ANNUAL REPORT

ON THE ACTIVITIES
OF THE PARLIAMENTARY COMMISSIONER
AND THE DEPUTY COMMISSIONER FOR CIVIL RIGHTS
IN 2005

(Abbreviated Version)

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1.

Introduction

The Parliamentary Commissioner for Civil Rights and his General Deputy produced a report on their activities in 2005 for the Hungarian Parliament, in line with the practices developed during previous years and in accordance with the requirements of Members of Parliament concerning the contents of the report.

Year 2005 was something of a milestone in the history of the ombudsman institution in Hungary, because the first Parliamentary Commissioners were elected exactly one decade earlier, in 1995. The first Parliamentary Commissioners developed the organisation structure and system of the institution which is still functioning today – after some minor changes – along with the elements of procedural rules that shall not be regulated by law. To commemorate the anniversary we brought out a jubilee publication entitled *'Ten years of ombudsmen',* containing a brief history of the institution, a description of its activities, along with the ars poetica and views of each of the ombudsmen, concerning the future of the institution. We organised a modest in-house celebration to commemorate the 10th anniversary of the establishment of the institution, where the Commissioners handed over memorial certificates to the employees who had been working for the office right from the beginning of its operation.

The report of the Parliamentary Commissioner for Civil Rights and his General Deputy on year 2004 was discussed by 9 committees of the Parliament. Thereafter it was unanimously accepted by the plenary session of the Parliament. It should be noted again however, that despite the fact that on the basis of a proposal made by the Parliament's Committee for Human Rights, Minority and Religious Affairs, Section 2 of the No. 59/2004. (VI. 14.) Resolution of Parliament and that of No. 50/2005. (VI. 4.) Resolution of Parliament on the acceptance of the reports of the Parliamentary Commissioner for Civil Rights and his General Deputy on their activities in year 2003 and 2004, respectively, provided, that 'The Parliament is calling on the Government to take the necessary actions to settle outstanding issues concerning the legal status of the headquarters building used by the Office of the Parliamentary Commissioner', no such actions have been taken to date. We are still using part of the building without a proper legal title. Our situation is further complicated by the fact that as a consequence of errors made in the course of refurbishment and owing to new requirements that have emerged in the meantime, we sometimes have to

carry out substantial improvements – of significant costs in comparison to our rather limited, indeed, gradually diminishing, budgetary funding – to a building not in our ownership, and even the elimination of defects under guarantee is quite a complicated task. This situation is an unnecessary burden not only for our own institution but also for the 'manager' of that building that is the Treasury Property Directorate. No adequate funding is provided for a real change, for resolving the outstanding issues, by the amount allocated to the institution from the year 2006 budget either, therefore we are asking again for the Parliament's help.

It should also be noted that the existing permitted headcount is still not sufficient for balanced operation of our office. Problems continue to be caused by the fact that the budget of the institution is determined, and submitted to Parliament for approval, by the Government, thus the institution has no say in the establishment of its budget, which may even undermine the institution's autonomy.

In year 2005 again – like in the preceding year – we produced the Report for Parliament in two versions. Its printed version which is to be published in the form of a book, contains a summary discussion of the main categories of cases dealt with, including descriptions of the most significant cases, initiatives concerning legislation and the report of the joint Office. The complete Collection of Cases that includes brief analyses of individual cases as well, is presented – owing to its size – only on the enclosed CD.

As a matter of course, the complete versions of the earlier and the current reports of the Hungarian Parliamentary Commissioners are available in Hungarian at www.obh.hu/allam.

2.

Statistics of year 2005

In year 2005 a total of 4,769 cases were referred to the Parliamentary Commissioner for Civil Rights and his General Deputy. This slight decline (only 223 cases fewer) in comparison to the number of cases dealt with in 2004 – which is a characteristic feature of the years preceding general elections – enabled the agency to close 434 complaints more, sort of offsetting the preceding year's 10% increase in the number of complaints. We also had an opportunity to significantly increase the number of investigations ordered to be carried out *ex officio*.

During the ten years and a half that have passed since the establishment of the institution a total of 72,897 complaints were submitted to the Parliamentary Commissioner for Civil Rights and his General Deputy. The numbers of complaints submitted in the various years varied widely, since in the year of establishment some three and a half thousand complaints were submitted in about six months, while in some of the later years the total number of complaints was below five thousand.

During the past five years a total of 23,425 submissions were received by the Parliamentary Commissioner for Civil Rights and his General Deputy, the largest number (5,264) in 2001 and the fewest (3,860) in 2002. The fluctuation of the number of submissions received by the agency from year to year has diminished in recent years. In the year when we took office we had to deal with a very large number of cases submitted repeatedly because many people thought that we would make different decisions concerning their grievances they had been trying to remedy for years. The 4,769 submissions received by the agency in 2005 contained 6,407 complaints, just slightly fewer than the 5,264 submissions describing 6,416 complaints. (In the submissions of the past five years we recorded a total of 30,871 complaints but this number may still grow higher for in the course of dealing with issues in progress we may find that some of the documents constituting individual submissions contain more than one complaint.)

The joint office of the Parliamentary Commissioners is operating an information service which is turned to by an increasing number of customers each year. In year 2005 they received a total of 6,356 phone calls, almost as many as the 6,308 calls in 2004 and about a thousand more than the 5,229 in 2003. The service was called at by 1,187 customers in person. The total

monthly number of customers dealt with (628) was almost as many as in 2004, when 633 customers contacted the service each month, on an average. The employees of the Customer Service Department heard fewer complainants than in 2004: a total of 1,070 persons called at the complaints' office in 2005, after the 1,120 persons and 1288 in 2003 and 2004, respectively. In addition to substantial professional knowledge the employees dealing with customers need to be capable of showing empathy for the customers because many of those turning to the agency have already gone through a number of fora where their cases had not been dealt with in the way they would have liked to see, and some of the complainants are supposed to have suffered spiritual injuries as well. With a view to this, we also have staff members with qualifications as teachers for handicapped children, at our Customer Service Department.

In comparison to earlier years, in 2005 a smaller proportion of submissions were received from private individuals while the proportion of those submitted by civil organisations and various communities continued to rise. (In 2003, 2004 and 2005 a total of 204, 233 and 236 such submissions were received, respectively). This is a highly important trend because such complaints show problems of larger groups of people and they often contain a more properly elaborated description of the problems concerned. The percentages of cases that reflected grievances of various groups of society increased as follows during the past five years: 2001: 17.1%, 2002: 13.1% (!), 2003: 20.8%, 2004: 24.4%, 2005: 26.4%. Again in over 99% of cases the complaints were submitted by Hungarian citizens, the change in this respect is not significant statistically.

In year 2005, again, urban residents submitted more complaints than did people living in rural Hungary. Some two thirds of the Hungarian population lives in towns but almost three quarters of all complaints were submitted by town-dwellers, i.e. one in 1900 urban residents and only one in 3100 villagers submitted a complaint. The share of complainants living in Budapest continued to increase, for while a mere sixth of all Hungarians live in Budapest, more than a third (35.6%) of all complaints came from the capital city. Apart from the capital, Pest County is the only county in Hungary where the proportion of submissions exceeded the ratio of the residents of the county to the total population of the whole country.

As in previous years, about 45% of all complaints received by the agency derived from five categories of cases. No major change took place in their order of frequency either: the first four most numerous categories are cases relating to health insurance, pension insurance and labour issues (11.2%), followed by issues relating to criminal or penal proceedings (10.3%), cases relating to construction, premises and housing (8.8%) and, again, the fourth largest category was of cases relating to civil law and corporate issues (8.1%). While however, in 2004 the position of the fifth largest category was shared by complaints against public utility service providers and those relating to tax, duty, customs, financial institution and insurance matters (6.7% each), in 2005

complaints against public utility service providers increased in proportion (to 7.2%) and in number (from 541 to 460), despite the overall decline in the number of complaints. Many complaints were submitted again in 2005 against action taken or not taken by local governmental offices and town clerks (in 17.08% of all cases). If we add the proportion of complaints involving local governmental councils (bodies of representatives) (3.95%), these categories together exceed 21% . The high proportion of complaints involving local governments is explained by the fact that customers do business with them in the largest number of cases and consequently the largest number will have problems with them, if only in accordance with the law of large numbers. They are still followed by courts (7.49%), local police headquarters (5.1%) and business associations. If however, we combine all complaints submitted against organs performing public service in the strict sense of the term (5.7%), these organs overtake police headquarters. The proportion of complaints submitted against organs performing public service has been increasing steadily over recent years.

An even larger proportion of citizens complained about procedures of authorities than in the previous year (49.3%), with a much smaller percentage (21%) of complainants actually disputing the decision itself. In almost seven percent of cases (6.9%) – 1% more than in 2004 – the complaint was about the piece of legislation applied to the complainant's case, in 4.1% of cases the complainant objected to the failure of the authority to respond or take actions. In 2005 again, in some 12% of cases complainants asked for information or for some help, sometimes financial. In our letters of response we tried to provide them with information on who to turn to but we could not act on behalf of them in their affairs and, unfortunately, we have no funds for providing financial assistance for those in need.

As we have noted already, in 2005 decisions were made concerning 6,689 complaints. In about three quarters of all cases – in 4,836 cases – we had to reject the application for lack of competence, in respect of 608 complaints we terminated the procedure. In 1,193 cases – in 17.8% of all cases – detailed investigations were carried out. From among the investigated cases we rejected 575 complaints, we made recommendations concerning 236 cases and in almost the same number of cases (248) we sent the complainants reports produced on other cases. (*Table 1* shows the actions by which complaints were closed in 2005.)

In respect of the investigated cases we could establish that in 2005 again, authorities violated the rights of citizens to legal certainty and to fair procedures (in 261 cases, almost as many times as in 2004), in 71 cases their right to property, in 69 cases their right to legal remedy and in 61 cases their right to health was violated. In order to remedy identified constitutional improprieties we made recommendations, initiated procedures or amendments to legal regulations in 286 cases. (For details, see Table 2.). More than half of our actions taken in 2005 were accepted by the addressees and in 118 cases the

deadline for response has not expired yet. The competent authority rejected our initiative only in 8% of cases. An even higher proportion – almost 70% – of our recommendations concerning the adoption, amendment or repealing of legal regulations of various levels was accepted during the past 10 years. It should be noted however, that this was achieved by relentless efforts, in numerous cases we had to make our proposal repeatedly time after time.

The relatively smaller number of submissions received in 2002 has enabled us in recent years to process the backlog of cases, however, since 2002 we have been receiving significantly larger numbers of submissions from complainants again. Consequently, though in 2005 our employees closed a 'record' number of cases (almost 500 more than a year before) and smaller number of complaints was received last year, the agency still has a substantial backlog (of 2463 complaints). This is an indication of the fact that the currently permitted headcount of the office is not sufficient. As a consequence of investigations we often have to note that the authorities have passed the deadline prescribed for them by law, and though there is no statutory deadline that would be binding on us, unfortunately, owing to the inadequacy of our headcount, we cannot complete some of the cases within the deadline we expect ourselves to observe, which is, indeed, criticised by complainants from time to time. It is, however, fairly safe to say, that while the processing of some cases took 4-5 years in the past, on 31 December 2005 there were hardly more than 350 cases in which the complaint had been submitted in the preceding year. The number of pending cases is 2111 from complaints received this year. The year 2006 budget does not enable us to hire more employees either, indeed, in our negotiations with the Ministry of Finance we were told to try and generate funding for our material costs by reducing our human resources. In this way – though we are using our best efforts to identify any possible internal reserves – the backlog of cases is not expected to be materially reduced in the foreseeable future.

3.

A selection of the most important cases

3.1.
Protection of the drinking water wells along the river Danube

One complainant living in a municipality along the river Danube complained that according to a decision taken by the local Water Company, people may enter the internal protected zone of the water wells along the riverbank against payment of a fee and holding the photo ID made out by the water company.

The Parliamentary Commissioner for Civil Rights launched an investigation based on suspicion of violation of the requirement of legal certainty, of the constitutional right to fair procedures and the right to healthy environment, and he contacted the CEO of the Water Company and the deputy state secretary of the Ministry of Environment Protection and Water Management, along with the mayor of the municipality concerned, asking for clarification of the circumstances of the fee introduced by the Water Company.

In the course of the investigation the local government assumed commitment to pay the costs – instead of the local residents – of the action introduced by the Water Company, thus the Commissioner considered the problem of the complainant as resolved. However, the Commissioner continued the investigation in order to establish whether the decision had been taken by the Water Company in observance of the relevant legal regulations.

The investigation found that the Water Company's wells producing water through bank filtration from the local water resource were located in the administrative territory of the municipality concerned.. The water resource – base – was located in a vulnerable geological environment. The piece of land concerned was owned by the Water Company. This area was not fenced off, but people were permitted to enter the area only with photo IDs made out by the Water Company.

The Parliamentary Commissioner established that according to the Act on water management and to the government decree on the protection of water bases, prospective water bases and water facilities supporting drinking water supplies the restrictive solution applied by the waterworks may give rise to certain concerns, with a view to the goal intended to be attained. The Commissioner emphasised that according to the relevant legal regulations

people – practically anybody – should not be permitted to enter the inner protective zone (even if against payment). This should be prevented by the owner of the land concerned.

The investigation found that the current use of the area does not meet regulations of importance from the aspect of the protection of quality water – and environment protection – one of the reasons for which is that the inner and the outer protective zones have not been designated in the area concerned so it is not clearly marked where entry is prohibited.

According to the Commissioner designation by the competent authority of the international protective zone and its fencing off by the owner along with its high standard supervision and protection would be the acceptable solution from the aspect of the constitution because this would clearly separate the area where people cannot go from those where they may, even without special ID cards. The ombudsman considered that this should be emphasised because this case showed the interest on the part of society, indeed, that people demand access – as a right – to the external protective zone for use as a recreation area. The Parliamentary Commissioner emphasised that the conditions for this should be created without jeopardising the quality of water, in line with the relevant legal regulations.

In order to remedy the impropriety so explored the Parliamentary Commissioner for Civil Rights made a proposal to the Budapest Government – as the owner of the waterworks – to clarify, in an investigation coordinated by the Budapest Government with the involvement of the competent single 'green' authority and the district government concerned, the legality and reasonableness of the action taken by the Water Company along with its harmony with the relevant constitutional rights. The Commissioner also proposed that the competent single green authority should designate – by an official decision – the internal protective zone for the Danube bank thereby securing the protection of water as an element of the environment and enabling the exercising of the right to health and to access to a healthy environment.

The Mayor of the Budapest Government accepted the recommendation and informed the Commissioner about his endeavours aiming at a solution corresponding to the recommendation. To this end, the Mayor called on the Water Company to submit a report on the status of the inner and outer protective zones of the wells and their ownership, along with the status of the land use categories of the areas concerned, and he also contacted the competent agencies. The director of the Inspectorate for Environment, Nature and Water notified the ombudsman about their preparation of a decision concerning the designation of a protection zone for the water base in question in accordance with the report.

By the time of the closure of this Report the decision had not been completed, therefore the Parliamentary Commissioner continues to monitor the case.

3.2.
Outstanding issues concerning the duty fee of private veterinary surgeons

A lawyer-veterinary surgeon turned to the Parliamentary Commissioner for Civil Rights because the obligation to perform duty service imposed on them on the basis of their mandatory chamber membership – in addition to providing direct veterinary treatment for animals taken to them – involving the performance of official duties, epidemic monitoring stand-by duty and a guard service activity as well, is not compensated by the state. The complainant argued that the mandatory duty service that they have to perform involves their being on stand-by duty from 4.00 p.m. on Friday until 8.00 on Monday during which they have to be permanently available in the given service district.

On the basis of a suspicion of violation of the right to the highest possible level of physical and spiritual health and of the basic right to resting period corresponding to the quantity and qualify of work performed, the Parliamentary Commissioner for Civil Rights, emphasising the obligation of the state to protect objective basic rights – disregarding financial requirements – considered that an investigation focusing exclusively on the issue of basic rights, should be conducted.

According to the Minister of Agriculture and Rural Development whom the Commissioner contacted to clarify the issue the state is not in charge of financing private veterinary surgeons performing actual duty service because there is no legal relationship whatsoever between the Ministry and the veterinary surgeon and the Ministry is under no statutory obligation to pay. The order of the duty service of private veterinary surgeons has to be organised by the Hungarian Chamber of Veterinary Surgeons for which the Chamber receives central financial support in the central budget, in the form of a priority appropriation.

The chairman of the Chamber agreed with the complainant and emphasised the value of the performance of permanent veterinary service from the aspect of public health and the national economy as a whole.

As a result of his investigation the Parliamentary Commissioner found that pursuant to the effective legal regulations all private veterinary surgeons are obliged – by virtue of their chamber membership – to perform duty service. Although by adopting the laws providing for continuous animal health service the legislator fulfilled its regulatory obligation but it did not take account of the circumstances of feasibility. The law does not regulate the amount of duty service time – that cannot be commercialised – and its compensation by the state. Passing the standby and in some cases the duty service fees of private veterinary surgeons tacitly on keepers of animals or on private veterinary surgeons is not justified from the aspect of the Constitution. Accordingly, the Commissioner established an impropriety concerning the right to legal certainty,

to proper compensation for work and to resting time. He asked the Minister of Agriculture and Rural Development to initiate amendment to the Act on the Hungarian Chamber of Veterinary Surgeons and to the Act on the exercising of private veterinary surgeon activities, to provide for a proper compensation for stand-by duty service. The Minister refused to deal with any solution concerning any kind of compensation for the duty service, his arguments were limited to taking into account the possibilities provided for by the effective legal regulations. The Parliamentary Commissioner did not accept the response of the Minister and he is conducting further negotiations to arrive at an acceptable solution to the problem.

3.3.
Government decrees on housing subsidies provided by the state

The Parliamentary Commissioner received numerous complaints concerning uncertainties in law resulting from changes in the system of housing subsidies provided by the state. As a general rule, banks and financial institutions do not fall in the scope of investigations carried out by the Parliamentary Commissioner, but since in the course of the payment of housing subsidies provided by the state, instead of participating in competition in the market they are involved in distribution of state funds pursuant to law, i.e. they are performing a public service, the Parliamentary Commissioner established that this aspect is part of its competence.

In the course of the comprehensive inquiry started *ex officio*, the Parliamentary Commissioner asked for and received information from numerous banks, financial institutions and governmental agencies – involved in specific cases – with respect to problems of interpretation of the law.

In reference to a decision of the Constitutional Court the ombudsman explained that it does not follow from the Constitution that access to state subsidy for acquiring a home is a subjective right of citizens, nor does it follow from the Constitution that the state is obliged to provide any specific form of housing subsidy. The right to social security does not mean guaranteed income or living standards because the amounts of social benefits, supports and allowances are determined primarily by the capacities of the national economy, the state of the central budget and by lots of other factors. Accordingly, the state enjoys a relatively high degree of freedom in deciding on which means of assistance it intends to provide to help people obtain their own homes. It is a matter of political choice how and to what extent the state intends to use such instruments to facilitate the objectives of demographic policy, social policy and economic policy.

At the same time, the Constitutional Court also declared that the entirety of the law, its particular constituent areas and rules alike, have to be clear, unambiguous and predictable in terms of effects. For this reason, in making its

political decisions the legislator has to observe the requirement of legal certainty, which, in this investigation, meant that according to the Parliamentary Commissioner the legislator acts in concert with the Constitution if it makes sure that the norms of housing subsidies are clear, unambiguous and predictable in terms of their effects.

As a result of his investigation the Commissioner found in relation to a number of complaints, that improprieties are caused in relation to the constitutional rights of citizens building or buying homes, to legal certainty, to legal remedy or to social security, by government decrees on housing subsidies provided by the state, if their particular rules are not clear for those applying them, if their effects are not predictable, and particularly if their consequences are not foreseeable for those concerned as a consequence of deficient information.

In order to resolve the improprieties the ombudsman asked the Prime Minister to initiate an amendment to the decree on housing subsidies provided by the state in a way as will ensure that decisions on entitlement to housing subsidy be made by the competent public administration organisation, against whose decision there be possibility for legal remedy. After such a final decision banks should only have competence with respect to deciding on the creditworthiness of the customer. The ombudsman proposed that the Prime Minister should take the necessary action to ensure that the notices provided by banks and by state agencies to customers as well as the press releases should provide information of sufficient detail concerning the conditions of access to and use of the various housing subsidies, and that no misleading information that is different form the actual contents of the legal regulation be transmitted to the population through the media because that would substantially prevent customers from exercising their rights.

The Commissioner proposed that the Prime Minister should ensure that in the case of the sale of property whilst retaining the ownership right the agencies concerned should not reject the application but should only suspend the payment of the subsidy until clear proof is provided of the termination of dual ownership.

The Commissioner proposed that the terms that allow different interpretations be clarified by law – e.g. that the concepts of building yet another storey on a building be clearly separated from that of building-in the attic. Another example is that it should always be specified whether a given piece of land is supplied or is not supplied with the required public utilities.

The ombudsman proposed that the Prime Minister should take action to ensure that the competent minister specifies the average prices in construction, a task that has not been carried out since 2001.

The ombudsman also proposed that the Prime Minister should consider the possibility of introducing additional arrangements in addition to those already operating to alleviate the burdens borne by married couples, who undertook to have children in exchange for the allowances provided for them in advance but

who cannot have children for medical (or other *force majeure* type) reasons, in relation to the repayment of the allowances provided for them plus the interests thereon, which could not have been calculated in advance.

Based on the Prime Minister's instruction the Minister heading the Prime Minister's Office, the administrative state secretary of the Ministry of Finance and the minister without portfolio in charge of regional development and catching-up gave answers to the Commissioner. Other ministers and several banks agreed with the report sent to them as lead information but opinions differed concerning certain points of the proposals.

The response given on behalf of the Prime Minister showed that the Government was not against modifying the government decrees but they made the amendments conditional upon the available financial resources. According, in order to resolve the problems originating from the fact that various forms of subsidies were linked to different age limits, the Government decided on raising the 30 year age limit of the 'nest building programme' from November 2005.

The Government did not agree with the proposal of delegating the decision making power concerning entitlement to housing subsidies provided by the state to a governmental agency therefore the Commissioner proposed searching for additional possibilities in this area that would more reliably provide for predictability and recourse to legal remedy for citizens in this field. One effort on the part of Government – aiming at stipulating in a decree that citizens are entitled to the subsidy at any financial institution regardless of whether they apply for a loan or not – was recognised by the Commissioner as a step taken to this end.

The Commissioner welcomed the fact that the Government had put the modification of decrees on housing subsidies provided by the state on its agenda, but was somewhat disappointed when he saw that this did not extend to a number of issues raised in the recommendation.

The Parliamentary Commissioner drew the attention of the Parliament to the necessity of resolving these issues in a comprehensive way and for a long run, owing to the constitutional concerns relating to the issue of housing subsidies.

3.4.
Noise pollution caused by aircraft

A number of submissions were received by the Parliamentary Commissioner for Civil Rights in which the complainants objected to the level of noise generated by aircraft passing over their places of residence.

The Parliamentary Commissioner launched an investigation on account of the involvement of the right to property and the right to freedom of movement. After hearing the standpoint of the Civil Aviation Authority the Commissioner found that while the noise generated by road and railway transport disturbs primarily those living along the roads or railway lines concerned, the noise

generated by aircraft affects larger groups of citizens. In reviewing the problem it must also be taken into account that the organisation and controlling of air traffic demands special professional skills. The height of aircraft flying over residential areas and flight directions can be assessed and appreciated only in possession of adequate professional expertise. There is no doubt about that the noise generated by individual aircraft passing over residential areas at low altitudes is very strong for 10-15 seconds. The noise generated by aircraft passing by frequently, at a few minutes intervals, may be rather disturbing even if, in terms of the time of assessment, it is below the permitted limit value.

The obvious links between air transport and tourism must also be taken into account. Maintaining and developing tourism, a dynamically growing source of substantial revenues for the national economy, is in the interest of the public, consequently, citizens living in certain areas may bear an obligation to tolerate increased noise burdens. The Parliamentary Commissioner arrived at a similar conclusion in the course of the investigation of a complaint against tourist buses passing frequently along the road leading to the Citadel in Buda.

Although the domestic aircraft fleet has become more up-to-date during recent years, the noise generated by aircraft cannot be eliminated entirely. The location of the International Airport at Ferihegy is a fact, so the best possible solution has to be sought for in relation to the existing conditions and circumstances.

The Constitution declares the right to ownership, along with the rights to free movement and to freely choose the place of stay, therefore, the legislator and the authority should strive, with respect to both fundamental rights, to ensure that exercising one right by some people can complicate the exercising of the other by other people only to the smallest possible degree. As has been indicated by the practice of the Constitutional Court, restriction of the operation of a fundamental right is not in line with the Constitution simply because it is required for the exercising and protecting of another basic right and freedom, unless the restriction meets the requirements of proportionality. In the case on hand the statutory restriction on the number of flights during the night hours is aimed to ensure the required proportionality.

The operator and the competent authority are definitely obliged to ensure freedom from disturbance for the people living in areas affected by air transport, at least during the night. This is aimed to be ensured by the regulation providing that up to 8% of the average daily traffic may take place between 10.00 p.m. and 6.00 a.m. and not more than 1% of the average daily traffic may take place between midnight and 5.00 a.m. It is not clear from the regulation whether the 8% and 1% limit has to be observed on a weekly, monthly or annual level. During the busier summer months daytime traffic is a lot more intensive than in winter, therefore the number of flights during the night hours may also be higher. Differences may also be encountered in the levels of traffic on different days of the week.

In designating the air corridors attention has to be paid to making sure that aircraft cause the lowest possible level of disturbance. Since the organisation and control of air transport takes special expertise, the Parliamentary Commissioner could initiate the investigation only of whether it is possible to designate an air corridor meeting other requirements, where air transport would cause less disturbance than that experienced today. The Commissioner considered it necessary that the Civil Aviation Authority should monitor compliance with the statutory restriction of the level of traffic overnight, and that the Authority should initiate modifications or adjustments to ensure observance of the restriction.

