT refund, (s)he would be limited in her/his decision where to purchase the vehicle and would be forced to purchase it in the Czech Republic.

The Defender had raised this issue already in his Annual report on activities in 2011, proposing, in a recommendation addressed to the Chamber of Deputies, that the relevant legal regulation be amended.

For VAT refunds to disabled persons, see also "Evaluation of the recommendations for 2011", page 14.

Comments on the amendment to the Firearms Act

The Government's draft amendment to the Firearms Act (Act No. 119/2002 Coll., as amended); the Chamber of Deputies, 2012, 6th electoral term, parliamentary print 856. **The Defender's comments were accepted**.

Within his inquiry, the Defender found a shortcoming in the applicable legal regulation consisting in the **impossibility to impose penalty on sellers of Category-D firearms** for selling firearms to persons under 18 years of age (according to the Firearms Act, Category-D firearms or ammunition for Category-D firearms can only be acquired, possessed or carried by legally competent individuals aged over 18 years.

In consideration of the foregoing, the **Defender recommended that the legal regulation be amended** to stipulate penalties (an offence would be committed by any person transferring the ownership of a firearm or of ammunition to a person not authorised to possess it, or giving it over to such a person).

The Defender also commented on the provision regulating police checks performed by the Police of the Czech Republic with respect to holders of gun licences, holders of Category-D firearms and ammunition for such firearms, as well as armourers and shooting-range operators.

Comments on the substantive intent of the Noise Act

The Government's draft substantive intent of the Act on Public Health Protection against Noise in Municipal Environment (the Noise Act); not submitted to the Chamber of Deputies yet. **The Defender's comments have not been addressed yet.**

The Ministry of Health prepared an entirely new substantive intent of the Noise Act, which would constitute a **major change in the existing design of the public health protection against noise**. On a general level, the Defender expressed disappointment with the process of preparing the proposed regulation. Even though the draft has the character of a new code, it has not been properly discussed with the expert and the lay public.

The above shortcoming was also reflected in the quality of the submitted material. The Defender pointed out that with respect to the preparation of action plans, which should become, in the future, **the main instrument for enforcing public health protection**, the draft failed to address their legal form, binding effect, penalties for non-fulfilment, and, most of all, participation of persons affected by noise from the concerned source.

As regards newly established **traffic noise zones**, there is no mention of necessary compensation to the present property owners, for whom the inclusion in the D noise zone will in effect mean a construction ban.

In the Defender's opinion, it is also thoroughly unacceptable that the definition of key concepts such as a "**typical flight day**" or "**isolated or short-term exposure to noise**", on the understanding of which the extent and content of the powers of public health protection authorities will hinge, was left to the executive and implemented by means of an implementing decree. Such decision must be taken by the legislator.

The fact that noise from business premises providing services is completely excluded from the public health protection regime can be regarded as ill-considered. Such noise can be continuous and dangerous to health, and the substantive intent deals with the municipalities' powers with respect to the business premises in a completely inadequate way. Similarly, it can be argued that noise from larger construction sites is by no means a short-term event (the construction can take several months or even years). It is not clear at all how the construction authority should intervene if a construction owner complies with the measures imposed but public health is being provably threatened or even damaged nevertheless.

Comments on the amendment to the Roads Act and the Road Traffic Act

The Government's draft amendment to the Roads Act (Act No. 13/1997 Coll., as amended) and draft amendment to the Road Traffic Act (Act No. 361/2000 Coll., as amended); not submitted to the Chamber of Deputies yet. **The Defender's comments were accepted.**

The Defender appreciated the Ministry of Transport's effort to find a legislative solution to problems encountered for many years in common practice, consisting, from the perspective of the citizen as the addressee of public administration, in the fact that a **major part of public administration in the area of local and publicly accessible special-purpose roads was in effect non-functional**. It has to be said that the mentioned shortcoming was also noted in the Annual report on activities in 2010; in a recommendation addressed to the Chamber of Deputies, the Defender proposed that the relevant legal regulation be amended so as to entrust the powers of a road administrative authority solely to the municipal authorities of municipalities with delegated competence.

The Defender also welcomed the effort to add provisions covering administrative punishment for polluting and damaging public special-purpose roads. He only marginally commented on other parts of the draft, as his comments were focused in particular on fine-tuning the draft legal regulation with respect to his legislative recommendation. Therefore his comments mainly addressed the completion, or clarification and resolving of the transfer of the agenda in question, relating to **proceedings on the existence of a publicly accessible special-purpose road or a local road, proceedings on the removal of fixed obstructions from a public or a special-purpose road** and, further, **the connection to a local road or properties to local roads**.

The Defender also gave his opinion on the matter of towing away vehicles if temporary "no stopping" or "no parking" signs (usually for the purpose of street cleaning) are not obeyed and, last but not least, on the provisions pertaining to the cost of six-month impoundment in cases when such costs are not covered by selling the vehicle (e.g., car wrecks of no value, or functional but old and used vehicles worth only a few thousand Czech korunas).

For changes in the competence of road administrative authorities, see also "Transport", page 65.

Comments on the amendment to the Act on Free Access to Information and the Act on the Right to Information on the Environment

The Government's draft amendment to the Act on Free Access to Information (Act No. 106/1999 Coll., as amended), and the Act on the Right to Information on the Environment (Act No. 123/1998 Coll., as amended); not submitted to the Chamber of Deputies yet. **The Defender's comments have not been addressed yet.**

The Defender perceives most of the proposed changes as a problematic attempt to improve the law because instead of simplifying the matter, they can lead to new problems in the application of the law. He believes that **amendments to laws must be approached with moderation and prudence**. Especially in cases where a certain question is already resolved by the case-law, a legislative change may introduce uncertainty into a stable legal environment and open a space for biased interpretation or misunderstanding as to its intended purpose.

The criticism is mainly aimed at the drafting party's intention to newly **define the category of so-called "liable parties"** and the scope of information not subject to disclosure at all, on the basis of the existing case-law. In the Defender's opinion, such amendment is unnecessary and neither is it required by the merger with the Act on the Right to Information on the Environment. The concept of a "public institution" as defined by case-law hardly encompasses most entities defined in this law (it would be suitable only to add persons providing services, by authorisation of the liable party having an influence on the environment). **The existing term "public institution" is the broadest possible concept** and any attempt to define it in detail, albeit in accordance with the existing case-law, cannot but restrict the range of liable parties, and thus undesirably lower the standards of the protection of the right to information in the Czech Republic.

The Defender also expressed his disagreement with a somewhat tendentious draft provision regulating the disclosure of the amounts of **public officers'** salaries, wages, remunerations or other similar payments. The draft was created in response to last year's decision of the Supreme Administrative Court dated 27 May 2011, File No. 5 As 57/2010, where the Court stated, for the first time, that even public administration employees can be considered recipients of public funds and information about the amount of remuneration can thus be disclosed to applicants.

The Defender also gave his opinion on the expressed introduction of a **public interest test**. He does not agree with the fact that in connection with formulating the test, any reasons for not disclosing information should be exempted from the requirement of assessment with respect to the public interest. It would mean that the **legislative change would in fact restrict the scope of the right to information** as compared to the present situation. He also pointed out that the Act on Access to Information on the Environment was inadequately integrated in the draft, and thus there was a danger that the present information-access standard in the Czech Republic would be lowered further.

Last but not least, the Defender rejected repealing a provision defining the relationship between the duty to disclose information and the duty of confidentiality. If this provision were repealed, there would be a risk that liable parties, based on their interpretation of the premise that information subject to the duty of confidentiality is exempted from disclosure, might start refusing, on a large-scale basis, to disclose a lot of data which are in fact subject to the duty to disclose.

Comments pertaining to the Act on the Prison Service and the Court Security Service of the Czech Republic

The Government's draft amendment to the Act on the Prison Service and the Court Security Service of the Czech Republic (Act No. 555/1992 Coll., as amended), the Chamber of Deputies, 2012, 6th electoral term, parliamentary print 714. **The Defender's comments were taken into account**.

The Defender welcomed the intention to partially align the authority of the Prison Service of the Czech Republic and of the Police of the Czech Republic (list of coercive means, sending officers on missions abroad, collecting biological samples, etc.). He commented in more detail on the new authority of the Prison Service of the Czech Republic to **overcome the resistance of persons when collecting biological samples**, including the obligation to use a method that is appropriate to the intensity of resistance and the prohibition of interfering with the physical integrity of persons (collecting blood samples).

Beyond the text of the amendment, the Defender submitted comments on the applicable legal framework, which still lacks expressed authorisation of the Prison Service of the Czech Republic to **use video cameras**

on the guarded premises although it should undoubtedly have such authority. The present situation can be considered in violation of Article 8 (2) of the Convention for the Protection of Human Rights (Communication No. 209/1992), although the use of video cameras (typically in the corridors of housing facilities for convicted or detained persons or in the guarded perimeter of the prison) is legitimate from the point of view of the Convention for the Protection of Human Rights (mainly in the interest of public safety and the protection of health and property).

Comments on the substantive intent of the Act on Misdemeanours

The Government's draft substantive intent of the Act on Liability for Misdemeanours and Misdemeanour Proceedings (the Misdemeanours Act); not submitted to the Chamber of Deputies yet. **The Defender's comments were partially accepted.**

The Defender **disagrees with the proposed extension of time constraints for hearing a misdemeanour, i.e. limitation period for liability for a misdemeanour.** The possibility to extend the limitation period in connection with suspending proceedings would seriously decrease the legal certainty of a person who has committed a misdemeanour at the time when the misdemeanour is to be heard. Therefore, the Defender proposes stipulating a fixed time constraint for hearing a misdemeanour. At the same time, the Defender supports setting the beginning of the limitation period as proposed. He also supports setting prescription periods to deal with the misdemeanour (in the spirit of the applicable legal regulation) of 12-18 months of the date the misdemeanour was committed in case of "common" misdemeanours, and of 36 months at the most in case of extremely serious misdemeanours (with specifics as regards perpetual or multiple misdemeanours).

The Defender also raised comments on the provision relating to fines imposed on individuals who decease before paying them. Such fines then become the object of succession proceedings even though, in view of the nature of the fine, they no longer represent sanctions against a specific offender.

The Defender supported the proposed transfer of subject-matter competence to handle misdemeanours committed off duty and not in direct connection with duty by **persons subject to military disciplinary jurisdiction or by members of security forces** to general administrative authorities.

3 / The Defender and the Constitutional Court

In relation to the Constitutional Court, the Defender has a special power to submit his own petition for **annulling secondary legislation** [Section 64 (2) (f) of the Constitutional Court Act (Act No. 182/1993 Coll., as amended)]. He **did not use** this right in 2012.

In relation to the Constitutional Court, the Defender most often stands in the position of a so-called interested party to the proceedings concerning proposals of other parties for the annulment of secondary legislation (as a rule, municipal edicts). In 2012, the Defender **gave his opinion on one proposal**, directed against an ordinance of the city of Liberec, which sought to **regulate street vending and the provision of services in public spaces within the city heritage zone** (see below, Chapter 3.1.).

The Defender also sent to the Constitutional Court (without entering the proceedings as an interested party his statement **concerning a constitutional complaint filed by the Assembly of the Town of Klatovy against an unlawful interference of the State with** the right of the town to self-government through the Ministry of Finance's failure to act with respect to the already issued permits to operate video lottery terminals, which were at variance with a newly issued municipal ordinance of the town of Klatovy (No. 1/2012). The Defender was invited by the Court to give his opinion since he had appeared as an interested party in the proceedings related to to the ordinances of the towns of Chrastava, Františkovy Lázně, and Kladno, respectively. The Defender provided information about these proceedings in the Annual report on activities in 2011. See also "Evaluation of the recommendations for 2011", page 14.

In some cases, the Defender is asked by the Constitutional Court to provide his legal opinion (in such cases, the Defender does not have the status of a party to the proceedings and appears as so-called **amicus curiae** - Section 48 (2) of the Constitutional Court Act). In 2012, the Defender was approached **twice**. He gave his opinion in the proceedings pertaining to an **individual constitutional complaint concerning pension insurance**, or, more precisely, the granting of a very low pension to an applicant – a person of Czech origin who had come to live in the Czech Republic – as a result of the fact that the application of the Social Security Agreement between the Czechoslovak Republic and the USSR (No. 116/1960 Coll.) had been discontinued. For details, see "Social security", page 39.

The Defender also gave his legal opinion on a portion of a draft submitted by a group of MPs, aiming at **annulling applicable provisions of the Employment Act** (Act No. 435/2004 Coll., as amended), specifically, provisions referring to the performance of **compulsory community service** (see below, Chapter 3.2).

Additionally, within one individual constitutional complaint, the Constitutional Court appointed the Defender a guardian ad litem for two minor interested parties in 2012.

New authority of the Public Defender of Rights in proceedings to annul laws and individual provisions

With an amendment to the Civil Procedure Code (Act No. 99/1963 Coll., as amended) and other related regulations, promulgated in the Collection of Laws under No. 404/2012 Coll., the Constitutional Court Act was also amended.

As of 1 January 2012, the provision of Section 69 (3) of the Constitutional Court Act **stipulates the status of the Defender as an interested party to proceedings even in proceedings to annul laws or individual provisions of laws.** Upon examining a petition forwarded to him by the Judge Rapporteur, the Defender is authorised to notify the Constitutional Court whether or not he will enter the proceedings as an interested party. The Defender welcomed the change, as within his activities a wide range of findings of legislative character are available to him. When handling complaints, he encounters practical problems related to law application and in many cases such findings are of constitutional magnitude.

3 / 1 / Proposal of the Ministry of the Interior to annul a part of the municipal ordinance of the Statutory City of Liberec No. 3/2009

File Ref. Pl. ÚS 19/11

The Defender joined, as an interested party, the Ministry of Interior's petition to annul a part of the municipal ordinance of the City of Liberec. The contested part of the ordinance prohibited offering and selling products and services by means of street vending in public spaces within the city heritage zone for the purpose of protecting public order, health and safety of the citizens and visitors of the City of Liberec.

As the city had obviously acted ultra vires when regulating the sale of products and services outside business premises through an ordinance instead of a regulation, the Defender proposed that the Constitutional Court grant the petition and annul the applicable part of the ordinance.

By its judgment dated 31 January 2012, the Constitutional Court granted the petition, **arriving at the same conclusion that the prohibition of street vending (offer and sale of products and offer and sale of services) constituted not independent but delegated competence,** on the basis of statutory authorisation provided by Section 18 (3) of the Trade Licensing Act (Act No. 455/1991 Coll., as amended).

By stipulating the given prohibition in a municipal ordinance, the City of Liberec had **exceeded the limits of the statutory authorisation** and the limits of its subject-matter competence defined by law, and thus found itself at variance with the constitutional order.

3 / 2 / MP's proposal to annul the so-called "Reform Package" (the aspect of compulsory community service)

File Ref. Pl. ÚS 1/12

The Constitutional Court asked the Defender, pursuant to Section 48 (2) of the Constitutional Court Act, to submit his statement concerning a part of a petition submitted by a group of MPs proposing the annulment of the provision of Section 30 (2) (d) of the Employment Act and the provision of Section 18a (1) of the Act on Assistance in Material Need (Act No. 111/2006 Coll., as amended) in words "and persons listed in the register of job seekers", stipulating the **performance of compulsory community service as a condition for the entitlement to unemployment benefits**.

The Defender informed the Constitutional Court that he had received dozens of complaints concerning the matter in question and presented a few representative cases aptly illustrating the state of affairs. He concluded that it can be considered highly disputable that the State, instead of consistently checking persons in respect of whom a suspicion of long-term avoidance of work and abuse of the social security system exists, endeavours to create a "preventive" system, which will, however, affect persons whose only problem on the labour market is age or parenthood, for example. Another problem seen by the Defender as a breach of the insurance principle, which the system of unemployment benefits is built on, lies in the fact that the State virtually forced duly insured persons to "work off" their relevant insurance benefit when an insurance event (a loss of employment) occurred.

The **Defender subsequently supplemented his original opinion**, as he deemed it necessary to ask the Constitutional Court to assess in the ongoing proceedings the contested legal regulation also in terms of its **compliance with Article 2 (3) of the Constitution and with Article 2 (2) of the Charter of Fundamental Rights and Freedoms**, with respect to the powers and competence of the Labour Office of the Czech Republic.

By its judgment dated 27 November 2012, File Ref. Pl. ÚS 1/12, **the Constitutional Court abolished the obligation of persons** listed in the job seekers register for a period exceeding two months **to perform so-called compulsory community service without being entitled to remuneration.**

4 / The Defender's power to file an action to protect public interest

Within an amendment to the Administrative Procedure Code (Act No. 150/2002 Coll., as amended) and other related laws, the Defender was granted **a new power** effective from 1 January, **to turn (directly) to an administrative justice court with a so-called action to protect a public interest**. It needs to be added that before the mentioned amendment became effective, the Defender had had the option to propose that the Supreme Public Prosecutor file the given action, which he had also done several times.

An action to protect the public interest can be defined, in very simple terms, as an instrument ensuring the control of the activities of public administrative bodies. In other words, authorised entities can, subject to conditions provided by law, file **an action against the decision** of an administrative body.

In 2012, the Defender made use of this power in **one** case.

4 / 1 / Action to protect public interest, directed against permitting the construction of a photovoltaic power plant

The first action for the protection of public interest filed by the Defender was directed at a number of final administrative decisions rendered by the Municipal Authority of Duchcov, whereby the administrative authority had permitted the construction of a photovoltaic power plant in the cadastral area of Moldava in Krušné Hory, and subsequently approved it for operation.

In terms of his standard inquiries, **the Defender found many shortcomings in the administrative proceedings as such**; the environmental impact of this industrial structure had not been assessed in advance (possible and probable impact on the landscape character, impact on the favourable situation in Eastern Krušné Hory Bird Area, absence of exemption from conservation rules for specially protected plant and animal species). Moreover, **the Building Act was materially breached** as the construction had been permitted and carried out in the open landscape and on undeveloped land, i.e., contrary to one of the main objectives of the construction regulation – the protection of undeveloped land.

In view of the degree of unlawfulness, contradicting the very principles of lawfulness and prevention, and in a situation where **public administration as a whole had been unable to provide for remedy of such unlawful procedures**, the Defender exercised his active right and filed the above mentioned action, with the understanding that this was an ultima ratio instrument.

A decision of the Regional Court in Ústí nad Labem, which has jurisdiction over the proceedings, is still pending.

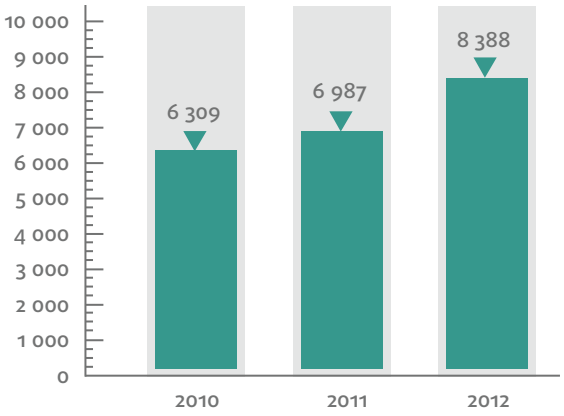
3 The Defender and Public Administration

1 / Basic Statistical Data

1 / 1 / Information on complaints received

The Defender received a total of **8,388 complaints** in 2012 (not including discrimination complaints – see Section V. – The Defender and Discrimination). This is a record-high annual number of submissions since the Public Defender of Rights was established. The Office of the Public Defender of Rights was visited by **1,239 individuals in person**, of whom 651 used the option to submit a complaint orally in a protocol and 588 individuals obtained legal advice on how to deal with a specific problem at the Office. For the sake of completeness, it should be noted that the number of complaints received by the Defender does not include additional filings made by the same complainant and delivered to the Defender while the file concerned is being processed. The number of complaints received in previous years is illustrated in a bar chart below.

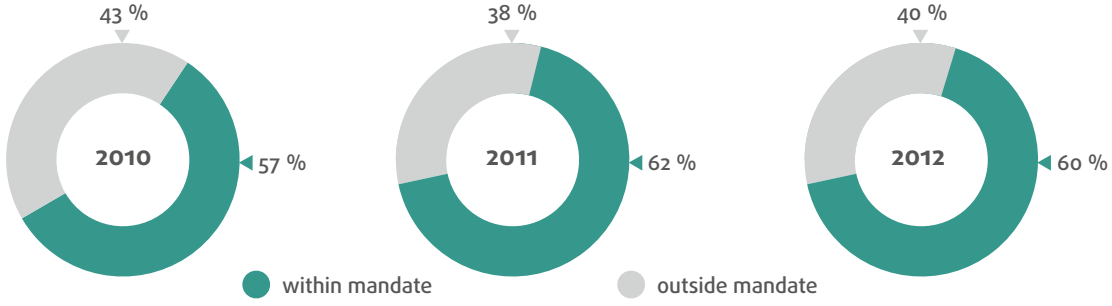
Complaints Received in Individual Years



The information hotline available for requests regarding simple legal advice and queries regarding the progress in handling a complaint was used by **5,717 people** in 2012.

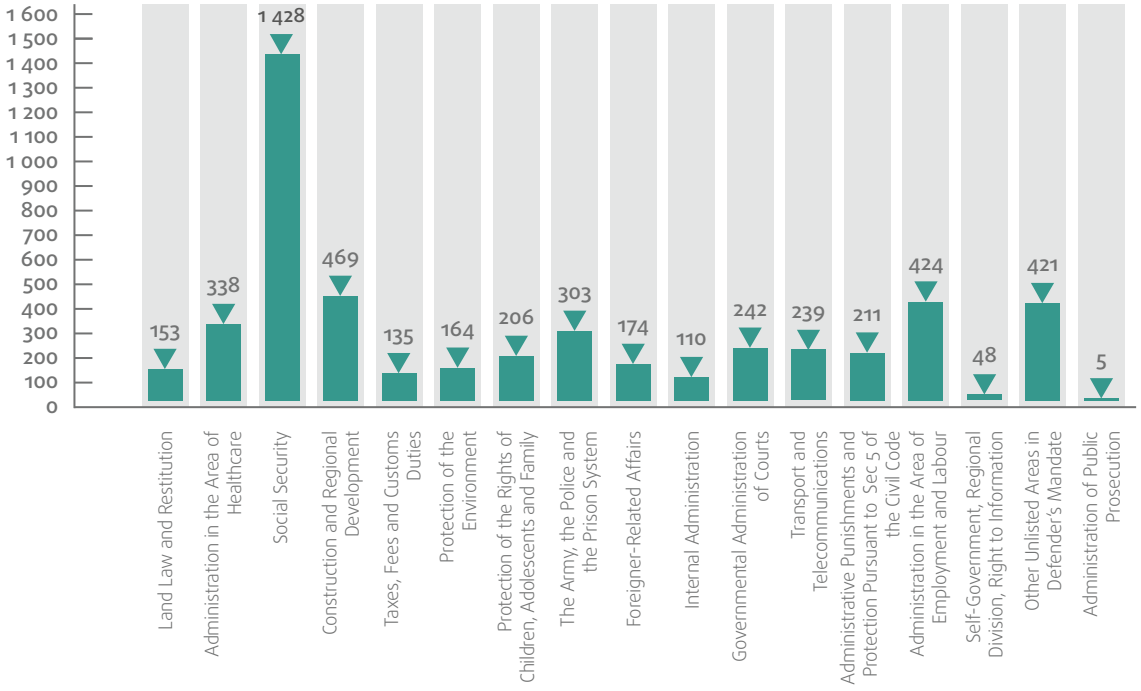
A positive trend can be seen in the structure of complaints. As in previous years, complaints within the mandate of the Defender prevailed (**60%** of the total were within the Defender's mandate, and **40% of complaints outside his mandate**). In terms of the trends over the past three years, it is encouraging that an increasing proportion of complainants understand correctly the Defender's mandate, which seems to suggest that the institute has anchored itself firmly in the legal awareness of the population (see the chart below).

Structure of Complaints with Respect to the Defender's Mandate

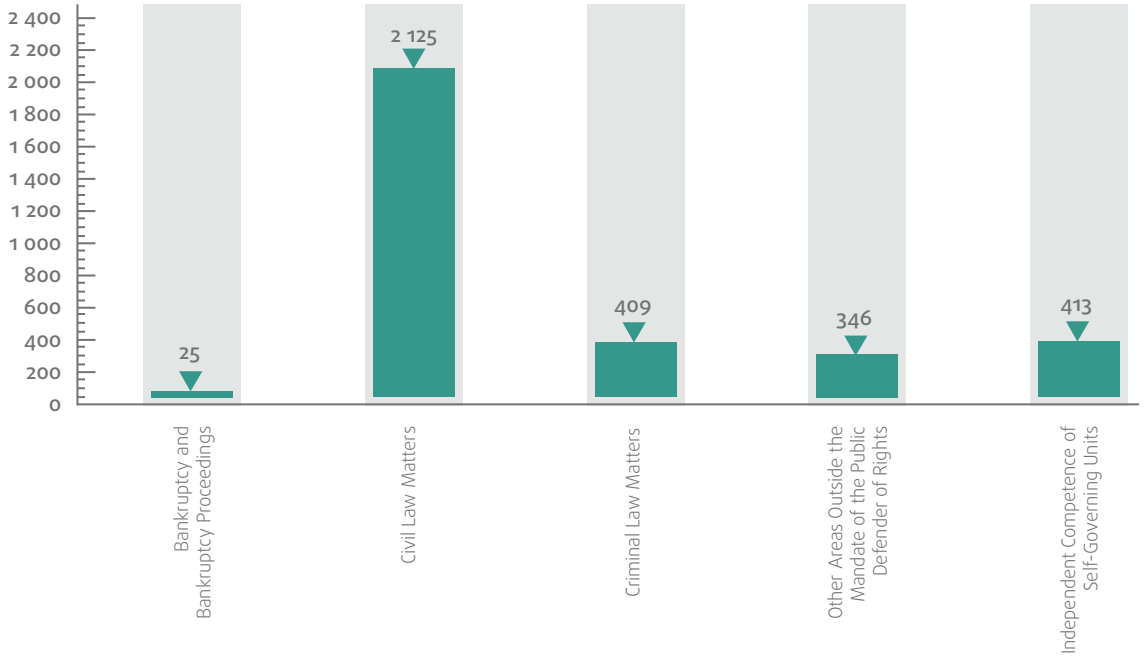


The following graphs show that **most individuals** consistently address the Defender **in the fields of social security, the Construction Code, work and employment, healthcare, the police and the prison system, and governmental administration of courts.** The individual areas of governmental authority to which the complaints were related can be summarised in the following charts:

Complaints Received Within the Mandate by Area



Complaints Received Outside the Mandate by Area



The Defender **launched 953 inquiries** in 2012, using his **authorisation to launch an inquiry on his own initiative in 24 cases**. As in past years, these pertained to issues of general character or situations where the Defender learnt of incorrect procedure by the authorities from the media.

1 / 2 / Information on complaints dealt with

In 2012, the Defender **dealt with 7,868 complaints**. Of the complaints dealt with:

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

- **6,335 were explained**. The Defender provided these complainants with legal advice as to 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 launched a general inquiry on his own initiative on the basis of some similar complaints.

In 2012, the Defender **closed 905 inquiries**, and:

- in **277** cases, he **ascertained no maladministration** in the procedure of the authority concerned;

- in **628** cases, he **found maladministration** in the procedure of the authority, where:

- In **532** cases, the authorities took remedial measures themselves following the issue of the inquiry report;

- In **72** cases, the authorities failed to take remedial measures and the Defender had to release a final statement, including a proposal for remedial measures; only then did the authorities ensured remedy;

- In **16** cases, the authorities failed to remedy their maladministration even after the final statement was released. The Defender therefore used his punitive power and notified the superior authority of the maladministration or informed the public.

The number of complaints dealt with in 2012 also includes **108** cases when the complainants **withdrew** their complaints as well as **3** cases where the complaint was actually, in terms of its contents, an appeal pursuant to the regulations on administrative or judicial matters.

Moreover, the Defender closed 7 so-called **inquiries of particular significance** in 2012, which should result in a change to the administrative practice in certain areas or creation of a legislative recommendation for the Government and the Chamber of Deputies.

2 / Selected Complaints and Commentaries

2 / 1 / Social security

Legislative changes in non-insurance social benefits

In 2012, the Public Defender of Rights received a substantially higher number of complaints pertaining to non-insurance social benefits (benefits of assistance in material need, State social support benefits, allowance for care, disability benefits). **An increase of about 36% in the number of received complaints as compared to the previous year** was due to major legislative changes implemented in the social field. Laws

implementing "Social Reform I" brought changes both in the criteria for granting benefits and calculating their amount, and in the way the decision-making on benefits and their payment is organised. This agenda was transferred from type II municipal authorities (designated municipal authorities) and type III municipalities (municipalities with extended competence) to the central Labour Office of the Czech Republic. This change, connected with a **substantial decrease in the number of employees taking care of this agenda**, resulted in a higher number of complaints already in the first months of 2012. In their complaints, applicants for benefits and benefit recipients mostly complained about insufficient information about legislative changes, about delays in the payments of assistance in material need benefits or rejection of applications for extraordinary immediate assistance.

