EUROPEAN ANTI-FRAUD OFFICE

Directorate B
Agricultural and Structural Funds II

NEBYLO DIGITALIZOVÁNO
podatelna
MINISTERSTVO FINANCÍ ČR
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Brussels

OLAF Investigations

FINAL REPORT

Case No: **OF/2015/1348/B4**

Type of case	Investigation
Legal basis for the opening decision	Article 3 of Regulation (EU, Euratom) No 883/2013
OLAF Staff	Zuzana HARMATHOVA – investigator Monika MATEICKOVA – investigator Audrius POVILIUNAS - investigator
Date of creation of OLAF case	27/11/2015
Date of opening decision	26/01/2016
Person(s)concerned	Company IMOBA a.s., legal successor of the project beneficiary company Farma Čapí hnízdo a.s. Ing. Jana Mayerová, born Nagyová Ing. Josef Nenadál
Source of information	FNS correspondents, Directorate General of the European Commission for Regional and Urban Policy
Fraud Notification System (FNS)	☒ Yes ☐ No
Offence category	Misappropriation of EU funds Irregularity Fraud
Area concerned	Structural Funds
Investigative activities carried out	Interviews with persons concerned Interviews with witnesses Operational meetings with the national judicial authorities Acquiring case-related documentation

Have the persons concerned been notified of the opening of an investigation?	☒ Yes ☐ No
	OCM(2017)18924 of 25/09/2017 OCM(2017)4979 of 09/03/2017 OCM(2017)4965 of 09/03/2017
Have the persons concerned been given the opportunity to comment on facts concerning them?	☒ Yes ☐ No
	OCM(2017)18924 of 25/09/2017 OCM(2017)18920 of 25/09/2017 OCM(2017)18922 of 25/09/2017 OCM(2017)22700 of 10/11/2017 (additional opportunity for comments submitted to one of the three persons concerned, company IMOBA a.s.)
Evidence of irregularity or fraud	☒ Yes ☐ No

Financial and other impact	
Impact on EU financial interests	☒ Yes ☐ No
Estimated financial impact of the facts established	CZK 42 497 826.8 / EUR 1 647 676.4
Amounts prevented from being unduly spent/evaded	N.A.
Judicial proceedings	Yes: Case No. KRPA- 505939/TČ-2015-000093-NL The case is being handled by the Regional Police Headquarters of the City of Prague, Unit of Economic Crimes, and supervised by the City Public Prosecutor's Office of Prague

Summary

On 25 November 2015, an anonymous source informed OLAF of the alleged misuse of Structural Funds in a project co-financed by the European Regional Development Fund (ERDF) under the Czech Regional Operational Programme Central Bohemia 2007-2013. The project beneficiary was the company Farma Čapí hnízdo a.s. The total financial allocation of the investment was CZK 436 588 000 / EUR 16.85 Mil with CZK 42 500 000 / EUR 1.64 Mil originating from the ERDF. The objective of the project was to construct a multi-functional congress centre.

According to the complainant, the beneficiary company was not eligible for the support under the particular call for projects under the ROP Central Bohemia due to the fact that this was targeting small and medium enterprises (SME) only, while the beneficiary company was allegedly linked to a large company, Agrofert Holding a.s., which disqualified it from this form of support.

In the course of the administrative investigation, the OLAF investigators conducted numerous investigative activities. Documentation and information was collected from the national authorities, two persons concerned and several witnesses were interviewed, and numerous operational meetings were held with the national judicial authorities

throughout the investigation process.

The OLAF investigation concluded that the family links between the persons involved in the ownership of Farma Čapí hnízdo a.s and Agrofert Holding a.s. appear to be such as to give those persons the opportunity to work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another. These two enterprises may be regarded as 'linked' for the purposes of the applicable legislation due to the fact that, through a group of natural persons acting jointly, they constitute a single economic unit.

Furthermore, the investigation revealed that representatives of the project beneficiary provided untrue information and concealed important information from the operational programme's managing authority when they submitted their project application and signed the grant agreement in 2008. The concealed information demonstrates that the beneficiary company did not suffer from handicaps typical of an SME. Therefore, in the meaning of the applicable legislation, the European Commission is entitled to refuse providing financial aid to such beneficiary. Providing financial assistance to an enterprise, which does not suffer from the handicaps typical of an SME, would be in contradiction with the state aid rules, since such assistance is likely to produce more severe distortions of competition.

By decisions of the previous company owners and subsequently the company shareholders, the legal form of the company changed from a limited company to a shareholders company shortly before submitting the project application in February 2008. The form of shares issued by the company allowed for their anonymous ownership during the whole period of the project implementation. The anonymous ownership of the beneficiary company did not allow for continuous monitoring and checking the beneficiary's eligibility for SME support throughout the project implementation what goes against the general principle of transparency applicable to the use of the EU financial resources. In addition, the subsequent sale of the company shares to new owners in December 2007 may be considered as an act having its purpose in obtaining an advantage contrary to the objectives of the applicable EU law by artificially creating the conditions required for obtaining such advantage.

In given circumstances, it is OLAF's view that preparation and implementation of the given project has been affected by numerous breaches of the national and EU legislation, notably the Commission Recommendation[1] defining the small and medium enterprises, the Structural Funds Regulation[2] defining the general eligibility rules, and the Council Regulation[3] on the protection of the European Communities financial interests. These breaches may constitute basis for judicial proceedings governed by the respective provisions of the Czech Penal Code on subsidy fraud and damage to the EU financial interests.