Having received the response of the aviation authority the Parliamentary Commissioner turned to the Minister of Economic Affairs and Transport, asking for information on the standpoint of the Minister and on actions planned to be taken by the Minister.

In his response the Minister stated that modifying the air space structure was quite an urgent task and that any delay would have threatened the safety of air transport. At the same time, based on a request by the Minister two expert teams were launched to search for ways to reduce the noise burdens of certain areas. The Commissioner also considered it necessary to explore possible ways to re-direct part of the passenger and cargo traffic of Budapest Ferihegy International Airport, in view of the fact that airports are available at a variety of locations across the territory of Hungary. Besides reducing traffic at Ferihegy, this would also have a positive impact on the development of the infrastructure of the regions concerned and could also create new jobs.

3.5.
Construction of shopping centre in the inner city

A number of civil organisations submitted complaints to the Parliamentary Commissioner for Civil Rights because the environmental authority had issued permit for the ‘Malom Centre’ shopping and entertainment centre in the town of Kecskemét, because of the issuance of demolition and construction permit for the centre and other official procedures relating to the project as well as owing to the authorities’ failure to recognise their client status.

In his inquiry the ombudsman contacted, among others, the National Housing and Construction Agency (Hungarian abbreviation: OLÉH), the Ministry of Environment Protection and Water Management (KöViM), the National Office of Cultural Heritage (KÖH) and the Chief Prosecutor. He found a variety of irregularities – some more some less substantial – in all of the procedures covered by his investigations. The largest number of irregularities were found in the procedure in which the construction permit was issued, therefore he asked the town clerk to have the construction stopped and then announce that he

cannot participate in the procedure for he cannot be expected to form an independent view of the case.

The construction of the shopping and entertainment centre that has been in progress since year 2002 has become an ill-famed case during the recent two and a half years: the construction of a building of almost 50,000 m^2 in floor area and 35 metres in height was started at a distance of hardly a hundred meters from the Great Church building which is a historical monument. The shopping and entertainment centre building would dominate and overwhelm the cityscape. In view of the advanced state of the project the findings of the investigations started on the basis of the complaints submitted by civil organisations were aimed preventing the future occurrence of the procedures objected to, rather than at influencing the future progress of the case on hand.

The necessity for such an approach is also confirmed by the fact that an increasing number of complaints received from other municipalities are indicative of a trend whereby the so-called 'plaza architecture' is moving into city centres and densely populated residential areas or even historical districts of towns from the outskirts.

According to the Commissioner the maintenance, rehabilitation and passing down to future generations of historical cityscapes, as parts of the national heritage and non-renewable resources (in contrast to opportunistic and always short term business interests), assumes a responsible value judgement and choice on the part of local and central civil servants and on the part of authorities established and operated in order to provide for the institutionalised protection of the man-made environment. The practice where neither professional and civil organisations, nor any high profile representative of the relevant disciplines or citizens living in the immediate environment of a project can have a say in the processes in the man-made environment around them, is not in line with, inter alia, the spirit and wording of the Convention for the Protection of the Architectural Heritage of Europe adopted by the Council of Europe – which has also been signed by Hungary.

In his investigations the ombudsman found it important to clarify some fundamental questions such as who qualifies as client in the case of protecting the man-made environment in relation to the construction of a project that would substantially alter the cityscape; who may act in order to protect – instead of his neighbour's rights provided for in the Civil Code – the environment of his day-to-day life, sense of identity, material and intellectual heritage and to combat 'visual environment pollution'.

The Commissioner found that a number of private individuals and civil organisations established for the protection of the interests of environment protection, who raised their voice against the construction of Malom Centre, were entitled to participate as clients in the process of the issuance of the construction permit, which was simply denied by the town clerk. Reviewing and deciding on the appeal lodged by the 'community representing public places' was the only case where the town clerk reviewed whether the complainant had

a right to proceed as client (i.e. party in the case). In this case however, the town clerk did not recognise the fact that a ten-storey building of almost 50,000 m^2 floor area will affect not only the rights of those living in its immediate neighbourhood but, through the traffic generated by deliveries and customers – it will also affect the rights and rightful interests of people living at larger distances from the centre, involving even the whole of the population of the town from certain perspectives.

The ombudsman pointed out that the building and its intended operation has a direct and substantial impact on the rights and rightful interests of people living on the other side of the streets around it. The implementation of such a project will thoroughly change the traffic, air pollution and noise pollution in the district concerned, as a consequence of which the living conditions of the local residents and the value of their property will also be changed. Furthermore, the centre – through substantially altering the cityscape – will also have an impact on those living at a distance from the shopping and entertainment centre, including future generations as well. Therefore, the civil organisations and individuals who submitted complaints are entitled to being dealt with as clients (parties) in the case of the construction project, both according to relevant legal regulations and to decisions made in the past by the Supreme Court.

The Commissioner also found that in the process of assessing and deciding on the appeals submitted with respect to Malom Centre no answer was ever given to substantive objections and complaints concerning the construction project, i.e. none of the appeals was evaluated in the merits at all, they were rejected on the grounds of format deficiencies, and these rejections were unjustified in the majority of cases. Most of the permits issued in this case were validated on the day of their issuance.

In the general findings of the investigation – in relation to the deficiencies of legal regulation the ombudsman pointed out that particularly in the case of large construction projects in city centres the existing set of legal regulations does not provide a sufficient guarantee for citizens to effectively exercise their rights to a healthy environment. Improprieties relating to constitutional rights also originate from unclear provisions contained in the legal regulations and from the loopholes and deficiencies in the legal regulation of the case on hand. Although legal regulations could make it possible to have lawful procedures both in terms of ‘substance’ and ‘wording’, yet they do not exclude the opposite. The relevant legal regulations do not constitute a ‘single closed system’ they do not harmonise or create a balance between the rights of those living in the man-made environment and the freedom of those intending to carry out fundamental changes in such environments. The large number of ‘discretionary powers’ and frame norms that can be interpreted in a variety of ways, can, in extreme cases, expose the participating authorities and the entire population of a municipality to a single decision making. The effective laws do not guarantee the functioning of (objective) controls over decision makers committed to projects (and so

subjectively biased) by national authorities or by representatives of the civil society.

The ombudsman proposed: that the Government should make sure that special rules applicable on a mandatory basis across the territory of the Republic of Hungary concerning the location and construction of facilities attracting significant traffic, including, in particular, shopping centres, be introduced in the existing, relevant and effective legal regulations; that the Government should make sure that the rules constitute a single harmonised set of regulations over the whole of the area affected by a given project including the entirety of all of the expected effects. In view of the complexity and the social and economic significance of the problem, the ombudsman asked the Prime Minister to set up an inter-departmental committee to ensure institutionalised coordination of the work of the competent line ministries. For the request of the ombudsman the County Prosecutor's Office ordered a criminal investigation on account of the well-founded suspicion of the criminal act of abuse of official powers.

With reference to violation of personality rights the investor submitted a claim against the ombudsman for a compensation of HUF 100 million.

The Prime Minister did not consider it necessary to set up an inter-departmental committee, because in his view the necessary conclusions could be drawn from the case and the occurrence of similar events in the future can be guaranteed by legislation and by proper application of the existing legal regulations. He said that 'unfortunately, the Aarhus Convention promulgated by Act LXXX of 2001, which provides for access to information concerning environmental matters, for the participation of the public in the decision making process and for the provision of recourse to legal remedy for environmental civil organisations, categorising them as clients in such cases, was not applied in this case'.

The minister without portfolio in charge of regional development and catching-up promised that in the course of his activities relating to the supervision of the OLÉH he would utilise the findings and recommendations of the Commissioner's report. He gave no substantive response to the initiative to eliminate deficiencies in the law; therefore the Commissioner maintained his proposal in unchanged form.

The Minister of Environment Protection and Water Management also notified the Commissioner that the lessons drawn from the case were intended to be taken into account in the amendment to the relevant decrees (including the one on the procedure of issuing the single standard environment usage licence). The report was forwarded to the Chief Inspectorate along with an instruction that the Chief Inspectorate should notify the local inspectorates about the findings of the environmental procedure.

The Mayor of the town notified the commissioner that the body of representatives rejected the proposal concerning a disciplinary procedure against the town clerk. On request of the general assembly the Mayor also sent

the comments concerning the reports, to the Commissioner. In response to objections to his proposal concerning the starting of a procedure the ombudsman said that the procedural legitimacy of the Parliamentary Commissioner cannot be questioned by anybody by saying that he had no competence to launch an investigation on account of a lack of constitutional impropriety. The existence or lack of an impropriety can be established exclusively by the investigation carried out by the Commissioner. The Commissioner maintained his findings and comments concerning constitutional improprieties and the status of the organisations concerned as clients in the case on hand.

The report was sent by the ombudsman to several organisations involved in the case as lead information, without any accompanying recommendation:

The Speaker of Parliament forwarded the report to the Chairman of the Local governmental Committee of the Parliament. The Environmental Committee heard the Parliamentary Commissioner and stated that the 'investigations underlying the report are indicative of serious potential violations of the law in the course of the state administration procedure, in particular in respect of the issuance of the environmental permit'. For this reason, the Committee asked the Chief Prosecutor to conduct investigation to explore illegal acts assumed to have been committed in the case on hand. The Committee also asked the Chief Prosecutor and the Parliamentary Commissioner to report to the Committee about the actions taken and the results of those actions, in their hearing next year, and to make proposals concerning amendments to legislation as they may consider necessary.

The chair of the Chamber of Hungarian Architects welcomed the report, particularly its 'perspective based on a European mentality'. He stated that 'we are convinced that this standpoint and the consistent realisation of the recommendations contained in it will prevent future value destroying construction projects under the pretence of 'development''.

The Chair of the Hungarian National Committee of the International Council on Monuments and Sites (ICOMOS) stated that 'Malom Centre is an example for cases where the wider effects of an investment project can seriously affect smaller or larger communities, municipalities or even parts of the country' and therefore 'it is not possible to assign the case of a construction project promoted so violently, to the scope of interests of a few lobby groups and some adjacent site owners ... the findings of the report are fully in line with the principles of the protection of historical monuments'.

A number of civil organisations made a joint submission to the Speaker and some Committees of Parliament: 'We fully agree with the findings and conclusions of the report, not only because we have been monitoring the events relating to Malom Centre but also because in the course of our activities we found similar developments in relation to other investment projects as well. ... these developments – unless impeded – are threatening the very existence of the rule of law.'

The inquiry of the case of the Malom Centre was conclusively closed by the Commissioner by declaring that he would only notify the Committees and the plenum of Parliament in his annual report. He would handle his findings concerning the deficiencies of legal regulations and the position statements received in response to them together with complaints received with respect to similar cases, and the common lessons drawn from them and his general findings, conclusions and proposals concerning legislation will be communicated to the Parliament, to the Government and the line ministers and will also be included in his annual report. (It should be noted that the investor firm submitted a statement of claim for the payment of compensation of some EUR 400,000 against the ombudsman on account of violation of personality rights. The text of this statement of claim is almost precisely identical with the comments made by the County Assembly in response to the contents of the report produced by the Commissioner.)

3.6. Imposing obligation to refund social benefits without substantive review

The district government granted caregiver's fee to a complainant back in 2001 when the complainant had neither officially registered place of residence, nor registered place of stay. The benefit was terminated by the local government with effect from 31 August 2004, and they imposed an obligation on the complainant to refund the benefit and interests thereon, for the period beginning on 1 February 2003. According to the explanation attached to the decision the complainant used the benefit without proper authorization and in a *mala fide* manner, since from 30 January 2003 the complainant had a (registered) place of residence in another municipality, but this had not been notified to the district government. According to the complainant the complainant's family had been living on habitually in the district concerned and the complainant's sibling permitted the complainant by way of a favour, to have themselves registered as living in the same household because beforehand they had no registered place of residence. Furthermore, from 15 December 2003 they had a registered place of stay in Budapest as well.

According to the act on social benefits, applications for cash-benefits provided on the basis of means testing, such as the caregiver's fee, have to be submitted to the local government of the municipality in which the place of residence of the application is. Accordingly, the act provides for a special competency, and the place of stay determines competency only in cases of homeless people who do not have registered places of residence. The act on the registration of the citizens' personal data and addresses of residence imposes an obligation on citizens to report their address of residence both in respect of the place of residence and of the place of stay, primarily in order to

make it possible to find people's whereabouts. One establishes an address of residence usually with the aim of living there but there is no regulation that would oblige people to actually live at their registered places of residence. The authority only acknowledges the notification of the address of residence and does not check – and cannot check – any intent underlying the notification of the address. In the course of official procedures (e.g. declaration of competency) the data contained in the register of addresses of residence are observed. Accordingly, the district government correctly established that from the point in time from which the complainant had a registered address of residence in another municipality, the local government to which the registered address belonged had the competence to carry out the procedure of establishing and disbursing the caregiver's fee. Consequently, the district government acted lawfully when – having learned of the change of competence – it terminated the payment of the caregiver's fee.

According to the act on social benefits however, only a person who used a benefit without proper authorization and on a *mala fide* basis, can be obliged to refund a social benefit disbursed in cash. During the period in question the complainant carried out the care giving activities continuously and with due care, living habitually in the district all along the period in question – regarding it as the complainant's home – and did not submit an application for caregiver's fee in any other municipality. Accordingly, the Parliamentary Commissioner holds that the local government caused an impropriety relating to social security and to fair procedures that can be derived from the rule of law, by imposing an obligation on the complainant to refund the aid referring exclusively to the complainant's failure to notify the change of address of residence without actually exploring the question of whether the social benefit was used on a *mala fide* basis.

The Parliamentary Commissioner proposed that the body of representatives of the local government should review their decision imposing an obligation on the complainant to refund the amounts in question. The body of representatives discussed the case again but they did not change their decision. The Parliamentary Commissioner acknowledged the decision.

3.7. Introduction of requirement to have GCSE for the performance of the work of village grave-diggers

A number of complaints were submitted to the Parliamentary Commissioner in view of which the Commissioner found it necessary to start an investigation relating to the application of the statutory provisions on the minimum professional conditions for burial services. The submissions complained about the introduction of the need for the presentation of GCSE as a pre-requisite for

taking the vocational examination, but obtaining the GCSE turned out to be a highly difficult for elderly complainants working as village grave-diggers.

With reference to the large number of complaints received with respect to the decree determining minimum occupational requirements and criteria, the Commissioner asked the Minister of the Interior to explain her position. He proposed that the introduction in the relevant legislative provision of a right to proceed on the basis of equity to be considered in the interest of persons having carried out burial services in certain small villages, with substantial knowledge of local customs, which, if certain specific and conjunctive conditions are met, grant exemption from the obligation to have completed secondary education.

The Minister of the Interior explained that she regarded the proposed exemption from the obligation to have GCSE as a step backward from a professional aspect and she rejected the idea of introducing a power of equity on the basis of equity arguing that in a longer run this would hinder the efforts aiming at improving the human resources used in the provision of services.

The Commissioner reviewed the basic principle prohibiting negative discrimination and the possibility of exercising the right to free choice of work and economic undertaking, heavily relying on the contents of earlier decisions made by the Constitutional Court on similar issues. The Parliamentary Commissioner found that the existing effective legal regulations do offer solutions that grant exemption to certain groups of persons from the obligation to pass examinations or part examinations required for the starting or continuing a given occupation. These solutions offer preferential terms or grant exemption from having to pass certain examinations, for groups of persons past a certain age or for those having substantial practical experience in their occupations. With reference to this, the Commissioner considered that it would be justified on the part of the legislator to permit burial service providers who are proven to have been engaged in such activities for years, and who – on account of their advanced age – cannot be expected to start studies in secondary education and to pass the examination of secondary education, to take the vocational examination even without GCSE. The Commissioner held that regulation on the introduction of additional training requirements for working in a given occupation or trade will – if it introduces restrictions – result in improprieties with respect to the right of a group of people to continue working in their occupations and to the free choice of work and occupation. The Commissioner asked the Minister of the Interior to consider the possibilities of amending the contested statutory provision.

The Minister of the Interior accepted the arguments of the Commissioner and professional coordination concerning the requested amendment is still in progress.

3.8.
Discrimination in the course of publishing names of debtors

The Parliamentary Commissioner launched an investigation *ex officio* to see whether the procedures of the Enterprise commissioned to operate the Széchenyi Card Credit Facility were in line with the constitutional requirements, when it published the names, registered seats, scopes of operations and amounts of debts of two entrepreneurs on a half-page notice in country papers, highlighting them from among hundreds of other entrepreneurs who also failed to fulfil their obligations originating from the Széchenyi Card loan agreement.

In the first phase of the inquiry the Commissioner reviewed whether his scope of investigation competence covers the procedures of the Enterprise. In the course of their consistent practices the Parliamentary Commissioners regard organisations that perform state or local governmental duties and do not qualify as authorities, to be functioning as organ performing public service in cases where the applicant cannot choose the service provider for the provision of the service the applicant needs, since such services are offered only by a limited number of organisations or only one organisation.

In this respect the Commissioner established that the Enterprise, as an organisation proceeding as a representative of the Ministry of Economic Affairs and Transport, is in a monopoly position in disbursing the loan concerned. Banks may conclude credit contracts only on the basis of loan applications submitted to the Enterprise with enterprises that have been pre-qualified and accepted by the Enterprise. Hitelgarancia Rt. provides joint and several (cash) surety for such credits which is also a proof of the role of the state in securing the facility, i.e. the performance of a public task.

One pre-requisite for participation in the credit facility was that in applying for the financial assistance the applicant should make a written declaration consenting to the publication of the fact of its debt, if certain conditions are met. The Enterprise actually used this instrument, because it keeps a list entitled ‘black list of non-performing customers’ containing the names of the customers that have accumulated debts, on the Széchenyi Card Credit Facility home page. The two debtors whose names were published in half-page notices in papers were selected at random from among these customers.

In his report the Parliamentary Commissioner stated that as a consequence of equality and comparative function of the right to human dignity each individual has to be treated as one of equal dignity with others’, and no unjustified and unreasonable difference must be made between individuals or between groups of individuals. This principle is also stated in the Constitution as the prohibition of negative discrimination. Making difference between subjects of law of identical statuses is only permitted if such discrimination ‘is justified by a constitutional reason of a sufficient weight’ or ‘there is a reason for it that is reasonable according to objective consideration’. In the case on hand however,

there was no reason that would have supported the observed discrimination. Selecting the debtors named in the press from among a homogeneous group of debtors was aimed solely to prompt others to pay. This treatment however, is injurious and humiliating from the aspect of the two debtors concerned, violating their human dignity. It is contrary to the principle of the prohibition of discrimination if the lender chooses two of the hundreds of borrowers in its register and discloses their names, registered seats, scopes of operations and the amounts of their debts, in an advertisement in the paper.

The Parliamentary Commissioner called on the decision making body of the Enterprise to review its discriminatory practice in response to which the CEO notified the Parliamentary Commissioner that his recommendations had been taken into account in the course of the finalisation of the text of the 'Regulation of procedures of publications and drawing rules'.

3.9.
Discrimination in getting social rented homes

The Parliamentary Commissioner for Civil Rights and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities conducted a joint investigation concerning a complaint submitted by two Roma legal aid organisations. The complainants claimed that several Budapest district governments excluded, in their local housing decrees, the persons registered as squatters from accessing social rented homes, by refusing even to take over their applications for rented homes.

In view of the findings of the investigation the Parliamentary Commissioners turned to the Minister of the Interior in a joint report, asking for action to be taken. They referred to resolutions of the Constitutional Court in which the Constitutional Court categorised as unconstitutional and annulled such exclusive provisions contained in local housing decrees of three Budapest district governments.

The Commissioners asked the Minister of the Interior to call on the county public administration offices to review, across Hungary, the legality of the housing decrees of local governments, and to take actions in view of the findings of their investigations, to ensure that local governments apply only conditions prescribed by law (e.g. conditions relating to income, wealth, social and family circumstances) to the letting of social homes.

In the preparation of the report the Parliamentary Commissioner for Civil Rights noticed that several constitutional rights are confronted in this case. In exercise of their ownership rights the local governments were trying to reduce the number of cases where dwellings are occupied by squatters unlawfully, through restricting their possibilities for submitting applications for rented homes, as a way of prompting them to act in compliance with the law. At the same time, a home is a social requirement where the right to submit an

application for renting a home cannot depend on whether anyone in the family concerned broke any rule or committed minor offences during the recent years.

Such provisions in decrees withdraw the right and possibility of those in charge of assessing and deciding on applications – primarily local governmental committees – to review the details of such cases and decide on them at their discretion. The Commissioner found that the local government creates an impropriety relating to social security if in its decree it imposes a condition on letting homes in its ownership – in addition to the criteria specified by law as pre-conditions for letting such dwellings – for which it has no lawful authorisation.

The Minister of the Interior accepted the proposal and called on the public administration offices to carry out a nationwide review, but she did not report on the findings of the review despite a written request submitted by the Parliamentary Commissioner for the Rights of National and Ethnic Minorities. The deputy state secretary of the Ministry of the Interior in charge of local governmental affairs notified the Commissioners in November 2005 that they had initiated an amendment to the act on certain rules governing the rental of dwellings and premises and their alienation, in order to provide for a clear solution to outstanding issues. The new Act that enters into force on 31 March 2006 however, does not contain any amendment concerning the problems described in this point.

3.10.
Autonomy of the local government in determining the master plan for the development of the municipality

The complainants claimed that despite their requests the local government refused to modify its master plan and did not categorise a piece of woodland as an area that can be built up, despite the fact that 'different type of utilisation' of the adjacent real estates 'is permitted'.

The Parliamentary Commissioner launched an investigation to explore whether the municipal government fulfilled its obligation concerning the development of the municipality, whether its procedures or failure to act resulted in impropriety concerning citizens' rights, and in the course of his inquiry he asked the town clerk of the municipality concerned, for information. The Commissioner found that at the time of acquiring ownership in 1993 and 1996 – and ever since then, on a permanent basis – the pieces of land of the complainants belonged to the category of 'utilisation as woodlands', without any right concerning construction on those sites. The re-categorisation was applied for in order to construct camp sites, health centre, old people's home and parking lots. The municipal government made its decision in view of the standpoints expressed by the forestry and environment protection authorities and these authorities rejected the application for permit for the use of the

woodland concerned as a building site. The mayor notified the complainants – attaching the standpoints of the authorities concerned – declaring that on the basis of the standpoints of the competent authorities the local government would not initiate modification of the master plan concerning these pieces of land. Possibility for legal remedy was offered in relation to the decisions of the authorities, and the complainants availed themselves of these possibilities.

The Parliamentary Commissioner did not review whether the categorisation of the area adjacent to the properties of the complainants as a construction site at an earlier stage in the master plan had been indispensable for the construction of the medicinal spa. This was taken as part of the existing circumstances in reviewing the complaint, assuming that the site had been chosen based on professional considerations in order to adjust that project to the hydro-geological conditions and the characteristics of the municipality as a whole. This however, cannot mean, in the procedures of municipal structure development, in environment protection and nature conservation or in that of the protection of woodlands, that if a piece of land on which construction used to be prohibited but later on it was permitted, then construction should be permitted on all of the other pieces of land nearby. Accordingly, no negative discrimination can be established to have taken place in this case.

In the development of the structure of a municipality the owners of sites of the same size in a given street, or the owners of sites in a block of sites equally affected by the opening of a street, are to be considered to be 'in the same situation' but this does not apply to those having sites in the whole of the internal administrative area or the outskirts of a municipality.

The Parliamentary Commissioners definitely hold that the preservation of the natural environment and green areas is essential for these are for the benefit of all people living today and of future generations. For this reason the Commissioner agreed with the professional standpoints of the forestry and environmental authority, i.e. with the preservation of all forests remaining after the designation of the area of the spa, as woodlands.

The Parliamentary Commissioner has already explained with respect to several cases that: 'Constitutional guarantees declare the inviolability of existing property (and the related rights). Ownership may be restricted, or taken away in exchange for compensation, only by law and only to the extent and degree to which it is indispensable in the interest of the public. The state or a local government however, bears no obligation to realise value increase of a given piece of real estate by extending the rights relating to the real estate (e.g. accessibility, construction permit etc.).'

Accordingly, the Commissioner declared that the complainants suffered no violation in their constitutional rights. The local government – as an organisation performing public services – fulfilled its obligation. Since the acquisition of the pieces of land concerned the rights of the complainants relating to those pieces of land have not been reduced and they have not been diminished by the municipal structural development plan, therefore, the Parliamentary

Commissioner rejected the complaint. (A similar standpoint was taken by the Parliamentary Commissioner in another case where the complainant claimed that the local government failed to modify in the regulation plan and in the local construction code, on his request, the categorisation of a piece of woodland in the floodplain of the river and did not categorise it as a piece of land – in the floodplain – on which construction is permitted.)

3.11. Necessity of establishing a Disaster Protection Fund to supplement voluntary property insurance and to enable compensation for damage caused by natural disasters

Several complaints were received last year again, from areas hit by natural disasters, claiming differences between the quantified amounts of the damage caused by the event and the amounts or rates of support for reconstruction. In the majority of cases the complainants claimed that the amount of support received did not cover the costs of reconstruction, or even that they received no support for reconstruction at all. The Parliamentary Commissioners have noted in several reports that there is no specific piece of legislation to go by with respect to cases of citizens who have suffered such damage that would clearly specify in each case with full certainty, the conditions under which citizens are entitled to aid in the wake of such a disaster. The proposal for drafting legislation on this was accepted by the Government but no comprehensive legal regulation has been adopted yet. On the basis of the proposals concerning legislation the Government has, on several occasions, decided by issuing government decrees, on alleviating damage and on carrying out the necessary procedures to enable reconstruction of properties damaged by specific natural disasters. These pieces of legislation clearly defined the groups of recipients and the conditions of access to the support as well as the relevant duties of the local governments concerned.