In view of the content of the complaints received, the Defender launched, on his own initiative, an inquiry into the impact of Social Reform I in February 2012. In the course of 2012, authorised employees of the Office of the Public Defender of Rights visited a total of 14 branches of the Czech Labour Office. First, they visited eight randomly chosen regional branches, where they spoke with chief officers, mainly about organizational difficulties encountered by employees working directly with clients. Subsequently, the employees of Office of the Public Defender of Rights visited six randomly chosen contact points and also randomly checked case files related to benefits of assistance in material need, focusing on the performance of social work, decisions on extraordinary immediate assistance and the provision of supplement for housing provided for other than rental housing (lodging houses, sublease).

Social work in the Labour Office setting

In terms of the inquiry performed at the contact points of the Czech Labour Office, launched on the Defender's own initiative, he checked whether and to what degree the employees of the Czech Labour Office performed social work, as required by the Act on Assistance in Material Need (Act No. 111/2006 Coll., as amended). Based on his findings from local inquiries, he concluded that **social work was not performed at contact points**, or that it was performed inadequately. The respective responsibilities of social workers of the Czech Labour Office, of designated municipalities and of municipalities with extended competence were not clearly defined and neither was the scope and purpose of information to be shared among them. The fact that social work (including, among other things, social inquiries, social counselling, screening, and systematic work with long-term recipients of allowance for living) is reduced to the bare minimum is caused by understaffing at the relevant contact points of the Czech Labour Office. At the Czech Labour Office branches visited, the average number of clients per benefits officer was about 200, i.e., about twice as many as prior to 2012. According to professional literature, one benefit officer should be responsible for 50 to 150 clients.

The Defender believes that even if conditions (i.e., mainly sufficient staffing of bodies of assistance in material need) for consistent social work with clients in material need are not ensured, **it is still necessary to insist on every client being given at least certain basic minimum of help**. This includes information on available benefits provided by the Czech Labour Office which could help improve the situation of the client (his/her family), assisting the client in obtaining such benefits (providing forms, helping him/her in drawing up applications, receiving completed forms), and, if need be, referring the client to a designated municipality or a municipality with extended competence. **Special attention should be paid to highly exposed groups**, such as minors, young people after leaving school, parents with young children, senior citizens, domestic violence victims, etc.

Executing decisions in cooperation with Česká pošta, s.p. – "hybrid mail"

During local inquiries at the contacts points of the Czech Labour Office, the Defender encountered a practice of using so-called "hybrid mail" to deliver benefit award letters. Benefit award letters were not issued by the labour office but their draft was sent to Česká pošta, s.p., which printed it out and delivered it to the addressee, without the signature of an authorised official or an official seal. According to the Defender, this procedure is in violation of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended) as the party to a proceeding is not given a copy of the decision with an official seal and the signature of an authorised official. Česká pošta, s.p. is not an entity authorised by law to execute decisions. Moreover, it is not

authorised by law to process personal data of benefits recipients. Therefore, public authority is exercised outside the statutory boundaries.

Housing Supplement for other than rental housing

In an inquiry launched on his own initiative, the Defender also dealt with the question of the maximum amount of housing supplement provided to the Czech Labour Office clients who use other than rental housing (lodging house, sublease, or social-service facility). He mainly focused on the cap on lodging-house costs because the applicable legal regulation changed effective from 1 January 2012 and the offices' practice should have been adjusted accordingly.

Effective from the above-mentioned date, the Act on Assistance in Material Need was amended, now making it possible to pay a benefit to a person living in a lodging house up to the amount of actual housing costs, but not exceeding the maximum amount of housing costs as stipulated in the Act on State Social Support (Act No. 117/1995 Coll., as amended). Within his local inquiries, however, the Defender found that **this statutory cap was not accepted by the Czech Labour Office when deciding on benefits.** In practice, a lower cap on housing costs is set. Instead of the limit prescribed by law, the Labour Office has been applying limits determined at its discretion, generally derived from the price of the cheapest lodging house defined as "the standard price at the given place". However, this method can only be applied to setting the "cap" on housing costs in case of rental housing ("standard rent at the given place"). The described procedure is in violation of law, forcing persons living in lodging houses to cover housing costs from allowance for living, which is, however, intended for covering their basic living needs (food, clothing).

At present, the Defender is discussing the interpretation of the law on a general level and in specific cases with the Czech Labour Office and the Ministry of Labour and Social Affairs.

Social systems card (sKarta)

In the course of 2012, the Defender repeatedly discussed with the Ministry of Labour and Social Affairs a possible legislative change pertaining to the payment of benefits through a social-systems card (sKarta) (see also "New Recommendations of the Defender for 2012", page 16).

Since September 2012, when sKarta started to be issued on a regular basis, numerous questions arose in the practice of the Czech Labour Office as a result of ambiguous transitional provisions of so-called "Social Reform I" (Act No. 366/2011 Coll.).

The Czech Labour Office and the Ministry of Labour and Social Affairs were of the opinion that the recipients of benefits were obliged to take delivery of their sKarta; should they fail to do so, a proceeding to terminate benefit payments would be opened. The Defender, on the other hand, believed that the **transitional provisions of the Act made it possible for the recipients of benefits to have their benefits paid by the existing method, i.e., directly to their accounts or by a postal order, until they take delivery of their sKarta**. At the same time, he maintained that a **failure to take delivery of the card could not be punished by benefit withdrawal** since the Czech Labour Office was not authorised by the Act to proceed in that manner. After a change in the leadership of the Ministry of Labour and Social Affairs accepted this interpretation and remedied the practice of the Czech Labour Office. Benefit payments through "sKarta" will be optional until a new legal regulation is adopted, which is expected to happen by the middle of 2013.

Negative impacts of the Social Reform on disabled persons

The Defender believes that **the impact of the Social Reform on both target groups (families with disabled children and persons with reduced mobility living in social service facilities) was excessively harsh**. He pointed to this fact in his Report for the 1st quarter of 2012 submitted to the Chamber of Deputies, requesting that MPs respond to these issues through MPs' initiative (see "The Defender and the Chamber of Deputies," page 23).

In May of 2012, within the examination of the MP's bill amending the Act on State Social Support and certain other laws (parliamentary print 594) in the Committee on Social Policy, the possibility to receive an allowance for care simultaneously with the parental allowance for up to 4 years of child's age was incorporated into the bill. For children aged between 4 and 7 dependent on assistance in Degree III or IV, the allowance for care was increased by CZK 2,000 regardless of the family's income. As to mobility allowance, it was stipulated that it could be granted for reasons worthy of special consideration even to people living in residential social service facilities. Draft amendments also contained the reinstatement of a special aid allowance, to address the problem of a non-functional scheme of lending special aid on the basis of a commodatum agreement (stair climbing wheelchairs etc.). The draft amendment was passed and promulgated in the Collection of Laws under No. 331/2012 Coll., and became effective on 1 December 2012.

Proving address of residence for the entitlement to parental allowance

The Act on State Social Support requires that entitled persons meet the requirement of permanent residence on the territory of the Czech Republic (with some exceptions for foreign nationals), and, newly, that they meet the requirement of a residence address on the territory of the Czech Republic. Difficulty arose mainly when verifying the address of residence in case of entitlements that had existed before the amendment came into effect. Within his activities, the Defender found that the Czech Labour Office (hereinafter also the "labour office") required a statement proving the address of residence on the territory of the Czech Republic from recipients of the parental allowance across the board and as a preventive measure. However, in accordance with the basic principles of administrative proceedings and the principles of good governance, the law needs to be interpreted in a different manner, i.e., verification of these facts in case of benefits that are already being paid is only possible if the labour office has doubts in this respect and provided that the address of residence of benefits recipients in the Czech Republic is not established through other documents already available to the labour office.

Complaint File Ref.: 3881/2012/VOP/AV

If a parental allowance from the Czech Republic is applied for by an economically inactive wife of a foreign EU citizen conducting gainful activity on the territory of the Czech Republic, the Czech Republic is the state competent to decide on the allowance and its amount.

The competence over legal regulations for the purpose of decision-making regarding a parental allowance in cases with a European element is determined according to the place of performance of gainful activity of the family provider, regardless of the place of residence of the family. The Czech Labour Office is not entitled to require the substantiation of facts other than the performance of gainful activity in such cases.

Annual checks of whether persons migrating within the European Union, recipients of family benefits from the Czech Republic, continue to meet the criteria for the provision of family benefits from the Czech Republic, is not supported in applicable legal regulations. The Labour Office of CR should treat migrating workers in the same manner as it treats citizens of the Czech Republic, i.e. check facts that are decisive for the entitlement to a parental allowance only when the circumstances of a case indicate that the entitlement to the allowance has expired or that the amount of the relevant allowance should be different.

The Defender was addressed by Mr. P. B., a citizen of another EU Member State, living in the Czech Republic with his wife, a citizen of a third country, and their child. The family have their permanent residence registered here too. Since November 2011, Mr. P. B. has been self-employed in the Czech Republic and before that he had been employed in the Czech Republic. In 2010, parental allowance was awarded to Mr. P. B.'s wife. In the middle of 2012, the labour office asked Mr. P. B.'s wife, for the purpose of checking her benefit entitlement, to submit documents proving her address of residence on the territory of the Czech Republic, such as a doctor's certificate, a document proving that Mr. P. B. carries on business activities, lease contracts, an account statement, etc. This procedure was contrary to the applicable law.

If a person migrates within the EU, the application of EU legislation takes priority in social security matters. The rules for providing benefits stipulated in the relevant legislation take precedence over the Czech Act on State Social Support, which, as of 1 January 2012, requires a residence address on the territory of the Czech Republic as a condition for providing Czech family benefits. It follows from the above mentioned facts that when the family's provider performs gainful activity in the Czech Republic, the labour office is not competent to check facts decisive for determining the address of residence of the family.

If the labour office had had any doubts whether self-employment immediately followed the performance of employment of Mr P. B. without interruption, it should have primarily ascertained this fact.

Moreover, the Labour Office of CR is not competent to perform annual checks to establish whether people migrating within the EU, recipients of Czech family benefits continue to meet the criteria for the provision of family benefits from the Czech Republic, not even for the purpose of preventing possible benefit overpayments. Such check is only possible after the labour office has found facts indicating that the benefit entitlement has ceased to exist or that the benefit should be in a different amount, as is the practice for citizens of the Czech Republic.

The Czech Labour Office agreed with the Defender's conclusion that the requirement to prove the address of residence in the Czech Republic was unauthorised. The relevant officer should have only checked whether Mr. P. B.'s employment had been uninterrupted and that his self-employment had immediately followed his employment. Parental allowance continues to be paid to Mr. P. B.'s wife.

Old-age pensions

In 2012, the Defender continued to be addressed by numerous complainants concerning old-age pensions. In most cases, these concerned the substantiation and re-examination of insurance (employment) periods previously not taken into account. A great deal of complaints concerned cases when an old-age pension had not been awarded due to the failure to accumulate the required period of insurance – as the required period of insurance increases under the applicable law, in 2012 it was necessary to have accumulated at least 28 years of insurance.

Complaint File Ref.: 4911/2011/VOP/PK

An old-age pension cannot be assessed from a calculation basis that is lower than the calculation basis of the adjusted personal assessment basis for the pre-existing pension, and this applies even to cases where the amount of such pre-existing pension was determined from an adjusted general assessment basis.

The Czech Social Security Administration (hereinafter referred to as "CSSA") rejected a complainant's application for an old-age pension, stating that the amount of the old-age pension was lower than the disability pension for the first degree of disability drawn by the applicant, and continued to pay out the latter pension. The amount of the disability pension had been set under the "protective provision" of the Pension Insurance Act (Act No. 155/1995 Coll., as amended), which makes it possible to use a general assessment basis for the calculation of disability pensions of insured persons who have accumulated at least 15 years of pension insurance. In case of the complainant's entitlement to disability pension, however, CSSA refused to calculate the amount of her old-age pension on the basis of the personal assessment basis, which had been used for calculating her disability pension, arguing that this amount follows from statutory provisions regulating the minimum level of percentage assessment of disability pension.

The Pension Insurance Act contains a rule saying that an old-age pension must not be assessed from a calculation basis lower than the calculation basis from an adjusted personal assessment basis of the pre-existing pension. There is no doubt that the above-mentioned "protection provision" of the Pension Insurance Act is applicable only to disability pensions. If, however, a general assessment basis was used to calculate a disability pension in accordance with the applicable

provision, such assessment basis needs to be used also to calculate the amount of the subsequent old-age pension, in accordance with the given rule. The Pension Insurance Act expressly foresees such a procedure. CSSA accepted the Defender's interpretation, and, having performed comparative calculations, granted an old-age pension to the complainant.

Survivor's pensions

In 2012 the Defender received a lower number of complaints concerning cases when an orphan's pension had not been granted due to insufficient periods of insurance accumulated by the deceased parent. This is because, as a result of the Defender's long-term initiative, an amendment to the Pension Insurance Act (Act No. 470/2011 Coll.) took effect on 1 January 2012, making it possible to grant an orphan's pension even in cases where it was previously impossible as the deceased parent hadn't accumulated the required period of insurance.

Disability pensions

As in previous years, the Defender repeatedly dealt with an **increased number of complaints pertaining to disability benefits**, where the complainants objected to being reclassified into a lower degree of disability or to the withdrawal of disability pensions. Some complaints challenged the health assessment as such. To such complainants, the Defender recommended first to submit objections to the CSSA's decision, and, if not satisfied with the decision on objections, to file an administrative action as the court also re-examines, within its proceedings, the assessment of disability made by the CSSA's assessment service.

In his inquiries, the Defender also looked into the content of disability assessments, used as a basis for CSSA's decisions on disability pensions. The most frequently encountered **maladministration** consisted in the **failure to satisfy the principle of conclusiveness and completeness of assessments**, as required by legal regulations and case-law (e.g., judgment of the Supreme Administrative Court of 25 September 2003, File Ref. 4 Ads 13/2003; judgment of the Supreme Administrative Court of 11 November 2010, File Ref. 61/2010, etc.). From the very brief substantiation by the physicians performing the assessment, it was impossible to retrace their line of reasoning that had led them to their respective conclusions, to establish how they had dealt with relevant information contained in medical files or what facts had been taken into account to establish the first day of disability. Owing to these substantial shortcomings, the Defender had a reasonable doubt as to the correctness of CSSA's decisions rendered on the basis of such assessments.

Pensions with a foreign element

Apportionment of pensions according to EU social security regulations

The Defender repeatedly came across **maladministration by CSSA in calculating pro-rata pension benefits for persons who had performed gainful activity not only in the Czech Republic but also in other EU Member States or in European Economic Area countries.** In such cases, the state deciding on a pension calculates a so-called theoretical amount of pension, i.e., an amount that the person concerned could claim if all the periods of insurance had been accumulated in this territory. The actual amount is then established on the basis of the theoretical amount by applying a so-called apportionment ratio.

When calculating this ratio, CSSA was taking into account the period of insurance accumulated in the Czech Republic after reducing non-contributory periods to 80%; this procedure was incorrect as the institution should have taken into account the Czech period of insurance in full.

As the Defender did not agree with CSSA on the interpretation of coordination regulations, he turned to the Ministry of Labour and Social Affairs, asking for their view. The Ministry then asked European Commission to provide a qualified view. **The European Commission agreed with the Defender's legal opinion.** The Ministry of Labour and Social Affairs accepted this interpretation and provided methodological guidance for CSSA's procedure.

Pensions for persons of Czech origin

In the course of 2012 the Defender was approached by several persons who had come to the Czech Republic from Kazakhstan, Russia, or Belarus in the 1990s, upon an invitation of the Government of the Czech Republic (persons of Czech origin). These people do not become entitled to old-age pension when reaching the retirement age because the Social Security Agreement between the Czechoslovak Republic and the USSR (No. 116/1960 Coll.) no longer applies. Under a Government resolution, a "substitute pension" is awarded to them, calculated only on the basis of Czech insurance periods, and it is very low as a result. One of the persons concerned filed an administrative action and a constitutional complaint against this practice. The Defender provided the Constitutional Court with his opinion within the proceedings on the said complaint (see "The Defender and the Constitutional Court", page 32).

The Defender is dissatisfied in particular with the fact that the Czech Republic ceased to apply the Social Security Agreement with the USSR without regulating pension benefit entitlements of people who had legitimate expectations to see the Agreement applied to their pensions (the Agreement had been in application for over 40 years). **The Czech Republic should have either continued to recognize the periods of insurance accumulated by the persons concerned when the Treaty was applicable, or, at least, enable the persons concerned to pay their back-contributions for such periods.** Unfortunately, this did not happen.

2 / 2 / Work and employment

Employment administration

The system of "attendance of the unemployed" (DONEZ)

Most complaints received by the Defender in the area of employment administration concerned the **DONEZ** system (**the obligation of job seekers to appear at a contact point of public administration**) and the performance of compulsory community service. Complainants mainly expressed their disagreement with being included in the DONEZ system (in view of their age, health condition, or care for children), the rules and impacts of such inclusion (travelling expenses, appointments unilaterally set by the contact point of public administration, limited possibilities for the unemployed to leave the area of residence). Some citizens also requested an inquiry into the procedure of the Czech Labour Office (hereinafter only as the "labour office", whereby they had been removed from the job seekers register as a result of their failure to appear (or as a result of late appearance) at the public administration contact point. The Defender had already explained his fundamental reservations regarding the DONEZ system in the Annual report on activities in 2011 (page 13). Throughout 2012, **the Defender made intensive efforts to have the DONEZ system abolished, or at least thoroughly modified**. However, his repeated requests were not heeded (see also "Evaluation of Recommendations for 2011," page 14).

Complaint File Ref.: 3199/2012/VOP/JB

A job seeker may not be forced by the labour office to perform an obligation that is not explicitly provided by law, let alone be removed from the job seekers register for his/her failure to perform such an obligation.

The Defender was approached by Ms. J. V., who complained about the procedure of the Czech Labour Office – Pardubice Regional Branch (hereinafter as the "labour office"), which had removed her from the job seekers register for late appearance at the public-administration contact point (hereinafter the "contact point") within the DONEZ system. Ms. J. V. did not agree with having been included in the DONEZ system in the first place as she was convinced that her age and deteriorated health condition made it impossible for her to find any employment at all, let alone work illegally. After having reported ten times to Česká pošta, s. p., where no employment was offered to her, she came one hour late – for health reasons – to her 11th appointment. Despite the fact that she excused herself at once and immediately contacted

the labour office, the office opened administrative proceedings against her and removed her from the register. The Defender inquired into the matter and found maladministration of the labour office consisting in exaggerated formalism and the violation of the principle provided in Section 4 (1) of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended), all this in absence of any legal provision imposing on job seekers the obligation to report to public-administration contact points on a regular basis, while neither mediation nor advice is provided.

Although the director of the labour office admitted that the issuance of the decision might have been in breach of law, the Minister of Labour and Social Affairs did not accept the remedy proposed to him by the Defender (quashing the decision in review proceedings).

Compulsory community service

In the matter of so-called compulsory community service, the Defender, acting as amicus curiae, submitted his negative opinion to the Constitutional Court, and the Constitutional Court agreed with it (see "The Defender and the Constitutional Court," page 32). Before the judgment annulling the corresponding provision was published, the Defender had encountered cases of **abuse of compulsory community service**; as part of compulsory community service, a job seeker filled a vacancy created by dismissing another employee, or the compulsory community service substituted the activities of a social worker in social services (helping disabled people with hygiene, everyday care tasks, etc.). The Defender shared his findings with the Czech Labour Office.

In comparison to the previous year, in 2012 the Defender noted an **increase in the number of complaints pertaining to the entitlement to unemployment benefits of people who had performed employment in another EU Member State** (mostly the UK or Ireland) preceding the registration in the job seekers register of the Czech Labour Office. The award of unemployment benefits to such applicants is conditional, among other things, keeping their habitual residence in the Czech Republic during their employment abroad. The concept of habitual residence must not be confused with registered permanent residence – it has no connection to citizenship, nationality, or generally to the country of origin. The Defender recommends that job seekers who upon their return decide to apply for unemployment benefits in the Czech Republic ask the Czech Labour Office first – in writing, or by e-mail – what facts and documents need to be submitted to substantiate that their habitual residence has remained in the Czech Republic. The Defender also believes that the labour office should inform job seekers of the possibility to **apply for unemployment benefits primarily in the Member State of their last employment**.

Legislative changes

In the course of 2012, the Defender also looked into the negative impacts of the **amendment to the Employment Act (Act No. 364/2011 Coll.**), which took effect on 1 January 2012. The amendment reduced from 3 to 2 years the reference period for recognising entitlement to unemployment benefits. The change negatively impacted mainly people who became temporarily unfit for work within the 7-day "protection" period following the termination of employment or just before the termination, and remained unfit for work for one year or more (even if by only a few days). Such job seekers did not become entitled to unemployment benefits because, given the period of unfitness to work, they had not met the requirement of at least 12 months of insurance accumulated over the 2-year reference period (see also "New Recommendations of the Defender – 2012," page 16).

Moreover, the above-mentioned amendment introduced a rule under which a job seeker who terminates employment himself/herself or terminates employment by agreement for no serious reasons is entitled to a reduced amount of benefits (45% of the average net income over the entire entitlement period). The Defender witnessed unwillingness of the Czech Labour Office to recognize the reasons provided by complainants as serious, especially where such reasons were not expressly stated in the notice or the termination of employment agreement, as applicable. Regarding this issue, the Defender also came upon a fundamental

shortcoming in application, as the Czech Labour Office was applying the new provision to situations where employment had been terminated for no serious reasons prior to the effective date of the new regulation (i.e., prior to 1 January 2012).

Labour inspection

The Defender welcomed the fact that **his discussions with the representatives of the Labour Inspection led to a noticeable improvement in the quality and scope of information** provided to complainants about the relevant inspection results. However, there are persisting difficulties in detecting the violation of the Labour Code (Act No. 262/2006 Coll., as amended) concerning relations at work (bullying, bossing, or unequal treatment) and in inquiring into the so-called double record-keeping of attendance.

Employment in civil service

Concerning employment in civil service, the Defender mainly inquired into complaints pertaining to **inaction in review or appellate proceedings**; upon the Defender's intervention, remedy was achieved and the respective pending decisions were rendered. Moreover, complaints were lodged in the course of 2012 where the Defender found no grounds for intervention (e.g., long-service entitlements or disciplinary reduction in the basic rate).

2 / 3 / Family and child

Complaints by children

The Defender is open to complaints filed by children and no minimum age is required for lodging a complaint. To make the communication easier and more user-friendly for children, a special website, **www.deti.ochrance.cz**, and a special e-mail address were created. The website provides information about the Defender's activities, as well as – in general terms – some typical cases encountered by the Defender. Children mostly ask questions concerning various legal fields (education, social benefits, misdemeanours, waste disposal fees, etc.). Upon children's complaints, the Defender, for example, inquired into the removal of children from their parents, the transfer of a minor from a children's home to a diagnostic institution, etc. Until the end of August, the Defender received 7 complaints by children. After the website and the e-mail address were launched, i.e., between 1 September and the end of 2012, 18 complains were lodged. This represents an increase as compared to 2011, when a total of 9 complaints were delivered.

Duty of the bodies of social and legal protection of children to provide advice

The Defender focused his attention on the duty of bodies of social and legal protection of children to provide advice about the most suitable legal manner of handling a child's situation in cases when the parents cannot take care of the child and when the parents themselves are minors. In this context, he also examined the duty of the bodies of social and legal protection of children to provide advice to ensure that a child is taken care of from the material point of view, mainly through State social support benefits, as the authorities are **required to provide or arrange for consultancy regarding such issues to parents or other persons responsible for the care of a child**.

Cases handled by the Defender indicate that the **duty to provide advice** is in this respect **often neglected** by bodies of social and legal protection of children. In one case, for example, grandparents took a child in their care, without being advised of their obligation to report the change to a State social support body. Parental allowance continued to be received by the child's mother, who passed it on to the grandparents, and the purpose of the benefit was therefore maintained; however, an overpayment claim against the mother was established, without the possibility to have it waived. The grandparents, at the same time, were deprived of parental allowance for several months although they would have been entitled to it on the basis of their care for the child.

Minor parents also face difficulty in obtaining parental allowance unless the question of the most suitable legal form of care is speedily resolved (i.e., either by recognizing the parental responsibility of the minor parent or by appointing a guardian for the child), as the actual fact of having a child in one's care is not sufficient for being granted parental allowance. The Defender would also like to point out that the duty of bodies of social and legal protection of children to provide advice needs to encompass advice on the possibility to apply for free legal aid if child-care court proceedings are opened and the social situation of the family is difficult.

Guardianship ad litem of minors in other than family matters

Based on the Defender's findings arising from individual complaints, regional authorities and the Municipal Authority of the Capital City of Prague were asked to provide statements as to the representation of minors in other than family-law matters (i.e., in property-law matters, criminal proceedings, etc.), in which a body of social and legal protection of children is usually appointed a minor's guardian ad litem. The Defender mainly wanted to know to what extent legal advice or representation by legal counsels was sought, as such matters are often legally so complex or highly specific that it is impossible, by definition, for a social worker, with his or her qualifications, to provide minors with adequate legal representation. From responses of the competent authorities, the Defender found out that legal services of legal counsels were used only sporadically, and, moreover, that by far not all authorities even consulted their in-house lawyers. To respond to these findings, the Defender issued a **recommendation that bodies of social and legal protection of children make use of any and all means available to them in order to provide minors with adequate representation** and that, for that purpose, in other than family-law matters they always at least consult their in-house lawyers. In justified cases, which require higher qualification or specialisation, bodies of social and legal protection of children should make use of legal representation by legal counsels paid for from a special grant for the social and legal protection of children. At the same time, the Defender addressed the Ministry of Labour and Social Affairs with a request for methodological support. The Defender intends to continue paying special attention to this field, as especially a failure to exercise the procedural rights of a party to proceeding (i.e. a minor) can have fatal consequences (e.g., failure to waive court fees, order to pay costs of proceedings to the other party, etc.).

Preventing minors from getting into debt due to waste-disposal fees

If, in the long term, parents fail to pay local waste-disposal fees for a minor, they cause damage to their children not only in the form of debt, but also possible penalties as well as other expenses associated with subsequent enforcement of the arrears through distrainment proceedings. In acting thus, such parents do not duly perform their duties arising from parental responsibility, which include, among others, the rights and duties in representing minors and in managing their assets. According to the Act on Social and Legal Protection of Children (Act No. 359/1999 Coll., as amended), the administrator of local fees informs the competent body of social and legal protection of children of the fact that the local fee has not been paid for a minor payer, which can represent a threat to the minor's legitimate interests, caused by the parents. A body of social and legal protection of children can, by means of statutory instruments of social and legal protection of children, **act** towards parents in order **to prevent damage on the part of minors**, i.e., advise parents of their obligation to pay waste-disposal fees for their children and of the negative consequences for their children as a result of the failure to pay fees (and, for example, inform them of the possibility to pay the fee from an extraordinary instant assistance benefit, in an extreme case). It is unthinkable that minors should bear the consequences of their parents' negligent acts or the consequences of the failure of a body of social and legal protection of children to use the possibility to act preventively.

Complaint File Ref.: 3446/2011/VOP/LD

Within decision-making on the transfer of a child into a different type of facility, it is impossible to refer solely to the content of files, as the grounds for such transfer must be clearly apparent from the justification of the decision; otherwise, the decision is not subject to judicial review.

During a preventive systematic visit, the Defender learnt about the case of a minor girl, M. H., at that time placed in a children's home with a school. A local inquiry showed that M. H. had been transferred from a children's home to a children's home with a school due to truancy, which had been allegedly encouraged by her father. Miss H. also said that she had an 89-year old great-grandmother, who had been taking care of her since she was little, and her contact with her great-grandmother was now difficult by reason of her being placed in a children's home with a school located further away from her home than the previous school. However, the decision on transfer lacked any justification, and it was therefore not subject to judicial review. The Defender submitted an initiative to the Ministry of Education, Youth and Sports to launch review proceedings. At the same time, he expressed his conviction that it was in the minor's interest to be given another chance, and that her transfer, ideally back to the children's home, should be considered. The Defender's legal opinion was respected, and the case developed favourably mainly due to above-standard approach of a special education officer from a diagnostic institution for children. Thanks to this intervention, the minor was transferred back to the children's home and a support network necessary for her development was created both for her and for her family. Specific steps to be taken are planned and coordinated at regular case-specific conferences, sometimes with the presence of the minor.

For more on the issue of administrative proceedings on transfer or placement of a child, see also Section IV. – "The Defender and facilities where persons restricted in their freedom are held", page 85.

2 / 4 / Healthcare

Dealing with complaints about the procedure of healthcare providers

The Defender continues to encounter an undesirable model used by competent authorities to inquire into the procedure of healthcare providers. Typically, the competent authority will forward all collected evidence to an expert without specifying the instructions, and if certain aspects of the case are not evaluated in the expert report, it foregoes asking any additional questions. The notification of the result of the **authority's inquiry** then only reflects the expert's conclusions, reformulated to make them understandable to laymen, **while authorities fail to deal with all the complainant's objections.**

Complaint File Ref.: 3897/2011/VOP/PH

The conclusions of an inquiry cannot be considered convincing if the competent authority fails to have key issues of the case examined by an expert competent to do so.

Mrs. P. K. was hospitalized in her 25th week of pregnancy for diabetic decompensation. At the same time, the foetus's death was established, as a result of umbilical cord strangulation. According to the conclusions of an inquiry conducted by the Regional Authority of the Olomouc Region (hereinafter as "the Regional Authority"), a gynaecologist with whom Mrs. P. K. was registered had erred by having failed to recommend immediate hospitalization despite alarming results of her oral glucose tolerance test. However, no causal link was established between his malpractice and the foetus's death.