The matter is being addressed by the Czech Police since 2015 (case No KRPA-505939/TČ-2015-000093-NL). In October 2017, following the initial collection and evaluation of information, the Police launched the criminal proceeding in the matter and addressed all persons accused with official notifications of their accusation. The national judicial authorities could take into account information collected during the OLAF investigation in their further proceedings.

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[1] COMMISSION RECOMMENDATION No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises contains in its annex Definition of micro, small and medium-sized enterprises adopted by the Commission

[2] COUNCIL REGULATION (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999

[3] Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests

1. Background information

On 25 November 2015, an anonymous source informed OLAF (THOR(2015)40022) of the alleged misuse of Structural Funds in project No CZ.1.15/2.1.00/04.00095 „Multifunkční kongresový areál Čapí hnízdo" co-financed by the European Regional Development Fund (ERDF) under the Czech Regional Operational Programme Central Bohemia 2007-2013 (CCI 2007CZ161PO009). The project beneficiary was the company Farma Čapí hnízdo a.s.

The total financial allocation of the investment was CZK 436 588 000 / EUR 16.85 Mil with CZK 50 000 000 / EUR 1.93 Mil originating from a public subsidy. The subsidy contained 85% co-financing from the ERDF programme which equals to CZK 42 500 000 / EUR 1.64 Mil.

The objective of the project was to construct a multi-functional congress centre offering premises for organising conferences, trainings, company events, as well as other events organised in the region. The project was implemented in 2008 -2010.

According to the complainant, representatives of the project beneficiary company - Farma Čapí hnízdo a.s. (Stork Nest farm) – concealed important information from the OP managing authority when they submitted their project application in 2008. The source claims that Farma Čapí hnízdo a.s. was part of the Agrofert group, one of the largest holdings in the Czech Republic. Considering the fact that the call for projects, under which Farma Čapí hnízdo a.s. received the public financial support, was restricted for small and medium enterprises only, a company with ownership links to a large company would not be eligible for support.

In his/her allegation, the complainant states that according to the Manual for beneficiaries issued by the managing authority of the ROP Central Bohemia, "Financial support must have a motivational effect, i.e. without the subsidy the applicant would not be able make the envisaged investment."

Furthermore, the source illustrates other links between the project and the Agrofert Holding a.s. and its linked companies - via people involved in the company and project management as well as bank loan guarantees provided by Agrofert Holding a.s. to the beneficiary company and real estates used for the project implementation being in the ownership of the Agrofert group.

In addition to the anonymous source, OLAF also received incoming information from the Directorate General for Regional and Urban Policy of the European Commission (THOR(2015)41374) as well as from the European Court of Auditors (THOR(2016)201). These institutions transmitted information about the political lobbying related to allocation of EU funds under the OP Enterprise and Innovations (2007-2013). Certain Czech political representatives aimed to increase the share of funds devoted in this programme to large companies at the expense of SMEs. This issue was treated by OLAF as background information and was not subject of the investigative activities conducted within this case. The matter concerns the operational programme's objectives and eligibility rules agreed bilaterally between the Czech authorities and DG REGIO (the operational programme being adopted by the European Commission by means of a Commission Decision) and as such was addressed by DG REGIO in the framework of the programme implementation monitoring.

2. Investigative activities carried out and evidence collected

2.1 Documentation received from the Czech authorities and open sources

Following the opening of the investigation, OLAF requested the available project-related documentation from the Czech AFCOS – Ministry of Finance (THOR(2016)4008).

On 26 February 2016, the Czech AFCOS provided OLAF only with the partial project documentation (THOR(2016)7026, THOR(2016)7029, THOR(2016)7056, and THOR(2016)8250) as the complete project file was given (in its original form) by the programme's managing authority to the Czech Police.

This documentation included the grant agreement, control reports from on-the-spot checks conducted by the employees of the managing authority during the project implementation, and three audit reports from government audits conducted by the Audit Authority in 2011, 2012, and 2013 specifically on this project – audits No PAS/01/2011/95, PAS/01/2012/95 and 017/13/ROPSČ. One of the audits was completed with no findings, while the other two identified the same irregularity – in its payment claim submitted to the managing authority for reimbursement (on 29 December 2009) the project beneficiary included an invoice issued by the construction company, which was only settled afterwards (7 and 8 January 2010). The respective amount of the invoice (CZK 15 127 336,78 / EUR 584 230) was identified as ineligible expenditure and a penalty of CZK 6 Mil / EUR 231 720 was imposed by the Audit Authority. Following the successful appeal of the project beneficiary, the amount of the penalty was reduced to 1% of the original amount.

Information published on the website of the Ministry of Regional Development (www.strukturalni-fondy.cz) demonstrates that the project in question was completed and the amount of the public subsidy provided to the beneficiary was CZK 49 997 443 / EUR 1.93 Mil, out of which the 85% ERDF co-financing amounted to CZK 42 497 826.8 / EUR 1 647 676.4.

2.2 Audit conducted by the Czech Audit Authority in 2016

When DG REGIO received a copy of the anonymous complaint related to the project in question and potential ineligibility of its beneficiary as an SME, on 18 February 2016 its representatives asked the Czech Audit Authority to conduct an audit on the project and verify the eligibility of the expenditure reimbursed.