In the course of an onsite inspection the Parliamentary Commissioner repeatedly established how important and crucial a comprehensive set of rules is in the course of the procedures of local governments and disaster protection organisations to be applied in the wake of force majeure events, in the assessments of applications for supports to the alleviation of damage to be carried out on the basis of the inspections. Only proceedings carried out and decisions made in line with such regulations can result in constitutional operation and this is the only way to guarantee that citizens can exercise their rights to legal remedy. The inspection reports produced with respect to previous complaints concerning the alleviation of damage, received from the county concerned, were sent by the Commissioner to the disaster protection directorate, notifying it about his initiatives concerning the adoption of legislation

relating to damage caused by inland water, floods and other natural and industrial disasters as well as about the establishment of a Disaster Protection Fund.

Despite the provision for the availability of property insurance arrangements based predominantly on voluntary participation (e.g. home insurance, holiday resort insurance, various types of agricultural insurance, CASCO insurance, a variety of mandatory insurances), these traditional – and highly important – legal institutions have proven to be inadequate in the cases of the biggest and most destructive natural disasters. This is why it became necessary to create a Disaster Protection Fund to supplement these arrangements. A technique for covering damage is also necessitated by the occurrence of industrial disasters as well (e.g. as a consequence of the explosion of a firecracker-factory a number of houses collapsed). In the wake of torrential rains landslides and mud avalanches have caused serious damage, a loess-wall collapsed, disasters of similar gravity have occurred in the wake of explosions or ignition of hazardous consignments on road or rail, or in the wake of other types of transport accidents, causing damage in human life and property. Climate change is a special serious factor that forecasts the danger of similar grave environmental disasters, and such a Fund seems to be suitable for at least partial ex-post coverage of the resulting damage. It may also be used for financing preventive measures.

In year 2005 again, the Government decided on the year's disaster protection tasks in a resolution ordering that a proposal be produced for the Government with the involvement of the competent ministries concerning the planning system of the disaster protection sub-headings of the budget chapters. The ministries concerned and organisations of nationwide competency, the county protection committees and organisations were ordered to participate, to the necessary extent in a variety of international nuclear disaster prevention exercises. The Government ordered that under coordination by the Minister of the Interior the ministries concerned and organisations of nationwide competency should participate in the establishment of the National Disaster Forecasting Systems and the EU's disaster forecasting and assistance organisations and that the Hungarian Academy of Sciences be invited to participate in these activities.

3.12.
Negative experience in two in-patient hostels

3.12.1.

The Parliamentary Commissioner and his colleagues carried out an investigation in May 2005 in a county which involved an onsite inspection of an in-patient hostel.

The Commissioner found that the issue of the area served by the institution was not clearly defined. The inspection found that no porter service or any other controlling system had been set up at the institution, one of the inmates spent time at the porter's booth during daytime, in exchange for a fee. Outside the main entrance there is a busy road which seemed somewhat dangerous for pedestrians. No problem had arisen from this until the time of the inspection, yet a need for the creation of a pedestrian crossing point was expressed.

The inmates receiving care and treatment in the former mansion building were accommodated in 8-10-12 bed rooms. As a consequence of the architectural features of the building the rooms in the various wings of the mansion opened from one another, thus they could be accessed only through other rooms. The inspection found that as a consequence of its architectural features the building was not suitable for its current function; the rooms accommodating people were extremely crowded.

As a result of the extra height of the rooms the light fixtures could not properly light the rooms, a number of rooms had only windows opening onto the corridor as a result of which these rooms were dimly lit even in sunshine – without any natural light coming in – and these rooms could be aired only through the corridor. The furniture and equipment, fixtures and other circumstances required for normal daily life only partly met the requirements arising from the age, health status and mobility of the inmates. The wards of the sick and ill were also accommodated 8-10 beds apiece, with a total of 50 patients, also under crowded conditions. No nurse call bells had been installed.

The separation of toilets and bathrooms by gender was not quite clear either. Soap, toilet paper, towels were missing from a number of these rooms. No sufficient number of showers had been installed and the existing ones were not separated by gender. The existing shower compartments had high rims and no partition curtains had been provided.

The size of the dining room was not sufficient for the number of inmates. The presence of alcoholics in the hostel was a source of problems; many conflicts arose from this in day-to-day coexistence. Drunken inmates are aggressive and intimidate other inmates. The primary source of the problem is that there is no separate specialised institution in the county dedicated to the treatment of addicts.

In the course of his investigations the Commissioner often experienced the lack of in-patient institutions devoted to addicts, particularly to alcoholics, to provide them with personal care. The Commissioner pointed out that the introduction of specialised institutional care for such individuals is also necessary and justified on a nationwide level: this would ease the crowdedness of the existing in-patient institutions and the conflicts resulting from the accommodation of addicts and other patients, and at the same time it would enable an improvement of the quality standards of the care provided in the institutions concerned.

The institution had no rooms for joint activities, of sizes corresponding to the number of inmates. Nor did the hostel have a room for receiving visitors or one for providing mental treatment. The mental-hygienic group consisted only of three (male) nurses who were also carrying out tasks relating to the handling of cash of the inmates, buying prescription drugs, making grocery purchases, performing the necessary administrative tasks relating to these functions as well as administrative duties relating to social/welfare matters. The small number of the individuals in this group has been a problem for years, because as a result of this they cannot properly carry out the prescribed mental-hygienic tasks. Another consequence of this is that the care-giving plans had been prepared only partially. According to the findings of the investigation the current operation of the group also raises concerns. The investigation found that the personal and specialised nursing resources of the hostel are not sufficient either: the number of (male) nurses is small; they do not employ a dietician or an employment organiser. Besides the employees with special medical/nursing and related skills 15 strong technical staff provides for the smooth running of the institution, only 6 persons keep the premises clean which is rather insufficient in comparison to the number of inmates.

Despite ongoing efforts and the renovations and reconstructions of various scales carried out using the available meagre financial resources, the building is, according to the findings of the investigation, not suitable for the performance of tasks of a home for old people and the accommodation of addicts in the same premises takes away the energies of the specialised employees from taking care of the elderly.

Based on his investigation the Parliamentary Commissioner found that the deficiencies found at the hostel violate the rights of the inmates of the institution to social security, to the highest possible level of physical and spiritual health, to life and human dignity. The Parliamentary Commissioner called on the Minister of Youth, Family, Social Affairs and Equal Opportunities to review the situation that has evolved in relation to taking care of addicts (with a particular view to alcoholics), and as a result of her review, to take the necessary actions in order to resolve the deficiencies of specialised care that is characteristic of a number of counties in Hungary. In order to remedy other improprieties found in the course of the inspection the Commissioner asked the chairman of the county government' assembly to consider replacing the mansion building. In relation to the existing building the Parliamentary Commissioner called on the organisation in charge of running the institution and the head of the institution to take the necessary actions. Furthermore, the Parliamentary Commissioner asked the mayor of the municipality concerned to consult the organisations concerned and to review the possibility of marking a pedestrian crossing point on the road in front of the building.

The individuals concerned agreed with the report and regular reports are being received by the Parliamentary Commissioner concerning the actions taken.

3.12.2.

A complaint of a woman living in an old people's home was delivered to the Parliamentary Commissioner by a Member of Parliament. The complaint was about an increase of the fee payable for the services provided by the hostel. The Commissioner launched an investigation of the case, asking the head of the public administration office and the chief clerk of the county government for information and carrying out a site inspection at the hostel.

In his investigation the Parliamentary Commissioner established that the rate of the increase of the fee payable by the inmates did not exceed the percentage rate specified in the act on social services, therefore, the raising of the fees caused no impropriety. In the course of his site inspection however, the Parliamentary Commissioner established that the design of the residential building of the institution did not meet the requirements of providing access for the disabled.

The proportion of the qualifications of the employees with relevant skills dealing directly with the inmates was in line at the institution with the requirements prescribed in the minister's decree concerning the technical/professional tasks and the conditions of the operation of social institutions providing personal care. The vocational staff was, however, insufficient in that the institution employed no dietician, kinesitherapist, mental-hygienic specialist or employment organiser.

The number of toilets and bathrooms was sufficient, but their conditions raised concerns. The walls of the showers are mouldy; there were no bathing chairs for elderly inmates with difficulties of movement (a plastic garden chair was put in the shower booth instead). No shower curtains had been hanged on the partitions which violates the constitutional rights of the inmates.

There were no nurse call bells in the wards, for instance, the nurses take care of a blind elderly woman living upstairs in the building alone, by going upstairs once an hour to check how she is.

Other deficiencies of the institution include the lack of a room for receiving visitors, one for mental hygienic activities, there are no mental hygienic activities and there is no medical room and separation room.

The mode of the storage of medicines is not in line with the requirements laid out in the relevant regulations either, for the medicines are stored in a box on an open shelf in the room of the head nurse, instead of a place under lock and key.

Although an interest representation forum has been established at the institution, it is not functioning, which is a deficiency resulting in improprieties relating to the constitutional rights of the inmates.

On the whole, the inspection found that the conditions have improved at the institution in comparison to those found by the previous inspection carried out by the ombudsman, which is explained by the attention paid and the substantial financial contribution provided by the organisation in charge of the operation of the institution and the technical/professional efforts of the Hungarian Red Cross organisation running the institution.

In order to remedy the identified constitutional improprieties the Commissioner asked the organisation in charge of the operation of the institution to make the necessary arrangements to provide for the missing specialised staff, for the installation of a nurse call system, for the proper storage of the medicines and in view of the decline in the number of inmates, for the proper conversion or creation of the functional rooms now missing, for ensuring the proper conditions of the toilets and bathrooms and for their equipment as required for the elderly and finally for the proper operation of the interest representing forum.

The deadline for a response has not expired as yet.

3.13.
Exclusion from a night shelter

The complainant turned to the Parliamentary Commissioner because of an injury suffered at a night shelter, claiming that he was banned from the shelter and his legal relationship with the institution was terminated for a period of five years owing to a misunderstanding, for the clarification of which he is given no opportunity. He claimed that on one occasion when waiting to be let in the shelter there was a scuffle among those standing in line and when the social worker appeared at the site the person wrestling with him happened to lie on the ground, as a consequence of which the complainant was not permitted by the social worker to enter the shelter. Later he learned from his acquaintances using the services of the shelter that he was banned for five years but he had received no decision or written notice about this at all. The complainant also reported that the first letter received in response to his submission to the Parliamentary Commissioner was opened without his knowledge.

The Parliamentary Commissioner asked the head of the institution for information but that report differed from the claims of the complainant. Since the Commissioner found that clarifying the contradictions is in no way part of his scope of competence, he restricted the findings of his inspection to reviewing the regulations underlying the banning of the complainant from the shelter.

He reviewed the provision of the internal regulations of the operation of the hostel according to which it is possible to ban persons from the group of those having legal relationships with the institution for a definite period determined by the employees of the institution. According to the internal regulations of the hostel complaint may be submitted to the organisation in charge of the operation of the institution against an action relating to legal relationship with the institution within 8 days, by the person whose social service provision has been suspended. The complainant failed to do so therefore the Commissioner established that he had no competence in respect to inspecting the actual injury of the complainant.

The internal regulations of the institution contained no precise rules concerning the duration or the maximum duration of any suspension of the legal relationship with the institution. The power of decision making on this issue is delegated by the institution to the scope of competence of the 'Team' meeting but no provisions were found concerning the possible members of this 'Team' or the frequency of its meetings or any rules on its proceedings. The Commissioner found the provision in the internal regulations concerning the duration of suspension to be contradictory, but he did not find it contradictory enough to establish an impropriety relating to any constitutional right, because, on the one hand, there was a possibility for legal remedy against the decisions and on the other hand, the complainant whose right to conclude a contract with the institution was denied could establish a similar contractual relationship with other institutions.

The Parliamentary Commissioner found no constitutional impropriety and initiated no action, but in order to prevent similar complaints in the future he asked the head of the institution to consider the possibility of modifying the internal regulations of the hostel.

3.14.
Failure to make a decision concerning a case of trespassing

The complainant claimed that the operator of the bar which is operating in a building attached to his home closes water and gas services to his home and that as a consequence of the noise coming from the bar prevents him from having a rest in the evenings and over weekends.

According to the town clerk of the municipality the complainant turned to him with a complaint in 2001 for the first time. Since then the town clerk conducted several procedures concerning the protection of property between the complainant and her husband (who has died in the meantime) usually as a result of the home owned by their two children and the operation and joint water and gas consumption of the bar functioning in a building attached to their home. In her letter dated 9 December 2004 the complainant repeated her earlier complaints and then on 11 January 2005 she appeared before the authority where she was told that as a consequence of the obligor's death the claim could no longer be enforced against the obligor. She could start a similar procedure against the new operator of the bar but since the problem has been there for years, this could be done before the court. Accordingly, no substantive decision had been taken in response to the claim for protection of the property. This oral notification does not substitute a decision. In cases of property protection decisions have to be made in which the town clerk has to declare whether he provides repeated protection to the property or whether he rejects the request. This decision is to be explained by the public administration organisation concerned along with specifying the possibility for legal remedy.

The Parliamentary Commissioner established that by his failure to act the town clerk caused improprieties relating to ownership, legal remedy, the requirement of legal certainty and the right to fair treatment. In order to remedy the improprieties the Parliamentary Commissioner requested the town clerk to make a decision on the case which the town clerk has carried out.

3.15.
The circumstances of the closure of a pharmacy

The complainant – the only chemist of the village – claimed that by closing the public pharmacy of the village the municipal government is jeopardising the medicine supplies of the residents.

From the documents received from the mayor the Parliamentary Commissioner found that the municipal government provided for the medicine supplies for the residents of the village in accordance with the provisions laid out in the relevant legal regulations. The mayor provided for the tangle requisites for the required supplies along with the personal needs of the chemist. For the first half of the operation of the pharmacy the local government charged no local tax, rental for the dwelling and the pharmacy itself, even the public utility charges did not have to be paid. As time passed, a number of difficulties and contradictions arose in relation to the chemist in connection with the circumstances of the opening hours of the pharmacy, the bad professional and working relationship between the chemist and the local general practitioner, the non-payment of various fees and debts which then divided the residents into groups at dispute with one another. Although the passions and the ethical objections that have developed in relation to the case were noted by the Parliamentary Commissioner, the rules on his competence do not permit an extension of the investigation of the basic rights to subjects of morals and ethics.

The operating licence of the pharmacy was withdrawn by the County Medical Officer's Service on professional grounds and then the rental contract was cancelled by the local government. The mayor of the municipal government eased the problems relating to the purchasing of medicines of those most in need with the aid of the village caretaker service, whereby the village caretaker purchases the prescribed drugs and other medical supplies from a pharmacy in a village at some distance from the village concerned. The mayor noted that the municipal government would be operating the arrangement and would be providing the service enabling the satisfaction of basic requirements until all legal obstacles are removed from the satisfaction of the community's needs and another invitation can be put out for bids from chemists to the village pharmacist job.

In view of the above the Commissioner found in relation to the complaint concerning the medical – i.e. drug – supply that the local government, having

fulfilled its obligation concerning basic medical services and the relevant medicine supplies, did not jeopardise the constitutional basic right to the highest possible standards of physical and spiritual health.

The complainant also objected to the proceedings followed by the body of representatives of the local government, that of the committee of the body of representatives and of the mayor. In this respect the Commissioner explained that the task of the Parliamentary Commissioner is to protect the constitutional rights of citizens against authorities but he is not in charge of supervising the operation of the justified operation of the whole of the state organisation and of the society. Accordingly, the scope of competence of the Parliamentary Commissioner covers the activities of the organs of the local government towards the citizens but it does not cover their internal operations.

The right to local governance as enshrined in the Constitution actually protects he local community against the central state power. Accordingly, a constitutional impropriety would be created if the state limited the rights – contrary to the Constitution – of local governments, e.g. by withdrawing certain rights. According to the Constitution and the provisions of the Act on local governments the Constitutional Court and the courts are authorised to investigate whether the operations of a local government are in accordance with the Constitution and other laws. Such proceedings may be initiated by the heads of the public administration office. A request for an investigation of the activities of the body of representatives of the local government and of the mayor can also be submitted to the public administration office and if the procedure of the public administration office is considered to be inadequate, the complainant may turn to the Minister of the Interior. The public administration office is also obliged to investigate whether any person interested in the given case participated in making the body's decision on the case.

Since the body of representatives made its decision concerning the pharmacy building as the owner of the building, in this respect the general rules of the Civil Code and its specific rules concerning rental contracts may be invoked. From the aspect of fundamental rights, therefore, the decisions taken concerning the pharmacy building and the rental contract on the service flat cannot be disputed. The Parliamentary Commissioner has no power to override such so-called civil law transactions because that would constitute withdrawal of the scope of duties and powers of the court organisation that is in charge of the administrative of justice, i.e. it would violate the autonomy of judges and the fundamental rights doctrine of the rule of law.

Finally, the Commissioner noted that the agreement between the holder of the personal right (the pharmacist) and the depository of local autonomy (body of representatives) must be detailed, prudent and most importantly of all, it must serve the interests of the residents (patients). If however, professional objections are also raised against the pharmacist, the chief pharmacist of the county medical officer's service and the board of ethics of the pharmacists' chamber may be called on to take the necessary actions.

3.16.
Termination of irregularity in the course of an official procedure

The complainants constructed a car repair shop but the building was constructed on the edge of the site instead of leaving a 6 metre back yard as specified in the final construction permit. In the course of the construction supervisory site inspection the County Public Administration Office noted the irregularity; thereafter the town clerk conducted a procedure concerning the issuance of a continuation permit. Meanwhile, the clients of the construction project purchased a 6 metre section of the neighbouring site, as a consequence of which their building now met the requirements of the construction regulations. The complainants objected to the fact that despite this, a construction fine was imposed on them along with the issuance of the continuation permit. They lodged an appeal against the decision, in response to which the public administration office increased the amount of the fine and otherwise confirmed the decision. The office declared that altering the site was a pre-requisite for the issuance of the continuation permit; this however, does not change the fact that the position of the building differs form the planned and approved position.

According to the Act on construction the fine may be withdrawn if the client of the construction project has the building or part of the building that has been constructed in violation of the rules, demolished, or terminates the irregularity, before the expiry of the deadline set for the payment of the fine. Since in the case on hand the irregularity was that the location of the building did not correspond to the statutory provisions operating in the form of the building permit, the extension of the site by 6 metres – which, in essence, also constitutes altering the physical parameters of the construction – can be regarded as the elimination of the irregularity. The positioning of the building is currently not contrary to the rules because the client has terminated the irregularity by altering the parameters of the site, thereby rectifying the situation.

The construction fine imposed in the course of the procedure aiming at the issuance of the continuation permit – which is an objective legal sanction in the public administration system – is not a simple consequence of an unlawful behaviour (e.g. the price of the violation), but it also has a repressive and preventive function. If the sanction is, ultimately, a consequence of an act (as in this case) that does not violate any private or public interest to any substantial degree and the acting authority does not recognise the efforts of the person who violated the law to terminate the irregularity, the sanction will have a dysfunctional effect and will not promote the observance of the law.

The Parliamentary Commissioner found that the construction authority caused constitutional impropriety by disregarding, in the course of the procedure aiming at issuing a continuation permit, the fact that the client of the construction project used his best efforts to remedy the violation. The Parliamentary Commissioner asked the head of the public administration office

to take the necessary actions to remedy the impropriety. The head of the office did not agree with the proposal of the Parliamentary Commissioner. In parallel with the investigation carried out by the Commissioner the professional supervisory body of the public administration office reviewed the decision of the second instance on request by the complainants, and annulled it. For the supervisory body did not share the position of the public administration office concerning the calculation of the volume of the part of the building that constituted the basis of the fine and concerning the way the foundations of the building were taken into account. Finally, the public administration organisation reduced the amount of the fine.

3.17. Anomalies of land registration

In his submission the complainant objected to the actions of the owner of a hotel: after the completion of the refurbishment of the hotel its owner installed a barrier blocking the road leading to the hotel, as a consequence of which it became almost impossible for the owners of the real estates along the blocked section of the road to supply their shops with goods. In order to have his problem solved the complainant turned to the district land register office and was informed that the closed road section is owned by a limited liability company (Kft.) and the title of the property is 'public road'.

The Parliamentary Commissioner, based on the response given by the head of the district land register office, found that according to the land registry the blocked road section is a 'public area'.

As a result of the investigation the Parliamentary Commissioner established that the real estate owned by the complainant opens onto a road owned by the Hungarian State, which runs parallel with the road owned by the Kft. According to the land registry the road recorded as property of the Hungarian State is not connected to any other road at either end, therefore it is practically impossible for this road section to be part of the national road network. It does not meet the conceptual elements specified in the act on road transport or the decree on the rules of road transport either. The Commissioner held that a property shoes only function is to enable access from a privately owned road to properties of other owners, cannot be regarded to be a road and such registry results in an impropriety relating to the requirements of legal certainty.

According to the land registry the title of the privately owned road is 'public area'. According to the relevant legal regulations a public area is a piece of land owned by the state or a local government, or a part of an area transferred in a specific contract for public use. The documents received from the head of the land register office included no contract on transferring the privately owned area for public use. If such a contract is not kept by the district land register office with respect to the privately owned road, then the designation of the piece of

real estate as a public area entails a direct threat to the requirement of legal certainty stemming from the rule of law that is declared in the Constitution.

In order to remedy the impropriety the Parliamentary Commissioner called on the town clerk and the head of the district land register office to clarify the purposes of the properties concerned and to ensure registration in line with the actual state of affairs. The town clerk and the head of the district land register office agreed with the position of the Parliamentary Commissioner and the two pieces of real estates were re-named in the land registry in accordance with the actual situation.

3.18.
Disregarding the interest of the public in a construction case

The complainant turned on several occasions to the Parliamentary Commissioner because of an auxiliary building constructed by his neighbour without a building permit and in violation of the relevant construction regulations.

According to the established facts of the case the authority of the first instance imposed an obligation on the complainant's neighbour for the first time in December 2001 to demolish the auxiliary building constructed without a permit and in violation of the relevant construction regulations. The authority of the second instance ordered a new procedure to be carried out and annulled the decision of the authority of the first instance. In the second procedure the authority imposed, again, an obligation on the owners of the property to demolish the building. The court annulled the decision of the public administration office confirming the above decision and imposed an obligation on the authority of the first instance to carry out yet another procedure. In January 2004 the town clerk issued a final continuance permit along with a permit for continued construction. According to the explanation attached to the decision in the case of the storage building constructed – in violation of the rules – in the side yard 'the violation of interest caused by the irregularity was not significant and it did not violate the public interest'. The public administration office established that the authority of the first instance failed to attach an explanation to the decision for it did not specify 'what interests are violated by the building constructed contrary to the rules (e.g. with respect to the adjacent property), whether such violation of interest is or is not significant and why it is so and whether the interest of the public would be violated if the building were permitted to continue to exist', therefore the decision was annulled.

At the time of the submission of the complaint the procedure of the second instance was still in progress, but according to the Commissioner there was a direct threat of violation of the constitutional rights of the complainant in this case, therefore he launched an investigation. In the repeated procedure of the first instance which was carried out during the investigation of the

Commissioner in June 2004 the construction authority issued the continuance permit along with a permit for the completion of the work. The public administration office confirmed the decision.

The Parliamentary Commissioner accepted the facts of the case as established by the authority of the second instance and stated at the same time that in the course of issuing the permit the authority did not substantially review any possible violation of public interest – which may originate from failure to comply with fire protection regulations – whereby the authority of the second instance caused an impropriety relating to the constitutional right to property.

The Act on the development and protection of the man-made environment provides that a continuance permit may also be issued if the violation of interests caused by the irregularity is not significant and the irregularity does not violate the interest of the public. According to this provision, therefore, the authority cannot issue the continuance permit for a property constructed in violation of the rules, if it would run against the interest of the public. The distance between the two buildings involved in the case is shorter than a meter, which gave rise to the possibility of breaching the rules on fire protection. Non-compliance with the requirements of fire safety, however, may arise not only as a violation of an individual's interests, because under certain circumstances it may also run against public interests. In the decision issued in August 2002 even the public administration office referred to the fact that the distance between the buildings is shorter than the necessary distance according to the relevant regulations on fire protection, and in his submission to the court the public administration office noted that walls of neither building qualify as a firewall. The decision was annulled by the court but in the repeated procedure these fire protection related considerations were not reviewed.

In view however, of the fact, that any modification or annulment of the decision would violate a right obtained or exercised in a *bona fide* manner, the ombudsman did not make a proposal or initiative but he asked the town clerk and the head of the public administration office to make their decisions in permission procedures in the future with a view to the requirements of fire protection as well, to protect the interest of the public.

3.19. Lack of detailed regulations in the course of the creation of an ecological network

The complainant claimed that a municipal government intended to enlarge the industrial zone at the expense of nature conservation areas of European significance, in the ownership of the municipal government. On account of suspected impropriety concerning the right to healthy environment the Parliamentary Commissioner launched an investigation. The Commissioner wished to clarify whether the municipal governments and other stakeholders

had been properly informed about the creation of the ecological network. He contacted the Natura 2000 Department of the Nature Conservation Agency in charge of the completion of the programme, and he asked the civil servants of the directorate of each national park in Hungary dealing with issues relating to the Natura 2000 network, for information.

The Commissioner found that the legislator's intent concerning the prospective ecological network and the relevant restrictions had been known to the public as early as in 2004. The owners and users of the real estates concerned had to expect *inter alia,* changes in the rules on land use and they also had to expect that the new rules would contain tighter conditions in order to protect nature.

The pieces of land covered by the programme were identified on the basis of their natural values, irrespective of whether any procedure had taken place with respect to them, or whether anybody had any valid (acquired) right concerning these pieces of land. The Commissioner found that the relevant government decree failed to regulate the use of pieces of land in Natura 2000 areas and failed to provide for an order of compensation in case of restrictions.

The lack of such detailed rules, according to the Commissioner, may endanger the realisation of the goals of the Council Directive on the protection of natural habitats, wild animals and plants, as well as those of the government decree on nature conservation areas of Community interest.