According to the Defender's findings, the Regional Authority requested an expert review only from a gynaecologist despite the fact that the key questions could have been answered only by a diabetologist. Upon the Defender's recommendation, the Regional Authority subsequently expanded the evidence on which its inquiry was based with a diabetologist's report. Even though an additional inquiry did not establish the causality for the foetus's death, information about a possible threat to Mrs. P. K.'s health and life emerged from the expert's report and the additional evidence. The Regional Authority thus met the requirement to make its conclusions convincing.

Of course, the Defender is also aware of examples of good practice, such as automatic sending of minutes from a meeting of an independent expert committee (including names and surnames of its members) to complainants, or requiring members of independent committees to submit a written affirmation of impartiality.

The Defender's findings show that there is an **increasing number of complaints by patients pertaining to the legal title of providing healthcare itself** (informed consent, or other reasons – e.g., a health condition requiring emergency care, but making it impossible to obtain informed consent). As the Defender ascertained, this is precisely the type of complaints that the competent authorities often do not handle in an optimal way.

Within inquiries into the procedure of healthcare providers, which the Defender is competent to conduct only **in cases of court-ordered protective treatment, malpractice was mainly established as to the use of means of restraint**. The Defender believes that, if a means of restraint is to be used, the requirement to limit it to extreme cases only, when all other available means for calming the patient have been exhausted, and to properly document the use of such restraint [as provided in Section 39 (1) of the Healthcare Act (Act No. 372/2011 Coll., as amended)], must be strictly adhered to.

Sterilisation

The issue of female sterilisation performed in violation of law has been followed by the Defender since 2004. In December 2005, he concluded his inquiry into the matter by issuing a final statement, proposing, among other things, that a new legal regulation be passed making it possible to compensate women affected by unlawful sterilisation. He addressed his recommendation to the Chamber of Deputies in his Annual report on activities in 2005.

At its meeting held on 17 February 2012, the Government Council for Human Rights, of which the Defender is a member, unanimously approved an initiative **recommending to the Government to establish a compensation scheme**. According to the draft, the scheme should address both the cases of women unlawfully sterilised over the 1973 – 1991 period and cases of women sterilised after 1991, who did not have a reasonable opportunity to seek damages in court as a result of the lapse of a 3-year limitation period for filing an action for the protection of personal rights.

The Defender also expressed support of this draft within the external commentary procedure. At present, he is waiting for the Government's decision. In this respect, he also advised complainants who approached him after the initiative of the Government Council for Human Rights had been echoed by the media.

Health insurance

In 2012, health-insurance debt was again the most frequent subject of complaints in this area. When checking the procedure of health insurance companies in assessing and enforcing health-insurance premiums and penalties due, the Defender repeatedly found maladministration consisting in failure to respect the extinction of a right to asses or enforce a claim against the insured. In many cases, the root cause of the maladministration was an incorrect assessment of a performed act as an act constituting the running of a new limitation period (a so-called qualified act). A health insurance company thus erroneously regarded as a qualified act the delivery of a health insurance premiums statement pertaining only to a part of the decisive period. The Defender also respects the legal opinion expressed by the Supreme Administrative Court in its judgment dated 26 April 2012, File Ref. 3 Ads 10/2012, according to which the notification that administrative proceedings have been opened is not, in itself, a so-called qualified act.

2 / 5 / Courts

Complaints about inappropriate behaviour of judges and judicial officers

As to complaints pertaining to inappropriate behaviour of judicial officers, the Defender again received complaints whereby complainants were trying to shift the "solution" to their disagreement with the decision of a court or a specific judge, or with the judge's procedural steps onto an "inappropriate behaviour" level. In extreme cases, complainants consider decision-making of a judge to be an act subject to disciplinary measures and demand that the Defender file a proposal to initiate disciplinary proceedings. Many cases, however,

concerned only the complainant's disagreement with specific steps taken by a judge within proceedings (record taking, summoning witnesses, producing evidence, etc.), or with the material decision of a judge in the case.

Nevertheless, a judge's activities performed within decision-making cannot be considered inappropriate behaviour. In his answers to such complaints, the Defender also reminds the complainants that he may initiate disciplinary proceedings only against court officials, not against judges.

Recurring issues pertain to various aspects of the public character of court proceedings. The Defender looked into complaints filed by complainants (persons who attended a court hearing as members of the public), who had been asked by the judge, upon the start of the hearing, to disclose the names and surnames and to present their identity cards, or that otherwise they would be led out of the courtroom. The president of the court subsequently refused to address the complainant's complaint as the judge concerned had resigned in the meantime. In this context, the Defender stated that, if a judge presiding over a criminal case requires that members of the public present their identity cards under the penalty of their being led out of the courtroom and this procedure is not supported in particular by factual and legal circumstances of the trial, the judge commits an act of inappropriate behaviour and official misconduct. Such practice can cause righteous indignation among members of the public as such procedure is, in the Defender's view, a typical symptom of so-called **cabinet justice** and has no place in a democratic rule-of-law state. Therefore, a body of governmental administration of courts is obliged to look into a complaint about inappropriate behaviour of a judge despite the fact that the judge concerned resigned between the date the complaint was filed and the date it was handled, since the mentioned procedure has a preventive, reparation and satisfaction function. Every **complaint about inappropriate behaviour of a judge duly examined and dealt with sends a signal to the public that judicial officers take due care to make sure that the judicial ethics code is respected.** The president of the court agreed with these conclusions in the end.

Complaint File Ref.: 1312/2011/VOP/PN

The actions of a judge who, despite a clearly formulated binding legal opinion of a higher court, proceeds contrary to this opinion, represent a disciplinary offence. Independence of a judge in the performance of decision-making activities is limited by binding legal opinions formulated by higher courts in accordance with applicable procedural rules, and any failure to respect such opinions by invoking judicial independence borders on arbitrariness, and can therefore disturb the dignity of the judicial office or jeopardise the trust in independent, impartial, expert, and just decision-making of courts.

In the case on hand, the competent panel of the Municipal Court in Brno was deciding a labour dispute between the complainant as the petitioner and his (former) employer. The court proceedings were unreasonably long, among others as a result of the fact that four judgments on the merits were successively made and all of them were subsequently reversed by the appellate court. The grounds for reversal included a repeated failure to respect a binding legal opinion of the appellate court expressed in the decisions reversing the judgment. In its last decision, the appellate court deemed the shortcoming of the court panel, consisting in repeated failure to respect the binding legal opinion, of such gravity that it proceeded to refer the case to another panel.

For the above-stated reasons, the Defender proposed that the president of the relevant court and the Minister of Justice initiate disciplinary proceedings. However, this did not happen since the chairman of the panel resigned from the post of a judge upon the release of the inquiry report.

The issue of inappropriate behaviour of judges is also indirectly linked to the **recording of court hearings**. At present, due to insufficient funds from the budget – making it impossible to acquire adequate recording devices – there are a great many court hearings, except for criminal hearings, from which recordings cannot be made in accordance with Section 40 of the Civil Procedure Code (Act No. 99/1963 Coll., as amended). The requirement to record court hearings is justified by an effort to avoid any distortion of the course of the hearing,

imprecision or omissions when recording legally significant information. Therefore, in the Defender's opinion, the court should inform (advise) the participants of the reasons a recording will not be made. Such information should also contain a statement that records of the hearing would be drawn up in lieu of a recording. The Defender recommends proceeding in this manner in order to protect the procedural rights of participants to proceedings. Having been thus advised by the court, participants should be aware that they cannot rely on a word-by-word recording of the hearing, as none would be made, despite the fact that such recording is anticipated by law; as a result, they should pay special attention to the contents of the written records.

Complaints about delays in court proceedings

In 2012, the Defender did not see any major changes in the number of complaints expressing dissatisfaction with the length of court proceedings. Since he has been pointing out, on a long-term basis, the necessity of finding a systemic solution in order to ensure smooth course of court proceedings in the long term, he decided to use his special power, addressing the Government on 1 June 2012 to draw attention to the fact that the right to a fair trial was not being fulfilled by courts (for more detail, see "The Defender and the Government," page 26).

Deciding on the time limit for the performance of a procedural act

Although the decision-making on a motion to set a time limit represents the exercise of independent decision-making, with which neither the Defender nor any court official can interfere, the Defender believes that court officials are required to consistently follow the handling of the given case load.

In the Defender's view**, increased diligence of bodies of governmental administration of courts is desirable especially in case of supervision of a procedural instrument designed to remove delays – the motion to set a time limit.** In his inquiry reports, the Defender points out that if a court fails to proceed in accordance with time limits set for processing a motion to set a time limit under Section 174a of the Act on Courts and Judges (Act No. 6/2002 Coll., as amended), this represents a delay in the court's activities, which needs to be addressed by the president of the court. At the same time, it is up to the president of each court what methods will be used to prevent delays in deciding on motions to set a time limit (as in other court proceedings).

Commercial Courts: Completeness of the collection of documents

The Defender conducted an inquiry on his own initiative to establish to what degree the collection of documents was complete and up to date. His inquiry showed that the level was low, 28%; in other words, **more than two thirds of all the financial statements** that should have been filed under the Accounting Act (Act No. 563/1991 Coll., as amended) **were missing from the collection of documents**. Commercial Courts do not check the completeness of the collection of documents in an adequate extent, in a systematic manner or on their own initiative. Therefore, the intention of the State that the compliance of de facto and de lege situation of entities registered in the Commercial Register with the mandatory provisions of the Commercial Code (Act No. 513/1991 Coll., as amended) should be submitted to judicial supervision was not achieved. Commercial Courts lack effective legal instruments as well as adequate staffing and equipment.

For more on this topic, see also "New Recommendations of the Defender for 2012," page 16.

Lay element in judicial decision-making

Within his activities, the Defender found systemic shortcomings pertaining to election and withdrawal of lay judges. In violation of law, certain municipalities do not request an opinion of the president of the court concerning individual proposed candidates. Practical difficulties often arise with respect to the interpretation of a vague legal notion contained in the qualification clause for the lay judge – "experience and moral qualities guaranteeing due performance of his/her office," with respect to gathering the necessary materials to assess the candidate's qualifications, and also with respect to the overlap of the office of a lay judge with legal professions.

The failure to request and obtain an opinion of the president of the court concerning candidates for the office of a lay judge causes, in the Defender's opinion, **unlawfulness of the decision** through which such a lay judge is elected. It is the Defender's belief that the **lay element in the judiciary cannot be meaningful if it is burdened through the choice of a candidate not meeting the statutory requirements for performing the office of a lay judge**. The Defender also believes that, under the applicable legal regulation, there is no other defence against the decision of a municipal assembly electing a lay judge than the supervision of the Ministry of the Interior under Section 124 of the Municipalities Act (Act No. 128/2000 Coll., as amended). At the same time, the Defender requests that the Ministry of the Interior provide **methodological guidance** to municipalities as to general issues pertaining to the election of lay judges (scope of information about the candidates, methods of collecting it, obtaining the opinion of the president of a court, the fact that members of the municipal assembly should meet the candidates in person, etc.), and the withdrawal of lay judges. While the Ministry of the Interior accepted his recommendation to provide methodological guidance, it refused to conduct supervision activities.

The Defender also recommended that the Ministry of Justice consider extending the statutory requirements for the office of a lay judge, or alternatively, **reassess thoroughly the institute of lay judges and its legal regulation.**

Supervision of the Ministry of Justice and presidents of district courts over distrainors

The Defender receives many complaints concerning distrainment, including complaints about the procedure of distrainors. Only in a small minority of cases, however, complaints were also filed with one of the bodies of State supervision over the activities of court distrainors. Moreover, such complaints cannot replace the necessary procedural steps by the liable party (or the entitled party, or the owner of property subject to distrainment) within distrainment proceedings as such.

The Defender, in concert with the Ministry of Justice, criticises the practice of certain legal counsels and court distrainors, consisting in **claiming and recognizing, without authorisation, the entitled party's costs in distrainment proceedings** in the form of a fee under Section 12 (2) of the Attorney's Tariff Decree (Decree No. 484/2000 Coll.), even if the legal counsel performed no acts in executing or discontinuing distrainment and only accepted the case and submitted a proposal to order distrainment. In this context, the Defender also welcomed the **introduction of a pre-action notice** as well as further reflections of the Ministry concerning changes to the legal regulation.

Newly, the Defender repeatedly encountered complaints criticising the practical consequences of the problematic practice of **distraining a several-months' severance pay**. If the deduction were made from the severance pay as a whole (not distributed over the subsequent months) with the last pay, the liable party would often have nothing left from his or her severance pay, although he/she would not be entitled to unemployment benefits for the period calculated as the number of multiples of average wage from which the minimum amount of severance pay was derived [see Section 44a of the Employment Act (Act No. 435/2004 Coll., as amended)]. The Defender is convinced that employers should calculate such deductions as if the severance pay were income earned over the relevant number of following months.

2 / 6 / Land law

Land Registry

As in previous years, a large portion of complaints related to **proceedings for the correction of an error in the Land Registry**. Shortcomings found by the Defender in the course of his inquiries were mostly of procedural character, i.e., neither substantive or systemic.

The Defender paid special attention to explaining the often complex issue of the Land Registry operation and the procedural steps of cadastral authorities. Although one of the major functional roles of the Land Regis-

ter is to make rights in rem public, cadastral authorities – contrary to complainants' frequent belief – cannot decide on property relationships. As the Land Registry operates on a record-keeping principle, cadastral authorities are not competent to decide about the correctness of title deeds, which – in some cases – can lead to duplicate registration. This was repeatedly pointed out by complainants. The Defender then advised the complainants that such cases needed to be addressed either through an agreement between the duplicate owners or through court action, but not through the cadastral authority.

Moreover, in his activities, the Defender encountered problems caused by **misinterpretation of a complainant's filing by the cadastral authority**. In the Defender's opinion, administrative bodies must strictly adhere to the principle that any filing is to be assessed on the basis of its contents, whatever its title. The same principle also applies to cadastral authorities.

Complaint File Ref.: 3396/2011/VOP/DV

An application to correct an error, filed in the same matter after a notice that the correction of an error had not been made and after the lapse of the time limit to express disagreement, must be assessed according to its content. It cannot be automatically regarded as a statement of disagreement responding to the notice that the correction had not been made, submitted late.

After receiving a notice that the correction of an error in the Land Registry had not been made and after the lapse of the time limit for expressing disagreement, on the grounds of which administrative proceedings are commenced, the complainant filed a new application in the same matter. The Cadastral Office for the Hradec Králové Region, Hradec Králové Cadastral Workplace assessed this application, by reference to a decision rendered by the Regional Court in Hradec Králové, as a late statement of disagreement with the notice that the correction had not been made. The Defender found this procedure contrary to the applicable law. The Czech Office for Surveying, Mapping and Cadastre agreed with the Defender's opinion.

The Defender also looked into the interpretation and application of the provisions of Section 8 (1) of the Act on Registration of Ownership Titles and Other Rights In Rem to Real Estate (Act No. 265/1992 Coll., as amended), under which registration can be made in the form of a record only if the existing registration in the Land Registry is consistent with the proposed registration. Specifically, the Defender looked into the interpretation of this provision with respect to ordered distrainment (followed by an auction), concluding that, if a certain person is registered in the Land Registry as the owner, while a resolution ordering the execution of a decision or a distrainment order has been delivered to that person, such person is prohibited from transferring the real estate subject to the execution to another person. If the ownership title registered in the Land Registry is transferred to another person, it can be presumed that the transfer had been made without authorisation. A person who has acquired the real estate based on the decision on the execution of a decision issued against the person registered in the Land Registry as the owner at the time the proceedings were opened can be registered in the Land Registry, despite the fact that a different owner was later registered in the Land Registry. The Defender stated that, in view of the records-keeping role of the cadastral office, he had certain objections to this legal construction, while observing, however, that the foregoing reflected the principle that in an auction a title is acquired in an original manner, even from a person other than the owner.

2 / 7 / Constructions and regional development

Activities of building authorities

In April 2012, the Defender organized an expert round-table discussion, attended by the staff of type II building authorities and the representatives of the Ministry of Regional Development. The aim was to exchange views on specific legal issues that, according to the Defender's findings, were inconsistently addressed by

building authorities. The topics discussed included the notification of construction exceeding the parameters of notification, examination of civil-law objections of parties to proceedings or the choice of an efficient procedure to address the occupancy of a structure at variance with the purpose of occupancy.

Review of consents of construction authorities

The Defender has long been displeased with the **lack of uniformity in terms of administrative practice** and the case-law as to their view of the nature of permits granted by building authorities, and the legal means of defence. In 2012, a new approach emerged concerning the nature of permits granted under the Building Act (Act No. 183/2006 Coll., as amended), and therefore also the manner of review. The lack of uniformity among administrative authorities and courts regarding the reviewability of consents of building authorities, commented on by the Defender in the Annual report on activities in 2011, was resolved through a resolution of the Extended Chamber of the Supreme Administrative Court dated 18 September 2012, File Ref. 2 As 86/2010. The Court ruled, without any ambiguity, that any explicit or implied consents under the Building Act, carried out upon the notification of construction or the notification of occupancy by the construction owner, represented other acts under Chapter 4 of the Administrative Procedure Code (Act No. 500/2004 Coll. as amended). The Extended Chamber of the Supreme Administrative Court ruled that such consents were not decisions within the meaning of Section 65 of the Code of Administrative Justice (Act No. 150/2002 Coll., as amended). Judicial protection of third-party rights – e.g., rights of adjoining-property owners – is guaranteed through an action for the protection against unlawful interference, an instruction or a compulsion under Section 82 of the Code of Administrative Justice.

The Defender considers the above-quoted judicial decision of the Extended Chamber of the Supreme Administrative Court **important contribution to the unification of the administrative practice in using so-called simplified procedural steps under the Building Act**. His subsequent handling of complaints was also based on the Court's conclusions.

Certificate issued by a chartered inspector

Since the effective date of the new Building Act, regulating the so-called accelerated construction proceedings by means of a certificate issued by a chartered inspector, the Defender has sought to achieve a legislative change to the Building Act which would allow remedies against the certificate. His aim was to provide for legal protection of persons who have ownership or other titles to adjoining property and who would otherwise be participants to construction permit proceedings.

Even following the resolution of the Special Chamber of the Supreme Administrative Court and the Supreme Court of 6 September 2012, Ref. Konf 25/2012, the Defender finds ambiguities as to the interpretation of the legal protection of persons who would otherwise be participants to regular construction proceedings. The Special Chamber ruled that **the issuance of a declaratory decision of a building authority stating that a right of the structure owner to carry out the construction has not been created was the only remedy against a certificate issued by a chartered inspector.** Therefore, the Defender has been communicating with the Ministry of Regional Development, seeking the issuance of methodological guidelines, to be followed by construction authorities when reviewing certificates issued before 31 December 2012. The aim of the guidelines is the uniform application practice of building authorities throughout the country.

Objections of neighbours to construction

In 2012, the Defender addressed, on a more systematic basis, the question of how building authorities evaluate neighbours' objections to a planned structure. The case-law of the Supreme Court indicates that a building authority cannot only assess the compliance of the structure with construction regulations and technical standards but it must also examine whether the structure or its subsequent operation will represent an unreasonable nuisance for the vicinity. It is the Defender's opinion that if a construction authority receives, within proceedings under the Building Act, a civil-law objection of a party to the proceedings, e.g., asserting that the planned structure would shadow their own building or land, **it is under the obligation to examine**

such objection also with respect to the Civil Code (Act No. 40/1964 Coll., as amended), which prohibits unreasonable nuisance to neighbours. Construction authorities are often unaware of this obligation, however, and are also at a loss as to the criteria that should be applied to assessing such nuisance since the methodological guidance provided by the Ministry of Regional Development is inadequate in this respect.

Heritage preservation

Over the last year, the Defender received several complaints pertaining to major development projects on the territory of the Capital City of Prague, which related to heritage preservation interests in a fundamental way. While inquiring into these cases, the Defender found shortcomings in the activities of the body of State heritage preservation of the Municipal Authority of the Capital City of Prague, and could not but describe the shortcoming ascertained as a serious failure of State heritage preservation. Among others, the Defender criticized the Municipal Authority of the Capital City of Prague for having accepted construction activities (an investment project) on a cultural monument and in a listed territory without submitting the project to the National Heritage Institute in Prague for assessment.

Complaint File Ref.: 5819/2011/VOP/JSV

When making a decision on permitting the demolition of an immovable cultural monument (for reasons other than construction defects), a body of State heritage preservation always has to weight the justification of the demolition against the interest in preserving the cultural and historic values of the real estate.

Permission to demolish an immovable cultural monument (for reasons other than construction defects) does not have to be preceded by a decision removing the property from the list of cultural heritage.

If a body of State heritage preservation supports its decision that differs from the opinion of a relevant professional organisation of State heritage preservation with convincing justification, its binding opinion cannot be challenged on grounds of unlawfulness.

The Public Defender of Rights was addressed by K.Z.s., a civic association, requesting an inquiry into the procedure of relevant State heritage preservation bodies regarding the demolition of the corner of Wenceslas Square and Opletalova street in Prague. The Municipal Authority of the Capital City of Prague had rendered a binding opinion consenting to the given investment project, subject to some conditions. It had done so despite a negative expert opinion of the National Heritage Institute, the regional branch in the Capital City of Prague. Although the Ministry of Culture had annulled the opinion of the Municipal Authority of the Capital City of Prague consenting to the given investment project, subject to some conditions, in an accelerated review proceeding, the Minister of Culture had annulled the decision of the Ministry of Culture upon of a proposal of the board of appeal and terminated the review proceeding.

After the inquiry the Defender issued an inquiry report, observing that in making a decision on permitting the demolition of the corner of Wenceslas Square and Opletalova street in Prague, the Municipal Authority of the Capital City of Prague had failed to justify the demolition with respect to the interest in preserving the cultural and historic values of the real estate and the given area, which is a heritage reserve. In addition, according to the Defender's opinion, it had rejected without convincing justification the arguments of the National Heritage Institute, the regional branch in the Capital City of Prague, whose expert opinion had been used as the source material in proceedings on the issuance of the binding opinion.

On the basis of the inquiry report, the Minister of Culture suspended the enforceability of the decision of the Ministry of Culture whereby one of the corner buildings to be demolished had not been put on the list of cultural heritage and decided to grant a preliminary heritage preservation status to the building in question.

Protection against noise

In 2012, the Defender received a great number of complaints related to Government Decree on protection of health against adverse effects of noise and vibration (Government Decree No. 272/2011 Coll.), including objections challenging the interpretation of certain provisions of the Decree. The complainants noted that the Decree allows **ambiguous or dual interpretations**, pointing out it was at direct variance with its stated purpose, i.e., public health protection. On this matter, the Defender initiated a working meeting with representatives of the Ministry of Health, certain selected Regional Public Health Authorities, and the National Reference Laboratory for Community Noise. The meeting aimed at clarifying certain topical issues in the area of protection against noise, which the Defender repeatedly encounters within his activities.

Subsequently, the Defender launched an inquiry on his own initiative, inviting the Minister of Health to initiate a partial amendment to the Public Health Protection Act (Act No. 258/2000 Coll., as amended), specifically, to certain provisions pertaining to the protection against noise. **The Defender considers the postponement of a legislative solution to the problematic issues (while invoking the upcoming new law on noise) unacceptable**. Within inquiries conducted on his own initiative, he will continue to look into the question of participation of persons affected by noise in proceedings for the issuance of a permit to operate a noise source, the question of isolated and short-term exposure to noise, the problem of joint liability of more than one operator of the noise source and the issue of noise measurement costs.

For noise issues, see also "Submission of comments by the Defender", page 28.

2 / 8 / Environment

Floodplains

The Defender has long encountered citizens' complaints pertaining to **construction activities in floodplains**, or even in active floodplain zones, where construction is prohibited, with some exceptions. Complainants usually argue that the location of structures in floodplains will reduce water flow rates in the given area thus worsening the floods. Some complainants also pointed out that inappropriate methods had been used to define active floodplain zones.

In 2012, the Defender decided to launch an inquiry, on his own initiative, into the procedure of the Ministry of Environment, the Ministry of Agriculture, regional authorities, and the Municipal Authority of the Capital City of Prague. Its main objective was to draw attention to certain problems arising in the area of the protection against floods. These mainly concern timely updates of floodplains and active floodplain zones on major watercourses, or the determination of such areas and zones, if not carried out yet. The inquiry is also concerned with the experience of the quoted authorities with the process of determining active floodplain zones and changing their extent, and aims to find whether property is not being intentionally exempted from such active zones. The inquiry also focuses on the practice of water-administration authorities with respect to granting consent to the location of structures in floodplains (outside active zones).

After his visits to selected regional authorities and to the Ministry of Environment, the Defender convened a round-table expert meeting in November 2012, attended by the authorities against which the inquiry had been opened. The Defender intends to continue his inquiries into the issue of floodplains.

The Green Savings Programme

Numerous complainants turned to the Defender with concerns regarding subsidies from the Green Savings Programme (Zelená úsporám). Their complaints mainly targeted the procedure of the State Environmental Fund (hereinafter only the "Fund"), which was in charge of administering the applications and which paid out subsidies out of its income, but also the procedure of the ombudsman of the Green Savings Programme and the Ministry of Environment as the Fund's administrator.

In the given matter, the Defender can act only towards the Ministry of Environment but he cannot secure the payment of subsidies to individual applicants in the amounts claimed, or change decisions on subsidy or the conditions under which it is granted.

In view of the multitude of complaints received by the Defender concerning the Green Savings Programme, the Defender opened an inquiry on his own initiative against the Ministry of Environment – more specifically, against the Minister. The inquiry mainly aims at reviewing the procedural steps of the Minister in **rejecting subsidy applications**, as the Defender **finds the practice of not informing applicants of the manner their objections have been dealt with** contrary to the principles of good administration.

The Defender is in disagreement with the Minister on the question whether the procedure of the Ministry – or of the Fund, as applicable – is subject to the Administrative Procedure Code (Act No. 500/2004 Coll., as amended). It is the Defender's opinion that exempting the decision-making of the Ministry from the application of the Administrative Procedure Code is not possible. In his opinion, a subsidy awarded by the Fund (even though the Minister himself decides on the award) is not a state-budget subsidy since the income of the Fund is not budget revenue.

Nature conservation and landscape protection

In the course of 2012, the Defender completed an extensive inquiry concerning the procedure of the Ministry of Environment and the Administration of the Šumava National Park in connection with tree-felling activities in the Šumava National Park in August 2011. The Defender concluded that **the Administration of the National Park and Protective Landscape Area of Šumava lacked the necessary authorisations at the time of the felling**. These included a pest-control permit, an exemption for activities otherwise prohibited in the Šumava National Park, and the statement of a nature conservation body saying whether felling could significantly impact the Natura 2000 area, which enjoys a special protection status.

Complaint File Ref.: 4064/2011/VOP/MPO

For the purpose of wood pest control, an entity managing a national park is required to obtain the relevant permit, even in cases when it has all the necessary exemptions from prohibitions pertaining to specially protected plant and animal species.

It is prohibited to carry out felling which leads to the formation of clearings in a national park unless proceedings on the issuance of an exemption for activities otherwise prohibited have been completed first.

If the competent body of governmental authority in the area of nature conservation ascertains that felling has been carried out in the national park without relevant permits and exemptions, it is under the obligation to proceed according to Sec. 66 of the Nature Conservation and Landscape Protection Act (Act No. 114/1992 Coll., as amended), i.e., either subject the felling to conditions or prohibit any further felling of bark-beetle infested trees.

The Defender inquired into the activities of the Administration of the Šumava National Park as a body of governmental authority, the Ministry of Environment and the Czech Environmental Inspectorate, upon a complaint filed by a civic association, in the matter of felling trees infested by bark-beetle at a location called Na Ztraceném, within the Šumava National Park, in July and August 2011.

After the inquiry, the Defender concluded that, in certain cases stipulated by applicable laws, the entity managing a national park was required to obtain relevant permits and authorisations. However, the Administration of the National Park and Protective Landscape Area of Šumava was not in possession of such permits. Such state of affairs should have elicited adequate reaction from the competent administrative bodies - the Administration of Šumava National Park as a body of governmental authority, the Ministry of Environment, and the Czech Environmental Inspectorate; this, however, did not happen.

As bodies of governmental authority failed to take adequate remedial measures, the Defender used his punitive power and publicized the case through the media.

State mining administration

The Defender conducted an inquiry on his own initiative into the exercise of governmental authority in the mining field. Specifically, the issues examined concerned **(non-)updated conditions of the protection of hard-coal deposits** located in a part of protected deposit areas, within the Czech part of the Upper-Silesia Basin.

The inquiry was launched on the basis of information and materials collected in the course of other inquiries related to mining and the exercise of State mining administration. They showed that the conditions set for the protection of the protected deposit area, determined for the given area, did not reflect the contemporary (actual) situation in the area, limiting property owners within the protected deposit area in an improper manner, mainly as to construction activities.

The inquiry results showed that, despite some effort by the Ministry of Environment, which is the central body of governmental authority responsible for determining protected deposit areas, the situation is far from satisfactory. This fact can be mainly ascribed to inadequate legal regulation, which had been repeatedly pointed out by the Defender in the past. The Minister of Environment agreed with the Defender's description of the present situation, also agreeing that **mining regulations needed to be amended in a comprehensive and systemic manner.**

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

Inspecting files by persons other than participants to proceedings

The Defender repeatedly encountered cases of rejection of applications for inspecting files, filed by persons other than participants to proceedings. For various reasons, such persons – affected by the misdemeanour committed – had not become participants to proceedings (often because no further action was taken in the case without justification). According to Section 38 (2) of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended), any applicant is required, among other things, to prove his or her legal interest or another compelling reason to inspect a file.