During the month of May 2016, the Audit Authority, located at the Czech Ministry of Finance, conducted an extraordinary audit No ROPSC/2016/MO/001 on the project in question.

On 19 May 2016, OLAF was provided by DG REGIO with a copy of the final audit report (OCM(2016)16389). In addition to the audit report itself, on 9 May 2016 the Audit Authority communicated to DG REGIO (THOR(2016)16050) the main conclusions of the audit by a separate letter. In this communication, the Audit Authority stated that its auditors verified the total expenditure that was certified in the project in question and considered it eligible. Nevertheless, the Audit Authority claimed that the scope of the audit was limited due to the fact that its auditors could not conduct an audit in other entities (economic operators) other than the project beneficiary. In their opinion, such checks would have been necessary if the Audit Authority was to assess whether other companies linked to the project beneficiary were operating on the same relevant or adjacent markets, and therefore had to be taken into account when assessing their SME qualification.

During the audit of the Audit Authority, its auditors requested specific documentation from the legal successor of the beneficiary company (Farma Čapí hnízdo a.s.), company IMOBA a.s. Among others, it concerned the presence sheets from the General Assembly meetings of Farma Čapí hnízdo a.s. which took place in 2008-2010, copies of mandates issued by the shareholders to their legal representatives representing them at the General Assembly meetings in 2008-2010. The listed documents were not provided by company IMOBA a.s. to the auditors. Its representatives claimed that no such documents needed to exist if the shareholders representatives brought the shares themselves to the General Assembly meetings.

2.3 Documentation obtained from the Czech judicial authorities, open sources and several witnesses following their interviews

During the operational meetings with the Police, which took place in 2016-2017, the OLAF investigators requested and were provided with a copy of the file – with an exception of documents that were acquired by the Police on the bases of a court order (e.g. documents falling under the bank secrecy rule). Copies of the collected documents – project related

documentation acquired from the OP managing authority, contracts and complete accounting records for 2007-2014 acquired from IMOBA a.s. - were attached to records from these operational meetings which were duly recorded in the OLAF registration system (THOR(2016)25069, OCM(2016)1896, OCM(2017)10494, OCM(2017)18580 and OCM(2017)20266). Furthermore, during the witness interview, Mr [redacted] provided OLAF with certain additional documentation (OCM(2017)8430). Following his witness interview, Mr [redacted] sent several documents to OLAF (OCM(2017)9878).

In the documentation acquired, OLAF established the following facts:

2.3.1 Call for projects

On 20 December 2007, the Regional Council for the Cohesion Region Central Bohemia published a call for project No 4 ROP NUTS 2 SČ in the framework of the Regional Operational Programme Central Bohemia 2007-2013.

According to point 5 of the text of the call for projects:

- *"Entrepreneurs established according to Art.2 of the Business Code No 513/1991 Coll., who meet the criteria of small or medium enterprises, have been conducting a business activity for at least two years and have been conducting their activities in the area of tourism.*
- *Entrepreneurs established according to Art.2 of the Business Code No 513/1991 Coll. who meet the criteria of small or medium enterprises, have been conducting their activities in the area of tourism and have been conducting a business activity for less than two years (only relevant for projects located in a municipality with fewer than 2000 inhabitants)."*

In point A of the "Definitions" included in the Instructions for the applicants and beneficiaries under the call No 4 published in the framework of the Regional Operational Programme for Central Bohemia, the definition of a small and a medium-size enterprise refers to following:

"When calculating the number of employees and the annual turnover or the balance sheet total, it is necessary to consider data about the partner enterprises or linked enterprises (if applicable) in compliance with the EU legislation - Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises Official Journal L 124 of 20 May 2003, p. 36–41), an extract from this recommendation is cited in the Annex of the Commission Regulation (EC) No 364/2004 of 25 February 2004 amending the Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for reseOLQarch and development."

Pursuant to point VIII.2 of the Instructions for the applicants and beneficiaries of the call No 4: *"The applicant / beneficiary is obliged to demonstrate that he is a small or a medium-size enterprise. Not respecting this requirement, he is automatically to be considered a large enterprise. Small and medium enterprises are defined via compliance with two criteria, i.e. number of employees and annual turnover or the balance sheet total. When calculating the value of these indicators, an enterprise is obliged to consider the data of its partner enterprises and linked enterprises.*

More details to be found in the Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises Official Journal L 124 of 20 May 2003, p. 36–41), an extract from this recommendation is cited in the Annex of the Commission Regulation (EC) No 364/2004 of 25 February 2004.

The calculations are to be made by using a form contained in the Commission Use Guide: Model Declaration Form concerning the qualification of an enterprise as a small or a medium enterprise –http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/sme_user_guide_cs.pdf."

2.3.2 Project application

On 29 February 2008 the company Farma Čapí hnízdo a.s. submitted a project proposal under the call for projects No 4 ROP NUTS 2 SČ, which was registered in the monitoring system Benefit under the unique No Ø7hHqPØØØ3. The number of the respective project is CZ.1.15/2.1.00/04.00095. The project application was signed by Mr Josef Nenadál and Ms Jana Nagyová.