The Commissioner also noted that the Government Decree does not provide for the persons who can make decisions and the procedures in which decisions are made with respect to the legality of the list containing the pieces of land concerning Natura 2000 lands, as specified in the Minister's announcement, or how any mistakes that may be identified later on, can be corrected. In this aspect the Commissioner noted that the Government Decree does not provide for procedural rules relating to any changes in the areas contained in the list or in the circumstances of life in general. The Commissioner noted that the legislator failed to regulate the tasks to be carried out if someone's land is included in the list without proper reasons, or if someone's land is not included in the list whereas it should be there.

The Commissioner established that the creation and protection of the Natura 2000 ecological network is to be considered as a goal in the public interest with respect to which the legislator may adopt certain restrictions constitutionally, since the protection of the quality of the natural environment and the conservation and improvement of natural conditions is in the interest of the society as a whole. The Commissioner noted that although the Natura 2000 areas have been designated, however, this act in itself does not guarantee that the network can fulfil its objective.

In order to remedy the impropriety so identified, the Parliamentary Commissioner for Civil Rights proposed that the Minister of Environment Protection and Water Management and the Minister of Justice should jointly regulate the persons to be authorised to make decisions and the procedural

system concerning complaints relating to the Natura 2000 list, elaborate an adequate official procedure and designate the person(s) to exercise the official power.

The Minister of Environment Protection and Water Management noted that designation as a Natura 2000 area does not affect permits already issued as final ones, or activities that have been licensed by decisions that have become final. Nor does it affect any licensing or permission procedure in progress. The Minister held that rights acquired on a *bona fide* basis would not be violated. The drafting of the government decree on the detailed rules on land use in Natura 2000 areas is in progress, and that the implementation of the goals of the directive on the protection of habitats is not hindered as regards the issue of compensation. He also noted that the corrected list of the Natura 2000 areas, complete with land registry numbers, will be disclosed in the first half of 2006 in a ministerial decree. The Minister does not consider that there would be a need for a government decree to regulate the rules of procedure on the judgement of complaints.

The Minister of Justice agreed with the proposal that there should be a possibility to modify the list of pieces of land, in view of changes. He said that about half of the Natura 2000 areas do not fall in the category of protected natural areas and that in these places protection is based on the habitat. In the case of individual animals belonging to various species the habitat may change naturally, which may necessitate reviews of the designation (qualification). The minister also agreed with the necessity of regulating compensation and of creating a regulation concerning the use of the areas concerned. He noted that there is a wide variety of different lands comprised in the Natura 2000 system and problems arise form the rules on use of and compensation for natural areas that do not qualify as protected natural areas. Finally, he informed the Commissioner that he had called on the Minister of Environment Protection and Water Management to prepare the missing regulations with urgency, keeping guarantee considerations in mind, also calling for a detailed regulation on the procedural regime of altering the categorisation of the designated areas.

3.20.
The notary causes risk of constitutional impropriety if he fails to exercise his competence in respect of an environmental affair

The complainant claimed that along a backwater section called Holt-Tisza a resort area of several kilometres has been developed without the construction of a sewerage network, and many property owners in the area releases waste water from the ‘closed/insulated septic tanks’ into the soil, polluting the water thereby. As a result of his investigation the Parliamentary Commissioner found that the municipal government did fulfil its obligations specified in the Act on water management and waste management. Some 98% of the residential areas

of the town are supplied by the sewerage system, and where there is no sewerage network the municipal government provides for the proper treatment of the waste water output by the public liquid waste treatment service as is prescribed by the Act on waste management. The municipal government is aware of the fact that – to protect the water base – sewerage is the preferred solution in the area concerned, this is also part of the plans of the municipal government, but its implementation is hindered by financial considerations.

In relation to the other claim of the complainant the Parliamentary Commissioner noted that the property owners whose conduct the complainant objected to could not be considered as authorities or organs performing public service therefore their activities were not covered by the Commissioner's competence. In relation to the question it was raised only on the basis of the answer of the mayor that the municipal government may not have handled the issue of releasing waste water in the soil in line with the relevant legal regulations. In response to the questions of the Commissioner the mayor noted that 'The municipal government has no power to apply sanctions in the case of environmental pollution that is part of the competence of the Environmental Authority.'

In this respect the Commissioner emphasised that if the town clerk learns about the owner or user (etc.) of a property releasing liquid waste in the soil, the town clerk has a variety of procedures to apply, including sanctions. In his report the Commissioner described the possibilities of the town clerk (*inter alia*) within the scope of his authority against individuals polluting the soil.

The investigation found that the street called Vízpart körút is bordered on the west by the Holt-Tisza which is a very important area from the aspect of the protection of the water base, therefore, until a sewerage network is constructed in this area the protection of properties closest to the water base is especially important from the aspect of public interest (e.g. protection of the elements of the environment, providing, through them, for the life conditions of future generations etc.). The Commissioner emphasised that the local government has, when necessary, to recognise its competence with respect to polluters, since inadequate treatment of liquid municipal waste may generate environmental problems, possibly having an adverse effect on the quality of subsoil waters, water bases and the soil as well.

The Parliamentary Commissioner asked the town clerk to communicate the findings and comments of the report to his colleagues, which the town clerk did as requested.

3.21.
Assumption of the complainant's not meeting the criteria of disability without precise exploration of the case

The complainant who was born on 9 February 1979 and who was born completely deaf asked for assistance because alongside his disability support he lost his job and the County Pension Directorate turned down his application for disability pension by saying that he did not have completed the service period required for eligibility to the disability pension.

The Parliamentary Commissioner carried out a prompt investigation based on suspicion of violation of the right to social security. The Commissioner contacted the County Pension Directorate, the County Directorate of the Hungarian State Treasury and the County Labour Centre and found that the Pension Directorate rejected the application of the complainant for disability pension because to their knowledge the complainant had a total service period of 2 years and 251 days instead of the statutory 6 years prescribed for persons of his age.

The decision contained no data on the investigation and opinion of the medical committee. According to information received from the Directorate they did not consider it necessary to have an examination by the medical committee because according to the available opinion of the medical committee dated 26 February 1997 the complainant's working capability declined by 67% before he turned 18. Since the employment relationship of the applicant was still in effect according to their knowledge, they did not assess his potential eligibility to other benefits either.

The County Directorate of the Hungarian State Treasury granted a disability support to the complainant on the basis of the professional opinion of the National Medical Expert Institution dated 14 March 2002, according to which the degree of the loss of the individual's working capability equalled 100% , he was a category II disabled, his disability originated from before his age of 18.

The above medical opinion made available for the Parliamentary Commissioner was promptly forwarded to the director of the County Pension Directorate.

According to information provided by the County Labour Centre after the termination of the legal relationship of the complainant and the expiry of his entitlement to the sickness benefit he was granted unemployment benefit for 122 calendar days whereby his acquired service period increased to over 3 years.

As a result of his investigation the Parliamentary Commissioner found that the complainant's fundamental constitutional rights to fair procedures and to social security were gravely violated; when deciding about the application for disability pension submitted by the complainant the County Pension Directorate failed to check the medical circumstances. They took into account a medical

opinion produced for some other purpose 8 years ago, and the Directorate did not inform the complainant – for lack of precise knowledge of his health status – about the possibilities for eligibility to disability benefit or about the possibility of pension based on equity.

Since the complainant did not have to go without any benefit and that in the course of the investigation the Directorate actively participated in the clarification of the case, and after obtaining the medical opinion dated 14 March 2002, they promptly notified the complainant about his eligibility, the Parliamentary Commissioner made no proposal. In view of all circumstances of the case, the young age of the complainant, his health status and the resulting special circumstances of life the Parliamentary Commissioner asked the head of the Directorate to draw the attention of his colleagues to the necessity of more careful and thorough compliance with the statutory obligation to provide assistance.

3.22. Violation of rights of mentally handicapped people in criminal proceedings

The Hungarian Interest Association for Persons with Mental Handicap asked for an inquiry of the criminal proceedings involving persons with mental handicap and their detention in relation to such proceedings. The complaint was triggered by the pre-trial detention of a person with mental handicap of medium severity who was mistreated during detention and had been forced to sign records without presence of a defence attorney whose contents he did not understand, and his detention was also unnecessarily protracted.

The Association holds that the conduct of the authorities in criminal proceedings involving persons with mental handicap is not in line with the principles and provisions of the Act on the rights of persons with mental handicap and on their equal opportunities.

Based on the complaint in view of a suspicion of violation of the right to life and human dignity the General Deputy of the Parliamentary Commissioner asked the Chief Prosecutor to carry out an investigation of the case.

The investigation carried out by the Chief Prosecutor confirmed the complaint. The person with mental handicap who was suspected to have committed an act of indecency made a detailed confession upon his detention. No defence attorney was present at the questioning. The criminal investigation was closed in two weeks yet he was kept in detention for four more months as a result of the delay in the preparation of the mental health expert opinion.

The suspect had to be given medical treatment for injuries indicative of mistreatment. In the wake of the hearing by the prosecutor a criminal investigation was started based on suspected mistreatment against unknown perpetrators, which had not yielded results by the time of the investigation

because the detainee – for the very reason of his mental handicap or for fear of retributions – could or did not dare to identify the persons who had beaten him.

According to the Chief Prosecutor's Office 'supplementation of the criminal and penal regulations in a way as would, besides fully satisfying the state's criminal law requirements, facilitate the exercising of the rights of persons with handicaps, may need to be considered.'

The mistreatment suffered by the individual during detention violated the detainee's right to human dignity and it also violated the prohibition of torture, inhuman and humiliating treatment as declared in the Constitution.

In the case on hand it was found that the rights of persons with handicaps – particularly persons with mental handicap – are exercised only in a limited range, indeed, such persons are in a definitely disadvantageous position in comparison to other people in detention. One reason for this is that the criminal law has not been harmonised with the act on the rights of people with handicaps, and lower level legal regulations are also focusing only on a certain group of people with handicaps.

The General Deputy of the Parliamentary Commissioner proposed that the Minister of Justice should – with the involvement of the National Council for the Handicapped and other social organisations concerned – initiate supplementation of the legal regulations on criminal proceedings and detention that will meet the requirements of the act on the rights of persons with handicap and on their equal opportunities. His report was also delivered to the Minister of Youth, Family, Social Affairs and Equal Opportunities.

The deadline for responding has not expired as yet.

3.23.
Omission of the town clerk in a case involving the protection of possession

A number of complainants claimed that the 24h operation of a snack bar in the neighbourhood and its noisy customers was disturbing the peace and quiet of the area. They complained that the district clerk failed to investigate their reports and complaints; he took no action and made no decision.

The Parliamentary Commissioner launched an investigation on account of suspected impropriety relating to the rights to legal remedy, legal certainty and fair procedures, and asked the district clerk of the municipality concerned for information.

The complainants submitted their complaint against the noisy operation of the snack bar in March 2005 to the district clerk who instructed the operator of the snack bar to ensure that the operation of the business does not disturb those living in the area. The clerk warned the operator of the snack bar that if he failed to comply with this instruction the opening hours of the snack bar would

be restricted and the playing of music would be prohibited after the evidentiary procedure.

Thereafter the parties came to a compromise in procedure aiming at the protection of possession, but the complainants had to turn to the district clerk again after the passage of two months, indicating that the operator of the snack bar does not comply with the agreement and they asked for the necessary action to be taken. The district clerk only warned the operator of the snack bar again, that if he failed to comply with the agreement, then in the case of a repeated complaint he would take the necessary possession protection action. Thereafter the complainants reported again that due to the overnight operation of the snack bar they cannot sleep and they asked for the clerk's action but it was not taken at all.

According to the effective legal regulations the district clerk should have taken the necessary actions to ensure compliance with the agreement and, had the submission contained any new fact in comparison to the agreement, or had a complainant who did not participate in the agreement, turned to the clerk, then a decision would have had to be taken through a possession protection procedure.

The Parliamentary Commissioner found that the district clerk failed to take real action or to make a decision despite the repeated complaints and claims of the complainants, whereby he caused impropriety in relation to the complainants' constitutional rights to property, legal remedy, legal certainty and fair procedures. In order to remedy the impropriety the Parliamentary Commissioner called on the district clerk to make a decision on the case which the clerk accepted and on the basis of that he took the necessary action.

3.24.
Tourist bus traffic and biker assemblies on Gellért hill

A complainant claimed on behalf of a nature conservation association that in one of the most important tourism destinations of Budapest, on Gellért hill, hundreds of tourist buses go up to the Citadel every day, and the gardens, balconies and now sooner or later the homes as well, of the people living along this route have become or are becoming unsuitable for proper use as a consequence of the noise, vibration and air pollution caused by so many buses and as a result of the night-sightseeing trips even their resting at night is disturbed. According to the complainant the Budapest Government disregards the findings of the earlier report of the Parliamentary Commissioner. The complainant also complained about the fact that on the first Saturday of each month hundreds of bikers assemble at the Citadel with the support of the Budapest Police Headquarters, who, when go up and down in a convoy, cause intolerable noise, air pollution and congestion. The association has contacted a number of authorities concerned. In the course of his investigation started on

account of suspected impropriety in relation to the constitutional rights to healthy environment, the highest possible standard of physical and spiritual health, resting and property, the Parliamentary Commissioner contacted the Transport Department of the Budapest Mayor's Office, the Chief Commissioner of the Budapest Police Headquarters and the chief clerks of the districts of Budapest concerned.

In order to remedy the grievances caused by the traffic of motor vehicles the 1st district government contacted the Budapest Transport Authority, the 1st District Police Headquarters and the Transport Department of the Budapest Mayor's Office. The district government was of the opinion that Gellért hill was not the venue for the biker assemblies. According to the district government the complaints of the residents are well founded.

In relation to the bus traffic the Transport Department of the Budapest Government declared that the transport route has been adjusted since the previous investigation of the ombudsman. According to the Transport Department of the Budapest Government the funicular line planned by the district with the aid of the Budapest Government may remedy the complaints in the future.

The Budapest Police Chief notified the Parliamentary Commissioner that no submission or report in the interest of the public had been submitted with respect to the bikers' assemblies to the district governments or to the Transport Department of the Budapest Government.

In respect of the bikers' assemblies the Budapest Police Chief noted that it was true that on the first Saturday of each month some 200-300 bikers assemble there and after coming together they ride away. The Chief Commissioner has ordered a higher level of controlling on several occasions. He also noted that for lack of authorisation by the law the parading of bikers in a tight convoy could not be prevented by the application of the means available for the police, but by providing police security coverage for the parading bikers they could prevent the development of dangerous situations. In his view the bikers' assemblies are very disturbing to the peace and quiet of Budapest; their marching across town creates dangerous situations and breaks up the order of traffic. He noted that bikers' assemblies are characterised by ad hoc organisation – as if based on a sudden idea – without proper organisers. In his view a bikers' assembly does not, on account of its nature, covered by the act on assembly, a bikers' assembly is not one aiming at expressing opinion, therefore it is not covered by the obligation to notify to the authority. In relation to the assembly the competence of the police is limited to taking the police actions specified in the Act on the police.

In relation to tourist buses the investigation found that the actions to be taken in relation to the route concerned fall into the scope of competence of the Transport Department of the Budapest Government. The Transport Department has introduced a transport restricting measure concerning the area covered by the complaint, on the basis of a decision taken by the Budapest Assembly.

Accordingly, buses are not permitted to enter the route to Gellért hill between 12.00 p.m. and 6.00 a.m. and between 10.00 p.m. and 6.00 a.m. in the summer and in the winter, respectively.

The Commissioner found that the Budapest Transport Department is making efforts to manage the problems resulting from traffic by installing road signs. Bus drivers disregarding the road signs prohibiting entrance can be sanctioned through misdemeanour proceedings. Enforcement of the rules on traffic is a task for the police; therefore the Budapest Police Chief invited the heads of the local police units to commission their personnel to regularly check the route concerned and to apply the necessary actions to drivers breaking the rules.

The ombudsman noted that tourism and its interests are for the benefit of the public, its maintenance is in the interest of the public, and therefore those living in the area may have to tolerate increased noise and other burdens. Accordingly tourist buses cannot be excluded from the area concerned; tourists cannot be barred from one of the most important tourist attractions in Budapest. The ombudsman held that the conflict between the different interests can be resolved by changes to traffic regulations, by proper and tight controls over compliance with those rules, and, in relation to the protection of the constitutional rights to healthy environment, the highest possible standards of physical and spiritual health and to property, in the introduction of restrictions in the interest of tourism, efforts should be made to minimise the adverse impacts on the environment.

In the course of the investigation the Parliamentary Commissioner found that rights – enshrined in the Constitution – of residents of Gellért hill to a healthy environment, is violated, but not more than the same right of other people also living in big cities. Like those living on Gellért hill residents of many other Hungarian towns and parts of towns are having problems with the consequences of the environmental loads resulting from increased traffic.

It was also established that actions had been taken by the Transport Department – e.g. traffic restriction – to provide for the protection of the interests of citizens and their healthy environment. The Transport Department that has competence to resolve the problem caused by tourist buses arriving at the Citadel does not only take actions but it has been and is making very substantial efforts. The Commissioner noted that he considered the actions relating to the regulation of the order of traffic to have been adequate and he found no circumstances indicative of constitutional improprieties in relation to these actions.

The Parliamentary Commissioner also noted that the problem cannot be resolved on the existing road network, there are no real alternative routes for tourist buses and no such routes can be designated for them up to the Citadel, since in that way traffic would cause similar problems on the routes so designated. Furthermore, there is no place in the area concerned to be designated as a parking lot.

Finally, he noted that perhaps the traffic restriction introduced so far could be further tightened on account of the fact that people living in the area really have no way for a good night's rest. The question whether the existing traffic sign guarantees the local residents' rights to property and a healthy environment can be decided by a traffic counting exercise to be carried out by the manager of the road, while the complaint about the noise and the air pollution may be assessed after the performance of a survey carried out by the environmental authority.

The Parliamentary Commissioner found that in justified cases both the right to free movement and the right to property can be restricted, as can the right to a healthy environment. In the case of a conflict between various constitutional fundamental rights or constitutional basic values one or another may be preferred at the expense of the other only on the basis of the 'test' of necessity and proportionality.

As regards the bikers' assemblies the investigation carried out by the ombudsman found no fact or data that would have confirmed that bikers' assemblies have to take place in a residential area with homes on both sides of the road, and that increased tolerance of local residents would be explained by any public interest. Instead, the rally which is organised through other than proper use of the public road violates the exercising of constitutional rights, restricting the rights of the local residents to a healthy environment and to property without any sound reason, in addition to which it is also detrimental to tourism.

The Parliamentary Commissioner found that though everybody – including bikers – has a right to participate in road traffic, the right to free movement may be restricted to the extent required for the exercising of other basic rights. At any given location the 'assemblies' can substantially restrict and hinder the conditions of life and the use of the properties of the complainants. In the area in question, which is a busy tourist destination, neither permitted, nor spontaneous bikers' assemblies should take place.

The Parliamentary Commissioner noted that the spontaneous assemblies and the rallies of the bikers in convoys cannot be prevented by the means available for the police; therefore there is a direct danger of an impropriety from the aspect of the protection of the rights to healthy environment as well as of those to the man-made environment and property. The authority is not in a position to guarantee the operation of the constitutional fundamental rights in practice, because the regulation concerning such spontaneous rallies – a new social phenomenon – is not adequate.

The Commissioner pointed out that the environmental load caused by individual bikes as well as that caused by groups of bikes may – by its nature, even if only for a short span of time – be very substantial (bikers often make their motorbikes even louder by applying special technical solutions), therefore, he specifically examined which authorities could act and on the basis of what legal regulations concerning the environmental noise and air pollution caused by motorbikes.

In order to remedy the impropriety so identified the Parliamentary Commissioner asked the director of the competent environment protection, nature conservation and water management authority to take the necessary actions in his scope of competence provided for him with respect to environmental load problems caused by transports, based on the government decree on certain rules concerning the protection of air quality and the decree on noise and vibration protection.

The Parliamentary Commissioner asked the Budapest Police Chief to take all required actions to ensure that the competent bodies of the police continue to control the observance of prohibition signs. He also asked that the Transport Department of the Budapest Government – with the involvement of the Departments for Environmental protection, Trade and Tourism – should consider modifying the time restriction stated on the supplementary signs under the signs 'No access for buses' in a way as will ensure that the time restriction provided for in the prohibiting signs is more in line with the rightful interests of people living there.

In his proposal concerning the adoption of legislation the Parliamentary Commissioner asked the Minister of Economic Affairs and Transport to review jointly with the Minister of the Interior whether it is possible to adopt regulation that would create a regulated form – in line with European regulations – for organised or spontaneous rallies growing both in frequency and the number of participants. Thereafter, he should establish the relevant rules on the basis of which the organisations concerned could take actions.

The Budapest Police Chief was also asked to continue to pay attention to residents' reports submitted with respect to bikers' rallies, in cooperation with the district headquarters, and to lay more emphasis on enforcing the traffic regulations as well as to checking the vehicles from the aspect of safety standards.

The Commissioner asked the Chief Commissioner of the Budapest Police Headquarter and the head of the Budapest Transport Supervisory Authority to cooperate in the checking of the vehicles (motorbikes) and to ensure that their subordinates and colleagues pay special attention to checking – using proper instruments – the noise and air pollution caused by the bikes in the course of inspections carried out on the road and at the premises of the operators.

The head of the Budapest Transport Supervisory Authority was asked to ensure that his colleagues screen and identify vehicles that have been made louder by technical means, in the course of technical controlling activities.

Finally, the Parliamentary Commissioner asked the Transport Department of the Budapest Government to review, with the involvement of district governments representing the interests of the residents and – by way of its statutory powers – the Transport Authority, the traffic order of the road sections concerned, and to consider the possible means of transport organisation (e.g. built structures, speed bumps, prohibition signs etc.), to effectively manage the problem.

The director of the competent environmental protection, nature conservation and water management authority (Authority) ordered a traffic noise measurement exercise to be carried out to establish the noise emission of the tourist buses and he noted that he would take the measures as part of his competence, depending on the results of noise metering.

In respect of the air pollution caused by tourist buses in the course of the preparation of the supplementary report the Commissioner had no information concerning the Authority performing instrumental air pollution metering as a result of the complaints concerning tourist buses.

In relation to the report the Mayor of Budapest declared that he did not see it possible for the Transport Department of the Budapest Government to modify the time restriction on the boards attached to the signs showing the prohibition of entering the zone concerned.

The Parliamentary Commissioner found that for lack of measurements at present it is not possible to establish whether the complaint submitted by residents concerning the noise and air pollution is well-founded, pointing out that it will be possible to assess these factors after completing the measurements and tests carried out by the environmental authority. The Parliamentary Commissioner pointed out that the – necessary – tolerance obligation of the people living on Gellért hill with respect to their property, stemming from the interest of the public generated by tourism may be brought into proportions by further tightening of the restriction of traffic that has been introduced already, which is the way of ensuring the operation of the basic principle of 'undisturbed usage'. At the same time the response of the Budapest Mayor rejecting the rationale of further tightening could only be accepted for the Parliamentary Commissioner if it were supported by data of traffic counting carried out in a busy summer month.

As to the biker rallies the ombudsman noted that according to documents received since the preparation of the basic report, since May 2005 the rallies have been organised by an organisation called Motorblokk Sports Association as demonstrative rallies covered by the act on the right of assembly, thus they are notified in advance to the Budapest Police Headquarters. Accordingly, these are no longer organised as a spontaneous event. The Commissioner added that this does not affect the objective of the investigation, and any judgement on this is not subject of his investigation. The Commissioner noted that even an announced (permitted) event may be disturbing for the level of disturbance does not depend on it being announced in advance.

The Parliamentary Commissioner was notified by the Budapest Police Chief that the report of his investigation had been forwarded to the head of the police units concerned to make sure that they carry out the necessary controls and actions.

Having received the report the Environmental Authority ordered a traffic noise measurement to be carried out in which they asked the Measuring Station

of the Environmental Authority to separate the noise of the bikers' rally and the rest of the traffic noise. In certain areas the measured noise levels exceeded the permitted noise limits.

The Commissioner established that the right of the residents of Gellért hill to a healthy environment is violated as a consequence of the rallies.

The experts of the Ministry of Economic Affairs and Transport and of the Ministry of the Interior gave a joint technical answer to the report, covering all aspects of the problems on hand. In their answer they explained measures and legal regulation that can be applied to reduce the effects of the rallies that disturb those living along their route. The answer of the two ministers indicated that the manager of the road concerned has the power to decide whether its permit is required for the bikers' rally and whether it grants or refuses such permit.

According to the ministers' answer the level of noise (vibration) caused collectively by the bikes passing by in groups may disturb the peace and quiet of those living nearby. The answer gave a detailed description of the possible measures and legal regulations that can be applied to reduce the disturbing effects of the bikers' rallies on those living in the environment of the road concerned based on the existing effective regulations.

The joint letter noted that by modifying the Highway Code (KRESZ) provisions have to be established concerning the movement of vehicles in tight convoys – supplementing the general regulations – to which it is possible to attach definitions of cases that constitute violation of the rules. Finally, the answer noted that it is not possible to keep the rallies under control exclusively by means available for the police, but the rallies can be kept under control of the existing effective legal regulations by close cooperation between the authorities and organisations concerned, the managers of the public roads concerned and the local governments concerned can, proceeding in their own competences, influence and control the organisation and holding of such events.

In his supplementary report the Parliamentary Commissioner initiated, in order to ensure that the impropriety so identified is resolved, that the relevant departments of the competent authorities consider further tightening of the restriction in the form of the prohibition sign attached to the road sign already along the route concerned, after a traffic count carried out in the summer.

He asked the director of the Environmental Protection, Nature Conservation and Water Management Authority of the Middle Danube Valley to notify the Commissioner about his professional opinion and standpoint formed after the evaluation of the measurements, and to take any necessary action in his own scope of competence, or make proposals to other organs having the relevant powers, to take such actions. Furthermore, he asked the director to make the measurements available for the manager of the road.