In the Defender's view, a **legal interest in inspecting files may be deemed to exist if the applicant suffered harm that is actionable** (whether on a civil or criminal level), **and the applicant declares his or her will to file an action** (e.g., for damages, adequate satisfaction or monetary compensation for immaterial harm) **or report a crime**. Proving a legal interest in inspecting a file cannot be made conditional on presenting a power of attorney given to a legal counsel since legal representation is not mandatory for filing an action. Similarly, access to a file cannot be made conditional on presenting the actual complaint, as it is the information from the file that the applicant usually needs to draw up his or her complaint.

If an administrative authority rejects an application, it is required to do so by means of a resolution under Section 38 (5) of the Administrative Procedure Code. The resolution can be appealed to a superior administrative authority. A decision denying the inspection of a file by a person who has not been a participant to proceedings is subject to court review (see, e.g., judgment of the Supreme Administrative Court dated 4 June 2010, File Ref.: 5 As 75/2009).

Notification of no further action

The Defender often comes upon the practice of administrative authorities notifying only the injured party that suffered damage to property that no further action will be taken. The Defender, however, consistently perceives the notion of the "injured party" with respect to Section 66 (4) of the Misdemeanours Act as a wider concept. In his opinion, the term **"injured party" refers to any party having been objectively affected by the reported actions** (i.e., not just with respect to property, but also health, honour and so on). He bases the above construction not only on a systemic interpretation of the law, but also on the purpose pursued by the stipulation of an obligation to notify the injured party that no further action will be taken.

In the Defender's opinion, the aim of the provision is to allow the injured party to seek remedies against potential unlawful dismissal of the case, whether by submitting an application to the superior administrative authority to take measures against inactivity under Section 80 of the Administrative Procedure Code, or through an application to proceed under Section 126 (1) of the Municipalities Act (Act No. 128/2000 Coll., as amended).

Defining the misdemeanour of negligent bodily harm

The Defender also encountered a case where an administrative authority was handling a misdemeanour against civil cohabitation of negligent bodily harm as per Section 49 (1) (b) of the Misdemeanours Act. It concluded that the elements of the misdemeanour were constituted if the effects of the injury were more serious than in case of intentional minor bodily injury under Section 49 (1) (c) of the Misdemeanours Act. This conclusion was based on the guidelines of the Ministry of the Interior.

Complaint File Ref.: 4972/2011/VOP/IK

A minor injury suffices to constitute the misdemeanour of negligent bodily harm; the notion of "minor bodily injury" in the extent of the facts of the misdemeanour against civil cohabitation under Section 49 (1) (c) of the Misdemeanours Act must be defined in the light of the bodily harm offence under Section 146 of the Criminal Code (Act No. 40/2009 Coll., as amended), or, with respect to the concept of bodily harm defined in Section 122 (1) of the Criminal Code.

Complainant V. P. challenged the procedure of the Municipal Council of Dvůr Králové nad Labem, the Regional Authority of Hradec Králové Region, and the Ministry of the Interior, concerning a misdemeanour committed by Mr. J. B., who had tried to push the complainant out of the Town Hall building of K.; as a result, Mr. V. P. tripped and suffered a minor injury in his fall.

Without looking more closely into Mr. B.'s behaviour to determine whether or not his negligence was deliberate, administrative authorities rejected that the elements of the misdemeanour against cohabitation had been constituted under Section 49 (1) (c) of the Misdemeanours Act, saying that in order for the elements of the misdemeanour to be constituted, an injury more serious than a minor injury needed to have been caused, as mentioned in the facts of the misdemeanour against cohabitation under Section 49 (1) (c) of the Misdemeanours Act. This conclusion is identical to an opinion expressed by the Ministry of the Interior in its Minutes from the consultation day of the General Administration Department of the Ministry of the Interior for authorities handling misdemeanours on a regional level, dated 9 December 2009.

The Defender does not share this opinion. A wide range of injuries – including cuts or lacerations – can be imagined, which would not qualify as bodily injury within the sense of the Criminal Code, and these would therefore be considered minor bodily injury under Section 49 (1) (c) of the Misdemeanours Act. Assuming the logic that within the facts of the misdemeanour of causing negligent bodily harm under Section 49 (1) (b) of the Misdemeanours Act, only bodily harm more serious than minor bodily injury can be penalised, an absurd conclusion would be inevitably reached that within the facts of the misdemeanour of causing negligent bodily harm under 49 (1) (b) of the Misdemeanours Act, only actions causing consequences corresponding to the offence of bodily harm as per Section 122 (1) of the Commercial Code could be penalised.

As the Misdemeanours Act makes no difference between "less serious minor bodily injury" and "more serious minor bodily injury", which could then be penalised within the facts of the misdemeanour against cohabitation under Section 49 (1) (b) of the Misdemeanours Act, the liability for such a misdemeanour must be assessed not on the basis of the gravity of its consequences, but on the very fact whether or not a certain action constituted negligent bodily harm. Incidentally, the relevant legal provision does not mention the seriousness of effects of bodily harm. This issue and other circumstances can be dealt with when a decision about the type and amount of penalty is being made, or, depending on circumstances, a waiver of penalty could be considered.

The Ministry of the Interior accepted the Defender's conclusions in this matter.

2 / 10 / The Police

Procedure in processing complaints

After several years of sustained pressure by the Defender, the Police President issued the Methodical Guideline of Police President No. 230/2012 pertaining, among others, to the processing of complaints.

This guideline, effective as of 1 January 2013, implements into the police practice the Defender's consistent opinion that the **response to a complaint** as per Section 175 of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended) **should contain, besides a conclusion regarding (a lack of) justification of the complaint, also justification of such conclusion**, and should contain a response to all principal objections of the complaint.

In this respect, it cannot be disregarded that partial remedy had been already achieved (in 2011), through an instruction to directors of Regional Police Directorates to proceed in the spirit of the Defender's legal opinion. However, if a complainant was not satisfied with his or her complaint handling, and made use of the option provided in Section 175 (7) of the Administrative Procedure Code, asking that the manner in which the complaint had been handled be reviewed, he/she received a letter from the Police President which, in many cases, contained no detailed justification.

Escorting persons to sobering-up stations

During 2012, the Defender looked into escorts of persons to sobering-up stations. His inquiries uncovered a certain amount of responsibility-dodging on the part of both the Police of the Czech Republic and the medical facilities concerned, as to who is responsible for a questionable placement of an individual in a sobering-up station.

According to Section 17 (2) of the Act on measures aimed at protection against harm caused by tobacco products, alcohol and other addictive substances and amendments to related acts (Act No. 379/2005 Coll., as amended), if a healthcare provider having the necessary qualifications and equipment for that purpose finds that the life of a person in their care is not threatened by the failure of vital functions but that the person is under the influence of alcohol or other addictive substance and fails, as a result, to control his or her behaviour, thus representing an immediate threat to himself/herself, other people, public order, or property, or is in a condition causing nuisance, such person is under the obligation to accept treatment and placement in a sobering-up station over such time as necessary for the acute intoxication to subside. It follows from this provision that **the decision to place a person in a sobering-up station is made by a physician**, who, however, mostly relies on information provided by the police (or the municipal police, as appropriate). A physician has no possibility to verify their statements, especially concerning the threat to public peace or property.

The Defender is of the opinion that, if an individual unable to control his or her behaviour is already being escorted to a sobering-up station, the other grounds provided by law (see above) must already exist at the time. **Whenever such other grounds are absent, and the person is placed in a sobering-up station upon**

the decision of a physician relying on inaccurate or incomplete information provided by the police, it is the police's failure. In the Defender's opinion, professional medical knowledge is not required in the initial phase to tell whether or not a person is unable to control his or her behaviour and thus represents an immediate threat to himself/herself, other people, public order, or property, or is in a condition causing nuisance. A police officer (or a municipal police officer) is fully competent to assess the matter, as, by definition, such behaviour must be utterly abnormal.

Being placed at a sobering-up station represents a restriction of personal freedom, to which, in some cases, the patient provides ex post consent (the law sets a 24-hour time limit). In the opposite case, the healthcare provider must report the acceptance of a patient, even for relatively short stays, to the competent court. The sobering-up station placement practice and the conditions in these facilities were brought into light through a case decided by the European Court of Human Rights in 2012, case of Bureš vs. Czech Republic (judgment dated 18 October 2012, complaint No. 37679/08). Through communication with the Government representative of the Czech Republic before the European Court of Human Rights, the Defender proposed that the Act on measures aimed at protection against harm caused by tobacco products, alcohol and other addictive substances be amended so as to meet the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (Communication No. 209/1992 Coll.). Specifically, this concerns the requirement of clarity and predictability of the legal provision that applies to the restriction of freedom [Section 5(1e)], which the present wording of the law fails to satisfy in the Defender's opinion. The law should also clearly stipulate that the placement of a person in a sobering-up station is an extreme measure, acceptable only if necessary, and unless more moderate measures can be applied.

Rights of persons restricted in their freedom

The Defender's inquiry into an individual complaint contributed to a change of long-lasting police practice with respect to persons restricted in their freedom.

Complaint File Ref.: 4753/2011/VOP/MK

The rights of individuals placed in cells under Section 33 of the Act on the Police of the Czech Republic (Act No. 273/2008 Coll., as amended) are reasonably applicable to persons restricted in their freedom in another manner (e.g., by being placed in rooms where detained persons or persons brought to the police station are held). Meals should be provided reasonably in view of the hour of the day and of the expected confinement duration.

Mr. P. K. approached the Defender with a complaint about the manner in which he had been treated by the Police of the Czech Republic, in the context of suspected traffic violation (which was not established in subsequent administrative proceedings), and a complaint about the handling of his complaints by the competent bodies of the Police of the Czech Republic.

The Defender found maladministration consisting in the failure to provide a meal (lunch), despite the fact that the complainant had been restricted in his freedom in the morning, and wasn't released until in the afternoon, i.e., after the lunch hour.

The Defender stated that meals should be provided on a case-by-case basis in view of the expected duration of confinement of a given person. Meals should be provided in accordance with normal daily regime, i.e., breakfast – lunch – dinner, no matter how long the person has been restricted in his/her freedom. If a person's freedom is restricted at 11:30 a.m. for the purpose of ascertaining his/her identity, the confinement can be expected to last no more than an hour, and providing lunch is then obviously unnecessary. If, however, a person's freedom is restricted at 11:00 a.m., and the time of his or her release cannot be reasonably estimated, it is the Defender's opinion that a meal should be offered at lunch time (i.e., at about noon), even though it may transpire that the person will be released shortly after eating the lunch.

The Defender's objection was accepted by the police.

2 / 11 / Prison system

In 2012, the Defender held an expert conference, attended by representatives of the Prison Service of the Czech Republic (hereinafter only the "Prison Service"), the Ministry of Justice and other institutions participating in the penitentiary system. The aim was to point out certain issues that the Czech prison system is facing.

Hygiene conditions, maltreatment

According to the Defender's findings, austerity measures implemented by the Director General of the Prison Service due to insufficient funds were mostly reflected in the hygiene conditions in prisons. Instead of being able to wash with hot water "if possible daily but at least twice a week", which is the standard set by the European Prison Rules, prisoners were allowed to shower in hot water once a week, in exceptional cases more often, under the mentioned internal instruction. In practice, prisons responded to the instruction by defining **time intervals during which shower rooms could be used**, or by **restricting** existing time intervals (outside this time, shower rooms were either locked or the hot-water supply was discontinued). In 2012, the Defender found the conditions in one ward of the Kynšperk nad Ohří Prison so poor that they fulfilled the defining elements of maltreatment (as a result of overcrowding and poor hygiene conditions, as discussed above). Even though prisoners were allowed to take a shower twice a week, the showers-opening interval was so short that only a half of the 100-person unit could use the showers. Such conditions in the unit caused conflicts among prisoners in situations where they had to share bedrooms with prisoners who were not performing basic personal hygiene. The prison argued that prisoners were not washing themselves by their own choice. In this case, however, **the shower-opening interval was too short for all the prisoners to wash** (even if all showers had been operational). As a result, the Defender accepted the complainant's argument that the showers were used only by individuals who were able to "assert themselves". The intervals for morning and evening hygiene were set in a similar manner. In conclusion, the Defender pointed out that, even though the above-described issues concerned an environment where prison sentences were served, it was necessary even in such facilities to **enable persons to maintain their basic hygiene and civilisation habits**.

Microclimatic conditions

In 2012, the Defender also found poor microclimatic conditions in prison cells (mainly temperature, air circulation, and humidity). The Ministry of Justice had not defined any limits on the basis of secondary legislation for constructions with respect to which it acts as a special building authority (i.e., prison facilities). Similar shortcomings are found as to the lighting requirements for rooms where prisoners spend their time. Previously, based on his findings from visits to remand prisons in 2010, the Defender had recommended that the Prison Service regulate the above limits with respect to prison facilities through an internal regulation, in collaboration with the Ministry of Justice as the competent building authority and the Ministry of Health, or rather the Chief Public Health Officer. The Prison Service is of the opinion that the limits provided by general legal regulations are also applicable to prison facilities. Basically, the Defender has no objections to this decision; he only points out that – in view of his findings – he is not convinced that such general limits are always respected. **Inadequate microclimatic conditions are one of psycho-hygienic stressors with negative impact on prisoners' behaviour and mental state**. Moreover, some prisoners spend months in these facilities. In the Prague – Ruzyně Remand Prison, for example, windows were permanently shut to prevent noise (prisoners' shouting out of the windows). Upon the launch of the Defender's inquiry, the facility asked the Health Institute to measure the microclimatic conditions in the cells. The results were appalling, especially as to air circulation. The Defender concluded that order and peace in the cells must be mainly maintained by guards, through disciplinary proceedings, not by shutting the windows permanently. By the time the Defender's inquiry had been completed, it was possible to open the windows again.

High-security ward ("Ward")

The Ward is intended for convicted persons who escaped during their detention or imprisonment, committed an extremely serious crime, or for whom there are other exceptional circumstances requiring their place-

ment in the Ward (serious security threat in case of a successful escape; terrorizing other convicted persons; threats to officers or their families). Detention in the Ward is associated with increased security measures that represent further restriction in rights and freedoms (e.g., prisoners are locked in their cells on a permanent basis; their yard time is separated from the yard time of other convicted persons and it is directly supervised by an officer; visits are mostly non-contact; meals are served directly in cells, etc.). At present, the Ward's existence has **no basis in law** but only in a secondary regulation, which has been criticised repeatedly by the Defender. Other details pertaining to the Ward are defined in the internal regulation of the Prison Service. The Defender reiterated his comments in 2012 within a comment procedure concerning an amendment to the Act on the Service of Imprisonment (Act No. 169/1999 Coll., as amended). The concept of the Ward should be stipulated directly in the new law, including the process of placement and removal therefrom.

Complaint File Ref.: 2290/2011/VOP/MS

If follows from the case-law of the Supreme Court of the Czech Republic and of the European Court of Human Rights that the ne bis in idem principle applies, in certain cases, also to the conflict between misdemeanour and criminal proceedings. It cannot be stated as a general rule that every final decision on (disciplinary) misdemeanour creates an obstacle of res iudicata to criminal proceedings for the same fact. If, however, a decision on the imposition of a disciplinary punishment and a criminal prosecution pertain to the same fact (identity of facts), but the elements of the relevant material facts applied to the fact are not at least partly identical (identity of material facts), the ne bis in idem principle remains intact.

The purpose of confining convicted persons to the Ward is not to force them to comply with the treatment programme in an exemplary manner. Placement in the Ward aims at minimizing extremely serious behaviour of a convicted person in cases set by the Rules of Serving Term of Imprisonment. The period of confinement in the Ward must reflect real security risks on an individual basis.

The complainant escaped from the Kynšperk nad Ohří Prison, for which he was sentenced to two more years in prison. In connection with his escape, he was transferred to the Horní Slavkov Prison, where he was confined to the Ward. He was also punished by a disciplinary measure for the same escape. He therefore argued that he had been, in fact, punished three times (sentence, confinement to the Ward, and disciplinary punishment). The inquiry into the multiple punishments concluded that the Prison Service had not erred when placing the complainant to the Ward after his escape and imposing a disciplinary punishment on him. The question is whether the subsequent criminal proceedings should have been discontinued due to an obstacle according to the provision of Section 11 (1) (j) of the Criminal Code (Act No. 141/1961 Coll., as amended). This question is outside the Defender's competence, however, as he is not allowed by law to intervene in decision-making of courts. The complainant was advised of the manner in which the final judgment could be challenged, and he made use of this possibility.

The Defender concluded the inquiry pertaining to the confinement of the convicted person to the Ward by finding maladministration on the part of the Prison Service due to an unreasonably long period of confinement in the Ward (3 years and 5 months). Even though confinement to the Ward cannot be considered punishment subject to the ne bis in idem principle, the Defender found that the primary and only legitimate reason to place the convicted person in the Ward was, in the given case, to prevent him from attempting another escape, or to reduce the risk to a minimum. The prison argued that the reason for the long-term confinement of the convicted person to the Ward was his failure to abide by the treatment programme, which, however, is not a valid reason for placement in the Ward. The Defender therefore found the period of his stay in the Ward unreasonably long, also in view of the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the case-law of the European Court of Human Rights. In the course of the Defender's inquiry, the complainant was removed from the Ward and transferred to a standard ward.

2 / 12 / Transport

Public roads

After ten years of sustained pressure, **the Ministry of Transport initiated a legislative process towards transferring the competence of highway administrative authorities** from so-called type I municipalities to municipalities with extended competence (for more detail, see "Submission of Comments by the Defender", page 28). The Defender expects major improvements in the performance of road administration activities, and believes that the draft amendment will be actually passed in 2013. The submitted intent is also supported by all regions.

In 2012, in the area of roads (public roads), the Defender mostly received complaints about the outcome of declaratory proceedings pertaining to the existence of a road, or proceedings to remove obstructions from roads. Complainants also often challenged traffic signs placed on special-purpose roads or local roads. There is also a large number of complaints attesting that **administration proceedings of highway administrative authorities can take up to several years.** The most frequent cause of unreasonably long proceedings is repeated referral of a case by appellate bodies back to the first-instance body, as a result of **the inability of small municipal authorities to carry out administrative proceedings to a high standard** and with due regard for the procedural rights of participants, as well as of their inadequate capacity to deal with the substantive basis of the relevant proceedings and collecting merits.

Therefore, the Defender changed his strategy and now inquires into "delayed proceedings" in a simplified manner, usually **proposing remedies in the form of compensation to participants for unreasonably long administrative proceedings**. The Defender must apply a holistic view of this issue since the Czech Republic – as a democratic rule of law – must be responsible for the (non)observance of its laws and the Constitution by its authorities. It is up to the legislator (and is, therefore, a responsibility of the Government) to allocate competence among various State administrative authorities and regional self-government bodies that exercise, within delegated competence, public administration for the State as its "contractors". Explaining that such delays are due to the complexity of legally complicated administrative proceedings for mayors of small municipalities can be understandable from the point of view of an individual; it is not, however, a fact that would justify unreasonable length of proceedings and release the State from an obligation to provide financial satisfaction to the persons affected.

The Vehicle Register

At the beginning of July 2012, a new Vehicle Register was launched, bringing about substantial difficulties both for the competent authorities and their staff and – most of all – for the citizens. As a result of recurring system crashes, citizens were unable to perform the required registration acts in due time. The collapse of the new Vehicle Register was frequently pointed out by the media. Surprisingly enough, the Defender did not receive any significant number of complaints on the subject; a possible explanation is people's understanding that **the situation was not due to malice or unlawfulness on the part of registration points but it was rather a result of a non-functional system**.

The Defender nevertheless published a press release regarding the Vehicle Register, **informing** the public of their **options to seek damages**. He mainly stressed that, besides damage to property, which the Ministry of Transport had itself recognized, people could also seek so-called appropriate satisfaction for immaterial harm.

Transport administration agenda

A large category of complaints pertain to the penalty points system (mainly complaints by persons who have reached the 12-point threshold); other complaints were filed by persons whose driving licence had been withdrawn by the police, and their case was then decided by a municipality with extended competence.

With respect to **proceedings to withdraw a driving licence**, the Defender issued a **statement** in 2012, which meant a modification to the prior practice. Specifically, it pertained to a different application of the provisions of Section 118a of the Roads Traffic Act (Act No. 361/2000, as amended). The law makes it possible to withdraw a driving licence only from persons who have committed a certain act, or are suspected of having committed a specific act. However, in practice administrative authorities were making a decision to withdraw a driving licence only on the basis of suspicion of certain behaviour, while **the law required, in such a case, that unlawful acts be established – i.e., simple suspicion was not sufficient to decide on withdrawing a driving licence**. For example, although the law stipulates that a driving licence can be withdrawn from a person having driven under the influence of alcohol, an authority decided to withdraw a driving licence upon simple suspicion of such act, without establishing within evidence that the person had indeed driven under the influence of alcohol. Whether or not such act constitutes a misdemeanour is not decisive and is to be assessed separately by the competent administrative authority.

Moreover, the Defender attained an amendment to Annex 7 to the Decree on Driving Licences and the Driver Registry (Act No. 31/2001 Coll., as amended). The said Annex contains a Driving Licence Application. The form specified, among others, that the document to be attached to the application is an identity card or, as stated in the brackets, a certificate of an identity card (temporary replacement document). This wording is misleading, however, as it leads applicants to mistakenly believe that a certificate of an identity card is a sufficient identification document. This is not the case, however, as a **certificate of an identity card is not a public instrument**. The Ministry of Transport accepted the Defender's opinion, and the note in brackets was deleted from the form.

2 / 13 / Taxes, fees, customs duties

The Defender traditionally dealt with a wide range of complaints in this area. Complainants challenged procedures and decisions of tax, municipal and customs authorities, but also applicable legal regulations as such.

Generally speaking, complaints encountered in this field are so diverse that **there are no grounds for assuming the existence of major systemic issues** (with the possible exception of local fees administration, which can be a burden for certain municipal authorities, legally complex situations, or delays in certain tax-related proceedings – e.g., pertaining to property transfer).

The Defender contemplated inquiries mainly into atypical or disputable cases or cases that are legally interesting (taxing income on sale of a share in a residential building to which the right to use a flat is attached; importation of prohibited medicinal products; legitimacy of tax credit for a dependent child claimed by the other parent – not living in the same household as the child; impossibility to lose entitlement to lawfully received monthly tax bonuses only as a result of having filed a tax return; extent of exemption from solar-power payments; depreciation and amortisation claimed by an institution of a self-governing unit, receiving contributions from the State budget, etc.).

Many complaints challenging the applicable law pertained, above all, to Section 250 of the Tax Rules (Act No. 280/2009 Coll., as amended), stipulating a "**fine for a late tax return filing**" (if a tax return is not filed or is filed late). Although the fine amount is primarily proportional to the tax assessed (tax deduction, or tax loss), and to the length of delay, there is a minimum amount of CZK 500 applicable whenever the fine thus calculated would be lower. **As a result, the fine often significantly exceeds the tax itself, especially in property-tax cases**. This should change thanks to an amendment effective as of 1 January 2013. A fine will not be prescribed in the case of late tax return (and no obligation to pay will arise) if its amount does not exceed CZK 200. In the event of a failure to file a tax return, however, the minimum amount of fine remains unchanged.

Such fines often concerned landowners whose land had been subject to **updates of cadastral records (digitalization).** Through this update, the land concerned ceases to be recorded through a "simplified registration"; as a result, the **obligation to pay** property tax passes from the tenant to the **owner**. Since they are

unaware of these consequences (as there are no changes to the land ownership as such), such owners often fail to file their tax return in due time, and face penalties as a result. The Defender welcomed a proposal of the President of the Office for Surveying, Mapping and Cadastre to publish, in collaboration with the General Financial Directorate, an **information leaflet** on the subject, to be attached by Cadastre Offices to a notice announcing the start and finish of the cadastral records update (the leaflet is available on www.cuzk.cz).

2 / 14 / Foreigner-related administration

Visas

Over the last year, the Defender was again approached by family members of EU/CR citizens (typically spouses of Czech citizens) with complains about the visa-processing procedures of embassies and of the Ministry of Foreign Affairs for a uniform Schengen visa (short-term visas). In most cases, administrative authorities justified their rejection of a visa application by their suspicions that the applicant had entered into a sham marriage with a Czech citizen, which constituted a circumvention of law. Within his inquiries, the Defender pointed out that family members of EU/Czech citizens applying for visas were in a fundamentally different position than third-country applicants. **The issuance of a visa is claimable by family members of EU/Czech citizens. An administrative authority may reject a visa application only for reasons strictly defined by law, while the burden of proof lies with the administrative authority**. This also applies to so-called sham marriages where the administrative authority must prove that obtaining a residence permit was the only reason for the marriage. In this respect, administrative authorities should check whether (emotional) family bonds exist between the spouses and whether they want to lead a family life also after a residence permit is acquired. In the Defender's opinion, the conclusion that a given marriage is a sham one cannot be inferred solely from circumstantial evidence (such as the existence of a language barrier, short duration of the relationship, or the fact that spouses do not live in the same household). Such circumstances should incite the administrative authority to examine the case thoroughly, mainly by conducting interviews with each spouse. The Ministry of Foreign Affairs, unfortunately, does not share the Defender's interpretation, and embassies pursue their previous practice, i.e., their conclusions that a marriage is a sham marriage are continued to be based mainly on collected circumstantial evidence. When assessing Schengen-visa applications filed by family members of EU or Czech citizens, the Ministry of Foreign Affairs continues to apply Section 12 (1) of the Visa Code (Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009), which, however, is not applicable to processing such cases and does not correspond to the statutory motives for rejecting applications, when applicable.

A favourable shift was observed in the practice of the Ministry of Foreign Affairs as to making records of interviews with visa-applicants or their family members, if appropriate. In response to the Defender's repeated inquiries, in which he had noted the problem of reviewability of such records and their limited value as evidence, **the Ministry of Foreign Affairs created – and has been using since 1 April 2012 – a single form for recording interviews with visa-applicants – family members of EU/Czech citizen**. This form should contain identification information about the applicant; the course of the interview; date; name and surname or badge number, and signature of the interviewing officer; and the applicant's signature. The Alien Police bodies have also adjusted their procedures accordingly, and their records of interviews (conducted mainly with applicants' spouses) will contain similar elements as specified above. The Ministry of Foreign Affairs recommended that embassies use a simplified version of the above form (without the applicant's signature) also in disputable cases when the individual involved is not a family member of an EU/Czech citizen.

Delays in processing residence of foreigners

The Defender dealt with an increased number of complaints about delays in proceedings conducted by the Department for Asylum and Migration Policy of the Interior Ministry pertaining to residence of foreigners. **The results of his numerous inquiries**, as well as information gathered from NGOs and legal counsels specialising in immigration and aliens law, **lead the Defender to a conclusion that these are not isolated individual shortcomings, but that they represent a problem of a systemic nature**. The Defender regularly encounters

cases with no decision rendered six months, or even a year after the filing of an application for a long-term residence permit, permanent residence permit or temporary residence permit. However, the Foreigners Residence Act (Act No. 326/1999 Coll., as amended) stipulates a 60-day time limit to process an application for a long-term/permanent/temporary residence permit in most cases when the application is filed on the territory of the Czech Republic. The same rules apply to renewals of such permits.

The Defender considers this situation to be a consequence of poorly-managed transfer of the foreigner-related administration from the Alien Police to the Ministry of the Interior, resulting in violations of the right of foreign nationals to a fair trial. In case of justifiably filed actions for failure to act, an obligation of the State to bear the costs of court proceedings could be created as a result. Moreover, unreasonable length of administrative proceedings can lead to the State's liability for damage and immaterial harm.

Besides delays in residence-permit proceedings, the Defender also found considerable delays in certain international protection proceedings.

Complaint File Ref.: 1098/2011/VOP/JŠM

The provision of Section 27 of the Asylum Act (Act No. 325/1999 Coll., as amended) sets a time limit of 90 days from the start of proceedings to render a decision in the case; in case such statutory limit cannot be observed, it enables the administrative authority to extent the time limit reasonably. A time limit that has been thus extended is no longer a "statutory" limit, however. Therefore, whether it is "reasonable" or whether the total length of administrative proceedings is reasonable need to be assessed in the light of Article 38 (2) of the Charter of Fundamental Rights and Freedoms, or, if appropriate, on the basis of criteria defined by the case-law (i.e., the complexity of the case, behaviour of the participant to proceedings, procedure of the authorities involved, importance of the subject-matter of proceedings for the participant – see Standpoint of the Civil and Commercial Division of the Supreme Court dated 13 April 2011, File Ref. Cpjn 206/2010, published in the Collection of Decisions and Standpoints under No. 58/2011).

Upon the expiry of the statutory time limit provided in Section 27 (1) of the Asylum Act (i.e., after 90 days from the start of international protection proceedings), an applicant has the right to file an application with the superior administrative authority under Section 80 of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended), which regulates protection against inaction.