Total eligible costs of the project were calculated by the applicant in point 13 of the application in the amount of CZK 277 Mil with CZK 227 Mil to be paid by the applicant himself and CZK 50 Mil from the subsidy (EU co-financing in the amount of CZK 42.5 Mil. The applicant stated in the application that for the purposes of his own financing of the investment he would use a bank loan in the amount of CZK 386.5 Mil and his own available resources in the amount of CZK 6.6 Mil. Together with the ineligible expenditure, the total project budget was estimated on CZK 436.6 Mil.

In this project proposal Ms Jana Nagyová is listed as the main contact person. As a person responsible for the consultation of marketing and subsidy, Ms Jana Nagyová is mentioned in the proposal as the director of the company EUTRAIN s.r.o. Other members of the company's management board, Mr Josef Nenadál and Mr Luděk Kalivoda issued a mandate for Ms Jana Nagyová to act on behalf of the company Farma Čapí hnízdo a.s. in the project preparation and implementation.

On 17 January 2008 Mr Josef Nenadál was elected the Chairman of the Board of Directors and Ms Jana Mayerová, born Nagyová the deputy chairwoman of the Board of Directors of the company ZZN AGRO Pelhřimov a.s. (Identification No: 625 08 873). They were occupying these posts until 5 January 2010. In the period of 6 January 2010 – 31 August 2010, Mr Nenadál was acting as a chairman and in the period of 6 January 2010 – 22 August 2011, Ms Nagyová as deputy chairwoman of the Supervisory Board of this company.

According to the data registered in the Czech Entrepreneurship register, Mr Josef Nenadál was an employee of the company Farma Čapí hnízdo a.s. in the period from 1 January 2008 to 31 July 2010. According to these records, Ms Jana Mayerová, born Nagyová was never an employee of the company Farma Čapí hnízdo a.s. In the period of 2008-2010, she was employed by the company EUTRAIN s.r.o. (Identification No: 255 60 328). According to the Entrepreneurship register data, in the reference period Ms Jana Mayerová, born Nagyová was a member of the statutory bodies of the companies Farma Čapí hnízdo a.s. and EUROFACTUM o.p.s. (a company of general interest), Identification No: 282 77 074.

On 20 February 2008 the name of the company ZZN AGRO Pelhřimov a.s. was changed to Farma Čapí hnízdo a.s.

In point 5 of the project application, the company Farma Čapí hnízdo a.s. is marked as a small enterprise.

In the annex to the project application the company Farma Čapí hnízdo a.s. provided annual accounting books of the company ZZN AGRO Pelhřimov s.r.o. for the year 2005 together with the Report on the company's ownership relations with the linked enterprises. According to this report, the only owner of the company ZZN AGRO Pelhřimov s.r.o. was in the given accounting period company ZZN Pelhřimov a.s.

2.3.3 SME declaration

In the Annex 2 of the Instructions for the applicants and the beneficiaries of the call No 4, the obligatory annexes of a project application have been listed. According to this text, the

obligatory annex No 4 is Declaration on the SME qualification. *"This declaration is only submitted by those applicants who declare in their project applications that they meet the SME definition. They fill in the model for declaration on the qualification of an enterprise as an SME. This form stems from the Commission User Guide which aims to provide support in the implementation of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises which replaces the Recommendation No 96/280/EC of 3 April 1996. The form has been published on the website www.ropstrednicechy.cz".*

In the Annex 4 of the project application, the applicant provided a declaration on the qualification of the applicant company as an SME, see Annex 9 of this report. This declaration was signed by Ms Jana Nagyová and Mr Josef Nenadál as representatives of the beneficiary company's Management Board. In this declaration the named representatives confirmed by their signatures that the company Farma Čapí hnízdo a.s. was an independent enterprise, and that in the reference accounting period (OLAF assumes it was the year 2007) it had no employees, annual turnover of EUR 9 000 and balance sheet total in the amount of EUR 274 000. At the same time they confirmed with their signature in this declaration that "compared to the previous accounting period there was no change regarding the data, which could result in a change of category of the applicant enterprise (Micro, small, medium-sized or a big enterprise)."

2.3.4 Company ownership

In the annex to the project application the company Farma Čapí hnízdo a.s. provided annual accounting books of the company ZZN AGRO Pelhřimov s.r.o. for the year 2005 together with the Report on the company's ownership relations with the linked enterprises. According to this report, the only owner of the company ZZN AGRO Pelhřimov s.r.o. was in the given accounting period company ZZN Pelhřimov a.s.

According to the annual accounting books of the company ZZN AGRO Pelhřimov s.r.o. for the year 2006 published in the Czech on-line accounting records register the company ZZN Pelhřimov a.s. remained the only owner of the company ZZN AGRO Pelhřimov s.r.o. also during the whole year of 2006.

According to the annual accounting books of the company ZZN AGRO Pelhřimov s.r.o. for the period January – October 2007 published in the Czech on-line accounting records register the company ZZN Pelhřimov s.r.o. remained the only owner of the company ZZN AGRO Pelhřimov s.r.o. also during this reference period.

On 1 December 2007 the legal form of the company ZZN AGRO Pelhřimov s.r.o. changed from a limited company to a shareholders company which was recorded in the Business Register.