The Parliamentary Commissioner also proposed that the Budapest Mayor and the district mayors – with the involvement of the chief clerks – present the contents of the joint letter of the ministers containing possibilities for solutions to

the problems caused by the bikers' rallies, to the organisations and authorities concerned and to jointly carry out the proposed measures (regulation of the use of parking lots, regulation of the entry of vehicles in certain road sections, establishment of local noise and vibration prevention rules etc.).

Finally, the Commissioner proposed that the chief district clerks – as the authorities exercising the power of environmental protection of the first instance – should identify, cooperating with one another and with their representative bodies, the possibilities for actions to manage the noise burdens generated by the rallies, and to proceed in their own scopes of competence with a view to the demands of local residents.

The Budapest Mayor notified the Parliamentary Commissioner about the preparation in the near future of a feasibility study entitled 'Plan for the system of parking and movements of tourist buses in Budapest', in which in the course of the thorough analysis of the problems and the elaboration of proposals for solutions, it will be possible to assess the issues relating to tourist buses and to make proposals for resolving them.

3.25.
Termination of permanent postal services in small villages and introduction of mobile postal services

Magyar Posta Rt. – the Hungarian Post Office – made a decision in 2003 about closing the post offices in hundreds of small villages and about introducing a mobile post office system, in spite of the objections of the mayors of the municipalities concerned. The Parliamentary Commissioner for Civil Rights initiated an investigation *ex officio* in 2003 owing to the jeopardising of the equality of opportunities of citizens living in small municipalities, in the course of which, at that time, the action introduced by Magyar Posta was not referred to as a constitutional impropriety in itself. At the same time, the Commissioner emphasised that the deficiency of information, the fact that the introduction of the measure was proven later on to have been inadequately communicated, the lack of gradual introduction and the sense that the change was introduced in an unexpected way, prompted the ombudsman to call on the CEO of Magyar Posta Rt. to pay special attention on continuous dialogue with the local governments – embodying the will of local residents – to taking their rightful requirements into account and to ensure that such measures are preceded by the provision of adequate information for all people concerned. The Parliamentary Commissioner pointed out that from the aspect of the functioning of the basic rights of citizens and from the aspect of the operation of the principles of equality in law and equality of opportunities, he agrees with and supports the introduction of Internet services in the post offices of small villages, connecting villages to the information society (and the information system of the European Union). For this reason the Parliamentary Commissioner recommended to the

Minister of Informatics and Communications as early as in 2003, that the vision of the ministry be elaborated in detail as soon as possible and its implementation be accelerated and monitored. He also called on the minister without portfolio in charge of equal opportunities as well as the Minister heading the Prime Minister's Office to pay special attention to the accumulated problems of residents of small villages of disadvantaged regions in Hungary to ensure equal opportunities for them.

Thereafter, residents of small villages and their representatives were increasingly frequently complaining about mobile postal services, and they continued to complain about the closure of small post offices. Therefore, one year after the previous investigation, in the summer of 2004 the Commissioner notified the CEO of Magyar Posta about his concerns relating to the introduction of mobile postal services and he raised his voice in the interest of small municipalities. To this end, he called on the Minister of Youth, Family, Social Affairs and Equal Opportunities and the Minister of Informatics and Communications but he noticed no positive changes. The Commissioner emphasised that his unchanged position was that the survival and the future of small municipalities would be supported by a comprehensive and complex development strategy leading towards the 21st century and the advanced Europe, instead of downsizing, reducing or 'modernising' alone, of various public services. Part of such a progressive strategy could be the transformation or multifunctional development of the post offices in comparison to the mobile postal services seem to be a solution of the 20th, rather than that of the 21st century.

The mayors of four small municipalities in three different counties turned to the Parliamentary Commissioner saying that the municipal governments of small villages spare no effort to retain the local populations, they maintain kindergartens, schools, in some cases only comprising the first four grades, community kitchens, old people's clubs and culture halls, assuming financial difficulties – often exceeding their resources – to do so. One of them said that the closing of the post office has a very negative effect on the 400 permanent residents and the 300 vacationing guests in the summer. The other mayors also had similar complaints. They said that on 19 March 2004 they were informed 'as a top secret' that 'the post office would be closed down on 1 April'. The local authorities had not been consulted; they were invited for a meeting as late as on 24 March, where they were told that the closure of post offices had already been definitely decided.

Based on an initiative of the Association of Municipalities of Zemplén (ZTSZ), since 2004 the media has announced several times that small municipalities that are not satisfied with the mobile postal services, have decided on organising a nationwide demonstration for many people have been complaining about the unpredictability of the arrival of the service and that those having to go to work often fail to be able to meet the postman who comes during working hours. According to a survey carried out by the ZTSZ some 83% of the leaders

of the municipalities concerned are not satisfied and the only places where the mobile postal services are appreciated are the ones where no postal services had been before at all. One of the leaders of the ZTSZ noted that since the introduction of the mobile postal services an increasing number of villages have joined their movement lobbying for the re-opening of small post offices. To date, almost a thousand mayors have announced that they agree with the initiative and they have contacted a number of fora in order to improve the conditions of life and the situation of residents of disadvantaged small villages.

In response to the request of the Commissioner for information the president of the ZTSZ provided detailed information on the failure of the popular initiative, their complaints about the mobile postal services and the solutions they proposed. He said that the mobile postal service is much more expensive than the operation of post offices with financial support provided by the local governments as well. The time of the arrival of the mobile postal service is unpredictable, since Magyar Posta Rt. does not or cannot comply with the statutory obligation: the law provides that – in order to guarantee the availability of postal services – the mobile postal service operated by the universal postal service provider or by the licensee postal service provider must, at least once on every work day, stay for at least 30 minutes at a place and at a time announced in advance in the way that is customary for the disclosure of announcements in the given community. If the service provider also takes over consignments in the course of its activities of delivering consignments to addressees, the unit must stay at the designated point of access, for at least fifteen minutes. By contrast, in the majority of cases the postal van has no schedule to go by, the time of its arrival is not specified, the place of stay where it can be accessed is not pre-defined, and the 'staying time' is not observed either. The postal van arrives at varying points in time because its time of arrival is influenced by a variety of factors (e.g. weather and road conditions, the quantity of consignments to delver etc.). Therefore, this mode of operation is not up to the provisions of the relevant legal regulation.

In the course of the follow-up investigation the Parliamentary Commissioner drew attention to the shooting of a series of films entitled *Falurombolás? (Destruction of Villages?)* focusing on the recent past and future of small villages, disadvantageous measures applied to small villages including the closure of the regular post offices, the first part of which has already been broadcasted. The question mark in the title of the documentary indicates that the dire picture suggested by the title is, perhaps, does not indicate a finished and completed process, and that it is, perhaps, still possible to alter or undo the changes that have taken place so far. The main theme of the already presented first part is the objections and protests against the mobile postal services showing the absurdity of the idea of the already introduced service, criticising the evidently un-lifelike state where the citizen is forced to be standing at his door or at a given point of the village waiting for the service provider. The producers of the film are asking the following questions: Do people living in rural

Hungary have nothing to do? Are people living in rural Hungary obliged to be waiting for hours for the arrival of the mobile postal van? The cinema has been closed, the school has been closed, and even the priest is commuting from village to village, now the same is the case with the postal services, while the former post office building is still available for the provision of the same service. The ombudsman, who was and is still investigating the problem, also expressed his views in the film, detailing his concern for the future of small villages and that the problem had been presented to the various committees of Parliament in connection with his previous annual report. The ombudsman also noted that the proposal on the Governments Programme for Micro-Regional Cooperation was in line with his own proposals. For there are very large differences between regions in terms of education, health services, availability of libraries, jobs and the standards of infrastructures that have a very substantial influence on the conditions of life. This is aggravated by the fact that even larger municipalities are facing a variety of – sometimes fundamental – problems depending on their location (i.e. whether in more advanced or in disadvantaged regions of Hungary), as well as on their other features such as accessibility, or being located at the end of a dead-end road, with no road leading out at the other end of the village. The position of small villages is usually less favourable than that of larger municipalities. This applies to the number of jobs and possibilities for work within reasonable distances, the amounts of the local incomes, the quality and quantity of local governmental administrative functions and services, the availability and quality of infrastructure elements and the entirety of services available locally. Moreover, residents of small municipalities are observing the development of the country as a whole, they see 'modernisation elsewhere, while the services that used to be available for them are being altered or terminated (school, postal services, transport etc.) and their income is also becoming less and less reliable and predictable. In the documentary entitled '*Destruction of Villages?*' the ombudsman drew attention to a way of thinking and a concept of organisation which, while fully accepting the trend of integration, duly observes the interests and requirements of the communities living in the various municipalities, this principle applying everywhere, from the development of larger municipalities up to the improvement of the situation of those living in smaller ones. This principle is the slogan of the international 'green movement' summed up as follows: 'Think globally, act locally'. This though is a perfect expression in a few words of the concepts represented by the representatives of the rural communities interviewed in the film, the producers of the film showing the fate of small villages, the government programme aiming at improving micro-regions and the proposals submitted by MPs, which has also been adopted and is promoted by the Parliamentary Commissioner for Civil Rights, who noted how these ideas run parallel with one another and how all stakeholders want to achieve the same goals. Such a similarity in the ways of thinking of different people and groups cannot be a mere coincidence and this excludes the possibility of everybody being wrong for

the above approaches involve all aspects ranging from drafting laws to description by means of sociology, and all come to the same conclusion, i.e. that the closure of regular fixed post offices in this way had been a hasty action disregarding the will of small communities, failing to ask them for their views, failing to negotiate with them in order to make it possible to save infrastructure that is already in place.

The ombudsman also joined in to advocate the proposals of MPs aiming to amend legislation. He made efforts to confirm the justified character of those proposals by comparing the provisions of the law to the information contained in the notices delivered to the population concerning the mobile postal services.

In his inquiry in 2003 the Parliamentary Commissioner came to the conclusion that by terminating the standard post offices in a lot of small municipalities and by introducing a mobile postal service instead, the Magyar Posta Rt. did not cause any constitutional improprieties. In the course of his earlier investigation the ombudsman accepted the declaration of Magyar Posta Rt. that they were not eliminating the service and that they were closing only some of the post office buildings while maintaining the postal services in another form. The information then provided by Magyar Posta Rt. and their promise to all Hungarian residents was that the mobile delivery vans would call at the municipalities according to a fixed schedule, indeed, they call at every single household, i.e. at a number of places using postal services will become even more convenient from a certain aspect, especially in communities that had been without post offices even before the changes. In his earlier investigation the Parliamentary Commissioner also declared that in the wake of the modernisation efforts implemented by Magyar Posta Rt. the standards of postal services would not decline, moreover, the provision of the planned standards of service would ensure that neither EU norms, nor the existing Hungarian legal regulations and the constitutional principles scrutinised by the Parliamentary Commissioner would be violated.

The initiative of the ZTSZ integrating the protests of almost a thousand municipalities and at the ‘results’ of an experiment at a small village show that the residents and leaders of the communities that used to have fixed postal services, cannot accept the new situation and they are using all possible means – popular initiatives, amendments to legislation, hearings by special committees of Parliament, spectacular demonstrations – to ensure remedying their injuries. The residents and leaders of small villages are doing things that support the trends of the 21st century. According to the ombudsman only a Union that observes and respects individual needs for equal opportunities along with local interests, can have a real future.

One of the most important goals of the law is to ensure the availability of postal services of adequate quality standards and to guarantee the protection of the interests of consumers, as well as to enable the development of postal technologies, the postal market, to promote and protect its effectiveness. The information distributed on the mobile postal services also promises that all of

the relevant services would be available, but in practice the mobile postal service does not offer complete service and it does not duly observe the requirements of the protection of consumers' interests. (There are problems in the deliveries of official documents and cash, where papers or magazines are subscribed for, the practice of delivering the product to the neighbour or to other persons results in uncertainties as to when and how the subscriber receives the service, waiting for the service to come which is a waste of time for the customer etc.)

The initiative of the ZTSZ objected primarily to the fact that the existing legal regulations do not meet the requirement of non-discriminatory treatment, they discriminate between different types of municipalities – and so between local governments – depending on the number of people living in a given community. If the population of the village is below 600, it is not even necessary to ask the local government for its views before the former permanent postal service is withdrawn. This is a practice against which municipal governments objected to right from the beginning, on the one hand because of the discriminatory nature of this approach, on the other hand, their intent to cooperate which was initiated in order to ensure continued operation, was not observed by the service provider and so hundreds of permanent postal service providing units were closed down.

It was clear in practice that 'The Post Office Comes to Your Home' promise was physically impossible to fulfil, since if the postal van goes along all of the streets of the village concerned – as promised by the slogan – deliveries in the next village will be delayed or even impossible. If the vehicle goes along every single street as promised, its fuel cost would be so high that it would be much more expensive than the costs of the previous practices when the postal van delivered the consignments in the morning and took away the consignments in the afternoon.

All of the complaining mayors have been constantly arguing – and it is also confirmed by the above documentary – that there is no precise time of arrival in the mobile postal services and that people often have to spend hours waiting for the postal van. The Parliamentary Commissioner holds that even only half an hour of waiting is totally unacceptable. People living in small villages cannot be made to wait and they cannot be assumed to have nothing else to do but keep waiting for the postal van in a given part of the day to receive deliveries, and then go to the post office that still opens for a few hours, to take over cash deliveries, to post their lottery tickets etc.

Only some of the letters posted form the 'pilot village' addressed to the ombudsman actually reached the ombudsman (2 out of 5), the reason for which was also revealed by the investigation. A nationwide movement has evolved in order to re-gain the services and people living in towns, high profile public figures, artists, film makers and MPs have joined residents of small villages in solidarity, all of them arguing that the decision taken without hearing and

coordinating the will of the governments of small villages has affected residents of small villages adversely.

It is very difficult to make residents of small villages accept the reasons for which it has to be their village in which a service of the Hungarian mail service in which some 39,000 people are employed and which is one of the most important services in the Hungarian economy, cannot not be maintained and has to be closed down, when their post office was not an idle one and despite the declined traffic they hoped that with the assistance of the municipal government – or even without it – the profitable service provider can or should absorb a potential modest loss on their unit.

According to the resolution of the Constitutional Court: 'The prohibition of discrimination does not mean that all discriminations, even those aiming at attaining a higher degree of overall social equality, should be prohibited. The prohibition of discrimination means that the law has to treat everybody as equals (people of equal dignity), i.e. it is human dignity that must not be violated and that the criteria of the allocation of entitlements and benefits have to be established with equal respect and care, taking individual considerations equally into account.'

By way of a summary, in the course of the follow-up investigation the Parliamentary Commissioner declared – in contrast to the conclusion of his previous investigation – that the regulation prescribing the operation of postal services and the termination of hundreds of previously functioning permanent post offices on the basis of the number of residents of the municipalities, completely disregarding the number of holidaying guests in certain areas, causes improprieties relating to the prohibition of negative discrimination as declared in the Constitution, to the right to human dignity and the requirements of legal certainty and the requirement of fair procedures originating from the principle of the rule of law. The constitutional impropriety is observed in relation to the already operating mobile postal services as well, in view of the widely experienced facts showing the difference and tension between the provisions of the law, the information provided by Magyar Posta Rt. and the practical operation of the service. The principle of equality of opportunities and that of non-discrimination is not observed in relation to the issue on hand as a consequence of the existing regulation, because the law does not treat people living in municipalities with different numbers of residents as people of equal human dignity, and this discrimination also affects the municipal governments operating in the various communities.

In his proposal concerning the adoption of legal regulations the Parliamentary Commissioner asked the Minister of Informatics and Communications to initiate amendments, as part of the state's tasks relating to the governance of the postal sector, to the Act on postal services and the government decree on the provision and quality requirements of postal services, in a way as will enable that the universal postal service provider can provide the universal postal services in municipalities with less than 600

residents, through permanent post offices as a general rule or, exceptionally, if this is agreed on with the municipal government concerned, in a contract, through mobile postal services. The Parliamentary Commissioner also endorsed the initiative of MPs demanding that in municipalities where on the basis of its unilateral decision the universal postal service provider is running mobile postal services on the day of the entry into force of the law, the service provider be obliged to conclude a contract within 60 days with the municipal governments concerned about the continued operation of the mobile postal services or – if no such contract is concluded – the postal service provider be obliged to restore the post office.

Having received a negative answer from the Minister of Informatics and Communications the ombudsman turned to the Government with his proposal concerning legal regulation through the Minister heading the Prime Minister's Office, asking for support to and implementation of his proposal.

In his answer the Minister heading the Prime Minister's Office declared that the government had discussed the legislative proposal of the Parliamentary Commissioner in relation to the draft of the amendment to the postal act. The government decided that sound decision can be made on the proposal on the basis of a thorough analytical assessment, exploring sociological and social aspects as well. This work has been launched by the Ministry of Informatics and Communications.

3.26.
Joint report of the Parliamentary Commissioner for Civil Rights and his General Deputy on the patient identification system applied by health service providers

Both the media and the public opinion, paid much attention to a case last year where two patients were mixed up in a hospital for the lack of possibilities for proper identification, as was found out in retrospect. Although no complaint was submitted to the Parliamentary Commissioner with respect to this concrete case, yet the Commissioners considered that they were compelled to explain their position regarding the issue in order to facilitate the observance of the fundamental constitutional rights relating to life, health, personal integrity and human dignity and other fundamental rights relating to these. Based on their powers conferred on them in the act on the Parliamentary Commissioner for Civil Rights they started *ex officio* an investigation with a view to developing guidelines concerning a system of patient identification that is suitable for the protection of the life and health of the individual patient and that respects, at the same time, the dignity, personality, privacy and sensitive data of patients, as well as to clarifying certain elements of the practical application of such a system.

Certain criteria of the method of patient identification are laid out in a guideline issued by the Minister of Health, which, among the general principles of the patient identification system, emphasises the need for the protection of personal data: 'the protection of personal data and the personality rights of the individual (unless an exception is made by law) shall not be prejudiced by any other interest relating to data management; accordingly, the personal data and special (health) data of the patient shall not be disclosed to any person other than the medical staff participating in the provision of treatment'. The meaning of 'identification data' is specified by the guideline as follows: 'The identifier shall contain data that identify the patient and the organisation unit in charge of his/her treatment precisely and exclusively. The identifier should contain the smallest necessary amount of data and such data contents shall not be disclosed (thus, for instance, for people outside the health service providing network the patients should not be possible to identify from the identifier). The identifier shall not contain special data concerning the condition of the patient. Elements of the patient identifier may include the last four digits of the social security identification number (so-called TAJ number), and the initials of the name of the patient, the date of admission, the code of the department or other organisation unit etc. The content, form or colour of the identifier shall not be indicative of the condition of the patient. Data managers of the inpatient care institution shall be authorised to know the data content (e.g. the persons taking care of the patient, the head of the institution, and the individual in charge of data protection). If a patient without personal identification documents has to be treated (e.g. in the case of emergency, a patient who cannot communicate), the patient shall be identified by an individual emergency identifier. Such an identifier element may be for instance: a series of numbers (or a simple serial number), or the code of the organisation unit and the date of admission etc.'

With a view also to the fact that in the general practices of a health institution activities qualifying as 'application of the law' in its traditional sense make up a small percentage in comparison to curative and preventive activities, the assistance and recommendation of the line minister is truly indispensable for the smooth introduction of the new patient identification system. Such assistance and recommendation, however, cannot be contrary to the purpose of patient identification and the fundamental rights of the patient. If however, the technical means whose purpose is to assist safe and secure provision of services for patients can be introduced in practice exclusively in line with the requirements of data protection, it can hardly fulfil its purpose completely.

Consequently, the excessive restriction of the range of data that can be displayed – that are medical data not qualifying as special data – for purposes of data protection, is contrary to the fundamental goal of the said Guideline that is to help treatment or save lives or emergency interventions, that is the protection and actual exercising of the most important rights of patients. And the above quoted part of the Guideline (Section I) is definitely setting requirements that are in contradiction even to itself, when it provides for precisely and

exclusively identifiable patients and organisation units in charge of the provision of the medical services, achieving all this in a way that 'it should contain the smallest possible range of data and its contents should not be disclosed'. In extreme cases this may lead to jeopardising the protection of the life and health of the patient especially if the patient is incapable of identifying himself or herself at the time and there is an unexpected need for an intervention.

The Commissioners hold that the repetition of the prohibition of disclosure is unnecessary – indeed, definitely confusing – in the Guideline. The patient's private secrets are under the protection of the Civil Code against everybody, even the health institution. From the moment of entering the inpatient institution the patient is under protection by the tighter norms of the civil law and the provisions of the health act, that apply to medical secrecy. The quasi service contract between the patient and the hospital (the doctor treating the patient) and all of its elements are, therefore, parts of the secret sphere protected by law. The excessive protective measures are also unnecessary from the aspect of the fact it is not – cannot be – presumed that the other patients or their visitors go to a hospital in order to find out data of other patients. Indeed, the 'presumption of innocence' may and should be applied in life and legal relationships otherwise protected by the rule of law, in an ever increasing range of areas. On the contrary, the presumption of illicit breach of confidentiality results in an unnecessary and disproportionate prohibition and restriction that may jeopardise the health or life of the patient.

Since the contents of the database stored on the basis of the patient identifier is an indispensable part of the curative/preventive activities, the health institution is, in this respect, a data manager on the one hand, and on the other hand, an institution undertaking to repair body and soul. The primary and fundamental goal is to protect life and health, the recording and handling of data is only part of the process. If in the system of constitutional values human dignity is viewed only in a moral interpretation, is the system of signs/codes applied by the medical institution a contradictory system when there is the patient's name, which is the most public identifier of an individual, and which is also protected by the Civil Code? The right to one's name is a personality right on its own, on the basis of which everybody has the right to bear his or her own name, of which nobody can deprive an individual. A person's name cannot be replaced by a code number or a bar code, particularly not on the patient himself or herself, stamped or tattooed on his or her body, on a wrist band or on any other device. Anonymity (impersonality) and encoding would degrade the individual into a 'product' of the health institution. (Social recognition is the basis of the valuable nature of the individual. For this reason, one of the most important preconditions for the realisation of the personality is that the members of the society be judged according to their real values.' From: Lenkovics–Székely: A személyiségi jog vázlata (*The draft of personality*). 2001. 116.).

The protection of the personality under the civil law relies on the individual's bodily existence, however, personality is not identical with biological/physical

existence; rather, it is a social ideal (intangible) value expressed by the entirety of the elements constituting the personality. The single integral and indivisible human personality is valuable in itself, in view of its unique and original nature. This personality is protected by the law in line with the social and constitutional order of the Republic of Hungary. Protection – which is always justified by the interests of the more exposed and weaker party – is a bilateral process: on the one hand, the rights relating to the personality must be respected by everybody. The word 'respect' is unambiguous: it is not compatible with any destruction of the personality, with the violation of its dignity, its restriction, the materialisation of the external manifestations of human personality as protected by the law or turning it into a 'subject' of the health care services.

Consequently, the unilaterally and excessively tight requirements of the Guideline concerning the contents of the patient's identifier do not meet the requirements of human dignity, the rights relating to personality and the freedom of self-determination in respect of information. The tight data protection regulations may result in unnecessary and disproportionate restriction of other fundamental rights which may – annulling its original goal – threaten the very treatment of the patient.

In their report the Commissioners gave a detailed analysis – invoking the most important relevant resolutions of the Constitutional Court – of the importance, from the aspect of the private law and the basic rights, of the right to life, human dignity and the personality rights derived from these, the legal and philosophical basis of the arguments concerning the rights of patients, and the relative relationship between data protection and self-determination.

In view of the logical system of the basic rights' test of necessity-proportionality the Commissioners found that the abstract value of data protection does not necessitate the restriction of personal data as described above, which is a restriction that is not proportionate to the goal intended to be attained, i.e. to the protection of personal data. The Commissioners held that the code system is definitely unsuitable for guaranteeing complete protection for personal data. Furthermore, the criticised method of protecting data imposes a disproportionate extra burden on medical staff and definitely jeopardises the smooth and safe treatment of patients.

The Commissioners also found that drafting laws, proper interpretation of the law and the application of the law are tasks for the state and for medical, administrative organisations and various authorities. The need for legislation that necessitated the introduction of the patient identification system in inpatient institutions did not at the same time mean that in addition to an amendment to the Decree it should also introduce a Guideline for its application that is unnecessary as was described above, and that generates constitutional concerns by reducing the effect of the legal norm that is in line with the constitutional requirements. The application of a personalised patient identifier that is suitable for the protection of the life and health of the individual patient and at the same time ensures the respecting of dignity, personality and privacy

as well as the sensitive data of the patient is an obligation of the doctor providing the treatment and of the health care institution with the involvement of the other party (the patient or his/her relative).

In order to remedy the constitutional impropriety so identified, the Parliamentary Commissioner for Civil Rights and his General Deputy called for action on the part of the Minister of Health. Accordingly, since the constitutional impropriety concerned originates from an unnecessary provision of 'other' legal means of government control, in order to avoid the impropriety in the future they proposed that the Minister of Health who is entitled to issue 'other' legal means of government control should promptly review the use of the provisions contained in the Guideline he has issued, taking into account the primacy of the right to human dignity and human health and that at the same time he should consider the possibility of introducing the necessary amendments to those provisions.

The report was transmitted – as a matter of course – to the Commissioner for Data Protection as well, who, in his response, criticised the competence and the professional standards of the report of the Parliamentary Commissioner for Civil Rights and his General Deputy. In his response the Data Protection Commissioner pointed out that if the Guideline of the Minister of Health were to be modified in a way as would permit the disclosure of data, he would have to use his powers and declare such data management to be illegal.

The Minister of Health welcomed the complex constitutional interpretation of the facts and conclusions outlined in the report of the Parliamentary Commissioner for Civil Rights and his General Deputy, the logic of the constitutional considerations of data protection versus other basic rights and the arguments supporting the proposal. In his answer however, the Minister also noted that there was no legal norm that would impose an obligation on him to make a choice or a legal judgement on the basis of the different opinions of the Parliamentary Commissioners, thus he can fulfil his obligation to draft legislation only if the Commissioners support his proposal in agreement with one another.