The complainant contested inaction of the Department for Asylum and Migration Policy of the Ministry of the Interior in international protection proceedings. The proceedings were opened on 11 November 2006, and the statutory time limit for rendering a decision expired on 9 February 2007. The Department for Asylum and Migration Policy of the Ministry of the Interior issued an international-protection decision only on 9 December 2010. The contents of the administrative file showed that after the expiry of the statutory limit, the administrative authority repeatedly used the option to extend the time limit for rendering a decision in the case, under Section 27 (1), second subparagraph of the Asylum Act. As a result, the proceedings took 4 years and 22 days in total, i.e., 1,483 days. The statutory time limit was thus exceeded more than 16 times. Having studied the case in detail, and in view of the existing case-law of the Supreme Court of Czech Republic, the Defender concluded that the total length of administrative proceedings had been unreasonable in the given case.

The complainant failed to achieve remedy through an application for the execution of measures against inaction (under Section 80 of the Administrative Procedure Code) filed with the Minister of the Interior. The Minister did not grant his application, arguing that a "statutory condition entitling a party to proceedings to file such an application was not met, that is, the time limit for issuing a decision did not expire, as provided in Section 80 (3), second sentence of the Administrative Procedure Code." The Defender found this argumentation fallacious (tautological), as the Minister's conclusion that the administrative authority was not inactive was based on the fact that the time limit for issuing a decision, repeatedly extended by the administrative authority itself according to Section 27 (1), second subparagraph of the Asylum Act, had not expired. Such interpretation would negate the purpose of the sense of the provision of Section 80 of the Administrative Procedure Code, however, degrading it to some kind of a formal initial stage before an action for the protection against inaction of an administrative authority is filed under Section 79 of the Code of Administrative Justie (Act No. 150/2002 Coll., as amended).

VISAPOINT

Also in 2012 the Defender observed, in certain countries (especially Vietnam, Ukraine, and Kazakhstan), difficulties pertaining to the operation of the VISAPOINT system, which requires foreign nationals in certain countries to register in order to be able to apply for a visa for stays in the Czech Republic longer than 90 days and for a long-term/permanent residence permit. **The Defender considers particularly alarming the long-term impossibility to register in order to file an application for a long-term stay for the purpose of family reunification and/or studies, as these types of stay represent a transposition of EU Directives,** namely Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, and Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, respectively. Directive 2003/86/EC explicitly stipulates a right to family reunification, subject to certain conditions, as was also confirmed by the case-law of the then European Court of Justice in case C-540/03 of European Parliament v. Council of the European Union dated 26 June 2006, and by the EU Commission in its "Report from the Commission to the European Parliament and the Council of 8 October 2008 on the application of Directive 2003/86/EC", whereby the Commission also added that the provision of Article 8 (1) of Directive 2003/86/EC "precludes the introduction of the notion of reception capacity as a condition in national law." Therefore, in the Defender's view, in cases where the Czech Republic in effect makes it impossible for foreign nationals to file an application for a long-term/permanent residence permit, and provided such cases are linked to EU law, **it violates its obligations arising for it from EU law**. As problems with the functionality of the VISAPOINT system were not resolved even after repeated correspondence and personal meetings with representatives of the Ministry of Foreign Affairs and the Ministry of the Interior, **the Defender decided**, in July 2012, **to ask the European Commissioner for Home Affairs** Cecilia Malmström **to provide her viewpoint**. The Defender also discussed the problems of the VISAPOINT system at a regular press conference in September 2012.

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

Questions regarding the use of data from information systems

When so-called basic registries were launched, public administration users expected substantial reduction in the necessity of submitting various documents. The **stated purpose of basic registries was to facilitate better contact of citizens, companies, and other entities with the public administration**. Authorities are supposed to use data from the registries, instead of demanding them from citizens. According to the Defender's findings, these **expectations were not fully met**.

When reporting a change of permanent address, e.g. title to a house or a flat, among other things, must be established. The Defender found non-uniform practice. Certain authorities do not require an official copy of an entry in the Land Registry, as they are able to check the information themselves on the basis of a remote access to the Land Registry. Others, however, insist that ownership be substantiated, invoking the relevant provision of the Citizens Registry Act (Act No. 133/2000, as amended). Property ownership is not even so-called reference data, which a reporting office could take for granted, without having to verify it. This problem should be resolved through an upcoming amendment to the Citizens Registry Act, which stipulates that a reporting office shall verify the existence of an ownership title in the Land Registry.

Differing practices were also observed by the Defender as to the submission of documents required for entering into marriage. For example, certain registry offices continue to require that e.g. the judgment of divorce be submitted while others no longer require this document, checking the marital status in the information system of the citizens registry. Another difficulty resides in the fact that registry offices do not have – as yet – technical access to all information systems, as they should have under the amended Act on the Registers, Names and Surnames (Act No. 301/2000, as amended), effective since 1 June 2012.

On the basis of media reports, the Defender looked, on his own initiative, into the general problem of proving the birth surname for the purpose of submitting an application for a criminal record certificate. The birth

surname is not defined by law and it is not reference data in the citizens registry. Identity cards issued after 1 January 2012 do not contain this information. On the application form for a criminal record certificate, however, this information is mandatory, and must be verified to the competent authority's satisfaction.

Lessors and reporting a change of permanent address

The Defender often encounters a problem that is difficult to resolve under the present legal regulation. Citizens complain that they cannot register permanent address of the house where they actually live in a leased flat, as the lessor refuses to give his/her consent. As a result, many citizens remain to have permanent address at the reporting office, or alternatively at an address different from their actual residence, for many years.

If a citizen wants to have official mail delivered at the address of his or her actual residence, he/she can ask the reporting office at the place of his or her permanent address to establish a delivery address under Section 10b of the Citizens Registry Act. For this purpose, citizens do not need the consent of the building owner or other authorised persons. At the same time, it needs to be added that the Defender also received complaints by property owners who object to this legal regulation.

The Defender finds the present regulation of citizens registry intrinsically incoherent and exceedingly complex. Even in his past Annual reports he pointed out the ambiguity of the concept of a registered permanent address, and the necessity of an entirely new approach. The Defender welcomed the upcoming amendment to the Citizens Registry Act, submitted by the Ministry of the Interior to a so-called intersectoral comment procedure at the end of 2012, as an impulse for discussion about the overall unsatisfactory situation.

Recording the house registration number on identity cards

Many citizens were adversely affected by the fact that their permanent addresses on their new identity cards did not contain the letter distinguishing the registration number of the house where their permanent address was registered from the house number of another building in the same municipality. This situation was due to the launch of a new application for identity cards printing on 1 April 2012, not making it possible to distinguish the registration number from the house number.

The Ministry of the Interior argued that the practice of attaching a letter to the registration number had no legal grounds. However, the applicable legal regulation (Decree of the Ministry of the Interior No. 326/2000) lacks transitional provisions that would stipulate a time limit for municipalities to align the existing situation in house numbering to the new legal regulation. The information system of the citizens registry gives no indication, either, that a citizen could not have permanent address registered in a house marked with a registration number to which a letter is attached.

A **modified application was launched** in October 2012, making it possible to distinguish between the house number and the registration number stated in the permanent address. As of that date, house numbers are preceded by "č.p." on identity cards, and registration numbers by "č.ev." If the manner in which their permanent address is marked causes any problems to citizens, they may apply for an identification card replacement, with no administrative fee charged.

Registering the death of a Czech citizen abroad in a special register

Registers where births, marriages, civil partnerships, and deaths of Czech citizens that happened abroad are registered are kept by the Authority of the Brno-střed Municipal Ward (hereinafter only the "special register"). Unlike in all other registers, the obligation to report birth or marriage for the purposes of registration in the special register cannot be inferred from the law. Registering a death, however, especially of a citizen with permanent address registered in the Czech Republic, should always be considered a registration made by virtue of office.

If a Czech citizen whose permanent address at the time of his or her death was registered in the Czech Republic dies abroad, his or her life status in the information system of the citizens registry may not be changed to "deceased" until his or her death has been registered in the special register. An important difference between registering a death in the special register and in the "regular" register must be pointed out: while even the death of a person whose identity has not been established will be registered in the "regular" register, this is not possible in the case of the special register. If a Czech citizen has his/her permanent address registered in the Czech Republic, **inquiries must be performed in order to ascertain any information necessary for registering the death in the special register by virtue of office.**

Even in the past, the Defender had dealt with cases where the special register preferred not to register a death, as it was not sure of the accuracy of the collected data. If the special register learns of a death of a Czech citizen abroad from a Czech natural or legal person or from a Czech embassy abroad and the information received is insufficient for registering the death, any letters that the special register (or registry offices) will address to persons believed to be able to provide crucial data for registering the death in the special register must be formulated as a plea for assistance, not as a request to supplement a filing. The special register must not remain inactive if such persons or institutions fail to respond. According to the Citizens Registry Act, the special register should also make sure that, while the case is pending, the "live" status of the relevant person in the information system of the citizens registry be designated as incorrect.

A more serious error than the failure to register the death of a deceased citizen is registering the death of a citizen who is subsequently found to be alive, as happened in the following case.

Complaint File Ref.: 1766/2012/VOP/MV

The special register may not register a death if there is any doubt about the correctness of the notice of death. The special register is under the obligation to initiate a thorough inquiry to ascertain whether conditions for registration have been met.

Mrs. M. G. asked the Defender for help after having unsuccessfully sought official confirmation of her very existence at various institutions. She explained that she was registered as deceased, and it was therefore impossible for her to apply for a new identity card. During an ordinary road check on 5 December 2011, the police found, by means of examining the relevant register, that she had been officially dead since 21 July 2002. Mrs. M. G. then stated her employments since 2002 and various authorities where she was registered. She surrendered her identity card to them since it was seriously damaged. After an initial check, police officers of the District Department of the Police of the Czech Republic in Bílina concluded that it was probably a mistake, and advised the complainant to apply for a new identity card as soon as possible.

However, the complainant was unable to apply for a new identity card as long as the registration of her death was not cancelled. She therefore successively turned to the Police of the Czech Republic and to other authorities and institutions, including the special register.

The Defender's inquiry revealed that the Authority of the Prague 8 Municipal Ward, competent with respect to the complainant's permanent address, had received in 2004 a death certificate from the Embassy of the Czech Republic in Spain, issued by a Spanish registry office, according to which Mrs. M. G. had died in Barcelona on 21 July 2002. The authority forwarded the file to the special register for the purpose of registering the death. For reasons unknown, the special register did not register the death in 2004.

Upon an enquiry of the Authority of the Prague 8 Municipal Ward at the beginning of 2011, whether the death was registered, the special register asked the Embassy of the Czech Republic in Madrid to send it the Spanish death certificate. It then received the notice of death together with the death certificate on 7 September 2011. It registered the death on the same day and issued a Czech death certificate. However, it was unable to register the death in the information system of the citizens registry since the system reported that the complainant had been divorced since 13 July 2011. Instead of

asking the Authority of the Prague 8 Municipal Ward to verify the correctness of the information of divorce, the Special Civil Registry asked that the complainant's marital status be amended in the information system of the citizens registry, and her life status changed to "deceased".

At the beginning of December 2011, the special register received a notification from the District Court for Prague 8 and the Police of the Czech Republic, indicating that Mrs. M. G. was alive. The police had found, among other things, that the passport number of the person deceased in Spain belonged to another person, whose photograph was not in the passport, however. The photograph in the passport – otherwise with Mrs. M. G.'s personal data – showed an unknown woman. Despite that, until the end of March 2012, the special register had failed to take any effective action towards cancelling the registration of death. It cancelled the registration of death only in April 2012 upon the start of the Defender's inquiry. Subsequently, the Authority of the Prague 8 Municipal Ward "resurrected" Mrs. M. G. in the information system of the citizens registry, and issued a new identity card to her.

2 / 16 / Right to information, personal data protection

Access to information

In 2012, the Defender mainly dealt with **three major subjects**. The first related to the unwillingness of authorities to provide information about the remuneration of their top officials. The second concerned denying access to internal instructions whose provisions impact persons outside the liable party. The third issue was the conflict between the right to access information on the environment, and the protection of business secrets.

As to the remuneration information, the Defender advised the authorities that, in case of officials empowered to decide on rights and obligations of persons or on managing pubic funds, the proportionality test must be applied. **Restricting the right to protection of privacy and personal data is generally appropriate and needed in case of top State administration officials and it is thus necessary to give priority to the right to information.** The Defender came to this conclusion in several cases, which concerned information about the salary and bonuses of the Chief School Inspector, of the Head of the Trades Department of the Děčín Municipality and the Director of the Dečín Municipal Police. In the case of the Chief School Inspector, the Defender additionally admitted that to make the required information about the amount of remuneration received by its employee complete, an authority is entitled to provide additional information to applicants, mainly about some extra tasks or activities whose manner of performance, difficulty, or impact on administrative practice led the employer to award non-claimable parts of a salary to a specific employee (personal bonus, extraordinary bonus).

As to internal guidelines, it needs to be mentioned that authorities often include in the category of internal regulations documents whose provisions in fact define the procedure of the authority or its staff with respect to persons coming into contact with the authority. Typically, such documents include guidelines for handling complaints, as was the case of the Czech Labour Office. However, on the basis of the Defender's report, the Labour Office finally provided an applicant with the relevant guideline. The Defender was also successful in another case where the Czech Social Security Administration had originally refused to reveal its methodological guidelines for assessing the degree of dependency for the purpose of the Social Services Act (Act No. 108/2006 Coll., as amended) to a civic association representing persons with disability. In both cases, the Defender pointed out to the authorities that, according to the case-law and professional literature, **provisions of internal guidelines that also impact persons outside the liable party cannot be considered information pertaining solely to internal instructions**.

Complaint File Ref.: 3758/2009/VOP/KČ

Authorities must always consider whether a piece of information designated as protected by the operator of a facility under the Act on Integrated Pollution Prevention, fulfils all elements of a business secret. Even if such information is indeed a business secret, authorities must apply the principle of proportionality (i.e., the public interest test); if disclosing the information to the applicant is necessary for achieving the purpose intended by the law, authorities do not take into consideration business secret protection, with reference to the Act on the Right to Information on the Environment (Act No. 123/1998 Coll., as amended). According to the Act, disclosing information pertaining to the environmental impact of business operational activities does not constitute a breach of business secret. At the same time, the extent of information to be provided under the Act cannot be restricted by special legal regulations.

The Defender looked into the procedure of the Ministry of Environment and of the Regional Authority of the Moravian-Silesian Region concerning their refusal to provide access to documentation submitted to the Regional Authority by a large metallurgic company, invoking business secret protection. The information was requested by EPS civic association, in two separate cases. The first of these cases concerned proceedings to change an integrated permit for a hot strip mini-mill, where EPS was a participant to the proceedings. Despite that, the Regional Authority had refused to allow it to inspect an annex to the application, containing practically all of the relevant technical information. In the second case, EPS had applied to the Regional Authority, under the Act on the Right to Information on the Environment, to be provided with operating rules and integrated-permit applications for some other facilities of the same company. The Regional Authority provided the requested documents, after excluding some parts, while failing to issue any decision in the matter. Responding to the Defender's final statement, the Ministry of Environment informed the Defender that it would apply his legal opinion in the future.

Personal data protection

Also in 2012, the Defender strived to contribute to personal data protection. He repeatedly found his position at variance with that of the Office for Personal Data Protection (hereinafter also the "Office"), as to the interpretation of individual provisions of the Act on Free Access to Information (Act No. 101/2000 Coll., as amended) in connection with addressing individual complaints. The Office President has long rejected the Defender's power to interpret the law, referring to the independence of his institution. Knowing that he represents, besides administrative courts, the only control mechanism over the Office's supervisory and inspection activities, the Defender does not intend to relent in his activities.

Disclosing personal data of experts and interpreters

In response to an expert's complaint, opposing the fact that his home address, with his private phone number, had been published, the Defender examined what personal data of experts and interpreters could be made public through a public register of these professions. As the Experts and Interpreters Act (Act No. 36/1967 Coll., as amended), regulating experts' activities in more detail, does not specify what personal data of experts and interpreters (except for an expert's ID number) are to be collected and published, the Defender infers that the data controller (Ministry of Justice) and the data processor (Regional Courts) may only process such personal data as is necessary to achieve the purpose of this register. While doing this, they must take care that the interference with the privacy of data subjects is kept to a minimum. The main purpose of processing experts' and interpreters' personal data is a clear (and as speedy as possible) identification of an expert (interpreter), and his/her traceability (possibility to contact them). **For experts and interpreters, the following personal information needs to be processed: name and surname, ID number assigned, postal address, and other contact data** (as chosen by each expert/interpreter), **to allow easy communication** (e.g., phone number, e-mail address, or data box address).

In connection with the result of the Defender's inquiry, measures started to be taken by the Ministry of Justice over 2012, with respect to newly listed experts/interpreters as well as experts/interpreters already regis-

tered, in order to bring the personal data processed into compliance with the law and with the Defender's conclusions.

The Defender also conducted an inquiry into publishing public transport drivers' names and surnames, printed on tickets sold on vehicles. In the Defender's opinion, processing personal data of employees – public transport drivers, including name, surname and ID number of a driver, in the form of printing them on a fare receipt, **without consent** of the data subject, constitutes a breach of obligations of the data controller.

In this respect, the Defender also looked into the practice of wearing name badges by employees; however, in this case, he did not find any breach of the data controller's obligations.

2 / 17 / Consumer protection

The Defender conducted several inquiries on his own initiative in the consumer protection field, focusing on specific aspects of the activities of the Czech Trade Inspection Authority (hereinafter as the "Inspection Authority") and its operation as a general supervisory body. He also looked into the activities of supervisory bodies on the basis of individual complaints.

Methodological guidance

For some time, the Defender has observed a **lack of consistency** in the response of the Inspection Authority to **consumer enquiries or complaints** (mostly outside the competence of the Inspection Authority). In most cases, the Inspection Authority informed consumers of the manner they can deal with their situation, while advising them of the legal possibilities. Over 2011 and 2012, the Defender visited all of the Inspection Authority Inspectorates and discussed his findings with Director General of the Inspection Authority in presence of the representatives of the Ministry of Industry and Trade. On the basis of these visits, Director General issued Measure 268/2012, setting out principles for control over supervision and decision-making activities in 2012, effective from 1 March 2012. According to the Defender's findings, inspections are performed properly and in depth, in order to ensure a consistent approach to dealing with consumer concerns.

Upon the Defender's recommendations based on several inquiries (among others, an inquiry on his own initiative pertaining to so-called false winnings), the Central Inspectorate issued, over 2012, other documents aiming at providing methodological guidance, and harmonizing procedures of individual Inspectorates. These include Guideline No. 83/2012, on the use of witness evidence and the reimbursement of cash expenses of other persons by the administrative body (effective date 2 April 2012). The Inspection Authority issued this Guideline to respond to the Defender's findings pertaining to inadequate use of witness evidence, mainly for proving unfair business practices at presentation tours. On this subject, the Inspection Authority also adopted a **Methodological guideline for checking the adherence to statutory conditions for contracts executed away from the usual business premises.**

In its **Guideline on setting the amount of fine** dated 2 April 2012, the Inspection Authority thoroughly dealt with all aspects of administrative punishment. The guideline was sent out to all Inspectorates in order to be applied in practice, whereby the Inspection Authority adopted the remedial measures proposed by the Defender (i.e., when setting the amount of a fine, greater consideration should be given to the extent of consequences of the unlawful action, the motivational effects of the fine and its impacts on the entrepreneur's economy).

Consumer complaints about goods

A considerable number of individual complaints concerned the process of making and handling consumer warranty claims. The Defender examined what act can be regarded as a due when making a warranty claim. Referring to the constant civil case-law, the Inspection Authority concluded that a complainant had failed to properly submit his warranty claim (as he had not specified his request), and did not penalize the entrepre-

neur for failure to handle the claim. In the meantime, the Inspection Authority revised its approach, mainly as a result of increased interest in strengthening the position of a consumer as a so-called weaker party in an obligation relationship. It is still up to the consumer to properly submit a claim within the warranty period, thus triggering a complaint procedure; this, however, does not discharge the entrepreneur from the obligation to inform the consumer of the correct procedure to submit a warranty claim within Section 13 of the Consumer Protection Act (Act No. 634/1992 Coll., as amended). The stipulated obligation to inform includes, among others, an obligation to inform consumers that they have failed to properly submit their warranty claim yet if they have not specified their claims based on the defects found. The Inspection Authority started to treat situations when a consumer "only" points to a defect in products or services and the seller is not handling the complaint saying that the claim has not been properly submitted, as a violation of Section 13 of the Consumer Protection Act. The Defender welcomes and supports the present approach of the Inspection Authority.

Complaint File Ref.: 3827/2011/VOP/PN

If a notice of the start of an inspection and a request to provide assistance are delivered to the entity to be inspected through the fiction of law under the provisions of Sections 23 and 24 (1) of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended), and the party to be inspected fails to provide such assistance, conditions for imposing a procedural fine will be met.

When considering the imposition of a procedural fine (e.g., for the failure to provide assistance during an inspection), the administrative authority should not, in view of the purpose of such instrument, take into account any other (penalty) administrative proceedings or their potential consequences for the entrepreneur.

If the grounds for proceedings cease to exist under Section 66 (2) of the Administrative Procedure Code, the elements of proceedings, necessary for conducting such proceedings, will be absent as a result (e.g., the party to legal relations or the object of legal relations that the proceedings concern cease to exist). The fact that an unlawful state of affairs as documented during the inspection was remedied in the course of such proceedings, however, is without prejudice to the existence of a fact constituting specific administrative offence. Therefore, the proceedings may not be discontinued on the above-specified grounds, by reference to Section 66 (2) of the Administrative Procedure Code. The fact that the unlawful state of affairs has been eliminated will be taken into account only as a mitigating circumstance during the assessment of the amount of fine.

Mr. P.P.'s complaint was directed against the Trade Licensing Office and the competent Inspectorate of the Czech Trade Inspection Authority. The complainant believed that the given authorities had failed to make enough effort to contact the sole proprietor of a business subject to inspection, or to obtain his assistance. Total disregard and refusal to respond make the assertion of consumer rights (e.g., in connection with making warranty claims) practically impossible. The issue of unreachable business entities concerns not only consumers, but also supervisory bodies.

The inquiry also showed an incorrect application of Section 66 (2) of the Administrative Procedure Code in cases where the unlawful state of affairs was remedied in the course of administrative proceedings. The Ministry of Industry and Trade and the Central Inspectorate agreed with the Defender's conclusions, and proceeded to provide methodological guidance to subordinate bodies.

The Defender's inquiry also pointed to problems in connection with examining the breach of Section 19 (3) of the Consumer Protection Act, according to which "a complaint must be settled – including the removal of the defect – without undue delay, but no later than 30 days of the date the claim was submitted, unless a longer period is agreed between the seller and the consumer. After the lapse of that period, the consumer shall have the same rights as if the defect were non-rectifiable." Besides civil-law sanctions [see the provision of

Section 622 (2) of the Civil Code (Act No. 40/1964 Coll., as amended)], any breach of this provision is also penalized as an administrative offence under the Consumer Protection Act.

In view of the elementary principles of administrative punishment, the burden of proof that an administrative offence (i.e., failure to settle a complaint within the 30-day period) was committed lies with the administrative body. As the law does not impose an obligation on sellers to keep records of processed claims, **it is often impossible to find the necessary evidence to prove an administrative offence**.

In his discussions with the Czech Trade Inspection Authority, the Defender proposed three possible solutions for this situation, and will continue to look into the matter.

Right to withdraw from a contract concluded away from business premises

Consumer protection was greatly reinforced by an amendment to the provision of Section 57 of the Civil Code (Act No. 40/1964 Coll., as amended), cancelling, with effect as of 14 June 2012, a provision that had not allowed consumers to exercise, within 14 days, their right to withdraw from contracts made away from business premises if they explicitly requested a salesperson's visit for the purpose of placing an order. This exemption, however, had been often abused by sellers. For this reason, it now applies only to contracts pertaining to repair or maintenance work, carried out at a consumer's request at a chosen location. **Additionally, consumers no longer need to fear that they could be deprived of the possibility of returning goods purchased at presentation events**. In this respect, however, the Defender considers it necessary to point out that consumers are often somewhat passive when asserting their rights and interests, or they try to solve a certain problem through supervisory authorities, although a suitable action to take would be going to court, for example.

Consumer protection in the area of electronic communications

The Defender was approached by numerous consumers who felt they had been cheated by **Skylink** and **CS link**, satellite-TV providers. Consumers objected to a new "**service fee**" for services described as free when the contracts had been signed. It is outside the Defender's competence to assess the behaviour of the company. He could, however, look into the action of the Czech Telecommunications Office, which is the administrative authority responsible for the exercise of governmental authority in the area of electronic communications and which also performs general supervision of the compliance with the Consumer Protection Act. The Czech Telecommunications Office opened administrative proceedings against Skylink and CS link on suspicion of their committing an administrative offence of deceptive business practices.

Supervision of the Czech National Bank over currency exchange activities

The Defender examined the activities of the Czech National Bank as an authority supervising currency exchange activities. A complainant filed a complaint with the Bank against a currency exchange office which had failed to duly provide information on exchange rates, as a result of which the complainant performed a transaction to her disadvantage. Even though the Czech National Bank properly performed the supervision of the currency exchange, it failed to inform the Complainant of its findings. In the Defender's opinion, a response of a supervisory authority to a complaint, to an application to perform supervisory acts, or to any other filing, must contain information about how the complaint, the application or any other filing has been acted upon – i.e., whether an inspection was performed, including the results of such inspection; whether it was used in preparing inspection plans and selecting entities to be inspected, etc. In view of the principle of public administration openness, the Czech National Bank should, in the Defender's view, respect the legal framework established by the Freedom of Access to Information Act (Act No. 106/1999 Coll., as amended) when responding to complaints and other filings. The Governor of the Czech National Bank notified the Defender that the Bank had an obligation to inform complainants about actions taken upon their complaints and followed a methodological guideline in this respect. As the response to the complainant's filing did not contain such information, employees responsible for handling complaints were reminded to follow the mentioned guideline.

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

Limiting the exercise of mandate of municipal assembly members

The Defender received several complaints by municipal assembly members stating they were not provided with information related to the performance of their duties, which they had requested under the Municipalities Act (Act No. 128/2000 Coll., as amended). He also dealt with a problem where a member of the financial committee of the municipal assembly was prevented from performing his duties. Before turning to the Defender, the complainants had asked the Ministry of the Interior (hereinafter only the "Ministry") to intervene as part of its supervision over independent competence of municipalities. The Ministry performed an inspection in the municipality as provided by the Municipalities Act, and provided methodological guidance to the bodies of municipalities subject to the inspection.

Complaint File Ref.: 1573/2012/VOP/ZS

The chairman of the financial committee of a municipal assembly who fails to invite a member of the financial committee to committee meetings, and the municipal assembly which accepts this situation, violate the Municipalities Act.

A member of the municipal assembly of the municipality of S. and of the municipal assembly's financial committee complained that she was not allowed to participate in the financial committee's activities, as the committee chairman repeatedly failed to invite her to the meetings. The Ministry stated that the operation of the financial committee was an internal affair of the municipal assembly and the Government was not allowed to interfere with it. It then referred to the upcoming extraordinary meeting of the committee where the issue was to be clarified. The Defender found that the problem – which at the time of the Ministry's supervisory activities had not shown signs of unlawfulness – persisted. He concluded that both the financial committee chairman and the municipal assembly were acting in violation of the Municipalities Act, which stipulates that a committee must have at least three members. In the Defender's opinion, a formally elected 3-member committee, but to whose meetings only two members are actually invited, fails to fulfil the intended purpose of the law, i.e., the existence of a functional and effective tool for supervising the management of municipal assets and funds. The unlawful procedure of the financial committee chairman who, moreover, fails to fulfil the task imposed on him by the municipal assembly to organize the committee's activities in accordance with law, prevents the member of the municipal assembly from performing her duties arising from her mandate as a member of the municipal assembly, as well as her duty to perform the duties of a member of the financial committee placed on her by the municipal assembly. The unlawfulness did not elicit any reaction from the inspection committee of the municipal assembly, which is under the obligation to supervise the compliance of other committees and the municipal authority with legal regulations in the sector of self-government. The municipal assembly did not respond either. The Defender turned to the Ministry to perform a new check of the exercise of independent competence by the municipality.

Supervision over acts of municipalities in pre-school education

In 2012, the Defender looked into the question whether the **acts of municipalities through which self-government bodies interfered with the powers of kindergarten head teachers**, as to the criteria and decision-making pertaining to a child's (non-)admission to a kindergarten, **were subject to supervision**. The Ministry maintains that supervision over the adoption and content of municipal acts will only apply to resolutions of municipal assemblies defining criteria for admitting children to kindergartens if such criteria are contrary to the Education Act (Act No. 561/2004 Coll., as amended), or to the Antidiscrimination Act (Act No. 198/2009 Coll., as amended). On the other hand, the Ministry does not believe that recommendations or informal meetings between municipal officials and kindergarten head teachers where such criteria are discussed would be subject to supervision. The Defender does not share this opinion, and will look closely into these questions when inquiring into individual complaints. For more details on criteria applied to admission of children to kindergartens, see "Education," page 100.

Election of lay judges

The Defender dealt with a case where a municipal assembly had appointed a lay judge who failed to meet legal requirements for performing the office. Subsequently, the President of the District Court did not allow the lay judge elected to take an oath. It is the Defender's opinion that, as to lay judge election, only a due exercise of the right to self-government (with no elements of arbitrariness) can contribute to fulfilling the mission assigned to lay judges. Therefore, in the Defender's opinion, a decision of the municipal assembly about the election of a lay judge deserves the attention of the supervisory authority – the Ministry, which is at present the only institution having locus standi to submit the case to an independent and impartial court. However, the Ministry refused to perform supervision as per Section 124 of the Municipalities Act (for more detail, see also "Courts," page 50).