According to an unverified copy of the sales contract, on 31 December 2007 the ownership structure of the company ZZN AGRO Pelhřimov a.s. changed, when its previous owner, company ZZN Pelhřimov a.s. sold and handed over 100% of the company shares to three new owners (Annex 17 of this report).

In the period 2005-2007, the company ZZN Pelhřimov a.s. had a stable major or unique shareholder respectively – company Agrofert Holding a.s. With the economic results for the period 2005-2010, the Agrofert Holding a.s. qualifies as a large enterprise in the meaning of the Commission Recommendation No 2003/361/EC.

2.3.5 Company shares and their ownership development

According to the notary record No NZ406/2007, N 448/2007 registered on 22 November 2007 by notary JUDr. [redacted], which was published in the electronic Collection of Documents, the only company owner, company ZZN Pelhřimov a.s. approved

an extraordinary closure of the accounting books of the company ZZN AGRO Pelhřimov s.r.o. and approved a change of its legal form from a limited company to a shareholders company. As a result, on 22 November 2007, the company ZZN Pelhřimov a.s. became owner of 20 bearer shares[4] of the company ZZN AGRO Pelhřimov a.s. with the unit price of CZK 100 000 per stock. It also became the only shareholder of the company ZZN AGRO Pelhřimov a.s. what was recorded in the Business Register on 1 December 2007. According to the referred notary record of 22 November 2007: *"The shares will be issued in paper form and will not be listed."* Further, the record states that: *"Shares will be issued in the form of bulk shares, as the company owner becomes the only shareholder of the company."*

Pursuant to Art. 7.3 of the Articles of Association of the company ZZN AGRO Pelhřimov a.s. (later Farma Čapí hnízdo a.s.) approved at the moment of the change of the company's legal form on 22 November 2007:
"On the basis of a written request by the owner the company is obliged to issue individual shares to the owner of the bulk share; which would be replacing it. This shall be done within the period of 90 days from the day of the delivery of the written request."

According to the comments provided by representatives of the company IMOBA a.s. on 13 October 2017 – the legal successor of the beneficiary company - no bulk shares were ever issued and the shareholders agreed with the company representatives that individual shares would be issued instead.

OLAF notes that the Articles of Association of the company ZZN AGRO Pelhřimov a.s. required a written request by the shareholders to change the form of shares. A copy of such request was not provided to OLAF by any of the persons concerned when they were provided opportunity to comment on facts and the form of 'agreement' on changing the form of shares was not explained by them.

The company IMOBA a.s. which bought 100% shares of the company Farma Čapí hnízdo a.s. in 2013; provided OLAF with an unverified copy of a sales contract of 31 December 2007. According to this contract, the seller, company ZZN Pelhřimov a.s. sold 20 pieces of paper-form bearer shares of the company ZZN AGRO Pelhřimov a.s. to three buyers, i.e. Adriana Bobeková, Andrej Babiš Jr, and Monika Babišová. The buying price of the 20 shares in total was CZK 2 386 000. The buyers purchased the following number of shares:

Adriana Bobeková – 5 pcs, No 001-005
[redacted] - 5 pcs, No 006-010
Monika Babišová - 10 pcs, No 011-020

According to Art II.5 of this sales contract, the buyers were obliged to pay for the purchased shares within six months from the day of signing the contract.

According to the unverified copy of a bank statement of the company ZZN Pelhřimov a.s., Mr Andrej Babiš (father of Adriana Bobeková and [redacted] and partner of Monika Babišová) paid for the respective shares their buying price of CZK 2 386 000 on 15 September 2008.

Mr [redacted] who was interviewed as a witness by the OLAF investigators on 28 March 2017, provided OLAF with unverified copies of three sales contracts by which he acquired 12 pieces of shares of the company Farma Čapí hnízdo a.s. According to these documents he signed these contracts with Adriana Bobeková, [redacted] and Monika Babišová.

According to the provided unverified copy of the contract signed on 16 February 2008(Annex 18 of this report), Mr [redacted] purchased 1 pc of shares (No 005) of

[4] The shares in question were issued (in the form of bearer shares) in accordance with Art. 156 of the Business Code. By adoption of the Czech Law No 134/2013 Coll., the anonymous bearer shares were made prohibited in the Czech legal system – as of 1 January 2014.

the company Farma Čapí hnízdo a.s. with the nominal value of CZK 100 000 from Ms Adriana Bobeková. The buying price of this share was CZK 119 300. The buyer was obliged to pay for the purchased share within a month from the day of signing the contract. Handing over of the share was confirmed by the buyer by the signature of the given contract.

According to the provided unverified copy of the contract signed on 16 February 2008 (Annex 18 of this report), Mr [redacted] purchased 1 pc of shares (No 006) of the company Farma Čapí hnízdo a.s. with the nominal value of CZK 100 000 from Mr [redacted] The buying price of this share was CZK 119 300. The buyer was obliged to pay for the purchased share within a moth from the day of signing the contract. Handing over of the share was confirmed by the buyer by the signature of the given contract.

According to the provided unverified copy of the contract signed on 16 February 2008(Annex 18 of this report), Mr [redacted] purchased 10 pcs of shares (No 011-020) of the company Farma Čapí hnízdo a.s. with the nominal value of CZK 100 000 per share from Ms [redacted] The buying price of there shares was CZK 1 193 000. The buyer was obliged to pay for the purchased share within a month from the day of signing the contract. Handing over of the share was confirmed by the buyer by the signature of the given contract.