The Data Protection Commissioner – in view of the Minister's answer – still 'sees no reason for deleting parts of the correct text of a recommendation type of a guideline helping those having to apply the law.' In his new answer he refused again to accept the legal arguments of the General Commissioners. This case was not settled during the period covered by this report, the Commissioners will return to this issue in the next report.

3.27.
Presenting pictures of minors who have become victims of crime

Broadcasters often present pictures of children (minors) who have become victims of crime. Since in view of this problem it was not possible to exclude the suspicion of violation of or direct threat to the right to human dignity, the right of

reverence that can be derived from the right to human dignity, as well as the right of children to protection and care, the General Deputy of the Parliamentary Commissioner for Civil Rights launched an *ex officio* investigation. In order to ensure an effective investigation he contacted the Chairman of the National Radio and Television Board (ORTT), the President of Magyar Televízió Rt. (MTV Rt.), the President of Duna TV Rt. – exclusively in relation to their public service programmes – and the President of TV2 as well as the CEO of RTL-Klub.

Each of the broadcaster so contacted declared in unison that during the preceding year they presented photos of children (minors) who had become victims of crime only in exceptional cases. When they presented those pictures they always had obtained declarations from the parents of their consent to presentation – which is an indispensable pre-requisite for presentation – and in most cases the pictures were made available for them by the parents themselves. The broadcasters declared that no complaints had been received with respect to this issue. In 2003 the ORTT issued a recommendation to the Hungarian electronic media concerning the presentation of minors and children in the media. The information provided by the Chairman of the ORTT also noted that 'according to the practices – of ORTT – the disclosure of the names and photos of minors, who have become victims of crime, is not compatible with the principle laid out in the Media Act.'

According to the Act on the Parliamentary Commissioners the competence of the Commissioners covers the procedures of authorities and organisations performing public services, their decisions and resolutions made in the course of such procedures and to their failures to take actions. According to the Media Act the ORTT has competence with respect to cases relating to violations of law or breaches of contracts by broadcasters as well as the fines imposed, which, in respect of the group of entities and in the course of processes referred to above, qualifies as an organisation acting in respect of issues of public administration, therefore, the scope of power of investigation of the Parliamentary Commissioners extends to the ORTT as an organisation performing tasks of public administration.

Thereafter, the Commissioner reviewed whether his authorisation to investigate extends to procedures, decisions and failures to act, of the broadcasters. In the practices of the Parliamentary Commissioners to date the category of organs performing public service has included organisations not qualifying as authorities, performing state or local governmental tasks, particularly those in relation to which the consumer has no real choice, cannot decide which service provider to purchase the required service from, since only a limited number of or only one organisation provides the service concerned. In view of these, and of the concept of public service programme or public service programme item as defined in the Media Act, the Commissioner found that his competence does extend to the procedures of MTV Rt. and the procedures of

the commercial broadcasters as well, i.e. he can scrutinise the procedures of broadcasters, as organisations performing public services.

In the course of his investigation – since he had rather limited possibilities in terms of watching programmes, as a consequence of which he had to rely primarily on statements of the broadcasters and the statements made by the ORTT – he found no cases where any broadcaster would have presented pictures taken of minors who had become victims of crime without consent by the legal representative (the parents). Accordingly, the Commissioner did not identify constitutional improprieties.. However, the prevention of the occurrence of such is highly important in the way of a guarantee, so the Commissioner felt compelled to conduct an analysis of theoretical questions relating to the issue.

As had been explained in its resolution by the Constitutional Court, 'a dead person cannot be a subject of the right to private secrets or of personal data protection.' Both are rights relating to persons, therefore they are not negotiable, cannot be inherited, they can be exercised only directly by the persons concerned and they vanish with the death of the individual concerned'.

The individual's right to self-determination is part of the constitutional right to human dignity. In the course of the procedures of broadcasters the right to self-determination of the persons involved in those procedures must be protected adequately against the broadcasters, subject to restrictions stemming from the nature of those procedures. Consequently broadcasters are obliged to proceed in the course of its operations observing human dignity and to avoid causing unjustified disadvantages to anybody. This requirement also follows from the obligations borne by broadcasters under the Media Act. With respect to the above it can be pointed out that broadcasters – in the course of their operations – must respect human dignity, the personality rights of the persons concerned as well as the right of reverence, and they must ensure that data concerning private life are not disclosed without proper reasons.

In relation to the article on the tragic death of a footballer of the national select team the Data Protection Commissioner issued a communication in which he definitely and repeatedly drew the attention of journalists working for the 'tabloid press' to the importance of modesty, increased empathy and respect of personality rights. The provisions of the Civil Code provide that any form of abuse involving a person's photo (image) or sound recording constitutes violation of personality rights. The consent of the person concerned is required for the publication of anybody's image or sound recording with the exception of public appearances. The consent of the person displayed is required, however, for publication, if the uniqueness and the nature of an individual portrait, of the recording, can be established.

It follows from the above that if the public service broadcaster or other broadcaster in its public service programme presents an image without permit granted by the person concerned, in breach of the right of a person to his or her image or in breach of a right relating to somebody's memory, such broadcaster may cause an impropriety or a direct danger of an impropriety relating to the

right to human dignity or the right to reverence, which can be derived from the right to human dignity.

The General Deputy also noted that using available instruments the ORTT is making efforts to ensure that the procedures of broadcasters do not violate the provisions of the Media Act referred to above. In the course of his investigation the General Deputy found no circumstances in relation to the procedures of the ORTT that would be indicative of any constitutional impropriety, however, he asked all relevant organisations to continue to pay special attention in the future in the course of the presentation of photos of children (minors) who have become victims of crime, in order to avoid even a direct threat of a constitutional impropriety.

3.28.
The range of objects that can be kept by detainees

A detainee in a penal institution Budapest submitted a complaint to the General Deputy of the Parliamentary Commissioner for Civil Rights in which he claimed, among other things, that he was not permitted to take into or keep in his cell a CD player or a refrigerator.

Considering that on the basis of the problem described in the submission the suspicion of a violation of the right to property or its direct threat could not be excluded, the General Deputy ordered an investigation, and to ensure its effective completion, he asked the Minister of Justice to carry out an investigation. Simultaneously with ordering the investigation the complainant was informed about the fact that the situation he objected to was caused by the legal regulations concerned and not by the actions of the authority, as a consequence of which neither the head of the penal institution, nor any other person with decision making authority, can permit – in general or on an individual basis – the keeping of objects that are not permitted to be kept by the relevant legal regulations.

In the operative regulation the implementing decree to the Penal Act does not regulate the range of objects that can be kept by detainees, instead, it authorises the Minister of Justice to establish detailed rules on the execution of sentences and on the performance of actions in agreement with the Chief Prosecutor and the ministers concerned (heads of organs of nationwide competence). This matter is regulated in detail by a decree issued by the Minister of Justice (R1) and by a decree issued by the Minister of the Interior (R2).

According to the provisions of the R1 the convict can, while in the penal institution, keep the objects that are listed in the annex to the Decree, and the head of the institution determines the quantity of the objects that can be kept with the detainee, in internal regulations governing the operation of the

institution. According to the R2 the detainee is entitled to keep the objects listed in the annex to the Decree.

In his response the Minister of Justice admitted that the key rules of the restriction of the right to ownership (property) must be contained in the law, and this requirement was not met by the operative regulation regulating the issues objected to. At the same time, the Minister of Justice held that the 'technical/professional reasons underlying the restriction constitute the basis of the judgment of proportionality. Such a technical/professional reason may in the course of detention (with respect to convicts or persons detained under other legal titles alike) be related to the order and safety/security of the penal institution. In view of this requirement, it is considered to be justified that the detainee should not be permitted to keep a CD player or a refrigerator in his cell.'

Furthermore, the Minister of Justice explained that 'technical devices that may be operated by detainees carry the potential risk of extraordinary events (e.g. communication via teletext, mobile phone hidden in television set etc.). It should also be considered from the aspect of safety and security that any increase of the number of pieces of movable technical equipment increases the possibilities to hide prohibited objects, and to create a blockade within the cell. Keeping a refrigerator in the cell is not acceptable from the point of view of sanitation or public health either. Large technical devices reduce the manoeuvring room specified in the R1. CD players can be converted to be suitable for data (sound, image) recording. Such recordings may undermine the safety/security of detention or the effectiveness of the criminal procedure that is underway. Breaking disks can create tools for punching/cutting suitable for attacking others or self-mutilation.'

The Minister of Justice also pointed out that the state bears a special obligation to protect the lives of detainees under the constitution and in the course of the adoption of regulations relating to the application of the penal act this constitutional obligation forces the organisations participating in the adoption of legislation and in the execution of sentences and other measures, to avoid and prevent any situation, to the maximum possible extent, that could entail threats to the healthy, bodily integrity or life of the detainees.

Finally, the Minister noted that in the course of the preparation of the new penal code the Minister of Justice paid special attention to the regulation by law of questions that are currently regulated by decrees, which is not quite in line with the requirements of the Constitution. According to the draft act the range of items that a convicted criminal may keep in his cell will be aligned to the various degrees of sentence and the organisation that has drafted the proposed legislation also regulates the limitations on restriction. The new penal code will – according to the Minister – remedy the deficiencies of the current situation from the aspect of the Constitution.

According to the standard practice of the Constitutional Court the right to property is a fundamental right. According to the Constitution 'In the Republic of

Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.' Since the range of objects that may be kept by a detainee in his cell is determined by decrees issued by ministers – and this was not refuted by the Minister of Justice either – the effective legal regulations do not meet the requirement of the Constitution quoted above, and they are not in line with the principle of the rule of law either, therefore, they result in improprieties relating to these.

In relation to the possibility of restricting various fundamental rights the Constitutional Court established the triple requirement of necessity, suitability and proportionality. Accordingly, a fundamental right may be restricted primarily because that is required for the protection of another constitutional right and not because it is required by any abstract social or state interest – particularly interest of the public and public health.

According to the practices of the Constitutional Court one precondition for the restriction of a fundamental right to be in line with the Constitution is that the requirements of necessity, suitability and proportionality are met simultaneously. If discrimination exists in relation to fundamental rights, it is typically a case of restriction of a fundamental right. In respect of a given subject of the law rights of every person are restricted, therefore in such cases a fundamental right test has to be carried out.

The Constitutional Court also pointed out that the state may apply the instrument of restricting a fundamental right if it is justified by the protection of another fundamental right or freedom or by its exercising, by the protection of other constitutional values or any other constitutional goal. Another aspect to be scrutinised is the relationship between the importance of the goal to be attained by the restriction and the gravity of the prejudice to the fundamental right. 'Restriction of the contents of the law is contrary to the Constitution if this is not supported by a substantial reason – forcing such restriction – or significant interest of the public, [...] it is not indispensable, [...] is not in proportion to the goal intended to be attained by the restriction.' – declared the Constitutional Court.

In contrast to the above, the Minister of Justice only offered technical penal arguments to support the proportionality of the restriction. Apart from two exceptions however, he gave no detailed information on the fundamental rights whose protection or exercising or on other constitutional values whose protection or on any other constitutional goal that would have justified the restrictions. The General Deputy did not dispute that a refrigerator in a cell can – as a result of its size – be suitable for building a blockade within the cell and that it further reduces the space to be provided for the detainee according to the provisions of the R1. With a view to this the exclusion of a refrigerator from the range of objects that can be kept by the detainee in the cell – e.g. in order to provide for the highest level of bodily and spiritual health – may be necessary and may be proportionate to the goal to be attained as well as suitable for

attaining the goal. In respect of the prohibition of keeping a portable CD player in the cell however, the Minister considered that a palm-sized device that is not more than a few dekagrams is not quite suitable for producing a blockage in the cell and the reference to this does not seem to be very plausible or well-founded. The necessity of the restriction was, apart from this, explained by the Minister of Justice by saying that CD players can be turned into devices suitable for recording data and recordings so obtained may jeopardise the safety of detention. According to the standpoint of the Commissioner however, if the safety of detention – which is quite an abstract interest – may be accepted as a reason for the necessity of the restriction, it is still not clear whether it meets the requirement of proportionality.

Furthermore, even if the restriction were necessary and met the requirement of proportionality, it would have to be suitable for attaining the given constitutional objective.

The General Deputy held that according to Annex 1 to the R1 the detainee may keep several objects on him in which it is possible to hide items that are suitable for recording sound or image, or that can be converted into objects suitable or data transmission, some of them can be purchased in the market in forms enabling data storage. This shows that the prohibition of the possession of a portable CD player is not suitable for attaining the goal specified by the Minister of Justice, i.e. to prevent the production of sound recording.

Having reviewed Annex 1 to the R1 it is also clear that a detainee can hold lots of items on him that can be converted into tools suitable for stabbing or cutting. Therefore, the Commissioner holds that the prohibition of keeping a portable CD player in the cell is not a suitable measure for preventing the detainee from creating a tool suitable for stabbing or cutting.

Consequently, the General Deputy came to the conclusion that such restriction of the range of objects that can be held by detainees in this way – since it is not suitable for accomplishing the intended goal as a result of deficiencies of the legal regulation of the issue concerned – entails a direct danger of a constitutional impropriety relating to the right to property, and it also entails a direct risk of a threat of an injury of the right to education.

The General Deputy also noted that the effective regulation is not in line with technical advancement. The effective regulation should always be at a higher degree of abstraction and instead of or in addition to a simple list it should specify the characteristics of the items that cannot be kept by the detainees. According to the General Deputy consideration should be given to the possibility of enabling heads of penal institutions to decide on permitting or prohibiting the keeping of certain objects in the cells. A regulation in the form of an act of law, meeting the above requirements, could be suitable for reducing the improprieties relating to the rights to ownership and education.

The General Deputy proposed to Parliament that it should specify, in an act of law, the rules concerning the objects that can be kept in possession of the detainees or in the cells, and that in the course of the adoption of the new Penal

Code and in the specification of the range of items that can be kept in possession of detainees and in cells it should observe the requirements of necessity/proportionality/suitability and in the course of this process it should identify the rational reason(s) of restriction with a view to technical development and the possibilities of individualization.

3.29.
Impropriety in the procedure of the National Radio and Television Board (ORTT) relating to the renewal of a broadcasting right

One complainant objected to the ORTT's renewal of the broadcasting rights of the national commercial television companies engaged in terrestrial broadcasting. Another submission claimed in addition that the broadcasters regularly violated the provisions of the Media Act concerning the protection of minors.

Since the submissions were indicative of a possibility of direct suspicion of violation of or direct threat of violation of the principle of the rule of law and of the ensuing requirement of legal certainty, the General Deputy of the Parliamentary Commissioner for Civil Rights ordered a joint investigation on the basis of the complaints. In the course of the investigation he contacted the Chairman of the ORTT, reviewed the reports submitted on the operations of the ORTT as submitted to Parliament and the decisions posted on the home page of the ORTT, the report on the audit of the ORTT and the Broadcasting Fund carried out by the State Audit Office, as well as other documents obtained in the course of his previous investigations.

In its response the ORTT held that the investigation carried out by the Commissioner raised concerns. He declared that '[the ORTT] definitely holds that the ombudsman has no competence in this case'. The Chairman of the ORTT considered that the ORTT did not qualify as a public administration organisation; instead it had to be regarded as an 'other' type of organisation acting on the basis of a public administration type of authorisation. The Chairman of the ORTT asked the Commissioner to terminate the procedure and transfer the complaint to ORTT. One member of the ORTT noted in writing, that he did not agree with the contents of the response of the ORTT to the Commissioner and he expressed a dissenting opinion concerning the matter.

The Commissioner did not accept the above position of the Chairman of the ORTT and asked him to fulfil all of his earlier requests. In response to that the Chairman of the ORTT repeatedly explained that 'he continued to hold that the scope of competence of the Parliamentary Commissioners cannot extend to assessing the procedures [of the ORTT] concerning broadcasting rights', repeatedly asking for the cancelling of the procedure but this time he gave some answers to the request.

According to the Chairman of the ORTT '[the broadcasters affected by the complaint] – just like any other one of the Hungarian broadcasters had been sanctioned [by the ORTT] on account of infringements and consequently on account of breach of contract. The sanctions extended from instructions to terminate the contested behaviour through fines to suspending the exercising of their broadcasting rights. The two most severe sanctions provided for [in the Media Act] were never applied [by ORTT] against the television companies concerned. In the majority of cases the sanctions reached their goals, the broadcasters terminated their behaviour in breach of the law, though it is also true that new forms of infringements appear from time to time.

A number of proposals were contained in the agenda [of the ORTT'] concerning the renewal of broadcasting rights and the first one was included among the points on the agenda of the 4th week of 2005.

In May 2005 the broadcasters [affected by the complaint] were notified [by ORTT] about its acknowledgement of the claims they had submitted concerning the extension of their broadcasting rights, and that those claims would be assessed and decided on as requests for renewal concerning the conclusion of the effective broadcasting contrast with unchanged contents.

The proposal by the approval of which on 20 July 2005 the ORTT decided on the extension of the broadcasting rights of 40 broadcasters was put on its preliminary agenda for the first time on 30 June 2005.

In other aspects the rules on the establishment of such rights were applied [by ORTT] to the renewal of the rights, with the difference that – there being no tendering procedure – the provisions on the evaluation of tenders were not applied. The decisions were made by two thirds majority of votes, as prescribed by the law.

In view of the above response from the ORTT and the annexes attached thereto, the Commissioner extended his investigation to issues relating to the rights of children to protection and to the fulfilment of the objective obligation of the state to protect fundamental rights.

The Commissioner established that the fact itself that the ORTT is making its decisions concerning the renewal of the broadcasting rights not in a scope of power of an authority, does not exclude the Commissioner's competence to investigate matters relating to this process. The Act on the Parliamentary Commissioner for Civil Rights (Obtv.) provides that 'Anybody may apply to the ombudsman if in his judgement he suffered injury in consequence of the proceedings of any authority... or organ performing public service (hereinafter together: "authority") or its decision (measure) taken in the course of the proceedings and/or of the omission of the measure of the authority in connection with his constitutional rights, or if a direct danger thereof exists, provided that he has exhausted the available possibilities of administrative legal remedies or that no legal remedy is ensured for him.'

According to the Media Act '[the ORTT] is a separate legal person under the supervision of the Parliament which is conducting its financial management by

applying, as appropriate, the legal regulations governing the financial management of budgetary organs, including the fact that its accounts are kept by the Hungarian State Treasury ... the financial management [of the ORTT] is audited by the State Audit Office (SAO)', and the ORTT 'performs the tasks of tendering for the allocation of broadcasting rights and the satellite channels made available for broadcasting as well as the tasks of evaluating the bids received'. It is clear from the above that the decision on the broadcasting rights was really not made by the ORTT as an authority, however, the ORTT was performing a kind of a state task (and is thereby providing a service) that cannot be obtained from any other organisation. Consequently – despite its doubts – the ORTT can be considered to be an organisation performing public service in deciding on the broadcasting rights, i.e. the Parliamentary Commissioner does have a competence to review its procedures.

The first thing that was inquired by the Commissioner was the procedure of the ORTT preceding the renewal of the broadcasting rights objected to by the complainant. On the basis of the available documents the Parliamentary Commissioner found that the broadcasters objected to had been asking the ORTT to 'extend' their broadcasting rights on a regular basis, from 2002–2003. On the basis of these requests however – before the decision objected to – the broadcasting rights of the broadcasters concerned were not renewed by the ORTT. The ORTT confirmed its acknowledgement of the receipt of the requests in a simple response letter but the Board considered the requests of the broadcasters to be premature.

A radically new standpoint is indicated by later decisions made by the ORTT in contrast to the ones described above.

In its decision concerning the extension of the broadcasting rights of commercial television companies of terrestrial broadcasting with nationwide coverage, the ORTT 'notifies the [...] broadcasters that it is acknowledging their requests submitted earlier with respect to the extension of the broadcasting right, and will decide on them as request for renewal, i.e. for the conclusion of the effective broadcasting contracts with unchanged contents. The ORTT is ready to conduct negotiations through consultation concerning the future contents of the broadcasting contracts in force between the contracting parties.'

The Commissioner found that the ORTT – with the facts of the case unchanged, since the broadcasters asked for the extension of their broadcasting rights more than 14 months before the expiry of those rights – made two decisions in stark contrast with one another concerning the renewal of the broadcasting rights of the two commercial television companies of terrestrial broadcasting of nationwide coverage, however, the Board failed to justify its deviation from its earlier standard and permanent practice. By making a decision in contrast to its earlier practice on the basis of the requests for the renewal of the broadcasting rights, the ORTT caused an impropriety relating to the requirement of legal certainty which stems from the principle of the rule of law.

The decisions of the ORTT concerning the renewal of broadcasting rights reflect two standpoints that are in contrast to one another. Earlier, the ORTT was, for years, handling these applications as premature requests and did not make decisions on them. The Media Act contains clear provisions concerning the timing of the submission of applications or the organisation of a tendering procedure if necessary. According to the generally accepted meaning of words the submission of the requests concerning renewal and the decision on renewal was premature. It is easy to see that the legal institution of 'renewal' as regulated in the Media Act constitutes a kind of an allowance or benefit for (favourable treatment of) the broadcasters which is suitable for relieving them from having to 'fight' for the broadcasting right, as a kind of bonus in the case of permanent contractual broadcasting. Accordingly, there is a good reason for the Media Act stipulating a deadline for the submission of the requests for renewal. Otherwise the broadcaster could submit its request for the renewal of the contract right on the day following the conclusion of the original contract for broadcasting, on the basis of which the ORTT could extend the broadcasting right.

The Commissioner considers acceptable the argument of the Chairman of the ORTT concerning the fact that the renewal of the broadcasting right would have been premature, by referring to the rule that the broadcaster can obtain the broadcasting right for an additional five year period without another tendering process upon the expiry of the original contract, and cannot obtain such right before the expiry of the previous one. The broadcasting rights that are the subject of the dispute would have been in effect for almost two more years, and the broadcasters could have committed breach of contract that would have prevented the extension of their broadcasting rights. In making its disputed decision the ORTT disregarded this possibility, i.e. this procedure also caused an impropriety relating to the requirement of legal certainty which stems from the principle of the rule of law.

The Commissioner also reviewed the extent to which the ORTT took – in making its decision on the renewal of the broadcasting right – into account the provision according to which 'The broadcasting right cannot be renewed if the holder of the right has repeatedly or gravely breached the contract.' The Commissioner found that neither the Media Act, nor the broadcasting contracts define – even in the form of a reference – the concept of 'grave breach of contract'. The fact itself that the Media Act does not define the concept of 'grave breach of contract' in any form, is suitable for carrying a direct threat of an impropriety relating to the principle of the rule of law. By establishing the concept of 'grave breach of contract' in relation to a sanction imposed in one of its decisions, instead of on the basis of the brevity of the violation of the law, the ORTT – since it is given no general authorisation to interpret the provisions of the Media Act – caused an impropriety relating to the principle of the rule of law.

The Commissioner also found that the broadcasters concerned had breached the provisions of the Media Act on numerous occasions. Thereby they

committed breach of contract according to the terms and conditions of their broadcasting contracts. The Media Act perfectly clearly excludes the possibility of renewing the broadcasting right in the case of repeated breaches of contract. The word 'ismételt' ('repeated') does not require interpretation by law, its meaning in the Hungarian language is: again, once more or several times more. According to the generally accepted meaning of words a person who violates its provisions again or even several times, regardless of whether in the course of the various breaches of contract it failed to fulfil the same or different contractual obligations (at all or properly), breaches the broadcasting contract repeatedly. It could not be established from the available documents whether the ORTT appreciated the fact of any breach of contract in the course of its decision making process. In the decision on the renewal (or refusing to renew) a broadcasting right it must be established whether the requirements laid out in the Media Act have been or have not been met. By failing to take into account whether the requirements of the Media Act had been met, and by failing to check whether those requirements had been met, in the course of the renewal of the broadcasting right the ORTT caused an impropriety relating to the principle of the rule of law.

The General Deputy of the Parliamentary Commissioner for Civil Rights had been scrutinising the system of sanctions available for application by the ORTT, along with some of the bigger problems observed in relation to their application, in an earlier joint report as well (hereinafter: Joint Report). The General Deputy found that 'the set of sanctions that can be applied by the ORTT and the sanctions actually applied are not suitable for forcing broadcasters to fully comply with and fulfil their obligations specified in the Media Act and in their broadcasting contracts. [...].' These findings are upheld by the Commissioner in an unchanged form!

The Chairman of the ORTT did not answer the Commissioner's question concerning when and what sanctions had been applied by the ORTT to the two broadcasters covered by the complaint. According to information provided by the Chairman of the ORTT the Board had applied sanctions on numerous occasions on account of violations of the law and consequently on account of breaches of contract, to all of the broadcasters (and not only the two television companies objected to in the complaints). From documents obtained in the course of an earlier investigation and from the annual reports submitted by the ORTT to Parliament, it was concluded that in 2003 the ORTT imposed sanctions on 19 broadcasters on 59 occasions, in 2004 it imposed sanctions on 169 occasions on account of violations of the provisions laid out in the Media Act concerning the protection of minors. In view of this, as well as in view of the fact that in recent years the broadcasters had been sanctioned by the ORTT most frequently because of violations of the rules on the protection of minors, the Commissioner established that in the course of its procedure concerning the renewal of the broadcasting right the ORTT did not take these cases into

account, therefore the Board caused direct danger of an impropriety relating to the right of children to protection and care.

The Commissioner also scrutinised the procedure applied by the ORTT in the course of making its decision concerning the renewal of the broadcasting rights. The Media Act provides that 'in respect of other issues in the procedure aiming at the renewal of the broadcasting rights the rules governing the establishment of broadcasting right shall be applied'. Different rules apply to the evaluation of bids received in tenders for district radio and television and local radio and television broadcasting rights. Accordingly, no decision could have been made in the same procedure concerning the renewal of the broadcasting rights of nationwide, district and local broadcasters. By disregarding this, the ORTT caused an impropriety relating to the principle of the rule of law through evaluating the bids (proposals) together.