Opinion on including arbitration clauses in municipal lease agreements

When dealing with social security and discrimination complaints, the Defender came across the practice of certain municipalities including arbitration clauses in lease agreements for flats in their ownership. As it seemed unclear whether the status of a municipality as a public-law corporation made such a procedure possible and whether it was in compliance with law, the Defender decided to give an opinion on certain legal aspects of the matter through a statement.

He concluded that the **possibility to establish the power of arbitrators (instead of judges) in disputes arising from lease contracts was highly questionable**. Since the legal regulation of lease agreements is characterised by a high level of mandatory regulation and other specific features, municipalities (as public-law corporations) should carefully consider whether placing disputes arising from lease contracts into the hands of arbitrators will weaken in an unacceptable way the (procedural) protection of lessees, which is undoubtedly the intended purpose of the legal regulation. For these reasons, the Defender explicitly advised municipalities against such procedure and published his opinion on his website and also sent it out to the Unit of Towns and Municipalities, the Minister of the Interior, citizens advice bureaux, non-profit organizations, the Agency for Social Inclusion in Roma Localities, and to the Minister of Justice. The Ministry of the Interior agreed with the Defender's opinion.

2 / 19 / Education

Preschool education

In December 2010, the Defender issued a Recommendation related to the execution of the right to equal treatment in access to pre-school education. He thus responded to an increasing number of complaints by parents whose children had not been admitted to pre-school education. Parents in similar situations turned to the Defender also in 2012. It transpired that **many shortcomings occurred in the admission procedure itself**. Therefore, in October 2012 the Defender issued an updated version of the Recommendation, which takes into account partial legislative changes adopted over the time. At the same time, he analysed in more detail the procedural aspect of the admission of children to kindergartens.

Criteria for admission of children to kindergartens, usually published in advance by head teachers, do not substitute for a decision on (non-)admission of a child, and are not binding. Rather, they are a limiting factor for head teachers because – within the spirit of the principle of legitimate expectation – head teachers cannot subsequently decide in a manner going against such criteria. Additionally, the Administrative Procedure Code (Act No. 500/2004 Coll., as amended) applies to the admission process in a subsidiary manner; therefore, it is important that any decision on non-admission be duly substantiated, to make it reviewable. It is not sufficient to state that the child failed to score the necessary number of points with reference to the criteria, or that the child was not admitted for capacity reasons.

The applicability of remedial measures is problematic in preschool education. Even though a child has the option to appeal – through his/her statutory representatives – to the competent Regional Authority, this appellate instance is, to a certain extent, only theoretical. In most cases, the kindergarten is already full to capacity; even if the appellate body quashed the head teacher's decision, there would be no possibility to admit the child to this kindergarten. As this fact is not taken into account in the present legal framework, the Defender endeavoured to outline certain options available under the applicable law in his Recommendation. He concluded that **kindergarten head teachers should keep a certain percentage of places unoccupied for the purpose of appeal and "fill them in" through a new decision only after the previous decisions have become final (i.e., when decisions have been rendered on all appeals)**.

As procedural aspects of admission to preschool-education (mainly the actual non-functionality of a regular remedial measure) seem to call for a systemic solution (such as a new legal regulation), the Defender asked the Minister of Education, Youth and Sports that such a systemic solution be provided, or at last a clear position be taken. He also requested that the Ministry give its opinion as to the lawfulness of the criteria, which are frequently used and applied, also in view of the fact that the Ministry had not agreed with some of the conclusions in the Defender's Recommendation. Even though the Ministry subsequently issued its own recommendation, it only deals with procedural aspects, and on a very general level.

Primary education

Besides complaints about unequal access to education and issues pertaining to providing adequate support to pupils with special educational needs (see Section V. – "The Defender and Discrimination," page 93), the Defender receives complaints about other issues related to primary education, **mainly about the procedures of school teachers and head teachers**. The complaints concern disciplinary measures taken by teaching staff, or complaints that bullying or other similar phenomena occurring in schools are being inadequately addressed. Teachers are also criticised by complainants for insufficient support to pupils who are different in various ways from the majority.

In certain cases, complainants are dissatisfied with the **procedures of the Czech School Inspectorate**. They complain that when the Inspectorate finds any shortcomings, it does not impose penalties and only notifies the promoter of the school of its findings. Here, however, it is the legal regulation itself that is criticised, not the procedure of individual inspectors. According to the Education Act (Act No. 561/2004 Coll., as amended), the promoter is only required to inform the Inspectorate of the measures taken; therefore, no explicit obligation is set for the promoter to respect the Inspectorate's findings. Complainants challenge this statutory provision, as they find it ineffective.

Secondary school-leaving examination

During 2012, the Defender was also approached by students who had failed the secondary school-leaving examination. Most students objected to the evaluation of a specific component of the part of a school-leaving examination common to all schools, a written essay in the Czech language. Many students' essays were given zero points because – in the evaluator's view – the essay failed to follow the assigned topic, or did not correspond to the assigned genre. Evaluators tended to provide very brief comments for such conclusions (often a single sentence). The students complaining to the Defender thus failed to receive any feed-back, and often did not understand, as a result, why they had failed.

Students could turn to Regional Authorities with an application for review, and it was precisely the activity of Regional Authorities that was the subject of the Defender's inquiry; he concluded that **the Administrative Procedure Code was applicable in a subsidiary manner to decisions of Regional Authorities made on reviews of essay results.** The same respective shortcomings appeared in the decisions rendered by all Regional Authorities. They were mostly of a double nature:

– A student who turned to the Regional Authority was not given the possibility to comment on the grounds of the decision before the decision in the case was made;

– The Regional Authority inadequately dealt with the basic facts of proceedings in the substantiation.

Regional Authorities did not accept the results of the Defender's inquiry, and the Ministry refused to open review proceedings on his request. However, **the correctness of the Defender's conclusions was confirmed by administrative courts**, which in several cases cancelled the decisions of Regional Authorities (due to their non-reviewability), and returned the case to Regional Authorities for new examination (e.g., decision of the Regional Court in Brno of 16 August 2012, Ref. 62 A 67/2012; decision of the Municipal Court in Prague of 28 August 2012, Ref. 10 A 278/2011).

Complaint File Ref.: 4460/2012/VOP/DV

The authority competent to decide the review of the results of a written essay in the Czech language, a specific component of the part of a school-leaving examination common to all schools, is the Regional Authority, not the Centre on Measurement in Education ("Centre"). The Centre's opinion or a second assessment can only be used as one of the grounds for a decision.

A student who requested the review of his/her results of the secondary school-leaving examination has the right to be acquainted with the grounds for a decision before the decision in the case is rendered. This right reflects the right to express one's opinion on evidence provided in Article 38 (2) of the Charter of Fundamental Rights and Freedoms, and is one of the basic aspects of a fair trial.

A decision of a Regional Authority on a review of the school-leaving examination is a decision on rights and obligations; as such, it must be reviewable. For this purpose, it is necessary for the Regional Authority to deal with all materials of the proceedings. If it fails to into account some of the basic facts, it must state its reasons for not doing so.

Complainant J. V. was dissatisfied with the way her request of a review of her essay, a part of a school-leaving examination, had been handled. She had failed to reach the needed score. As the corresponding verbal assessment shows, her low score was due to the fact that (according to the evaluator) the essay lacked any conclusion. In her application for review, the Complainant argued that her essay indeed contained a conclusion. However, when writing her essay, she had skipped three sheets by mistake, and wrote her conclusion on page 6 instead of page 3. The Regional Authority of the South Moravian Region ("Regional Authority") asked the Centre for an opinion. The Centre authorised an independent expert to provide a second assessment. The second assessment was in agreement with the original evaluation. The Regional Authority then – referring to the second assessment – confirmed that the essay lacked a conclusion. However, it did not state how it had verified that the external opinion had not been made by the same evaluator. Moreover, the evaluator remained anonymous even for the student. In its decision, the Regional Authority only quoted the second assessment. At the same time, it failed to make this fact (in essence, the only one upon which the decision was based) available to the complainant, and failed to respond to the complainant's arguments stated in her review application. As a result, the Defender concluded that the decision was unreviewable. The same conclusion was reached by an administrative court to which the complainant subsequently turned upon the Defender's advice. The Court returned the case to the Regional Authority for new proceedings, and the Regional Authority changed its decision. J. V. did not have to resit the examination and commenced university studies.

Delays in proceedings relating to the recognition of foreign university qualification

The took the Ministry ten, fourteen, or even sixteen months to decide on appeals against the decisions of some rectors of public universities on the recognition of a foreign university qualification in the Czech Republic. The Defender discovered unjustified delays on the part of the Ministry in administrative proceedings, procedural defects and insufficient methodological guidance of universities in the area of governmental au-

thority, as given by the Higher Education Act (Act No. 111/1998 Coll., as amended). Therefore, the Defender asked the Minister of Education, Youth and Sports at the end of 2012 **to ensure that the Ministry uses its methodological guidance competence over the universities more efficiently when exercising governmental authority (joint trainings and meetings on decision-making activities according to the Administrative Code)** in order to accommodate applicants for adequate satisfaction for immaterial harm caused by delays in appellate proceedings and to increase the staff of the relevant department of the Ministry that is facing increased numbers of applications.

2 / 20 / Other administrative authorities

Ministry of Defence

The adoption of the Act on the Participants in Anti-communist Opposition and Resistance (Act No. 262/2011 Coll.) triggered an increased case load for the Defender, concerning mainly **complaints about unreasonable delays in proceedings of the Ministry of Defence for the issuance of a certificate of a participant in anti-communist opposition.**

When inquiring into such complaints, the Defender found that a number of proceedings were not resolved even many months after the application had been filed. The reason was a high number of applications, and, on the other hand, a low number of people handling them, both at the Ministry itself and – most of all – in the Security Services Archive, as the institution required to give its expert opinion for the purpose of processing applications.

Through his inquiries, the Defender contributed to an increase in staff numbers at the relevant authorities, and to prioritization of applications based on age. In the Defender's opinion, **it is in the interest of a democratic rule of law to ensure that participants in the so-called third resistance are shown appreciation during their lifetime**. Nevertheless, in view of the age structure of applicants and the number of applications, this "positive discrimination" applies only to the most elderly applicants.

As the main wave of new applications seems to have subsided, the situation can be expected to slowly improve in the future, as the time between filing an application and obtaining the decision of the Ministry of Defence should become shorter.

The Office for Government Representation in Property Affairs

Following numerous complaints about the procedure of the Office for the Government Representation in Property Affairs (hereinafter the "Office") in enforcing claims related to a State contribution for private residential housing, the Defender launched an inquiry on his own initiative against the Office at the end of 2011.

The Defender's opinion that the Office was "other administrative authority" falling within his competence was opposed by the Minister of Finance, arguing that the Office had not been established by law as an administrative authority, and none of its activities represented the exercise of administrative-authority competence. Therefore, it does not have the status of a governmental authority endowed with public powers with respect to other authorities, and so it is not an authority of the State through which governmental authority would be exercised. Its character was described as "operational" or "service-providing."

In the Defender's opinion, **governmental authority in a wider sense includes also fiscal authority, which the Office performs through "operating" or "managing" State assets while not being in a position of power**. If the Office proceeds, with respect to natural persons, in a manner contrary to the principles of good governance, the exercise of the Defender's power to protect such persons can be justified within the meaning of the Public Defender of Rights Act (Act 349/1999 Coll., as amended.

Despite the continuing difference of the views of the Minister of Finance, the Office revised its procedures in the course of 2012; in many cases, this meant waiver of interest on late payment, waiver of debt, or recognition that contractual terms had not been, in fact, breached.

2 / 21 / Compensation

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

In the first half of 2012, the Defender again looked into the manner **Ministries and other bodies of governmental authority handled damage claims** under Act on Liability for Damage Caused within the Performance of Public Authority (Act No. 82/1998 Coll., as amended), and whether they fulfilled the Ombudsman's "**Ten Rules of Good Practice for the Assessment of Compensation Claims**" ("Ten Rules"). In 2010, the Defender inquired, on his own initiative, into the procedural steps of three Ministries; in 2011, he looked into the procedural steps of six Ministries. At the beginning of 2012, he inquired into the activities of the Ministry of Environment, the Czech Office for Surveying, Mapping and Cadastre, and the Czech Telecommunication Office. In case of the remaining Ministries (i.e., Ministry of Defence; Ministry of Education, Youth and Sports; Ministry of Health; and Ministry of Culture), the Defender did not perform local inquiries; he only invited each of them to comment on Ten Rules or to give their viewpoint. However, none of these Ministries seized this opportunity.

As the Defender did not succeed, within his inquiries, to achieve remedy with respect to all Ministries, he advised the Government thereof and recommended that the Government adopt a resolution obliging all Ministries to comply with Ten Rules (for more detail, see "The Defender and Government," page 26).

A second meeting on compensation claims was held at the Office of the Public Defender of Rights on 17 December 2012, for the purpose of presenting the results of the Defender's inquiries to all Ministries and discussing other issues. The issues discussed included recourse claims and the relation between the Liability for Damage Act and Act on the Property of the Czech Republic and the representation of the Czech Republic in legal relations (Act No. 219/2000 Coll., as amended).

The **outcome of the meeting** can be summarised as follows:

– Fulfilling the Ten Rules and their publishing

Most Ministries have been fulfilling the Ten Rules, and have posted them on their respective websites. Some Ministries fail to fulfil the Ten Rules "only" by not having a single place for processing compensation claims. This is not considered a problem by the Defender, provided that a uniform approach to all claims is ensured.

– Differentiating between claims, i.e. immaterial harm and damages

Most Ministries have no problem to make that distinction. Examination of claims for immaterial harm caused by incorrect official procedure (inaction) must be based on the existence of a strong assumption that inaction caused immaterial harm, and it is then up to the State to disprove it.

– Recourse claims against liable persons responsible

When claiming recourse, Ministries encounter difficulties with proving a subjective fault of the liable person when such person is not their employee. The Liability for Damage Act does not provide that the person against whom the recourse claim is made must have an employment relationship with the authority making the claim; the Labour Code (Act No. 262/2006 Coll., as amended) is applicable only for establishing the maximum amount of recourse. The claim is made against a specific employee, who, however, does not have to have an employment relationship with the central body of governmental authority; recourse is claimed

against an official or a regional self-governing unit. The important thing is, therefore, to specify the term "official".

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

In the Annual report on activities in 2011 (page 79 – 80), the Defender pointed out incorrectly performed deductions from pension insurance benefits by the Czech Social Security Administration (hereinafter as the "CSSA"). **The Defender also encountered an incorrect procedure of the CSSA in the course of 2012.** When handling complaints, the Defender acts not only toward the CSSA to ensure that it brings its procedure into accord with the legal regulations but he also informs the liable person (pension recipient) of the option to claim damage/appropriate satisfaction under the Act on Liability for Damage (Act No. 82/1998 Coll., on liability for damage caused within the performance of public authority through a decision or incorrect administrative procedure. Decisions on claims are made by the Ministry of Labour and Social Affairs (hereinafter also the "Ministry") within the so-called preliminary submission of a claim.

As the Ministry had rejected claims of persons seeking damages for incorrect procedure of the CSSA in making deductions from pension insurance benefits, **the Defender recommended to the claimants to file a court action for damages/appropriate satisfaction.** As the court had failed to decide on the actions by the end of 2011, the Defender followed their development in 2012, too. The first problem arose as to the territorial jurisdiction – i.e., whether the court competent to hear the case was the District Court for Prague 2 (where the Ministry has its seat), or the District Court for Prague 5 (where the CSSA has its seat). The question of territorial jurisdiction was examined twice by the Municipal Court in Prague, which reached a different decision. In view of the importance that the Defender attaches, on a long-term basis, to protecting the rights of persons affected by an incorrect official procedure of the CSSA in making deductions from pension insurance benefits, in December 2012 he asked **the President of the Supreme Court to consider using her power and propose that the competent Division provide a standpoint in the interest of uniform court decision-making.** The President of the Supreme Court stated that on 18 December 2012 the Head of the Civil and Commercial Division had tasked judges of the 30 Cdo panel to prepare a draft statement on the subject.


POLIC

4 The Defender and Facilities Where Persons are Restricted in Their Freedom

In 2012, the Defender continued his practice of **systematic visits to facilities where children are placed in the Czech Republic**. Such systematic visits concerned healthcare facilities (Children's Centre Opava, and Children's Centre Plzeň – infant homes). Visits to school facilities were finished (Chrastava Reformatory, Children's Home with School, Secondary School, Elementary School and Canteen; Uherské Hradiště Children's Home; and Hrotovice Children's Home), and the Defender assessed his findings from this type of institutions in "Report on visits to school facilities where institutional and protective education is performed" and "Standards of Care for Vulnerable Children and their Families."

After a one-year interval, seven **follow-up visits** were performed, and visits were also made to five "**education centres**" and five "**diagnostic institutions**" – for more detail, see below. The Defender also provides more detail about his systematic visits to four facilities with **police cells**, and systematic visits dealing with senior citizen issues – i.e., **visits to non-registered facilities for elderly people**.

To promote the prevention of maltreatment, the Defender organized several meetings with the expert public to discuss problems related to maltreatment in institutions and to present and disseminate his recommendations. There was a round-table discussion with the staff of infant homes and the psychiatric hospitals visited. Paedopsychiatrists and the representatives of facilities for the exercise of institutional and protective education were invited to participate. The Defender organized the meeting to bring together two groups of professionals who have the same clientele – vulnerable children – but who are not really working together as a result of the non-uniformity of the Czech system of protection of vulnerable children and their families. The Defender posted minutes of this meeting on his website.

The Defender also organized a conference on the most recent issues faced by the Czech prison system (among others, the question of judicial reviewability of disciplinary punishments).

International exchange of experience in the prevention of maltreatment also continued in 2012. Closer ties were established with the Slovenian national preventive mechanism, which is also an ombudsman-type institution in Slovenia. The Defender received representatives of his Slovenian counterpart. In the course of discussions, during a visit to a prison, and two systematic joint visits, experience was exchanged, mainly as to the methods used in conducting such visits.

1 / The Defender and his power to impose penalties

Responding to a widely-covered incident when a patient died in a caged bed, the Defender performed a systematic visit at the **Dobřany Psychiatric Hospital,** focusing on its conditions for using this means of restraint within the facility. As the Defender's exchange of views with the hospital did not leave him fully satisfied, the Defender approached the promoter, the Ministry of Health. Even though the hospital had responded to the tragic incident by taking measures, including organizational, aimed at improving patient safety, the Defender was dissatisfied by the fact that, in his opinion, the investigation of the event conducted by the hospital and its promoter had failed to deal with certain debatable aspects pertaining to the legality of the caged bed use at the time of the death. Beyond the circumstances of this specific case, the Defender reiterated his find-

ings from his previous systematic visits to the hospital in 2008 and 2009 – that the conditions in which care was being provided in that ward required the use of restraining means in a preventive manner, as soon as a patient became agitated, and not in situations where the life or health of the patient or other persons was threatened, as anticipated by law.

In 2012, the Defender also exercised his power to impose a penalty on the occasion of his systematic visit to **a home with special regime** in **Jevišovka,** operated by SENIORPROJEKT, s. r. o. After the visit, the Defender found a breach of social-service quality standards and maltreatment. Although the institution specialized in clients requiring special care, it had been unable to secure qualified personnel and the required standard of care. According to the Defender, maltreatment took the form of ignoring problems such as clients' falls and injuries, malnutrition, behavioural disorders in dementia patients, etc., which shows not only lack of professionalism but also lack of interest in the clients entrusted to their care. Clients in the facility were not given even a minimum level of privacy. The Defender also found use of sedatives in a manner violating the Social Services Act (Act No. 108/2006 Coll., as amended). Files containing sensitive patient data were repeatedly getting lost in the institution, and no proper documentation of the social services provided was kept. A follow-up visit showed that a remedy had not been made. Therefore, the Defender presented the case to the media, while asking, at the same time, the Regional Authority of the South Moravian Region to take all necessary steps leading to the revocation of the licence to provide social services, which the authority accepted.

The public was also informed of maltreatment in **Domov důstojného stáří Harmony in Líchnov,** a home for elderly people, operated by Vedrana, s. r. o. This is a hotel-type facility providing comprehensive services, including care for elderly people with dementia or Parkinson's disease. The Defender pointed out that it was unlawful to provide services that are social services in nature without the necessary registration, as was the case of the facility (for more detail on the subject, see below). In view of the problematic status of the facility, the Defender mainly issued a recommendation that the facility should make remedy and obtain the necessary registration, and thus also authorisation to provide social services. As to the treatment of patients in the facility, the Defender found that professional nursing care was absent; the approach to care provided to fragile elderly persons was intuitive; prevention of malnutrition was neglected; means of restraint were used in an unprofessional manner; drugs (including sedatives) were administered without medical prescription. The facility did not respond to these recommendations. As these facts might be constitutive of a criminal offence (unlawful business activity), **the Defender also informed the police**.

The Defender felt compelled to exercise his power to impose a penalty on **Children's Psychiatric Hospital in Louny,** as a result of finding persisting and serious shortcomings during his third successive visit to this facility. The rooms where children were spending their time were not only comfortless and bleak, but also untherapeutic, or even degrading: peeling plaster and tiles in bedrooms, battered and broken furniture, and children's beds located in rooms with tiled walls. Consents to hospitalisation were provided on a completely uninformed basis. Privacy protection was inadequate (patients' personal data were not secured); numerous irregularities were found in medical record keeping. Therefore, the Defender asked the relevant authority, the Ministry of Health, to remedy the situation.

In 2012, a visit was performed to Chrastava Reformatory in order to check, above all, whether and how recommendations previously provided in 2006 had been implemented. The visit led to a report in which the Defender assessed the implementation of his earlier recommendations and pointed out some persisting shortcomings and irregularities. The response sent to the Defender by the facility did not make it clear, however, whether or not his reiterated recommendations for improvement would be implemented. Therefore, the Defender closed the case by a penalisation procedure and notified the relevant authority, the Ministry of Education, Youth and Sports, thereof asking it to provide its position on the matter and to decide on the steps to be taken if appropriate.

Liběchov Children's Home with School, Elementary School and Canteen was visited in June 2012. The Defender found maltreatment in the form of separating siblings, unreasonably hard internal rules, checking children's phone calls, inappropriate behaviour towards children by one staff member, and imposing unlaw-

ful educational measures. He demanded an immediate remedy, and shared his findings with the Ministry of Education, Youth and Sports as the operator, with the Public Prosecutor's Office as the authority competent to supervise the compliance with legal regulations in the exercise of institutional and protective education, and the investigative, prosecuting and adjudicating bodies. Some remedial measures were immediately taken; however, an overall assessment was not yet possible at the time of issuance of this report.

One year after the initial visit, systematic visits to **a facility for children – foreign nationals** were concluded by a penalisation procedure. This case is described in more detail below.

2 / Follow-Up Visits

Out of more than thirty school and healthcare facilities for children visited in 2011, the Defender chose seven for follow-up visits, focusing mainly on checking if and how his recommendations had been implemented. These visits concerned a children's home for children under 3 years of age at Mladá Boleslav Regional Hospital (CH3 Mladá Boleslav); Children's Psychiatric Hospital in Louny (CPH Louny); Children's Home, Elementary Practical School, Practical School and Canteen Dlažkovice (CH Dlažkovice); Children's Home with School, Elementary School and Canteen Měcholupy (CHS Měcholupy), Children's Home Budkov (CH Budkov), Reformatory, Secondary School and Canteen Terešov (RF Terešov), and Reformatory, Secondary School and Canteen (RF Žulová).

Follow-up visits to the following educational institutions: RF Terešov, RF Žulová, CHS Měcholupy, CH Budkov, and CH Dlažkovice, showed that **barred windows continued to be used in areas where children undergoing institutional, and not protective education, were held.** Despite an improvement in material conditions at some facilities, a greater degree of privacy for children (possibility to lock toilet doors, curtains in showers, lockers for their personal belongings) is still not a general rule. **Contact with families is often unreasonably and unacceptably restricted** (limited access to the phone, listening in on phone calls, unlawful "authorisation" of visits for children undertaking ordered institutional education, integrating permissions to be with their family into the reward/punishment scheme). **If there is any social work with a family (family recovery), it is random and not systematic**. In many facilities the Defender found as a serious problem consisting in the fact that professional services – special-educational, psychological, or psycho-pedagogical – were inadequately provided; in certain locations, **paedopsychiatric care is not readily available**. This issue has special importance in children's homes, where the absence of timely paedopsychiatric intervention jeopardises further stay of a child showing an onset of psychiatric problems, including behavioural disorders, in the facility, or exacerbates the situation and makes it necessary to transfer the child into a facility with stricter regime, further away from his or her family. Generally speaking, staff that are overworked and are not given self-reflexion support is mainly concerned with supervising and organizing children, not with any educational or even therapeutic activities. In isolated cases, inappropriate punishment was also discovered (e.g., collective punishment, taking-away clothing, punishment for speaking in the canteen).

Follow-up visits to healthcare facilities concerned one psychiatric facility (CPH Louny – see above) and one infant home (CH3 Mladá Boleslav). Even though the infant home had implemented some of the Defender's recommendations (such as keeping children's journals), follow-up visits confirmed a **very low interdisciplinary support for the children's families**, as all effort focused on finding foster families and on adoption processes, rather than on the recovery of a biological family. In many cases, the involvement of bodies of social and legal protection of children in family recovery was often found to be very low. **The staff, in the numbers present during the visit, was unable to provide children with individual care**, including physical contact (so much necessary and natural for very young children), or to **meet** each child's **individual needs**; the overall regime and all activities were shared by all children.

The re-visited facilities acknowledged many of these findings, and accepted a recommendation that remedy be made (provided doing so was within the management's powers). More general issues were or will be mentioned in the Defender's summary reports containing recommendations for central authorities or self-government bodies.

3 / Educational care centres

The Defender visited five centres of educational care (a "Centre"), more specifically, their residential departments: Children's Diagnostic Institution, Centre of Educational Care, Elementary School and Canteen, Olomouc – Svatý Kopeček (CDI Kelč); Children's Diagnostic Institution, Children's Home with School, Centre of Educational Care and Canteen, Homole, České Budějovice (CDI České Budějovice); Help Me Private Centre of Educational Care (CEC Help Me); Klíčov Reformatory and Centre of Educational Care (RF Klíčov); and Diagnostic Institution, Children's Home with School, Children's Home, Centre of Educational Care, Elementary School and Canteen, Dobřichovice (DI Slaný). All clients in the given facilities were staying therein on the basis of a contract on preventive educational care, concluded voluntarily. No maltreatment was found in any of these facilities.

During the assessment of the living conditions, the care provided, and treatment or privacy arrangements at the centres, recommendations and standards specified by the Defender in his Report on systematic visits to school facilities for institutional and protective education were applied appropriately. **The main conclusion of these visits is that access to preventive educational care is inadequate**.

The Centres are not distributed evenly over the country's territory; out of the 40 Centres in total, only 16 include a residential department, while day-care departments are fewer still. The capacity of most residential or day-care facilities does not exceed 20 children. In certain regions, Centres are to be found even in smaller towns; in others, however, **availability of such facilities is reduced to a minimum**. This mainly concerns the Vysočina and Pardubice Regions with one Centre each, working only on an "outpatient" basis. This situation is contrary to the objective set out in the 2009-2011 National Action Plan to Transform and Unify the System of Care for Vulnerable Children, i.e., to reduce the number of children placed on a long-term basis in all types of institutional care by reinforcing work with vulnerable children and their families, and to concentrate on prevention above all. For now, the reality is different, however: the number of school institutions for the execution of institutional education is a multiple of the number of educational care centres.

Therefore, the Defender recommended that preventive educational care be made equally accessible in all regions, even in smaller towns, in the form of outpatient care, day-care, residential, and field care.

Another obstacle to the availability of preventive educational care is the cost of day-care or residential form of such services. Even though preventive educational care as such is provided free of charge, housing and meals are subject to charge in accordance with the applicable law, both for the residential and for the day-care form of stay; payment must be made prior to a client's enrolment, unless otherwise agreed by the parties. In practice, the amount is a few thousand crowns per month of stay. At the same time, outpatient care (not associated with such costs) is hardly accessible in some regions, and it may also be unsuitable or inadequate in certain cases, in view of the specific client's problem. **The cost of the residential and day-care forms of preventive educational care still reduces its accessibility, especially for socially disadvantaged families**.

4 / Diagnostic institutions

Diagnostic institutions are facilities representing a "gateway" to institutional substitute care for children. Their mission is mainly to make a diagnosis for each child, on which his or her further pathway through the system of facilities for educational and protective care will be based; based on the diagnosis, the head of an institution will decide where the child is to be subsequently placed. In 2012 the Defender continued his visits to facilities where children are placed by visiting five diagnostic institutions: Children's Diagnostic Institution, Children's Home with School, Centre of Educational Care and Canteen, Homole, České Budějovice; Children's Diagnostic Institution, Centre of Educational Care, Elementary School and Canteen, Brno-Hlinky; Children's Diagnostic Institution, Elementary School and Canteen, Bohumín; Diagnostic Institution for Youths, Prague-Lublaňská; and Diagnostic Institution and Centre of Educational Care, Prague-Hodkovičky).