Following an e-mail request of 8 June 2017, Mr [redacted] did not provide OLAF with a confirmation of the payments for the purchased shares. The law firm representing Mr [redacted] informed OLAF that there was no such document in his disposal due to the time that elapsed since 2008.

The company IMOBA a.s. provided the Czech Police with unverified copies of three sales contracts by which it purchased all 20 shares of the company Farma Čapí hnízdo a.s. in November 2013 (Annex 19 of this report). According to these unverified copies, the contracts were signed by Mr Andrej Babiš on behalf of the company IMOBA a.s. as the buyer and Ms [redacted], Mr Václav Knotek and Mr Alexej Bílek on the selling side of the contract. These three persons were presented in the contracts as the sellers. Although these transactions fall behind the time scope of the project implementation, they are mentioned in this report due to the fact that according to the above sale contracts, these persons were share owners in 2013. As it is not known when and how they became their owners, these persons could have been owners also during the period of 2008-2010, when they participated in the company's General Assembly meetings. The Czech Police tried to interview Ms [redacted], Mr Knotek and Mr Bílek, and OLAF also invited Mr Knotek for a witness interview but these persons claimed the professional secrecy of attorneys at these interviews and refused to provide their statements which could have clarified their role in the company.

According to the unverified copy of the contract signed on 18 November 2013 with Ms [redacted], the company IMOBA a.s. purchased 12 pcs of shares (No 001 -004, 007-010 a 017-020) of the company Farma Čapí hnízdo a.s. with the nominal value of each share of CZK 100 000. The buying price of all 12 shares was CZK 30 000. The buyer was obliged to pay for the purchased share within three weeks from the day of signing the contract, which was confirmed by a copy of the cashier's receipt. Hand-over of the share was confirmed by provided unverified copies of the hand-over protocol of 18 November 2013.

According to the unverified copy of the contract signed on 18 November 2013 with Mr Václav Knotek, the company IMOBA a.s. purchased 4 pcs of shares (No 011 -014) of the company Farma Čapí hnízdo a.s. with the nominal value of each share of CZK 100 000. The buying price of all 12 shares was CZK 10 000. The buyer was obliged to pay for the purchased share within three weeks from the day of signing the contract, which was confirmed by a copy of the cashier's receipt. Hand-over of the share was confirmed by provided unverified copies of the hand-over protocol of 18 November 2013.

According to the unverified copy of the contract signed on 18 November 2013 with Ms [redacted], the company IMOBA a.s. purchased 12 pcs of shares (No 015 -016, 005-006) of the company Farma Čapí hnízdo a.s. with the nominal value of each share of CZK 100 000. The buying price of all 12 shares was CZK 10 000. The buyer was obliged to pay for the purchased share within three weeks from the day of signing the contract, which was confirmed by a copy of the cashier's receipt. Handing over of the share was confirmed by provided unverified copies of the hand-over protocol of 18 November 2013.

2.3.6 General Assembly meetings in Farma Čapí hnízdo a.s. 2008-2010

The available records from the General Assembly meetings organised in the company ZZN AGRO Pelhřimov a.s. / later renamed to Farma Čapí hnízdo a.s. show the following facts:

According to the list of participants of the extraordinary General Assembly meeting of the company ZZN AGRO Pelhřimov a.s. of 17 January 2008, the following persons participated in this meeting as shareholders or their representatives: Ms [redacted] (shares No 001-010), and Mr Václav Knotek (shares No 011-020). In the record from this extraordinary General Assembly meeting it is stated that: *"The meeting was attended by 2 company shareholders who represent 100% of the ownership rights and votes."*

According to the list of participants of the extraordinary General Assembly meeting of the company Farma Čapí hnízdo a.s. of 5 January 2010, the following persons participated in this meeting as shareholders or their representatives: Ms [redacted] (shares No 001-004, 007-010, 017-020), Mr Václav Knotek (shares No 011-014) and Mr Alexej Bílek (shares No 015-016, 005-006). In the record from this extraordinary General Assembly meeting it is stated that: *"The meeting was attended by 3 company shareholders who represent 100% of the ownership rights and votes."*

According to the list of participants of the normal General Assembly meeting of the company Farma Čapí hnízdo a.s. of 31 August 2010, the following persons participated in this meeting as shareholders or their representatives: [redacted] (shares No 001-004, 007-010, 017-020), Mr Václav Knotek (shares No 011-014) and Mr Alexej Bílek (shares No 015-016, 005-006). In the record from this extraordinary General Assembly meeting it is stated that: *"The meeting was attended by 3 company shareholders who represent 100% of the ownership rights and votes."*

According to the list of participants of the normal General Assembly meeting of the company Farma Čapí hnízdo a.s. of 22 August 2011, the following persons participated in this meeting as shareholders or their representatives: Ms [redacted] (shares No 001-004, 007-010, 017-020), Mr Václav Knotek (shares No 011-014) and Mr Alexej Bílek (shares No 015-016, 005-006). In the record from this extraordinary General Assembly meeting it is stated that: *"The meeting was attended by 3 company shareholders (with a hand written word "representatives" added) who represent 100% of the ownership rights and votes."*