According to the minutes of the meeting of the ORTT the Board rejected the proposal concerning voting in accordance with the provisions of the Media Act. The Commissioner held that the provision of the Media Act quoted by the Chairman of the ORTT is a so-called referring rule which does not describe all of the elements of the procedure in which a decision is made on renewal, instead it provides that the rules governing the process of establishing such rights shall be applied when the Board is making a decision on renewing such rights. Since in the course of its decision the ORTT failed to proceed according to this rule, it caused an impropriety relating to the rule of law.

According to the Report of the SAO published in August 2005 on the audit of the operation of the ORTT and the Broadcasting Fund 'funds raised from the private sector is reinvested by the fund in the private sector in the form of financial assistance (supports). In accordance with the relevant Community regulations the financial independence – and, indirectly, the independence of the broadcasters – is guaranteed by the combined (dual) revenue sources of the Fund. In this dual financing system the costs of the operation of the Fund and the ORTT are covered primarily from the contributions paid by media undertakings. One practical problem of financial management is that payments are refunded according to basis figures but as a consequence of inadequate payment discipline some elements of the revenues from the private sector cannot be planned reliably, because they can enter the system only when they are actually paid on the basis of final and enforceable decisions.'

A particular light is shed on the above finding of the SAO by a statement made by the former Chairman of the ORTT on a different affair claiming that in sanctioning infringements the ORTT always takes into consideration the possible effects of its sanctions on its contractual relationships as well. The Commissioner held that as a consequence of the official type of legal relationship the contractual (co-ordinated) relationship that is created between the ORTT and the broadcasters besides the naturally existing relationship between a superordinated organisation and subordinated organisations cannot have any material impact on the performance of the official duties of ORTT

functioning in this case as an authority. The Constitution categorically prohibits – among other things – any discrimination based on 'other' situations.

In view of the above the Commissioner reviewed whether the practices described above can lead to constitutional improprieties relating to the prohibition of negative discrimination. This review involved the performance of the 'general reasonability test' applied by the Constitutional Court as well. This comparability test means that the prohibition of negative discrimination may be breached only between entities in similar (identical) positions. Discrimination causing a constitutional impropriety may take place only if a person or group is treated in a disadvantageous way in comparison to another entity or group in the same situation. Accordingly, a direct danger of an impropriety relating to the principle of the rule of law, the ensuing requirement of legal certainty and the right to fair procedures as well as the prohibition of negative discrimination is caused by the ORTT if in its procedures, disregarding the operation of the constitutional principles, it takes into consideration the effects that may be affecting its contractual relationships by its procedures, particularly by the sanctions it may apply.

An impropriety relating to the principle of the rule of law is caused also by the fact that in the existing system of financing the operation of the ORTT – as a contracting party and at the same time as an authority – largely depends on the broadcasting fees and penalties paid by the broadcasters operating under the supervision of the ORTT. Article 10 of the Convention signed in Rome on 4 November 1950 on the protection of human rights and fundamental freedoms, provides for the freedom of expression. Accordingly, everybody has a right to the freedom of expression. In the course of its procedure detailed above, by its decision the ORTT had an effect on the structure of the broadcasters (media market) as well, that may be suitable for influencing the communication process that is indispensable for the expression of well-informed (well-founded) opinions. This then entails a direct danger of an impropriety relating to the right to the freedom of expression. It is part of the competence of the Office of Economic Competition to assess from the aspect of the legal regulation of economic competition, the actual effects of the decision of the ORTT on the entirety of the Hungarian media market; therefore, the Commissioner did not extend his examinations in this direction.

The General Deputy had made proposals concerning amendments to the Media Act on several occasions earlier, but they have not been realised to date. Since those proposals are still valid, as is confirmed by this report, the Commissioner upheld his proposals concerning amendments to the Media Act in an unchanged form.

In addition to those proposals however, he proposed that the Parliament should amend the Media Act in a way as will create and guarantee complete financial independence for the ORTT from the broadcasters; it should clarify and complement the procedural rules concerning the renewal of the broadcasting right and should define the concept of 'grave breach of contract'.

The Commissioner asked the Chief Prosecutor to review the ORTT decision on the 'Extension of local and district, and national broadcasting rights expiring in 2006 and 2007, respectively' and to scrutinise the preceding procedure and to take the necessary actions in line with the findings of his reviews.

The Commissioner asked the President of the Office of Economic Competition to review whether the renewal of the broadcasting contracts as described above, had influenced the Hungarian broadcasting market.

The Commissioner asked the ORTT to review its decision on the extension of the broadcasting rights, the preceding procedures and the broadcasting contracts modified as a consequence of that procedure and to carry out the necessary corrections.

3.30. Suspicion of discrimination in the case of the MTV m1 Newsreel programme

The General Deputy of the Parliamentary Commissioner for Civil Rights learned from the media that in contrast to previous practices the Newsreel (Híradó) programme starting at 7.30 p.m. on the m1 channel of MTV Rt. would be hosted exclusively by men from the month of September. The various media organs explained this by saying that according to the decision makers middle-aged mature men are creditworthy for viewers, and such persons are capable of hosting the news programmes even alone.

Since in view of this problem there seemed to be a likelihood of the violation or direct danger of violation of the principle of the rule of law, the state's objective basic right protection obligation, the guaranteeing of the equality of women and men, the prohibition of negative discrimination and the actions aimed at eliminating inequality of opportunities, the General Deputy ordered an investigation *ex officio*. In order to enable the effective completion of the investigation he asked the President of MTV Rt. to carry out an investigation and to send him the available documents.

The Commissioner was told by the President of MTV Rt. that a new programme and news structure had been introduced. The m1 channel was broadcasting an increased number of news programmes. The work schedules of the programme hosts were also aligned to the transformed system of programme hosting. The number of newsreel programmes on the m1 channel increased by the introduction of two more such programmes, and – with the exception of the midday newsreel – it became a general practice that newsreel programmes are hosted by a single person.

The managers directing the newsreel programmes of MTV Rt. decided, on the basis of – not specified – professional considerations and criteria, that in the main edition of the Newsreel at 7.30 in the evening there should be a single programme host, after a few years of dual hosting. The main reason for the

decision was that employees with significant experience as journalists and editing should participate more effectively in the whole process of the production of the programmes. The tasks of the programme host include among other things to draft the texts he/she is to read out or recite alone, by comparing a variety of sources of news, i.e. he or she should act as more than a news reader/announcer. Studio guests often appear in the evening Newsreel with whom interviews may be produced only by colleagues who also have decades of experience as interviewers. Accordingly, programme hosts having significant journalist and editorial experience can participate more closely, as participants of the creative process as well, in the production of the 7.30 newsreels, including even for instance the shaping of the visual appearance of the studio. Another important professional criterion is that in extreme situations (e.g. in the case of natural disasters, assassinations, military conflicts or unexpected political events), well informed and highly experienced colleagues should help provide factual and comprehensive information for viewers. This is why the two key hosts of the 7.30 evening newsreel are now two male hosts who have decades of experience both as journalists and editors, as well as interviewers and media correspondents. According to the President of MTV Rt. 'thus it will be possible for the women moderators who worked until the structure change in the autumn in the 7.30 evening Newsreel programme, to appear as hosts of the 7.30 newsreel programme after steady practising and extension training. The only precondition for this is that they meet the technical/professional criteria outlined above."

According to the information received by the Commissioner women newsreel hosts will appear on screen in even more news programmes and for longer periods of time, than before the structure change in the autumn.

The President of MTV Rt. also notified the Commissioner that 'not one of the managers [of MTV Rt.] has ever announced that only and exclusively men can be employed in the news programme in question (Newsreel, 7.30 p.m.). Consequently, nobody has ever said that only middle-aged mature men are the only creditworthy persons for viewers and they alone can be suitable for hosting the Newsreel programmes. For this reason, as a matter of course, nobody has, with any explanation, ordered any 'survey' that could confirm such a definitely untrue statement. [...] The alleged declaration referred to in the press and the sentence referring to a survey that has never taken place, come from a publicist of a certain daily who either did not specify his sources in his article or he referred to a newsreel editor 'who preferred to remain anonymous'. His article was taken seriously and believed by many, but those spreading untrue news must face the consequences. Incidentally, the articles discussing the professional suitability and abilities of the programme hosts are considered by the management of MTV Rt. as 'parts of the literary works' of the journalists concerned.'

The president of MTV Rt. provided data, in a breakdown by programme, that describe the proportions of men and women and the types of programme

hosting at MTV Rt. The data show the programmes that are hosted exclusively by women, the ones hosted by men and those hosted jointly or alternately by both. The president of MTV Rt. emphasised that 'in the workshops of MTV Rt. programme hosts and the types of hosting are chosen on the basis of technical/professional criteria.'

The Commissioner also asked the President of MTV Rt. for information on the proportions of individuals belonging to the various national and ethnic minorities (apart from those hosting programmes dedicated to minorities) among the programme hosts of the m1 channel. As a matter of course, this question did not relate to the national and ethnic identity of the various individual programme hosts, not even the relative proportions of the various national and ethnic minorities. The only purpose of this part of the investigation was for the Commissioner to obtain information from the data required for the preparation of the plan of MTV Rt. concerning the equality of opportunities – that are managed in accordance with the provisions of the act on the protection of personal data based on voluntary data supplies of those concerned – from which no conclusions can be drawn concerning the individuals concerned but which help the effective completion of the Commissioner's investigation. MTV Rt. could not provide adequate information of this type but they said that they 'were taking actions to support the equality of opportunities of employees belonging to the Roma [...] minority.'

According to the President of MTV Rt. therefore, 'the question to be decided was not whether a woman or a man should be hosting the main evening news programme, rather, that we should find persons, journalists, who had substantial experience as reporters and editors in addition to programme hosting experience.' At the time of the structure change there were two such employees who met these conditions and they happened to be men. The answer given in response to the Commissioner's questions also noted that 'in line with the criteria just outlined, this group of employees will increase for a new host will join them with substantial experience in editing new programmes, in working as reporter and in appearing live on TV, and that person now happens to be a woman'.

According to the president of MTV Rt. the position of the Rt. is that 'In its own area the Newsreel programme provides opportunities for programme hosts to learn, whilst familiarising themselves with the entire technology of the Newsreel programme, skills of writing and editing news, compiling orders of news items, producing reports for the newsreel, producing newsreel materials, newsreel studio discussions, handling unexpected situations, editing programmes and editing news programmes.'

The president of MTV Rt. held that the Commissioner has no statutory authorisation to order an investigation concerning the operation and activities of MTV Rt. For according to the Act on radio and television MTV Rt. is a privately established one-man shareholding company, therefore, from the aspect of the application of the Act on the Parliamentary Commissioners (Obtv.) it cannot be

regarded as an ‘organisation engaged in conducting proceedings’, it is not conducting any sort of proceedings relating to the issue under investigation or any other proceedings of different contents, it has no such power just as it has no supervisory organ the way public administration organisations have. (A similar argument was voiced by telephone by the chairman of the Board of Trustees of the Hungarian Television Public Foundation.) Furthermore, he complained about having been set a 15 day deadline for fulfilling the requests of the Commissioner.

In an earlier case the General Deputy has already carried out an investigation focused on Magyar Televízió Rt., as an organ performing public services, when he justified his competence for carrying out an investigation on MTV Rt. as follows: ‘Accordingly, first of all I reviewed whether the ombudsman’s power to carry out investigations extends to the procedures, decisions or failures to act, on the part of public service broadcasters. As I explained in the ... case, the provisions in Article 29 (1) of the Obtv. referred to above, only gives a precise definition of the term ‘authority’. Otherwise the ‘Obtv. makes it subject to the interpretation of the law by the Parliamentary Commissioners to decide which organisations can be regarded to be organs performing public service. The Parliamentary Commissioners always regard organisations not qualifying as authorities, performing state or local governmental tasks, to be organs performing public service, especially those in the case of which the users of the services have no realistic opportunities to decide who to obtain the required services from, since such services are offered only by a limited number of or only by a single organisation. Considering all this as well as in view of the term public service programme and public service item of programme as defined in Article 2 18–19 of the Media Act, I have established that my scope of competence does include the investigation of the procedures of public service broadcasters, as organisations performing public services.’ The president of MTV Rt. has fulfilled several requests already and he has never disputed the authorisation of the Parliamentary Commissioners to carry out investigations.

As regards the subject of the investigation the Commissioner explained: The requirement of equal treatment demands that those under obligation refrain from any form of behaviour that results in direct or indirect negative discrimination, retaliation, harassment or unlawful segregation against or of any person or groups of persons based on any specific characteristic. Accordingly, the requirement of equal treatment means a negative obligation on the one hand: those under obligation must not violate the equal human dignity of other people. On the part of the people with eligibility, this means that everybody has a need – which can be enforced as a right – to be treated as a person of equal human dignity. For this reason, the investigation was aimed at finding out whether the new system of the hosting of news programmes is suitable for creating constitutional improprieties in relation to the prohibition of negative discrimination. In the course of his investigation the Commissioner first reviewed

certain theoretical and practical questions of negative discrimination and then those of indirect discrimination. He highlighted that neither direct, nor indirect discrimination is a 'deliberate' behaviour (the organisation introducing a measure needs not be lead by the intent to discriminate), instead it is a matter of fact.

As a result of the investigation so conducted, the Commissioner could not decide beyond doubt whether any negative discrimination took place between programme hosts as members of a homogeneous group. The only reason for this is that he could not investigate whether the individuals who had been hosting the 7.30 newsreel programme from 12 September 2005 actually met the criteria outlined by the President of MTV Rt. – as described above – nor could he check whether the same criteria are not met by other potential programme hosts. (Furthermore, for failure to receive the required documents, he could not actually review whether all programme hosts or only groups of certain programme hosts constituted homogeneous groups.)

Pursuant to the Act on equal treatment and on facilitating equality of opportunities the requirement of equal treatment is violated by indirect negative discrimination and instructions given to others to carry out actins constituting negative discrimination, besides direct negative discrimination, harassment, unlawful segregation and retaliation. The category of indirect negative discrimination includes an instruction that does not qualify as direct negative discrimination (apparently meeting the requirement of equal treatment) which creates, for certain individuals or groups having certain characteristics, a more disadvantageous situation in a much higher proportion in comparison to other persons or groups in a comparable situation. The essence of indirect negative discrimination is that discrimination is based on conditions that are, apparently, neutral, yet it affects individuals having certain protected characteristics, in a significantly larger number. In this case, in order to be released from the assumption of having breached the requirement, the given provision has to pass the test of reasonableness in respect of the persons having the protected characteristic.

In the course of his investigation the Commissioner carried out the test of 'prohibition of arbitrary discrimination' as applied by the Constitutional Court as well. The comparability test means that the prohibition of negative discrimination may be violated only among persons or groups in similar (identical) situation. Discrimination causing constitutional impropriety may take place only where a person or a group is treated in a more disadvantageous manner in comparison to a person or group in a comparable situation. As a result of the investigation the Commissioner found that the programme hosts of the Newsreel programme of MTV Rt. constitute – from the aspect under consideration – a homogeneous group. The criteria specified in the new programme structure of MTV Rt. under discussion – which is not aimed to be discriminative according to the president of MTV Rt. – were not met by 7 female programme hosts and 1 male programme host. The action so introduced by MTV Rt. resulted in a disadvantageous situation for a larger number of women than for men. The

president of MTV did not specify the constitutional explanation for the measure that only men could host the 7.30 newsreel. The system of technical/professional criteria is far from being transparent, the information provided by the President of MTV Rt. did not specify the precise qualifications required for holding the position, the extent and type of the required practical experience, thus it is suitable for arbitrary application. These however, entail a risk of negative discrimination.

The European Court of Justice has explained in respect of several cases that a labour hiring scheme that is not transparent violates the principle of equal access to work, because the lack of transparency makes any form of controlling by the national court (and in this case the ombudsman) impossible. For this reason, the measure introduced by MTV Rt., also generates an impropriety pertaining to the fulfilment of the obligation of measures aiming at eliminating inequality of opportunities.

The General Deputy also checked the extent to which in the course of its procedures MTV Rt. fulfilled its tasks resulting form the objective basic right protection obligations of the state. The General Deputy holds that in the course of their activities the national public service broadcasters must proceed with special care in all cases in which there is but the lightest likelihood of the violation of any fundamental right. The Media Act prescribes that a broadcaster must comply with the constitutional order of the Republic of Hungary, its activities cannot violate human rights, and they cannot be suitable for generating hatred for persons, genders, nations, peoples, national, ethnic, linguistic or other minorities, churches or religious groups. Broadcasting must not aim at offending or excluding any minority or majority in an express or covert way, at presenting them or condemning them on the basis of racial criteria.

It cannot be disregarded that in the course of their activities broadcasters (and particularly public service broadcasters) must, not even for a minute, forget about the effects of their programmes on television viewers or radio audiences that cannot be compared to the effects of the press from any aspect, and about their special responsibilities relating to these effects. Since the procedure of MTV Rt. was suitable for entailing a direct danger of an impropriety relating to indirect negative discrimination in the case on hand, the ombudsman established the direct danger of an impropriety relating to failure to fulfil the state's objective fundamental right protection obligation.

The Commissioner also reviewed the actions MTV Rt. was taking to improve the situation of disadvantaged social groups. The Commissioner did not agree with the statement of the President of MTV Rt. who said that MTV Rt. 'had practically no means to take 'actions' to improve the 'situation of disadvantaged social groups' because this was not part of its tasks.' The Commissioner held that taking actions aiming at realising equality in law and eliminating inequalities of opportunities, was an obligation of MTV Rt. based on the Constitution and the provisions of the Media Act. MTV Rt. fulfils this obligation – within the limits of its capabilities – when it proceeds in accordance with the provisions of the Media Act

and the effective Public Service Broadcasting Code and pays special attention to making information of importance for groups in disadvantaged situations on account of their age, intellectual or spiritual state or social circumstances.

In addition to establishing the direct danger of constitutional impropriety, the ombudsman proposed, with respect to the case on hand, to the President of MTV Rt. to pay special attention in the future in selecting programme hosts to meeting the requirement of equal treatment both in terms of contents and form, and to elaborate a more objective method – one that meets the requirements of the rule of law – for measuring the technical/professional skills of programme hosts.

3.31. Position statement concerning competition affecting the entirety of the health service providing system

On the basis of a notion and request of the Hungarian Medical Chamber the following problem was brought up: 'safe, high standard service provision for patients with a view to the equality of opportunities, the system of social security based on the principle of solidarity' is currently subject to competition according to economic criteria which raises constitutional concerns relating to fundamental rights with a view to the changes of legal norms as well.

Since economic competition that is driving the economy, can create unusual or even contradictory conditions in pharmacies or doctor's offices, the Parliamentary Commissioner for Civil Rights considered it necessary to carry out an evaluation of the situation from the aspect of human rights and from the constitutional fundamental rights, and to notify the public of his findings.

In the concrete event on hand, a draft act – according to the Office of Economic Competition – was intended to start a price competition between pharmacies in the category of drugs without state subsidy, so as to eliminate the 'price cartel type' behaviour among pharmacies. This was a clear indication that – since the standard price of non-prescription drugs did not appear as a result of an act on the part of the authority – this is not a consequence of the pharmacies' behaviour aiming to avoid competition. This was enabled by the power of the Pharmacists' Chamber by which it determines the regulation of the price margin affecting this group of products as well, together with which it means the quarterly announcement of indicative consumer prices. According to the Office of Economic Competition however, 'there is a need for a more daring deregulation in this area as well, based on the laws of the market economy, as well as for the re-regulation of this sector'.

The Constitution of the Republic of Hungary declares the state's objective obligation to protect basic rights, which obligation is particularly important especially in respect of issues relating to the health sector. In addition to the Constitutional Court's having defined the framework of the rights to the highest possible level of bodily and spiritual health – as a goal of the state – the

problem of equality of opportunities which is emerging again in relation to this right, affects the system of service provision from a number of aspects, from the basic and special medical services through inpatient services and rehabilitation, to the supplies of medicines and medical aids. Accordingly, what we are talking about is the 'commercialised' measurement of the value of health and the channelling of the problems resulting in the inequalities of access – resulting from financial inequalities – to the area of competition policy dictated by the market.

The Constitution points out that the Republic of Hungary is facilitating the implementation of equality in law among other things by introducing measures to eliminate inequalities of opportunities. Though competition is a driving force of the economy, in the area of the commercialisation of medical treatments and other health services, there are a number of arguments against competition, e.g. that opportunities are not equal in respect of treatment and recovery, as well as that neither the role of the patient (consumer) nor that of the service provider (market) can be translated into the language of the competition law. It is not possible to talk about pure commercial conditions in the relationship between a (lay) patient (consumer) without the necessary knowledge and the service provider (the doctor) who does have the knowledge, and the differences in the qualities of the service providers are not known either simply because (ideally) we do not use such services (e.g. medical services) often enough so as to build up a 'marketable' knowledge of the services provided for us. Another problem is that for the patient, who is a layman, the use of the treatment, of the drugs etc, is not transparent, for he is not the doctor, i.e. he only knows his own demands and is not quite familiar with the ins and outs of an adequate treatment. (Dr. Kovács József: *A modern orvosi etika alapjai.* (The fundamentals of modern medical ethics) Medicina, pp. 206–208). Therefore, the consumer (patient) who is not sufficiently well-informed, needs to make a decision in the market structure governed by competition, i.e. he would have to choose quality service (treatment, medicines etc.). There is no need for more constitutional fundamental rights related arguments to convince anybody that on the part of the patient the exercising of the right to the highest possible standards of physical and spiritual health based on equal opportunities, is difficult to imagine on the basis of the philosophy of economic competition, in a structure of market mechanisms (a market of supply with multiple participants, competitors participating with equal opportunities, efforts to maximise profits etc.). Nevertheless, even in a health sector of public financing only in exceptional circumstances can one imagine the commercialisation of certain forms of service provision – innovative procedures and medicines – however, it is only possible in a definitely consistent insurance system in full observance of medical ethics and the chances of access to services.

If the situation is assessed from the aspect of the freedom to conclude contracts as provided for by the civil law, a – currently quite substantial – contradiction is found again between the state's obligations and the basic citizens' rights of the individual. Instead of interpreting the right to health as a

general right that can be derived from the Constitution, the Constitutional Court regards this right as a constitutional obligation of the state on which an objective limitation is imposed by the economic capacities of the state. At the same time, the state's institutional obligation to protect life and health also means that if it cannot finance a new or a 'too expensive' curative instrument or procedure, it has to make it possible for citizens to finance such on the basis of their personal self-determination rights and financial autonomy, based on proper medical professional indications of course. The primary question with respect to this type of 'commercialisation' is whether it may be permitted in line with the Constitution (e.g. is it compatible with the right to life and human dignity, the prohibition of negative discrimination etc.). Based on the requirement of the unconditional operation of the right to life and human dignity, a new procedure is obviously to be permitted, indeed it should be mandatory. And if it is permissible, then the secondary obligation of the state is to facilitate equality of opportunities for all citizens in terms of access to such treatments.

Consequently, since as a result of the inequalities in personal wealth, no real equality of opportunities can be achieved, and not even the state is capable of achieving complete equalisation – the institution system of the civil society (such as various associations, foundations and public foundations) may also be invoked to provide for compensation and assistance. If therefore the state – in view of the limitations of its capacities – cannot provide for complete equality of opportunities in relation to self-financing, there is a need for the promotion and involvement of the financing possibilities of the civil society as well.

These however, cannot be assessed from the aspect of the competition law, since only the possibility of access is given but that of actual and free choice is not. (So despite the availability of up-to-date, effective, non-prescription preparations, if they are highly expensive, the majority of people will not be able to use it because they do not have the money to buy it with.)

The 'presumptive market' in the area of health services is not a real market based on the independence of supply and demand: it is a market adjusted by the doctor (he recommends drugs) where both demand and – indirectly – supply is determined by the doctor. Accordingly, if we keep referring to the principles of the competition law as well as the expectations of the Union in the area of the drug market and the distribution of drugs and regard the position of the everyday consumer (without medical expertise) to be one of an equivalent market participant, disregarding the above significant role of doctors, would mean that we cast a shadow of doubt on the authority of doctors to prescribe drugs that are not subsidised. However, the competition between manufacturers and distributors of drugs is real competition of real market participants; moreover, it should satisfy a quasi unlimited demand side (patients). The demand side however, is not in an adequate decision making position since the restoration of health is – at present – a matter for the medical profession and it is a situation of forced necessity on the part of the patient.

Therefore, as regards the plan concerning the introduction of price competition for pharmacies, it would result in a market situation of such an inequality with respect to drugs without subsidies that would result in impossible, indeed, in some cases definitely disadvantageous position (i.e. one of inequality of opportunities) for the 'one-man' pharmacies of small municipalities as well as the consumer with limited purchasing power.

Incidentally, according to the competition regulations of the treaty establishing the European Community it does not constitute a competition distorting kind of a behaviour or an abuse of a dominant position if a given member state's certain undertaking (in this case: pharmacy) renounces, in the expressed interest of the consumer, the prohibition of its concerted behaviour constituting restriction of competition (in this case: price competition). (Treaty establishing the European Community, Title VI, Chapter I, Articles 81-83).

Consequently, the ombudsman held that the market is imperfect – since the consumer in the health sector (the patient) is not a real consumer – and competition is a situation of necessity that does not fit in with the traditional system of conditions of the competitive economy either as regards demand or supply, in their pure form, and it would have passed demands for advantages in the national economy to the pharmacies, which cannot be justified from the aspect of the basic constitutional rights or from the aspect of the competition law. And it would also have strained the relationship of trust – which is quite a fragile relationship anyway – between the doctor and the patient.

3.32.
Position statement concerning the protection of the constitutional rights of Hungarian citizens employed in Germany

In April 2005 the Hungarian public was busy talking about and keeping up with the developments of a concerted campaign – referred to as SoKo Bunda – started by the German authorities and carried out in the territory of Germany, Austria and Hungary, against illegal employment, in the course of which a total of 134 premises were searched, computers and documents were seized and several Hungarian citizens were arrested. In the course of the raids armed police units secured – against employees – the German officers of the customs and finance guard (who were also armed themselves). In relation to this campaign the Parliamentary Commissioner for Civil Rights launched an investigation to clarify whether the authorities involved respected the fundamental freedoms of the Hungarian citizens and their human dignity, and whether the actions taken did meet the constitutional criteria of necessity, suitability and proportionality.