During his visits, the Defender focused his inquiries on the nature and degree of involvement of families and other entities in the course of diagnostic stays, on the regime and treatment in facilities, the level of equipment, and the transfer or placement of children by the diagnostic institution to facilities within its network. His specific and systemic findings and his recommendations were summarized in Report on visits to diagnostic institutions. He thereby expanded Standards of care for vulnerable children and their families. Some **essential standards** are quoted below:

The rights of participants to proceedings must be respected within administrative proceedings for the transfer or placement of a child. Above all, they must be notified of the opening of such proceedings and given the possibility to respond to the grounds for a decision before it is issued. The child's opinion must be actively sought. The Defender encountered practices where the opinion of a child as a participant to administrative proceedings on the transfer or placement was neither ascertained nor taken into account.

Substantiation of administrative decisions must be adequate so as to make the decisions reviewable. It must be apparent what line of thought led the administrative authority (the head of a diagnostic institution) to the decision; the facts of the matter on which his/her decision was based must be specified, as well as his/her response to participants' arguments. In these respects, the Defender found shortcomings. For a specific example, see Family and child, page 47.

The child's parent(s) should be given the possibility to participate as soon as the child has been admitted to a facility. If no parent can be present, the facility should inform the parents in writing (or by phone) about the character of their child's diagnostic stay and provide any information relevant for their mutual contact. Working with the family is an indispensable part of work of the institution where the child is placed, separated from his/her family. This is yet more important in diagnostic institutions, where the situation may still be reversible, as the child is standing at the very doorstep of the institutional care system.

In its diagnosis, the institution must use relevant information collected from a wide range of involved parties (parents, school, bodies of social and legal protection of children, etc.). A diagnostic report, which is the main document on which subsequent work with a child will be based, must be objective and comprehensive. This cannot be achieved without collaborating with all entities whose activities have educational impact on the child's life.

Children's bedrooms must be fitted out and furnished in accordance with common standards, and in compliance with the requirements of legal regulations. For example, rooms previously designed for other purposes were found to be used for accommodating children, and their unsuitable layout resulted in undermining the regime in the facility. Minimum space requirements specified by Decree regulating the particulars of exercise of institutional education and preventive education in school facilities (Decree No. 438/2006 Coll., as amended) often remain unfulfilled.

A "detention room" must be safe and look congenial to the child. Detention rooms designed for a temporary stay of a child brought back after an escape cannot have the character of a police cell (as has been also found). The safety of children confined there and of their carers must be ensured in another manner. The rule that no children under the influence of addictive substances may be taken in must be always respected. The approach to children placed in the facility must be based on suitable pedagogic management or on crisis intervention, as appropriate in each case.

5 / Facility for Children – Foreign Nationals

A systematic visit to Permon, a facility designed for children who are foreign nationals (Children's Home with School and Educational Institution, Facility for Children – Foreign Nationals, Diagnostic Institution, Children's Home with School, Educational Institution, Centre of Educational Care, Elementary School and Practical School) took place in 2011, and included two local inquiries. Most of the findings were assessed by the Defender in 2012. He mainly pointed out that the structure of admitted children – foreign nationals was not

in line with the original target group for which the institution had been founded, and noted inadequate living conditions in the educational institution and treatment of children – foreign nationals in general. **All in all, the Defender ascertained maltreatment and notified of this fact the Ministry of Education, Youth and Sports as the relevant authority, the Ministry of the Interior, the Ministry of Labour and Social Affairs, and the Supreme Public Prosecutor's Office.** The competent authorities – most of all, the relevant authority – were invited to look into the situation in the facility, and to work together in order to prepare a new concept of care for children – foreign nationals.

As the Ministry of Education, Youth and Sports failed to provide for any remedy on the part of the facility or to contribute to preparing a new concept of care for children – foreign nationals, the Defender decided to use his sanction powers by informing the public. The Ministry as the relevant authority failed in its duty to prevent, detect and punish maltreatment.

Subsequently, by a decision of the relevant authority, the remote facility of the institution was closed down (Children's Home with School, Educational Institution). Through Resolution No. 646/2012 dated 6 September 2012, the Government adopted a new Concept of the protection and care of unaccompanied foreign minors, including international protection seekers. An amendment to the Act on the Exercise of Institutional Education or Protective Education (Act No. 109/2002 Coll., as amended) modified the competence of a facility designed to provide care for children – foreigners. At present, foreign nationality is not the only criterion for admitting a child to a facility, and the actual situation of a specific child, i.e. whether he/she comes from an utterly different cultural and social background, the existence of a major language barrier, possible traumatizing experience (war, etc.), must be taken into account.

6 / Police facilities

The Defender continued to perform systematic visits to police cells. Four facilities were visited.

In one case it was found that, when being confined to police cells, persons were not given the advice of rights form (notification advising persons confined of their rights and obligations), contrary to Section 15 (1) of the Police President's Binding Instruction dated 2 December 2009, pertaining to escorts, guarding of persons and police cells (the "Binding Instruction"). **The Defender insists that a person confined to a cell have access to the advice of rights form throughout his/her confinement stay. The possibility of familiarising oneself repeatedly with one's rights is a safeguard against maltreatment**.

The Defender also focused on the actual possibility of confined persons to perform personal hygiene, specifically, to take a shower. According to Section 33 (4) of the Act on the Police of the Czech Republic (Act No. 273/2008 Coll., as amended), a person placed in a police cell is entitled to adequate access to water and toilet, and to being allowed to perform his/her basic hygiene. Therefore, the possibility to take a shower is not explicitly guaranteed by law and it is not specifically regulated in the Binding Instruction either. It was found that, wherever a shower is located nearby the cells, a person who is very dirty is generally allowed to take a shower. However, confined persons are not informed of their right to request the use of a shower. It seems important to the Defender that, in the exercise of the right to perform personal hygiene, the subjective need of the detained person for a shower be taken into account, as well as the duration of his/her stay in the cell. In other words, it needs to be taken into consideration that in case of a confinement in excess of 24 hours, more thorough personal hygiene needs to be performed. **Therefore, in cells where a shower is available, the Defender recommends including the information that shower use may be requested on the advice of rights form, and recording all requests, or instances when this possibility was used.**

The Defender also examined the conditions inside cells. He mainly commented on providing access to daylight. According to Section 33 of the Act on the Police of the Czech Republic, a cell must be perfectly hygienic and must be suitable for its purpose. The law does not stipulate providing natural light. According to Section 2(b) of the Annex to the Binding Instruction, no windows are required in cells, and according to letter j) of the same Section, daylight is required "except for cells established prior to the effective date of this Instruction."

In two cases, visited cells lacked windows. In one case, daylight was absent also from a room used for consultations with legal representatives. It must be pointed out that a person confined to a cell with neither windows nor direct daylight cannot distinguish day from night by sole observation. Negative impact on human psyche is then irrefutable. It can be argued, of course, that interrogation or other procedures will be carried out in daylight conditions; on the other hand, it cannot be ruled out that a confined person might be denied daylight for more than a 24-hour period as a result of being placed in a windowless cell. The Defender also advised the police that even the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stressed that cells should preferably enjoy natural light, and that individuals restricted in their freedom for more than 24 hours should be allowed physical exercise (stay) in fresh air. **The Defender considers this requirement reasonable; therefore, he recommended that, in the case of cells without access to daylight, persons placed in the cell be allowed after a certain period of confinement in the cell to go outside their cell– i.e., to enjoy daylight and/or fresh air. This information should be included into the advice of rights form, and it should be recorded whether this possibility was offered to confined persons, and whether and for how long they made use of it**.

7 / Non-registered facilities for elderly people

Upon repeated individual complaints, the Defender visited the following housing facilities for elderly people: "Ubytovací zařízení pro seniory Tuchlovice (residential facility for the elderly)", operated by Senior Home, s. r. o., and "Domov důstojného stáří Harmony Líchovy", operated by Vedrana, s. r. o. This is a hotel-type institution for elderly people, focusing on persons with various types of dementia and also offering services. **Alarming facts were found as to the quality of service**: unprofessional handling of medication; absence of nursing care of an appropriate standard; providing social services without authorisation; inadequate prevention of malnutrition; unprofessional manner of restraining clients.

It was ascertained that both institutions corresponded – by the nature of services they provided – to what the Social Services Act (Act No. 108/2006 Coll., as amended) defines as a "home with special regime". However, both were operated on the basis of combination of trade licences, lacking the registration required by law, i.e., authorisation to provide social services. As a result, the care provided appeared not to be subject to the requirements of the Social Services Act with respect to personnel, equipment, and the quality of care, or the inspection of providing social services. If assessed under the social-services mode, practices discovered in both facilities would be found in breach of statutory requirements. The Defender assessed the legal situation by stating that their purpose (operating a home with special regime) had been achieved contrary to what was required and anticipated by the Social Services Act. **He recommended that both facilities immediately remedy the situation by filing a registration application and by creating conditions making it possible for the Municipal Authority in Prague to grant it**. A follow-up visit to the Tuchlovice facility showed that the operator had complied with the recommendation. Vedrana, s.r.o., on the contrary, failed to do so; therefore, the Defender used his sanction powers and informed the public of his findings in accordance with applicable law. He also warned that due to the violation of the Social Services Act, persons who "unofficially" surrendered their allowance for care to such an unregistered professional facility, could have their allowance payments suspended.

The Defender is in possession of other information indicating that the phenomenon of using several different business licences for providing services that the Social Services Act defines as "social services" subject to registration has been spreading. It can be inferred that these are situations where care can be provided to vulnerable and sick persons without proper control and supervision. Such care can be unprofessional, intuitive, involving restriction of free movement and seclusion, with no adequate nursing care or protection of clients, while citizens have no means for judging these aspects. **To reinforce preventive measures against such practices, he issued a Statement on providing social services on the basis of trade licences, and demands that competent authorities take action against such operators for an administrative offence of providing social services without authorisation.**

5 The Defender and Discrimination

Three years after the Antidiscrimination Act (Act No. 198/2009 Coll., as amended) came in to effect, **it seems absolutely crucial** to the Defender **that discrimination victims should go to court and assert their statutory claims** (termination of discrimination, remedy of its consequences, adequate satisfaction or monetary compensation for immaterial harm). This is the only way to change the legal and social environment to an environment in which discriminatory conduct will be steadily and effectively combated. However, the findings of the Defender as an equality body showed that persons in whose cases the Defender found discrimination mostly did not want to file a discrimination complaint. Most frequent reasons include the parties' uncertainty as to the outcome of proceedings (unpredictability of court-decision-making, lack of Czech case-law pertaining to discrimination), the amount of court fees, and the impossibility to find qualified legal aid (see also New Recommendations of the Defender for 2012, page 16).

Free legal aid to victims of discrimination

In 2012, the Defender established cooperation with the Pro bono aliance civil association, which arranges **free legal aid** to **selected victims of discrimination**. This legal aid mostly consists in bringing court actions and administrative actions in favour of complainants who turn to the Defender with a complaint regarding discrimination and the Defender finds that discrimination took place in their case. Free legal aid **may be provided only to complainants** who notify the Defender that they intend to assert their claims as victims of discrimination before court or initiate proceedings before an administrative authority/a body of governmental authority and whose financial situation prevents them from paying for legal aid themselves.

Specific legal aid is provided on the basis of a contract between a cooperating law firm or an attorney from the **Pro bono aliance** civil association and a complainant (client). The Defender does not interfere with this relationship in any way. The Public Defender of Rights in particular provides an evaluation of the act of discrimination with respect to substantive law, including an analysis of domestic and international case-law as well as existing statements of the Defender as an equality body. The **Pro bono aliance** civil association arranges legal representation to **several complainants per year**. In these cases law firms provide their legal services completely free of charge and do not require the victims of discrimination to pay a flat fee to cover cash expenses.

In 2012, **three victims of discrimination** accepted such legal aid. Two cases concerned discrimination in access to services on grounds of disability and the third concerned discrimination in access to employment due to age. The results of the proceedings are not known to the Defender as yet.

1 / Recommendations and Surveys

In 2012, the Defender published one new recommendation, and performed one research pertaining to equal treatment. While the need for the recommendation arose as a result of an increasing number of complaints in a field where administrative practice seemed at a loss (creating reserved parking spaces), research activity

responded to persisting criticism of the Czech Republic by international institutions (mainly by the Council of Europe) regarding access of Romany pupils to education.

Recommendation of the Public Defender of Rights regarding the execution of the right to equal treatment when providing reserved parking spaces on local roads

The purpose of providing reserved parking at the place of residence of a person with disability is to help such people to overcome their limitations. Therefore, a road owner should approve applications for reserved parking to the maximum extent possible. A road owner is bound by the prohibition of discrimination, and is under the obligation to take reasonable measures with respect to a person with disability in access to services intended for the public. A person with a disability may only be rejected if there is an objective barrier to creating a reserved parking space. In any case, the usefulness of the reserved parking for the applicant must be considered, as well as the existence of any relevant options that could be used instead.

The Defender received many complaints by disabled people who had applied for a reserved parking space at the place of their residence or for the renewal of their existing reserved parking space, but the road owner, i.e. municipality, denied the application. For many applicants, however, reserved parking represents the only possibility of being integrated into normal life. Therefore, they consider the denial by the road owner discriminatory.

In his Recommendation on providing reserved parking on local loads, the Defender summarised his experience and defined cases when the road owner commits discrimination if it does not consent to the provision of reserved parking. Discrimination against persons with disabilities can be not only due to unequal treatment, but also to passivity. **A refusal to take proportionate measures in order to ensure that a person with disability has access to services intended for the public is one of special forms of discrimination**. The Defender inferred that a road owner also has such an obligation, in the form of consent to the provision of reserved parking, provided it does not constitute a disproportionate burden. Simply stating that insufficient capacity makes it impossible to satisfy everyone is not enough, however. The municipality should examine the usefulness of reserved parking for each individual applicant (e.g., in view of the nature of his/her disability), as well as any alternative solutions. If applicants with disability request that a reserved parking space be created, the municipality can, in certain cases, oppose the creation of such a space only if the applicant has another adequate and realistic option available.

Survey into the ethnic composition of pupils of former special schools

If the proportion of pupils of Romany origin in former special schools (now mostly practical primary schools) significantly exceeds the proportion of Romany ethnic group in population, it is a case of indirect discrimination in access to education on grounds of ethnic origin [Section 1(i) in connection with Section 3(1) of the Antidiscrimination Act (Act No. 198/2009 Coll., as amended)]. Even though criteria applied to placing pupils in education according to a simplified education programme are the same for Romany and non-Romany pupils, the present system places at disadvantage Romany pupils who are educated in this type of schools in groundlessly high numbers.

In his survey, the Defender looked into whether and how the decision of the European Court of Human Rights case D.H. and Others v. the Czech Republic (Application No. 57325/00, November 2007), where the Court held that indirect discrimination against Romany pupils in the then "special schools" had occurred, was being fulfilled. The Court held that Romany children were placed in these schools groundlessly, in an excessive number of cases, and their right to equal access to education was thus violated.

A survey carried out in 67 randomly chosen former special schools across the Czech Republic showed that Romany children represented 32% or 35% of all pupils. The first result was obtained through observation of pupils in classes randomly chosen by the staff of the Office of the Public Defender of Rights, the other through questions about ethnic origin asked by their class teachers. When these figures are compared to the share of Romany people in the total population of the Czech Republic (the figure varies between 1.4% and 2.8%), **it is obvious that the percentage of Romany children found in the given schools is disproportionate**. Indirect discrimination in access to education therefore continues, and Czech authorities have so far failed to remedy the situation quoted in the judgment five years ago.

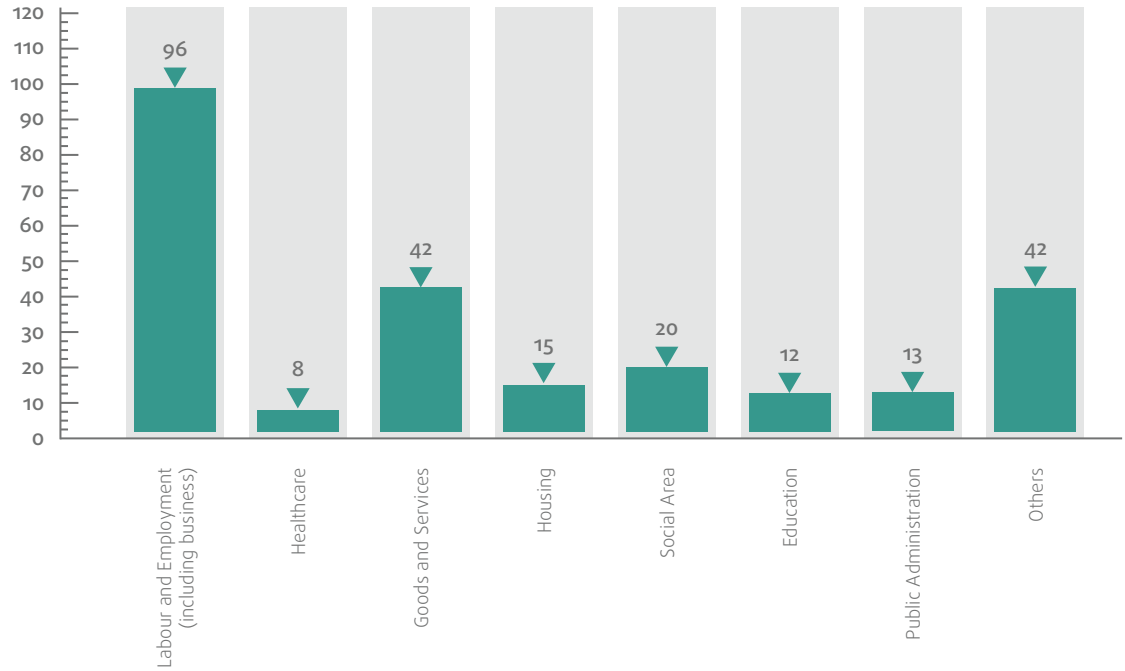
By his survey of the ethnic composition of pupils of practical elementary schools, with assessment of possible discrimination, the Defender fulfilled his legal obligation to promote equal treatment. It is up to the relevant bodies of the State, mainly the Ministry of Education, Youth and Sports (the "Ministry"), to take measures in order to eliminate such discrimination. On the basis of the survey results, the Defender himself formulated **three legal recommendations** – one addressed to the Government, and two to the Ministry. Other questions (such as the process of placing a pupil to a special school, activities of school counselling facilities, financing assistant teachers etc.) should be examined within expert discussions initiated by the Ministry. Expert meetings culminated with "Equal Access of Children to Education" panel discussion, co-organized by the Ministry, the Office of the Government, and the Defender. Within the discussion, experts looked for answers to the question what the State (both governmental authority and self-government) can do to ensure that all children have equal chance of education.

2 / Statistical data on complaints

The Defender **received 253** and **dealt with 178** complaints as part of his antidiscrimination mandate in 2012. **Discrimination was found in 18 cases**. In the other cases, the Defender provided the complainants with an analysis of the topic and advice as to further steps that could be taken in protecting their rights.

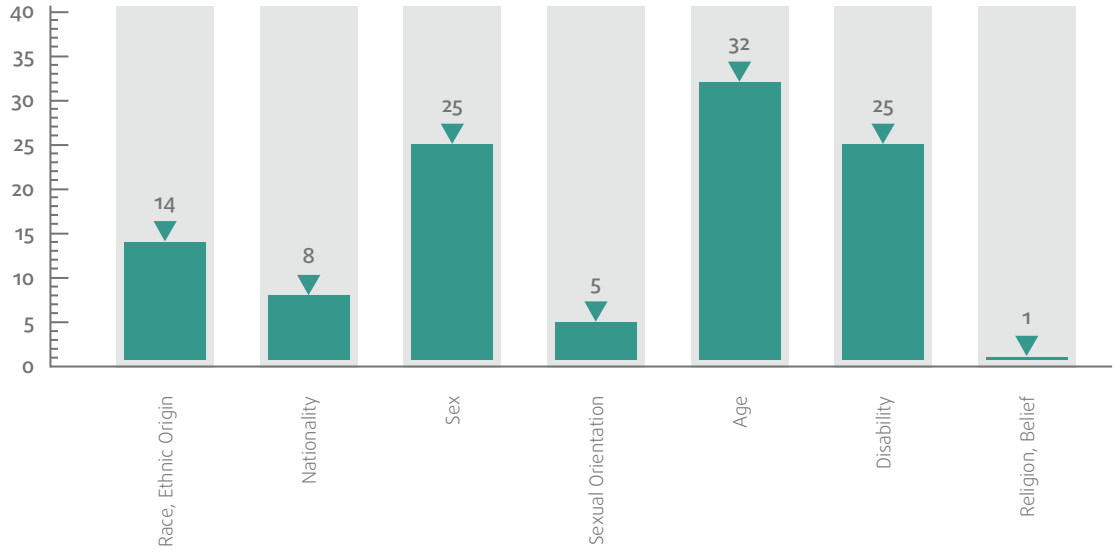
The following chart shows that **work and employment (96), access to goods and services (42), and social area (20) are the most common areas where discrimination is claimed.**

Claimed Areas of Discriminatory Conduct



The **grounds** for discrimination most often subject to complaints include **age (32), sex (25), and disability (25)**; see the following chart.

Claimed Grounds of Discrimination



3 / Selected Complaints and Commentaries

3 / 1 / Labour and employment (including business)

Discrimination in this area not only interferes with human dignity, but can also limit an individual's possibility to make a living, and thus to satisfy one of the main human needs.

Prohibited differentiation on grounds of age and disability

The age of job seekers is frequently mentioned as a ground of discrimination in complaints. In the cases handled, age was specified as a criterion directly mentioned already in job advertisements. It also appeared as an indicator of poor physical fitness, and an older candidate was rejected for this reason. **It is legitimate to require reasonable fitness, but higher age does not necessarily imply its lack**. Therefore, older candidates cannot be rejected without any other considerations.

On the basis of complaints filed by persons with disability, the Defender looked into the question of cases in which it was legitimate to reject a job seeker with a hearing impairment, for example, and into the extent of employers' obligations to take reasonable measures with respect to persons with disability.

Complaint File Ref.: 217/2011/DIS/JKV

If a hearing-impaired candidate were rejected solely based on the assumption that he/she would have difficulty to communicate, this would represent direct discrimination on grounds of disability.

The requirement to ensure the safety of employees cannot be a reason for excluding employees with hearing impairment. On the contrary, it is the employer's obligation to take tailored measures in order to enable integration of persons with disability.

The Defender was approached by Mr. M. T., who is hearing-impaired. Nevertheless, he can lip-read in normal communication and has no problem to communicate in writing. As he has a family to support (a son in his care), he has been actively looking for a job and trying to find his place in the labour market. When applying for a job, however, he is often rejected, which he attributes to his impairment. Therefore, the Defender addressed several employers who had rejected the complainant lately. In several cases, it transpired that Mr. M. T. did not have the necessary qualifications. In two cases, however, the rejection was due to his disability.

In response, the companies quoted communication difficulties, and also their obligation to ensure workplace safety, which would be considerably difficult with respect to a hearing-impaired person.

A potential rejection of a candidate based on alleged communication difficulties in case of jobs for which functional hearing is not an essential prerequisite, without even examining to what degree the job seeker is able to communicate, represents direct discrimination on grounds of disability.

Discrimination on grounds of sex and parenthood

In 2012, the number of complaints filed by women leaving for or returning from their parental leave went up as compared to previous years. Employed pregnant women are exposed to pressure from their employer or superiors to leave their employment on a "voluntary" basis. Employers resorted to such practices despite (or because of) the fact that pregnant women benefit from a so-called "protection" period, within which they may not be dismissed. When negotiating their return after parental leave, women (and this could of course concern men too; however, all complaints received by the Defender were women) encounter problems with reintegration because their employers often do not expect them to return. After such women exercise their legal right to return to work and to continue employment according to their employment agreement, their employers dismiss them soon.

The Defender also encounters (although less frequently) discrimination of men in access to employment, especially in professions traditionally perceived as feminine.

Complaint File Ref.: 264/2011/DIS/JKV

Systematic rejection of male job seekers in the absence of any objective reason linked to the character of the job represents direct discrimination on grounds of sex.

A public declaration that an employer will not employ men in a given position, or a statement that it prefers women, also constitutes discrimination grounds of sex. Such a declaration could discourage job seekers, and thus constitute a barrier to the exercise of their right to employment.

In assessing discrimination, it is not decisive whether the information that a candidate cannot be employed was provided by a person who is not authorised to hire employees. An employer is responsible for the actions of its employees in shops where new employees are to be hired, even if such employees act outside their powers.

A man complained to the Defender about discrimination in the area of employment. He specified that he had been fruitlessly looking for employment as a shop assistant for two years. He often encountered situations where only women were hired as shop assistants. He substantiated his assertions by five video recordings from his negotiations with the staff of shops where he had applied for a job.

Consequently, the Defender turned to all of the five operators of shops. The manager of one shop never responded; the others denied that they would hire only women shop assistants. They referred to the fact that the information that men could not be employed had been provided by unauthorised persons, who had no say in the hiring process. The Defender closed the complaint, finding discrimination in case of all the given employers.

3 / 2 / Goods and Services

The Defender encountered many services where persons were, at least apparently, treated differently based on the ground of discrimination. Discrimination was claimed in access to transport services, financial products, and to housing. A special category of "services" concerned reserved parking for persons with disability, for which the Defender gave a recommendation (for more detail, see "Recommendations and Surveys", page 93).

Discrimination on grounds of sex

In the area of access to services, sex was frequently claimed as a ground of discrimination. The Defender was often required to examine whether in such cases differences in treatment were discriminatory or not. **Difference in treatment in not discriminatory, as long as it is objectively justified** by a legitimate aim and the means of achieving that aim are appropriate and necessary. Complaints pertained, for example, to compartments reserved to women by a railway company.

Complaints Ref.: 38/2012/DIS/LO; 49/2012/DIS/LO; 51/2012/DIS/LO

A measure whereby certain train compartments are reserved for women is not discriminatory, as it pursues a legitimate aim to increase the demand for railway transport. The measure is also appropriate as it only gives women priority rights over men. If the train is fully occupied, men cannot be prevented from taking seats available in "female compartments."

Male complainants objected that a railway company had reserved certain compartments in its trains to women. They considered this practice discriminatory.

Even though the Antidiscrimination Act (Act No. 198/2009 Coll., as amended) prohibits discrimination in access to goods and services on grounds of sex, it also specifies that differentiated treatment in this domain can be justified by a legitimate aim, provided appropriate means are used to achieve it. The railway company introduced the measure to respond to safety concerns voiced by certain women travellers. A measure aiming at providing a service separately on the basis of sex of the consumer would be discriminatory if such service were provided in a lower quality, under less favourable terms and conditions, etc. In this case, however, men are neither excluded from access to the service nor put at disadvantage in a disproportionate manner.

Age and disability as grounds of discrimination in access to financial and transport services

A frequent ground for discrimination in the services sector is age, mainly in access to financial products. The Defender continues to receive complaints that financial institutions refuse to provide even short-term consumer loans to people of a certain age. He also encountered a case where a client, who exceeded a certain age limit, had been denied a credit card. As the question has wider social relevance, the Defender decided to carry out a survey on the subject. Its results will be presented to the public in 2013.

Complaint Ref. No.: 193/2011/DIS/JKV; 235/2011/DIS/JKV

Excluding credit-card applicants because they exceeded the age limit of 65 or 70 years, respectively, constitutes direct discrimination on grounds of age. However, the age criterion can justify requiring additional information necessary for assessing the ability of clients to meet their obligations toward the bank.

Mr. J. V. complained to the Defender about a bank and a provider of financial services. Among other services, both entities had offered a credit card to which various benefits and discounts were linked. However, both refused to issue such a card to the complainant, stating that he had already exceeded the age limit (65 years in one case, 70 years in the other).

The Defender based his legal evaluation of this situation on his position already taken in 2011 when inquiring into another financial institution. Excluding credit-card applicants because they exceeded certain age limit constitutes direct discrimination based on age; this position had been already published in 2011, and many financial entities adjusted their rules for the provision of financial services accordingly. The entities addressed by the Defender within his inquiries also stated that they respected the Defender's position and did not apply an age limit for providing financial services. Failure to issue a credit card in a specific case was attributed to shortcomings on the part of individual employees; the entities stressed that applying an age limit was not their general policy.

Persons with disabilities often face obstacles in the field of services too. For example, the Defender inquired into a complaint of a person who was denied a life policy due to his disability. He also dealt with a complaint against an airline company that had failed to adapt its seat to the needs of a client with disability, although such adaptation had been agreed on beforehand. This **case also illustrates cooperation between European equality bodies** – Equinet members.

Complaint File Ref.: 27/2012/DIS/JKV

A service provider is under the obligation to take adequate measures with respect to persons with disabilities. If a person with a physical disability requests that his/her special seat be transported aboard an airplane, the airline is obliged to make the transport of such aid possible. If the transport of a specific aid is prevented by security regulations, the airline must inform the client thereof in an adequate manner and sufficiently in advance.

Belgian Centre pour l'égalité des chances et la lutte contre le racisme (Centre for Equal Opportunities and Opposition to Racism) asked the Defender for assistance in negotiations with an airline that had transported its clients several times between Brussels and Jerevan, with a stopover in Prague. The family represented by the Centre travelled with a son having a physical disability, and complained about shortcomings on the part of the airline, as the company had failed to adapt their son's seat with respect to his disability, although this had been pre-arranged. They also complained about inadequate assistance at the airport.