Pursuant to Art. 7.2 of the Articles of Association of the company ZZN AGRO Pelhřimov a.s (later Farma Čapí hnízdo a.s.) approved by its only shareholder, company ZZN Pelhřimov a.s. on 22 November 2007 (recorded in the notary record No NZ 406/2007, N 448/2007): *"The shares are free to transfer at any moment. Rights connected to the shares' ownership shall be executed by a person that is able to provide the shares; or is able to demonstrate – via a written confirmation of the shares' deposit – that these shares had been deposited for him in accordance with the applicable rules."*

Representatives of IMOBA a.s. submitted a general comment (of 13 October 2017) claiming that persons presenting the company bearer shares before a notary did not necessarily have to be owners of these shares and in practice they often were not (it is a standard procedure that shareholders are represented by other persons in a General Assembly meeting). Even if these persons were listed in the minutes from the General

Assembly meetings as shareholders, the notary had no means to verify the circumstances and validity of the possible transfer of shares, and therefore, indication of the alleged shares ownership by the two / three named persons does not have any relevance.

OLAF notes that in its comment, IMOBA a.s. did not confirm who were the shareholders participating in the described General Assembly meetings according to their minutes, i.e. whether the participating attorneys were shareholders themselves or only representing the actual shareholders based on a written full power. Pursuant to Art. 184(1) of the Czech Commercial Code No 513/1991 Coll., such power of attorney must be issued in written form. As stated in part 2.2 of this report, copies of these full powers were requested from IMOBA a.s. by the Czech Audit Authority and they were not provided.

OLAF also notes that Mr Knotek, Director of the Board of Directors of the company IMOBA a.s., was one of the three persons participating in the referred General Assembly meetings. During the interview of Mr Knotek, OLAF sought confirmation whether the persons participating in these meetings were company shareholders or their representatives. However, claiming the professional secrecy of an attorney, Mr Knotek did not answer the questions of the investigators.

2.3.7 Declarations of Mr Andrej Babiš concerning the ownership of Farma Čapí hnízdo a.s. and the project itself

According to the statement of Mr Andrej Babiš he made during an interview with the weekly magazine Respekt (www.respekt.cz) in relation to the project of the construction of the congress centre Čapí hnízdo (issued on 19 September 2013): *„I do not know, I think the farm is in the ownership of some lawyers."*

According to the statement of Mr Andrej Babiš he made during the 43rd assembly of the Chamber of Deputies of the Czech Parliament held on March 23, 2016:

"In 2005, I was thinking of building a family farm with animals. The farm was to be built by the company IMOBA a.s which belongs to the Agrofert group. However, this project was not economically efficient. Subsequently, the company IMOBA considered an alternative – building a congress centre for the Agrofert group. Nor did this intention proved profitable. Consequently, in 2007 an EU funds specialist proposed drafting a new project of a facility open to the public which transformed into building a multifunctional congress centre Farma Čapí hnízdo. This project, which qualified for an EU subsidy, was economically viable. Since the project did not concern Agrofert's business, I did not want to implement it within the Agrofert group, and therefore I did not want to deal with it and did not.

...

Company Farma Čapí hnízdo a.s. was owned in the reference period by my two adult children and the brother of my partner who was holding the proportionate shares of my two minor children and my partner."

2.3.8 External evaluation of the project proposal preceding its approval

In June - July 2008, the respective project application was subject to evaluation by two independent external experts selected by the programme's Managing Authority – Ms [redacted] and Mr [redacted]

According to the conclusive remarks of Ms [redacted], the project of the construction of the congress centre in Farma Čapí hnízdo represents *"an extensive and financially very demanding investment. The envisaged area could very well serve as a representation centre for a major investor – it could be a place to organise its company events. However, contribution of this project to the whole region and effectiveness of the invested financial allocation were not sufficiently demonstrated – with regards to the construction plans and the project documentation."*

Below are conclusions of Mr [redacted]:

"It is clear that the applicant devoted considerable efforts to organisational, personnel and design preparation of the Project. On the other hand, the investment CF area is unconvincingly processed, and also the area of operational CF, and hence the financial sustainability of the operation, shows significant shortcomings and defects for some important items. The applicant did not pay enough attention to the transparency and controllability of projected operational indicators (see the operating income statement), which unnecessarily raised doubts about important items in the profit and loss account (see paragraph IV.d above) that could have been remedied had the approach to the transparency of the economic part been more thorough. Substantial objections of the evaluator persist for the feasibility of the individual scenarios of financing the investment phase and the Project's investment CF and selected important items of the profit and loss account (advertising revenue, rent, utility costs).

The scope, detail and controllability of how this economic part of the Project's operating stage was drafted are rather insufficient.

On the other hand, it should be noted that this is an evaluation of the economic part of the Project, which the applicant can relatively easily remedy.

What is important, however, is which scenario of financing the investment CF is valid (II.c) – which schedule for drawing the subsidy from the ROP applies and what amount of loans is necessary to cover the investment budget. The scenario of CZK 385 million of loans is valid with substantial objections or basically the unfeasible scenario of CZK 437 million of loans.

If the applicant is able to document and justify that its Projected Indicators contradicted by this assessment are realistic, and documents that selected income (advertising, rental) and cost items are realistic by disclosing the calculations and parameters, then the Project and its operational stage can be judged to be financially feasible and sustainable. However, this judgement cannot be unambiguously formulated in this stage of the Project evaluation."