In the spirit of the 'cooperative constitutionality' between the institutions of the Member States of the European Union in charge of the same functions the Parliamentary Commissioner for Civil Rights contacted dr. Karlheinz Guttmacher asking whether any complaint had been submitted to his office with

respect to the above procedures of the German authorities. The German ombudsman was sorry about the fact that the actions taken by the German agency controlling illegal employment (FKS) caused such indignation in Hungary. At the same time he informed the Parliamentary Commissioner that a German-Hungarian joint committee was set up to investigate the case. The committee is comprised of representatives of the German Ministry of Economy and Labour (BMWA) and the representatives of the Hungarian Ministry of Economic Affairs and Transport, the Ministry of Foreign Affairs and the Ministry of Labour and Employment Policy.

The Hungarian Parliamentary Commissioner contacted the three Hungarian ministries concerned to ask them about the actions taken to remedy the injuries of the Hungarian citizens and in order to stop the negative discrimination against the Hungarian employees.

Each of the three ministries gave detailed and comprehensive information on the actions they had taken, assuring the ombudsman about their efforts aiming at protecting the rights of the Hungarian citizens concerned using all available means at their hand. They had represented and promoted Hungarian interests at a number of high level negotiations and they called for urgent action on the part of the German governmental agencies to close the cases as soon as possible and to provide compensation for legitimately operating Hungarian enterprises and employees. After meetings of senior officers of the ministries concerned and a number of diplomatic exchanges of letters, the bilateral inter-governmental joint committee has had two meetings to date. The aim of the joint committee meetings is to analyse the legality of the inspections, to identify any abuse of authority on the part of the German authorities concerned, to clarify the national and EU background of the case as well as to restore mutual trust and confidence.

Based on the available information the Hungarian ombudsman arrived at the following standpoint:

The standard practice of the Hungarian Constitutional Court has established the triple requirement of necessity, suitability and proportionality in relation to the possibility to restrict the various fundamental rights. This constitutional requirement applies to the procedures of the various authorities as well. Accordingly, the authorities may restrict the fundamental freedoms and constitutional rights of citizens only in order to protect other fundamental rights of the same gravity or to protect other important interest of the public, only to the extent and in the way required to this end. The actions applied with respect to Hungarian citizens working in Germany did not meet all of these criteria. The goal intended to be attained by the German authorities (fighting illegal employment), could have been attained by less drastic means as well. The radical means applied by the FKS (deployment of special services, standing employees up to the wall, house searches etc.) caused an unnecessary and disproportionate degree of endangerment of the human dignity, personal freedom, rights to work and social security of Hungarian citizens working in

Germany. A dispute in terms of interpretation and application of the law between two EU Member States – Hungary and Germany – cannot result in violation of the freedom and fundamental human rights of Hungarian (EU) citizens who are truly innocent in respect of the issues on hand.

Accordingly – since the German Constitution, the Grundgesetz also guarantees the fundamental rights to which all people are entitled, such as the rights to human dignity, to legal certainty or the right to fair procedures, so all of the public agencies in Germany also have to comply with these – the Hungarian ombudsman asked the representatives of the Hungarian ministries involved in the case to continue to use their best efforts to protect such constitutional rights of the Hungarian employees. The Hungarian ombudsman asked – through the German ombudsman's institution – the German authorities to do the same.

3.33. Position statement concerning compensation by the state for those who have suffered adverse consequences of preventive vaccinations

The head of a civil organisation submitted a protesting petition and a complaint to the Parliamentary Commissioner, objecting to the repeal of the regulation providing for compensation for individuals who have suffered health impairment as a consequence of mandatory vaccination or for their relatives in the case of the death of vaccinated persons. In response to the invitation a total of 325 individuals signed the petition. In their request they claimed that as a consequence of the state's obligation to provide compensation the right to reparation of those who have suffered injury, is reduced to an inadequate level.

In view of the mode of the change of the regulation that gave rise to the protest and its expected consequences and having recognised the importance of the fact that the mandatory application of certain vaccines may become necessary in wide groups of society to protect public health, the Parliamentary Commissioner for Civil Rights considered that there was a need for an assessment of the situation from the aspect of human rights and from that of constitutional fundamental rights, and for information of the public.

The legal institution of compensation was introduced in the Hungarian legal system by the Civil Code (with effect from 1 May 1960), by providing that 'A person who suffers a loss in consequence of performing appropriate activities in order to prevent imminent hazards of extraordinary proportions shall be entitled to request compensation therefore, unless he is under immediate obligation to perform such activities as part of his duty. In the event of such person's death in the line of duty, his dependents and/or those whom the person had been required by law to provide for shall be taken care of, if necessary.' The legislator imposed the obligation to provide such compensation on the sate. Judicial

practice in Hungary established a link between the averting of a danger to the public and mandatory vaccination, as early as in 1972. In its final decision the Supreme Court declared that the provisions of the civil law according to which in the case of guiltless damage the injured person is entitled to compensation shall also apply in the case of damage caused by actions aimed at preventing and fighting infectious diseases. Vaccination is not only aimed at protecting the health of the recipient but it is also aimed at averting a danger that would affect large groups of the society if an epidemic were to spread. By this verdict the supreme judicial forum laid down the foundations for the subsequent way of thinking in respect of fundamental rights that was reflected by the now repealed provision of the Health Act.

In the Civil Code the legislator provided that the various other pieces of legislation governing certain circumstances and situations in life (personal and financial relationships) are to be interpreted – unless otherwise provided in such other pieces of legislation – in concert with the Civil Code, with a view to the provisions of the law. Accordingly, the hierarchy of various categories of legislation and legal certainty requires that a special rule concerning a special personal and financial relationship regulated in a separate piece of legislation should be in concert with the highest level norm of the private law.

The formerly effective text of the Health Act was in line with this requirement of the fundamental norm of the civil law, and it confirmed the regulation that guaranteed compensation, as a basic citizens' right, by the state in order to make up for any damage suffered by persons who have received vaccination as an obligation of citizens in case of a danger of an epidemic which is a special form of a danger to the public.

The legislator terminated a situation that reflected legal certainty for some 45 years, i.e. a quick and secure way of exercising the citizens' right guaranteed by law, through the amendment to the law which entered into force on the day referred to above, i.e. by the elimination of the guarantee of the compensation that used to be provided for in the Health Act. An amendment to a regulation of such importance may be introduced only on the basis of a very substantial reason but in this case there is no reason that could be considered to be substantial enough to necessitate such a reversal in view of the constitutional test of necessity and proportionality. It is not possible to refer to harmonisation with the expectations of the European Union either because those expectations define specifically the minimum requirements. Consequently, the Member States are entitled to provide additional guarantees for their citizens. An EU expectation cannot be regarded to be as an obligation on a Member State's legislator to withdraw already existing rights, because this would cast an unfavourable light on the Union itself and especially on Hungary's EU membership.

The unnecessary and unjustified reversal is explained – but is not justified – by the mode of the amendment to the act, i.e. the way in which it took place quasi 'unnoticed', in the closing provisions of a new act (the Drugs Act) only in the form of a reference to the Article concerned. This technique of drafting legislation

should – according to the Commissioner – be avoided in the future for the very reason of undermining the constitutional requirement of legal certainty.

A quick – and the only – way to correct the problem would be to restore the formerly effective text of the Health Act, which would also restore its harmony with the basic principles of the Civil Code and at the same time ensure that it meets the requirements of the Constitution. If the state imposes a restriction on the individual's freedom, imposing an obligation on the individual – to facilitate public health (averting danger of epidemics) – to tolerate mandatory vaccination, the requirements of justice, equity and social solidarity demand that at the same time the state should provide possible compensation for anybody whose health is impaired by such vaccination or, in the event of such person's death, for his or her dependents.

The provision of compensation by the state does not prevent the sate – where someone else (e.g. the doctor, the health institution, the manufacturer or distributor of the vaccine) is responsible for the damage – from demanding compensation from the person responsible for the damage on the basis of statutory concession. The state is much more in possession of the necessary medical and legal apparatus for this purpose than its citizen (who has just suffered the unwanted consequences of the vaccination).

In view of the above the Parliamentary Commissioner for Civil Rights asked the Minister of Health to urgently submit his proposal concerning the restoration of the repealed provision of the Health Act to the Government and the Government to submit it to the Parliament's plenary session.

3.34.
A letter written by the General Deputy of the Parliamentary Commissioner for Civil Rights in respect of parking fees

Dear Mr. T,

In your complaint submitted to the Complaints Office of the Office of the Parliamentary Commissioners you claimed that a number of parking companies, including ... sent you reminders to pay parking fees and surcharges on account of parking in violation of the relevant regulations. The reminders for surcharge payments relate to dates and times of parking when the motor vehicle was no longer in your ownership. Your complaint also noted that you submitted a request to the Mayor's Office of the 2nd district of Budapest to call on the new owner of the vehicle to have his ownership registered but no action was taken to this end.

From the documents attached to the complaint I have found that according to the sale and purchase agreement the new owner of the vehicle is – since 13 April 2004 – D.T. a resident of the town of Debrecen. I have asked the document bureaus of the mayor's offices of Budapest and Debrecen.

I found that your request submitted on account of the change of ownership was transferred by the Budapest document bureau – for lack of jurisdiction – to the document bureau of Debrecen, having jurisdiction over the place of residence of the new owner, on 4 January 2005. However, the new owner could not be obligated by the document bureau to arrange for the registration of the ownership of the vehicle, because at the place of residence specified in the sale and purchase agreement the individual was listed in the local register of addresses as 'fictitious' as at 25 November 2004. This was notified by the Debrecen document bureau to the Budapest document bureau.

I also found that the investigation department of the Budapest Police Headquarters in charge of crime involving vehicles had started criminal proceedings against an unknown perpetrator, for having stolen the vehicle. The identity of the perpetrator could not be established therefore the investigation was suspended and the withdrawal of the vehicle from the register was requested at the Budapest document bureau. From 18 February 2005 the document bureau withdraw the vehicle from the register for good. The decision became final on 28 July 2005.

I was also notified by the document bureau of Debrecen that the above facts are contained in the motor vehicle register, along with the entry – which is of importance from the aspect of your complaint – that from 13 April *2004* the new owner of the vehicle was *D.T.* through change of ownership.

I cannot take action to have the debts owed to the parking companies – that are contested by you – cancelled or to proceed on your behalf for lack of competence, because the legal relationship with the parking companies is a legal relationship under the civil law and any legal dispute originating from such relationships can be settled through court procedures. In view of the data contained in the vehicle registry which is a document of public authenticity I recommend that referring to the data contained in the register you submit a request to each of the three parking companies to have your fee debts cancelled.

In relation to the procedure of the document bureau complained about I found that the procedure of the Budapest document bureau was in line with the relevant legal regulations, it did not cause any constitutional impropriety. Therefore, I took no action with respect to this case in line with provisions laid out in Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights.

I trust and sincerely hope that your problem will be quickly resolved.

Budapest, November 2005

Sincerely,
Albert Takács

4.

The ombudsman's activities relating to legislation

The Parliamentary Commissioners may make proposals concerning the drafting and adoption of legislation, to amend or repeal existing legal regulations, to organisations that have been authorised to draft and adopt legislation or to issue other legal means of government control. One pre-requisite for this is that they should find, as a result of their investigations, that the impropriety they have identified in relation to constitutional rights, results from superfluous or unclear provisions of acts of law or other legal means of government control or from the lack or deficiency of the regulation of the issue concerned.

During the first ten years of the operation of the Hungarian ombudsman's legal institution – between 30 June 1995 and 31 December 2005 – the Parliamentary Commissioner for Civil Rights and his General Deputy made a total of 1,207 proposals (in 98 cases in year 2005) concerning the adoption, modification or repealing legal regulations of various levels. (This total figure also includes modifications proposed repeatedly with respect to the same piece of legislation). In the largest number of cases (392) the Commissioners initiated the adoption of, amendment to or repealing of Acts of law. This is followed by various ministers' decrees (261) and government decrees (234). In the majority (68.8%) of cases the addressees accepted the recommendations of the Commissioners, rejecting only about a quarter (25.8%) of them. In respect of the rest of the proposal the deadline for response has not expired to date. (For detailed statistics see Table 2.)

In year 2005 a number of acts were adopted or amended in line with the recommendations of the Parliamentary Commissioners. Such cases included for instance supplementing the Act on the Police in accordance with the proposal that in the case of missing the 8 day deadlines there should be a possibility to submit a request for certification. It was on the basis of our initiative that the Parliament adopted the Act on the assistance for victims of crime and on the mitigation of their damage/loss by the state, and amended the Act on the election procedure. A number of proposals made by the ombudsmen concerning amendments to government decrees or ministers' decrees were incorporated in new Acts on the subjects concerned. (For instance, the proposal that it should be possible to release medicines that are medically justified but that cannot be financed by the Hungarian social security system, if the patient

requests this and undertakes to pay the price, was regulated in the Act on the drugs market.)

In their reports the Parliamentary Commissioners gave accounts to Parliament on their proposals concerning the adoption of legislation which – after discussions with the addressees – they did not uphold as well as about those not fulfilled by the addressees.

Pursuant to Article 26 (1) of the Act on the Parliamentary Commissioners, in their annual reports the Parliamentary Commissioner for Civil Rights and his General Deputy submit to Parliament the descriptions of the most serious improprieties and those affecting the largest groups of society that they have explored in their investigations, in the case of which their efforts could not lead to resolving the problems. In their report on the year 2005 activities they put forth the following, recommending at the same time that the Parliament should order investigations to explore these issues:

– the Parliamentary Commissioners asked that the Parliament should review the possibilities of amending the Act on local appellation councils whereby the words 'piece of land' is replaced by 'agricultural land' and in relation to this the Parliament should review the possibilities of amending the provisions of the Act on agricultural land concerning the exercising of the pre-emptive right (right of first refusal) concerning agricultural land and homesteads;
– they asked that the Parliament should review the possibility of supplementing, as soon as possible, the Act on misdemeanours with provisions on harassment;
– they repeated their request that the Parliament should provide for the reviewing of the possibility of supplementing the Act on assembly by provisions enabling the establishment in an implementing decree the circumstances and criteria to be taken into consideration by the police in prohibiting the exercising of the right to assembly;
– they continued to ask the Parliament to take into consideration the possibility of discussing the draft legislation on partial compensation for violations to ownership (property) as a consequence of certain international agreements concluded by the state and to adopt such an act as soon as possible;
– in order to prevent people from becoming homeless and to eliminate the negative legal consequences of being homeless, the Parliamentary Commissioners continued to propose that Parliament should discuss experience on the theme repeatedly and to take possible actions.

The Parliamentary Commissioner for Civil Rights and his General Deputy – in contrast to the Data Protection Commissioner – do not have statutory duties for commenting on drafts of legislation. However, those preparing drafts of certain statutory instruments sent drafts to them even without a statutory obligation.

The drafts of statutory instruments that were proposed by the Parliamentary Commissioner for Civil Rights or his General Deputy in their recommendations, as a result of their investigations, were submitted by the organisations

concerned to the Office of the Parliamentary Commissioner in proof of their fulfilment of the Parliamentary Commissioner's recommendation. These drafts were usually checked by the Parliamentary Commissioner and his General Deputy from the aspect of whether the text of the regulation drafted on the basis of the recommendation can be suitable for remedying and preventing in the future, the constitutional improprieties identified by the Commissioners.

In some cases the drafts of legal regulations that governed the practical operation of certain constitutional rights – and therefore they affected large groups of citizens or entities – were also sent to the Commissioners by the organisations in charge of drafting, in the course of the phase of circulation in the public administration system. In commenting on the drafts the Parliamentary Commissioner and his General Deputy – relying on their experience in the application of the law built up in the course of their investigations – drew the attention of those drafting legislation to risks of constitutional improprieties hidden in the draft texts. In the case of draft legislation about which they had no experience, the Commissioners made no comments.

Agreement of the Parliamentary Commissioner or his General Deputy is not a pre-requisite for the adoption or entry into force of draft legislation. Therefore, they reserved the right to make proposals for amendments to regulations in their recommendations in case they find any constitutional impropriety after the entry into force of legal regulations they have commented on.

In respect of what happens to the draft legal regulations they have commented on, the Parliamentary Commissioner and his General Deputy found that their comments had been taken into consideration and in most cases utilised in the course of the re-drafting of the texts of the regulations.

5.

Summary

2005 was a year of outstanding importance in the history of the Hungarian ombudsman's institution. As the first ombudsmen started working on 1 July 1995, our institution commemorated the 10th anniversary of its establishment. This celebration was a very modest, in-house event. The Commissioners handed over memorial certificates to the employees who had been working for the office from the first year of its operation. Furthermore, we released a commemorating publication summing up the 10 year history of the Institution and the *ars poetica* and views of the ombudsmen formerly and those currently in office. This publication was also sent – besides Hungarian institutions – to European and other partner institutions. On the occasion of the anniversary the Hungarian ombudsmen organised a meeting for the ombudspersons of the 'Visegrád Group' countries focusing on the operation of the right to social security.

In the report on year 2005 the 10th anniversary offers an opportunity for a look into the past and a look into the future alike.

In respect of the past 10 years it may be 'objectively' noted that the new institution of the rule of law has lived up to the expectations. By its high standard professional activities, its autonomy and resolute approach the institution fulfilled its social purposes and function in a state governed by the rule of law. The work of the ombudspersons has contributed to the development of the Hungarian public administration system that is not only more effective and more expedient, but one that is more humane and closer to the citizens in its operations. The activities of the authorities scrutinised by the Commissioners are increasingly characterised by a client friendly attitude, a service provision nature and steadily improving quality. Awareness of the system of values and the spirit of the Constitution, that is the contents and requirements of the constitutional fundamental rights, is being raised in the organisations of the public administration system and in other agencies. The public appearances and the media coverage of the ombudspersons have contributed to the growth of the awareness of the law among citizens and restored their (sometimes: lost) trust in the state. The activities of the Parliamentary Commissioners have perceptibly improved the situations in life of soldiers, detainees, refugees, inmates of institutions, patients, pensioners and those relying on other social services and benefits and the actual operation and exercising of their rights. An

increasing number of expressions of recognition and appreciation of the efforts of the Commissioners are coming from clients and complainants, along with, of course, responses of criticism, though the number of these has been declining. As for the recognition of the work of the Commissioners by the Parliament, it is clearly indicated by the fact that our reports have been accepted by Parliament unanimously year in year out. The Commissioners thanked for this because it gives them strength and incentive for the future, and not because they actually consider that their work has been flawless.

This is the point where, at the beginning of the second decade of the operation of the ombudspersons, new challenges have to be faced. New social requirements for the protection of fundamental rights from holders of economic power in the private sector, and from media have been observed to be developing. Furthermore, a number of civil organisations are calling for the establishment of new ombudsman institutions in certain sectors and areas. The four existing Commissioners jointly and unanimously hold that instead of additional ombudspersons it is their office apparatuses should be strengthened and their scopes of authorisations should be broadened. The broader scope of power however, would mean extension towards an advocate and mediating function, and no more or increased power. The prestige and respect of the ombudsman's institution has – not only in Hungary but across the world – always lied in its exclusiveness and high quality standards. Accordingly, the institution has to be protected from erosion, both in respect of increasing the number of employees as well as in respect of an unlimited extension of its powers. If this is achieved, then there will be ground for hoping for universal enforcement and exercising of the fundamental rights without improprieties. To this end however, the so called 'cooperative constitutionality' will have to be extended across the whole of the institution system of the state governed by the democratic rule of law.

This constitutional cooperation could mean the initiation of a special procedure of 'legal harmonisation' by any constitutional institution upon experiencing any contradiction in the area of protecting and enforcing constitutional fundamental rights. Meanwhile, the laws perfectly separate the various institutions of the state governed by the rule of law in terms of powers and functions but they do not provide for an organisational and operational institutionalisation of the possibility to coordinate these. Not only the economic, social and other societal relationships are growing increasingly complex and complicated, but the relevant legal regulation applying to them is also becoming increasingly complex and less and less transparent, and, consequently, more difficult to apply. (As a result of which the problem of the 'sustainability of the rule of law' has also cropped up in legal literature.)

Under such circumstances cooperative constitutionalism should also evolve primarily among the Commissioners. Since the same circumstances in life may appear in different ways from the aspect of different constitutional fundamental rights, there is a need for the operation of the Parliamentary Commissioners as

a body in which standpoints are formed by majority voting along with the possibility of expressing parallel or dissenting opinions. As the constitutional fundamental rights form a coherent system, but the institutions in charge of protecting fundamental rights are separated from one another, the problem and necessity of coordination between and among the various constitutional institutions also need to be dealt with.

Based on their practical experience the Parliamentary Commissioner for Civil Rights and his General Deputy may refer primarily to the prosecutor's institution in this field, where their investigations come to show the requirement for the involvement of stronger public power. Coordination with the courts would be necessitated increasingly frequently by the large number of complaints against courts and the confusion from time to time of the protection of the fundamental rights by the ombudsmen and the protection of the citizens' subjective rights by the courts. Since the ombudsmen refer to the resolutions of the Constitutional Court very frequently, in other words, the ombudsmen try to enforce those decisions, they also see their deficiencies. As a matter of course, this is may also occur the other way around, consequently, the need for cooperation seems to be highly justified on both sides. One positive example is the preparation of legislation by government, where the general Commissioners may – informally – comment on drafts of regulations relying on their own recommendations, initiatives and practical experience. A similar positive process has got underway in the cooperation with certain committees of Parliament where in the course of the discussion of the most important fundamental Acts the Parliamentary Commissioners can explain their comments, and thereby they can positively influence the process of legislation. In these areas the ombudsmen are performing 'pre-active' tasks preventing complaints that could result from wrong or deficient legislation, and they are also engaged in the performance of 'pro-active' tasks.

Finally, when looking from the presence into the future, mention should also be made of the internationalisation of the protection of rights by the ombudsmen. This is particularly clear from the experiences of the first year after Hungary's EU accession. The protection of rights of citizens of other EU Member States in Hungary needs to be improved just like the protection of the rights of Hungarian citizens (employees, students, researchers, tourists etc.) in other EU Member States. Environmental protection has already been a special area of internationalisation, since environmental pollution and its danger has never been confined the territory of any given country. This issue appeared in particularly salient forms in relation to the noxious foams of the river Rába in Hungary's relationship with Austria and in relation to the preparations of gold mining in Banska Bistrica and Rosia Montana, with Slovakia and Romania. As a consequence of Hungary's historical and geographical position there is a particularly compelling case for regional cooperation in relation to the protection of the rights of minorities and of refugees, not only with neighbouring countries that have already joined the EU, but also with those that have not. We were

pleased to see that the Voivodship had its ombudsman before the Serb Republic and after his appointment he promptly called a regional conference on the protection of the rights of minorities in 2006, and his first foreign trip will be to Hungary for exchanging experience.

These forces of internationalisation are generating new tasks for the European community of ombudsmen as well. New proposals crop up and sometimes intense debates take place in relation to the expansion of the functions of the International Ombudsman Institute and its regional organisation, the European Ombudsman Institute. These international ombudsman institutions may play an important role both together and separately, in the elaboration and practical enforcement of the universal contents of fundamental freedoms and human rights even if in the interest of creating and maintaining peace among civilisations.

Dr. Albert Takács

General Deputy of the
Parliamentary Commissioner
for Civil Rights

Dr. Barnabás Lenkovics

Parliamentary Commissioner
for Civil Rights

Table 1

Complaints Completed by the Parliamentary Commissioner of Civil Rights in 2005, Broken Down According to the Steps Taken

Method of Completion	Year Complaints were Lodged			Total	%
	2003	2004	2005		
Rejected					
with report	0	1	1	**2**	0,03
with information	157	1235	2908	**4300**	64,30
with remittal	1	83	450	**534**	7,98
Total rejected	158	1319	3359	**4836**	72,30
Total terminated	54	211	343	**608**	9,10
Staying (proceeding, investigation)	9	27	16	**52**	0,80
Completed with investigation					
– report establishing no constitutional impropriety	0	17	35	**52**	0,78
– rejected after investigation without report	27	270	269	**566**	8,46
– rejected after investigation with report	0	4	5	**9**	0,13
– report with recommendation	16	103	117	**236**	3,53
– report stating unfeasibility of remedy, no recommendation	0	6	5	**11**	0,16
– complaint solved, no recommendation	1	21	15	**37**	0,55
– dealt with by using reports made in other cases	16	113	119	**248**	3,71
– report without recommendation, calling attention to the problem	2	19	13	**34**	0,51
Total of investigation	62	553	578	**1193**	17,8
Grand total	**283**	**2110**	**4296**	**6689**	100,0

Table 2

Initiatives Related to Statutes Broken Down According to Responses

Initiatives 2005 to Remedy Constitutional Improprieties Broken Down by responses	**Replying**			**Total**	**%**
	Recommendation accepted	**Recommendation rejected**	**The time limit for answering has not yet expired**		
Initiative with state organ concerned to remedy constitutional impropriety	59	6	53	**118**	41,3
Recommendation to supervisory authority	40	4	16	**60**	21,0
Initiative for adopting, amending or repealing statues:					
Act of Parliament	8	4	14	**26**	9,0
Government Decree	14	4	13	**31**	10,9
Ministerial Decree	8	1	3	**12**	4,1
Local Government Decree	8	2	9	**19**	6,7
Other instrument of state administration	1	0	5	**6**	2,1
Initiative of prosecutor's protest	0	0	1	**1**	0,4
Initiative of criminal proceedings	1	0	1	**2**	0,7
Initiative of Disciplinary Proceedings	0	2	1	**3**	1,0
Initiative for the right interpretation and implementation of law	6	0	2	**8**	2,8
Total	145	23	118	**286**	100,0
%	50,7	8,0	41,3	**100,0**	