Upon the Defender's intervention, the family was given compensation for the company's failure in the duty to adopt adequate measures with respect to a person with disability, at an amount equivalent to the price of their air tickets.

3 / 3 / Education

The Defender's main activity in the area of discrimination in access to education consisted of a survey looking into the ethnic structure of pupils of former special schools (see "Recommendations and Surveys", page 93). The research was followed by cooperation with the Czech School Inspectorate; authorised staff of the Office of the Public Defender of Rights participated in government inspections at school counselling facilities in all Czech regions. These inspections focused on the compliance with legal regulations when issuing reports and recommendations on which head teachers base their decisions about placing a pupil in education according to a simplified education programme.

As in previous years, complainants (statutory representatives of pupils) objected to the **failure to be provided support in the educational process**. This mainly concerns pupils with special educational needs under Section 16 of the Education Act (Act No. 561/2004 Coll., as amended). Compared to previous years, there were complaints about lack of such support in access to pre-school education, and the number of complaints relating to the implementation of supportive and compensatory measures for primary-school pupils (as well as ensuring that professional pedagogical methods are used in education of pupils, e.g. with behaviour disorders) has been growing.

Complaint File Ref.: 4282/2011/VOP/LO

Admission of a child with special educational needs for education in a kindergarten in the last year before the child begins mandatory school attendance cannot be limited to a fixed period of time, or to a restricted number of hours per day referring to the fact that a special kindergarten is specialized in children with a different type of disability.

The Defender was approached by parents of a child with combined disability after their child had not been admitted by the head teacher of a kindergarten specialized in children with physical disabilities. Subsequently, the head teacher enrolled the child, but only for a limited period, for a few months, while also limiting the number of hours that the complainants' son was supposed to spend at school every day. This case concerned, however, enrolment for the year immediately preceding mandatory school attendance. For this reason, the parents complained to the Defender. The head teacher justified her decision by reference to the fact that the kindergarten was specialized in educating children with somatic disabilities, while the complainants' son had a combined disability, so that the teaching staff was unable to take care of him.

Such justification is inadequate. According to Section 34 (4) of the Education Act, children in the last year prior to the mandatory school attendance have priority of admission for education in a kindergarten. The law does not provide that pupils with health problems would be exempted from this right to priority of admission. Especially in a situation when the complainants' home town has only one special kindergarten, the pupil cannot be refused admission to or his stay limited with justification that the school normally educates children with different forms of disabilities. As a result of the Defender's intervention, the complainants' son was admitted with no limitations.

The Defender also received filings whereby complainants argued that regional authorities failed to grant funds for teacher assistants. Therefore, head teachers lack funding for paying assistants, who represent a key means of supportive, or compensatory measure in integrating pupils into mainstream primary schools. At the same time, regional authorities approve the establishment of the post of a teacher assistant, under Section 16 (9) or 16 (10) of the Education Act. It is evident from some complaints that Regional Authorities consented to the establishment of a teacher assistant post, but subsequently lacked funding to cover the costs. The costs are then borne by the pupils' statutory representatives, among others in the form of a donation to the school. In these cases, the State fails in its duty to secure the right of a pupil with special needs to education.

Similarly, the Defender receives complaints about **insufficient support to students with disabilities during higher education**. Education is a public service, and the Antidiscrimination Act (Act No. 198/2009 Coll., as

amended) requires that adequate compensatory measures be taken for providing persons with disabilities with access to services too. Failure to take such measures constitutes indirect discrimination. Therefore, inadequate support provided to pupils with special needs and failure to secure the above supportive tools may not only represent a violation of education regulations but also interference with the right to equal treatment under the Antidiscrimination Act.

3 / 4 / Healthcare

In 2012, the Defender received several complaints about discrimination in access to healthcare. It needs to be noted, however, that this is a domain where the Defender seldom comes across discrimination complaints; he more often deals with other cases of violation of legal regulations (for more detail, see "Healthcare", page 49).

The Defender inquired into a case where healthcare had been denied due to the patient's ethnic origin. Although it may be assumed that such discriminatory conduct is not isolated, complaints concerning this area are rare since victims of discrimination mostly give up on addressing the problem and do not wish to make use of legal remedies available.

Complaint File Ref.: 67/2012/DIS/JKV

Physicians may only reject a patient for reasons specified by applicable law; they cannot decide whether or not a patient will be registered only upon their personal contact with him or her.

Recordings of a discussion with the physician and of a phone conversation pertaining to a possible visit can be used in court, as such exchanges are not of a personal nature.

A non-profit organisation representing two complainants asked the Defender for his position on a case of a dentist's refusal to provide care. The non-profit organisation carried out so-called situation testing involving a doctor suspected of systematically refusing Romany people. An appointment was first made by phone, followed with a personal visit. Both the phone call and the visit to the dentist's were monitored and video-recorded. Within the test, Romany patients were indeed not treated, while testers belonging to the majority society were. In his report the Defender focused on assessing possibilities to take this case to court, and to use the evidence collected through the test as court evidence.

In several cases, the Defender examined whether the activities of blood transfusion centres fell within the definition of healthcare, and whether it was possible to speak of discrimination in such cases. The raised grounds of discrimination included sexual orientation and disability.

Complaint File Ref.: 161/2011/DIS/AHŘ

General refusal of blood-donor candidates just for reasons of disability is direct discrimination in the healthcare field. Each donor's eligibility should be assessed individually, focusing on eliminating such donors as pose an actual health risk for the blood recipient or for themselves.

Mrs. K. K. informed the Defender that she had decided to donate blood, but, when she appeared – with her carer – at the transfusion and tissue centre, she was rejected with reference to the fact that she was blind.

Within an inquiry, it was first necessary to assess whether the rejection of a blood-donor candidate could be regarded in the light of the Antidiscrimination Act (Act No. 198/2009 Coll., as amended) as unequal treatment in the area of healthcare, or in access to services (as an alternative, the case could be considered encroachment upon privacy rights). The Public Defender of Rights is inclined to think that the choice of an individual who can become a suitable donor of blood or

donor of blood components indeed falls within the healthcare domain, and, therefore, everybody has the right not to be discriminated against in this type of legal relationships. Selection of blood-donor candidates as a whole can be classified under the system of healthcare, as candidates are tested through relevant diagnostic methods so that their suitability can be determined. Construing "healthcare" as procedures exclusively aiming at providing therapeutic care to a patient would be very restrictive, and would not correspond to the present definition of healthcare and healthcare services under the Healthcare Services Act (Act No. 372/2011 Coll., as amended). Therefore, in this case, the Defender concluded that discrimination on grounds of disability had indeed happened.

4 / Public awareness and Educational Activities

The Defender focused his 2012 discrimination-related educational and public awareness activities on several topics. Among the most important ones, collaboration with Pro bono aliance must be mentioned; with the help of this association, he organized two training sessions for attorneys and trainee attorneys on antidiscrimination law. The Defender also considers very useful his collaboration with LMC, which organized **three meetings in Prague, Brno, and Ostrava for HR Officers of large and medium-sized companies, on the subject of discrimination in the labour-law area**. Upon invitation of the Czech National Disability Council, the staff of the Office of the Public Defender of Rights also presented, **at 14 regional conferences, the Defender's recommendations and statements pertaining to equal treatment of persons with disabilities**. His collaboration with Prague, Brno and Olomouc Law Schools also continued, giving students the opportunity of free internship at the Defender's Office, and of addressing specific discrimination-related complaints. The Defender also had the opportunity to present his statements in the area of discrimination at a number of thematic conferences, round-table discussions or professional symposia (e.g., inclusive education, rights of elderly people and sexual minorities, ethnicity in the media).

5 / Communicating with European Entities

One of the Defender's major missions in the "equality of treatment" field is exchanging information with relevant European entities. Within this collaboration, he provided information on Czech equality law (and his statements) to the Hungarian, Dutch, and Maltese equality bodies. He used the Equinet network to share his findings about racial discrimination. He informed the EU Fundamental Rights Agency (FRA) about the structure of complaints received (most frequent grounds and domains), while specifying the number and facts of such cases where discrimination had been found. With the representatives of Serbian and Bosnian equality bodies, he shared information about legal assistance to discrimination victims, work with NGOs, survey activities, and strategic litigation in the educational area. As to education, the Defender **personally presented the results of his survey to the officials of Council of Europe** (Commissioner for Human Rights, and the representatives of the Department for the Execution of Judgments of the European Court of Human Rights). His Equinet membership gave him access to valuable information about the use of mediation in discrimination litigation in other EU countries. An Equinet working group meeting was held at the Defender's headquarters, titled "Equality Law in Practice," where European equality experts looked into three real-life cases (from Austria and Sweden) about unequal treatment based on nationality and age respectively, in the field of access to municipal housing and to employment.

6 Supervision of the Expulsion of Foreigners

The mandate exercised by the Defender on the basis of the provision of Section 1 (6) of the Public Defender of Rights Act (Act No. 349/1999 Coll., as amended), i.e., the exercise of the detention of foreigners, the exercise of administrative expulsion, surrender or transit of detained foreigners and the penalty of expulsion of foreigners who were placed in pre-expulsion custody or are serving imprisonment (hereinafter only "monitoring expulsion"), includes, in practice, the monitoring of administrative and court decisions rendered on administrative detention or expulsion of foreigners as well as supervision of the execution of punitive and administrative expulsion, surrender and transit of foreigners. The Defender thereby provides a guarantee of an effective system for monitoring forced returns, as required by Article 8 (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the "Returns Directive").

1 / Monitoring Administrative Decisions and Court Decisions

In 2012, the Defender received and analysed a total number of **2,346** decisions on administrative expulsion (1,715 in 2011), **366** decisions on detention or extension thereof (334 in 2011), and **43** judgments relating to a judicial review of detention (71 had been sent to the Defender in 2011). Therefore, there has been an apparent increase in the number of decisions on administrative expulsion sent (up 631), while the number of decisions related to detention sent grew only slightly (up 32). What can be seen as a positive sign is the fact that no decision relating to placement of a foreigner in the strict regime section of a facility for the detention of foreigners was sent to the Defender (3 cases over the previous year).

The Defender focused his activities mainly on analysing the use of **special measures in order to achieve a foreigner's departure** (so-called "alternatives to detention") as per Section 123b of Act on the Residence of Foreigners in the Territory of the Czech Republic (Act No. 326/1999 Coll., as amended). Despite certain initial inconsistency in the application of the given instrument in the decision-making of Regional Courts (mainly as to considering special alternatives in extending detention and deciding on detention under Sections 124a, 124b, and 129 of the Foreigners Residence Act), the case-law of administrative courts has stabilized to conclude that the Immigration Police is obliged to consider imposing a special measure for all types of detention (i.e., both for detention for the purpose of administrative expulsion under Section 124 or 124a, as applicable, of the Foreigners Residence Act, and for detention for the purpose of achieving a foreigner's departure and for the purpose of surrender or transit under Section 124b and 129 respectively, of the same Act), and also for the extension of detention. In 2011 and 2012, the Defender found that **special measures were imposed in 135 cases**, with a slight increase in 2012 (70 cases). Therefore, detention is applied more than four times more often as compared to the imposition of a special measure. The most frequent shortcomings found by the Defender are the absence of substantiation (out of 366 decisions on detention or its extension issued in 2012, 105 decisions lacked any substantiation of the decision not to impose a special measure), or inadequate substantiation of not applying a special measure, mainly in cases of deciding on detention for the purpose of surrender under Section 129 of the Foreigners Residence Act. The analysis also showed that a pledge of money, one of the two alternatives to detention, was not used at all in practice. Detailed results of this analysis and recommendations for improving decision-making practice were shared with the Head Office of the Alien Police and individual Immigration Police departments of Regional Police Directorates at a seminar organized by ASIM, a non-governmental organisation, and the United Nations High Commissioner for Refugees, in Prague on 17-18 December 2012.

In 2012, the Defender published the proceedings of a scientific seminary held at the Office of the Public Defender of Rights on 20 October 2011, titled Return Directive: Expulsion, Detention, and Court Review, analysing in detail all material aspects pertaining to expulsion and detention of foreigners.

2 / Decision-making on the expulsion of foreigners by on-site orders at Václav Havel Airport Prague

The Defender continued his inquiries into the decision-making pertaining to administrative expulsions at Václav Havel Airport Prague through **on-site orders.** Neither the Head Office of the Alien Police nor the Department for Asylum and Migration Policy of the Ministry of the Interior share the Defender's opinion according to which this kind of decision-making pertaining to administrative expulsion is unlawful. Nevertheless, the procedural rights of foreigners subject to expulsion were at least partially strengthened. The Alien Police no longer use their own officers as interpreters, and hiring interpreters registered in the list of experts and interpreters is preferred over interpreters under oath. In proceedings pertaining to administrative expulsion concluded by an order on site, foreigners are now provably advised of the consequences of their consent to the imposition of the obligation (i.e., to imposition of administrative expulsion) through an on-site order (an order issued on site is final and enforceable, the foreigner may no longer oppose the expulsion using standard appeals or an administrative action). In December 2012, **the Defender addressed a request to the Minister of the Interior that the Ministry ask its Advisory board on the Administrative Procedure Code to consider the lawfulness of decision-making pertaining to administrative expulsions by on-site orders.**

3 / Decision on the obligation to leave the territory

On the basis of his practical findings from monitoring expulsions, the Defender launched an inquiry on his own initiative pertaining to the decision-making of the **Police of the Czech Republic on the obligation to leave the territory** as per Section 50a of Act on the Residence of Foreigners in the Territory of the Czech Republic (Act No. 326/1999 Coll., as amended). This inquiry aims at checking the procedure of the Police within administrative proceedings in which orders to leave the territory are issued, a precondition for surrendering a foreigner to the requested state, usually a neighbouring state, on the basis of a readmission agreement. Doubts arose as to the due conduct of administrative proceedings and issuance of such decisions, not only in individual cases but also within the established practice of the Alien Police. The Defender also became interested in the question of publication, or non-publication of the Agreement between the Government of the Czech Republic and the Government of the Polish Republic on the Surrender of Persons on Common Borders dated 10 May 1993, in the Collection of Laws or in the later-created Collection of International Treaties. The inquiry was not completed by the end of 2012.

4 / Supervision of the Execution of Expulsions, Surrenders and Transits

The Defender is also responsible for supervising the actual execution of administrative expulsion, surrender and transit of detained foreigners and the penalty of expulsion of foreigners who were placed in pre-expulsion custody or are serving imprisonment.

In the context of the exercise of this mandate, the Defender was advised by the Alien Police and the Ministry of the Interior of expulsion, transit or surrender of **696** foreigners. On the basis of this advice, the Defender **monitored 6 expulsion cases**. Three of the cases involved supervision of the execution of surrender under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("Dublin Regulation"). One case concerned transit of a foreigner and two the execution of the penalty of expulsion.

According to the nature of monitoring expulsion and the circumstances of its execution, the authorised staff of the Office of the Public Defender of Rights were present at the surrender of a foreigner to escorting authorities in detention facilities, the escorting as such. They were also present at airport procedures and also at the surrender of a foreigner to authorities of another State. It needs to be specified that, in three cases, the staff of the Office of the Public Defender of Rights supervised the escorting of foreigners directly aboard an aircraft.

The Defender monitored the given expulsion cases with no prior notice to the authorities concerned, which, on a general level, gives more considerable weight to his preventive actions and action-readiness. Only in one case, with respect to necessary participation regarding the transit of a foreigner subject to expulsion through the territory of another State, the assistance of the Alien Police had to be requested in advance.

When monitoring expulsions, the Defender looked into the formal aspects of the case (studying the files, in particular the legal title on the basis of which the foreigner was forced to leave, decisions on escorts, etc.), the facts of the case (place of surrender, facilities where the foreigner is temporarily placed, the manner of transport – i.e. with respect to sufficient space available, availability of food and drink, possibility to use a toilet, etc.), and the question of treatment (approach and professionalism of the Police, members of the Prison Service, employees of the Refugee Facilities Administration, and the Department for Asylum and Migration Policy of the Ministry of the Interior, transfer of foreigners within individual units, the manner of conducting body search, presence of interpreters, use of coercive means, medical care, medication, manner of and time schedule for informing the foreigner of the execution of a forced return, etc.).

Within his mandate pertaining to monitoring expulsion activities, mainly with respect to **the actual treatment of foreign nationals**, **the Defender did not find any shortcoming affecting human dignity** or rights of the foreigner in the course of the execution of expulsion, transit or surrender.

Statistics of expulsions, surrenders and transits in 2012, as described above, are provided in the following table.

Statistical Data on Expulsion, Surrender and Transit of Foreigners in 2012

	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.
Penalty of Expulsion												
Total	**17**	**19**	**23**	**20**	**29**	**24**	**23**	**23**	**22**	**27**	**28**	**20**
By Air	10	10	10	10	14	9	7	10	9	8	14	7
By Air with Escort	0	0	0	0	3	3	1	0	0	2	1	1
Administrative Expulsion												
Total	**5**	**10**	**8**	**12**	**8**	**8**	**12**	**8**	**12**	**9**	**10**	**8**
By Air	1	1	1	4	1	1	3	3	3	1	2	2
By Air with Escort	0	0	0	1	0	0	0	0	1	1	0	0
By Air with IOM[1)]	4	1	3	4	1	2	4	2	3	2	0	2
Surrender under the Dublin Regulation[2)]												
Total	**4**	**4**	**12**	**9**	**20**	**16**	**12**	**12**	**6**	**18**	**21**	**12**
By Air	0	0	0	0	0	0	0	0	0	0	0	0
By Air with Escort	4	2	8	3	9	2	5	4	2	2	5	2
Surrender under an International Treaty												
Total	**3**	**3**	**2**	**2**	**3**	**6**	**16**	**2**	**2**	**1**	**6**	**3**
By Air	1	0	0	0	0	0	1	0	0	0	0	0
By Air with Escort	0	0	0	0	0	0	0	0	0	0	0	0
Transit under an International Treaty or the Dublin Regulation												
Total	**13**	**19**	**26**	**2**	**4**	**2**	**0**	**4**	**4**	**13**	**20**	**12**
By Air	13	19	17	2	4	2	0	4	4	13	19	12
Total in 2012	**696**											

1) Within the Voluntary Return Programme operated by The International Organization for Migration.

2) Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

7 The Public Defender of Rights and His Office

1 / Budget and Spending in 2012

From the beginning of 2012, the Office of the Public Defender of Rights operated on an approved budget in the amount of CZK 93,750 thousand. As of May 2012, an additional CZK 150,000 was granted towards the expenses of filing a "Supplementary Analytical Data Sheet" (PAP) with the Central Government Accounting Information System (CSÚIS), thus bringing the **total budget up to CZK 93,000 thousand.** The actual 2012 **spending** against this budget amounted to **CZK 85,405 thousand**, i.e., **90.95%** of the revised budget amount.

CZK 8,495 thousand was saved in the adjusted 2012 budget, particularly from funds for running costs in the amount of CZK 8,165 thousand by saving namely on the purchase of services and other services in the amount of CZK 2,632 thousand, on telecommunications and radio-communications services in the amount of CZK 955 thousand, on repair and maintenance in the amount of CZK 738 thousand, on energy costs in the amount of CZK 721 thousand, on car fuel in the amount of around CZK 250 thousand, on postal and bank services in the amount of around CZK 315 thousand, etc. A saving of CZK 330 thousand was achieved on investment expenditures.

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

2 / The Personnel in 2012

The budget for 2012 determined an obligatory limit of 113 employees of the Office. The actual average recalculated number of staff recorded was **110.11 employees** in 2012, whereby the limit stipulated by the State budget was met. The fact that the limit was not used in full is mainly due to the difficulty of finding specialized, highly-qualified staff with graduate legal education. Of the total number of employees, 85 directly processed complaints, carried out so-called detention visits and performed activities following from the Antidiscrimination Act (Act No. 198/2009 Coll., as amended), and the Act on the Residence of Foreigners in the Territory of the Czech Republic (Act No. 326/1999 Coll., as amended).

As certain major cases needed to be comprehensively examined, the Office also continued working with external experts, mainly from the law faculties of the following universities: Masaryk University in Brno, Charles University in Prague, and Palacký University in Olomouc.

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

3 / "Access to Information" Annual Report as per the Free Access to Information Act (Act No. 106/1999 Coll., as amended)

In 2012, the Office of the Public Defender of Rights ("Office"), which is the liable party under Act No. 106/1999 Coll., on free access to information, as amended, received and dealt with a total of **31 requests** for the provision of information pursuant to the Act. They were received in writing, by electronic mail or via a data box, or in person.

The information was provided in **29** cases, which mainly concerned requests about general observations from the Defender's inquiries and his positions on individual agendas, requests for extracts from statistics of the received complaints classified by individual areas, requests for the provision of documents from the complainants' files, requests relating to the Defender's comments on draft legislation in various fields, requests concerning the internal regulations of the Office, its staffing, the Defender's salary, or repeated collective complaints pertaining to the application of the Charter of Fundamental Rights and Freedoms.

No complaint under Section 16a of the Free Access to Information Act, pertaining to disagreement with the person handling the request for information, was lodged by any of the applicants.

The information was not provided in **2** cases. The first of these was an application by a third person for the provision of a complete set of information provided to the Defender within complaints of three specific persons and the other case was an application by a third person for the provision of the wording of an action for the protection of public interest, filed by the Defender.

In 2012, the Supreme Administrative Court in Brno issued a resolution (Ref. 1 As 110/2012), rejecting a cassation complaint against a judgment of the Regional Court in Brno (Ref. 30 A 17/2010), also from 2012, dismissing an action against the Office of the Public Defender of Rights for its decision to refuse to provide information, dated 24 February 2010.

	Total Number of Requests for the Provision of Information	31
Section 18(1) (a)	Number of issued decisions refusing a request (or its part)	2
Section 18(1) (b)	Number of appeals lodged against decisions	0
Section 18(1) (c)	Copy of relevant parts of each court judgment	0
Section 18 (1) (d)	List of exclusive licences granted	0
Section 18 (1) (e)	Number of complaints lodged under Section 16a of the Act	0
Section 18 (1) (f)	Other information relating to the application of the Act	0

4 / Presentation in the Media, International Cooperation, Conferences

4 / 1 / Press releases, TV series, website

In 2012, the Defender organized **11 press conferences**, where he acquainted the public with his activities, findings from inquiries into cases, findings from systematic preventive visits to facilities where persons restricted in their freedom are held and recommendations in the area of equal treatment. These included, in particular, the following:

- Findings from systematic visits to facilities for children and from private facilities for elderly people which often circumvent the law, gambling with the health, lives, and dignity of clients;

- Results of a survey of the ethnic structure of pupils of practical primary schools and recommendations aiming at ensuring equal access to education;

- Criticism pertaining to serious shortcomings in issues related to foreigners, mainly as to the VISAPOINT system, and delays in foreign residence proceedings;

- Criticism pertaining to the situation in the judiciary, e.g., case overload, delays in court proceedings and inability of the State to ensure that the right to a fair trial, or to a court decision within a reasonable period of time be respected;

- Pointing out the failure of the Ministry of Agriculture to respect the sense of the Game Management Act (Act 449/2001 Coll., as amended), as the Ministry disregards public interest in the exercise of game management rights as a specific type of environmental care, hindering game management in hunting areas with legal uncertainty;

- Criticism pertaining to persisting shortcomings in the legal regulation of heritage preservation, resulting in alarming cases of devastation of cultural monuments, and threat to the cultural heritage of the Czech Republic.

Over the year, the Defender published over **70 press releases**, short news items and other information about his activities. He also pursued his practice of posting selected inquiry reports and statements on interesting cases on his website (www.ochrance.cz), so that his legal argumentation is accessible to both the professional and the general public. Within his educational activities, he continued to publish information leaflets explaining legal regulations and providing advice for various real-life situations. 65 such leaflets have been already posted on his website.

A detailed analysis of legal regulations, case-law, and the Defender's arguments was presented in two publications: "**Památková péče" (Heritage Preservation), and "Přestupky" (Misdemeanours),** published in the "Stanoviska" (statements) series.

In cooperation with Czech Television, the Defender prepared a second series of "The Defender", which included 16 episodes and was first broadcast by Czech Television from September to December. The programme explains to viewers what steps they can take in certain life situations and what rights they have.

Media interest in the Defender's activities is evidenced by a total of **4,829 printed or broadcast** news items, articles and reports. TV stations paid attention to the Defender's activities in **345** cases; the Czech Press Agency and Mediafax in **486** news items. Internet media largely contributed to informing the public about the Defender's statements and findings, through **2,395** reports and articles. The Defender and his deputy

appeared in television and radio broadcasting, provided a number of interviews, participated in live broadcasting and answered citizens' questions in online interviews.

Public interest in the Defender's activities and the information published by him was also shown by the number of visitors to his website. Over the year, over **220,000** visits were logged on the website.

On 1 September 2012, the Defender also launched a special website for children and teenagers - www.deti.ochrance.cz. He explains there, in a form comprehensible to children, how he can help them, and what their rights are. Over the first four months of its existence, the website registered almost **2,500** visits.

Although the existence of the Public Defender of Rights is not provided for in the Constitution of the Czech Republic, opinion polls have shown that almost 70% of the population considered him the most credible of all "constitutional agents".

4 / 2 / International Meetings and Conferences

- **Participation in a conference organized by the EU Fundamental Rights Agency (FRA) and the Danish EU Presidency (Copenhagen, 15 – 16 March 2012)**
  - Theme: Bringing the Charter to Life
- **Visegrád Group Ombudsmen's Meeting (Brno, 21 – 23 May 2012)**
  - Theme: Ombudsman/Justice Relationship, Ombudsmen's Power with Respect to Justice
- **Meeting with the Dutch Ombudsman (Brno, 29 May 2012)**
  - Theme: Extending the Ombudsman's Mandate, Equal Treatment, Fulfilling the "Return Directive"
- **Participation in the 9th Annual Ombudsmen Conference organized by Azerbaijan's Commissioner for Human Rights (Baku, 18 – 20 June 2012)**
  - Theme: Rights of Ethnic Minorities and Migrants, and the Ombudsman's Role in Securing Them
- **Meeting with participants to CEVRO Institute's international project for the furtherance of democracy, from Belarus, Bolivia, Burma, Honduras, Nicaragua, Russia, Sudan, and Syria (Brno, 11 September 2012)**
  - Theme: The Defender's Mandate and the Ombudsman's Role in Democratic Society
- **Meeting with Uzbek MPs (Brno, 19 October 2012)**
  - Theme: The Ombudsman's Mandate, with Focus on Protection of Persons Restricted in their Freedom
- **Participation in the 6th Equality Summit organized by the European EQUINET network and the Cypriot EU Presidency (Nicosia, 22 – 23 November 2012)**
  - Theme: Importance of Equality and Accessibility Policies and Legislation on Promoting Economic Growth
- The Defender's active involvement in cooperation and exchange of experience within a network created by the EU Ombudsman. Active involvement in the EQUINET network of national equality bodies.
- **–** Meetings with Ambassadors: Netherlands, Austria, Ukraine

4 / 3 / Conferences and Round Tables Organized by the Public Defender of Rights

Conferences

- **Care of vulnerable children** (Prague, 5 April 2012)
- **Social reform in practice** (Brno, 3 May 2012)
- **Equal access of children to education** (Prague, 20 September 2012)
- **Present problems of the prison system** (Brno, 8 November 2012)

Round Tables

- **Round table with heads of psychiatric hospitals for children** (Brno, 16 March 2012)
- **"Labour Inspection" round table** (Brno, 10 April 2012)
- **"Selected Issues in Application of Construction Law" round table** (Brno, 24 April 2012)
- **"Common Themes in Children and Youth Psychiatry and Institutional Education Topics" round table** (Prague, 12 June 2012)
- **Round table with heads of Diagnostic Institutions** (Brno, 9 October 2012)
- **"Floodplains" round table** (Brno, 22 November 2012)
- **"Heritage Preservation" round table** (Brno, 11 December 2012)
- **"Compensation" round table** (Brno, 13 December 2012)

8 Conclusion

As was the case last year, I will take the liberty of opening my final remarks by reminding you of the substance of the previous one. At that time, I wrote, in this chapter of my Annual report, that the legal status of Czech Ombudsman was not very different from that of his colleagues in other countries. To be more precise, he has the same mandate, and the same (= virtually non-existent) powers. He never orders, he only recommends; he endeavours to calm heated arguments and to take edge off of things. Advising, contributing to out-of-court settlement. In this respect, I complained that, alas, the addressees of the Ombudsman's recommendations showed reluctance to accept or implement them in our environment. Nevertheless, my reflection ended on a slightly optimistic note, expressing the hope that – small-step after small-step – we would maybe achieve a better perception of the law (and of the Ombudsman's role) even in our country.

A year has passed, and I cannot but admit that nothing has changed in the Czech Republic. In certain aspects, there has even been a downward trend. The fact is evidenced by a rather dramatic upswing in the number of complaints received by my Office during 2012. An attentive reader will have noticed, at the beginning of this Report, that willingness to implement legislative recommendations has been significantly lower than over the previous year – practically non-existent in certain cases.

Despite all these difficulties, the Public Defender of Rights as an institution continues to enjoy a high degree of trust among the Czech civil society. One of the reasons may lie in the fact that he sometimes reminds people of the fairy-tale barber who caused the information about the king's ass's ears spread wide among the population.

This trust is certainly an encouragement for all of us who work here. But it is not enough in itself. Therefore, we sometimes hum the famous song saying that one day (maybe) we shall overcome.

Brno, 22 March 2013

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Public Defender of Rights

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