Representatives of IMOBA a.s. submitted a comment that the company Farma Čapí hnízdo a.s. was never aware of the above expert opinions of the external project application evaluators. They learned of their existence only from the media in spring 2017.

OLAF finds the approach of the managing authority in the assessment and approval of this project rather unusual and brings this fact to the attention of DG REGIO. Both external experts formulated their objections to different aspects of the project application and suggested that the project applicant had a chance to clarify the identified shortcomings in their project proposal. However, the beneficiary was never informed of the results of this external evaluation and was not requested to clarify the objected elements of the project description. In spite of the seriousness of the experts' comments and the absence of explanations by the project applicant, the project in question was approved.

2.3.9 Partners of the beneficiary in the project implementation

In its point 7, the project application contains information about the partners of the project beneficiary. The company Farma Čapí hnízdo a.s. in this part of the application listed the following entities:

- Golf Konopiště a.s. (IČ: 256 16 242)
- ZZN Pelhřimov a.s. (IČ: 466 78 140)
- Jaroslav Pelíšek FOTO, živnostník (IČ: 667 80 551)
- Obec Olbramovice (IČ: 002 32 416)
- TK PLUS s.r.o. (IČ: 253 10 593)

Annex 3 to the Additional information to the project application contains two cooperation agreements. The first one was concluded between the company Farma Čapí hnízdo a.s. and company Golf Konopiště a.s. (Identification No: 256 16 242). According to the

contract, the company Golf Konopiště a.s. would provide its accommodation capacity to Farma Čapí hnízdo a.s., if necessary (the congress capacity of the farm was exceeding the accommodation capacity). The second agreement was concluded on 25 February 2008 by the company Farma Čapí hnízdo a.s. and Agrofert Holding a.s. (Annex 20 of this report). In this agreement, the company Agrofert Holding a.s. committed itself to organising its company events, agricultural days and one annual agricultural machinery expo every year starting in 2010.

2.3.10 Information on the financial coverage of the project by the beneficiary

After the project application was approved (21 August 2008), the Regional Council Central Bohemia approached the applicant by e-mail of 27 August 2008 and requested submission of the compulsory attachments to the grant agreement. One of these attachments was a declaration of ensuring the financial coverage of the project. In response to this e-mail, on 5 September 2008 Ms Nagyová sent, inter alia, a partial copy (verified by a notary) of the loan agreement that the company Farma Čapí hnízdo a.s. signed on 23 June 2008 with the Prague branch of the HSBC Bank plc. in the amount of CZK 350 Mil. (in total, the HSBC Bank provided three loans to Farma Čapí hnízdo a.s. in 2008 in the total amount of CZK 455 Mil., see Annexes 13-15 of this report). This partial copy of the contract does not contain information about how the loan would be guaranteed – e.g. via property guarantee or guarantee declarations provided by a natural or a legal person (Annex 16 of this report). Provision of an incomplete copy of the loan contract was justified by the project applicant by respecting the business secrecy.

Article 2.11 of the full text of the loan contract signed between the company Farma Čapí hnízdo a.s. and the Prague branch of the HSBC Bank plc. contains information about the loan guarantees:

- Contract on the property guarantee in relation to real estates listed in the cadastre record No 163, in the locality of Tomice u Vojtic, where the property rights belong to company IMOBA a.s. (Identification No: 261 24 459). This company was part of the Agrofert Holding a.s. group in the period of 14 August 2008 – 30 January 2014, currently its only shareholder is the company SynBiol a.s. owned by the trust fund *AB private trust I.*
- Guarantee declaration provided by the company Agrofert Holding a.s. (Identification No: 261 85 610). This declaration was signed on 25 June 2008 by Mr Andrej Babiš, as the chairman of the Management Board of Agrofert Holding a.s. on the basis of an agreement on the provision of a guarantee signed by the representatives of the company Farma Čapí hnízdo a.s. - Ms Jana Nagyová and Mr Josef Nenadál and by Mr Andrej Babiš representing the company Agrofert Holding a.s. (Annex 21 of this report)

With respect to the SME declaration, Ms Jana Mayerová noted in her reply to the Opportunity to comment of 13 October 2017 that to her knowledge the company ZZN AGRO Pelhřimov a.s. became a small enterprise already in 2007. According to her, the company was sold by its previous owner, and this exogenous change resulted to an immediate acquisition of the SME status. Due to this fact, the company representatives – herself and Mr Josef Nenadál - confirmed in the application form by their signatures that *"Compared to the previous accounting period there was no change regarding the data, which could result in a change of category of the applicant enterprise (micro, small, medium-sized or big enterprise)."*

OLAF notes that the SME declaration clearly defines the reference period, for which economic data of the applicant company are provided, as *"the last approved accounting period"*. None of the persons concerned confirmed in their comments which accounting books were used as the source of information on the number of employees, annual turnover and balance sheet total in the declaration. The website of the Collection of Documents run by the Ministry of Justice contains the extraordinary accounting books for

January – October 2007, no accounting books were published for the remaining months of 2007 or 2008. Assuming that the reference period for the representatives of Farma Čapí hnízdo a.s., when they submitted their project application on 29 February 2008, was the year 2007 (or a part of it), and therefore, compared to the previous accounting period – year 2006 – there was a change regarding the data having impact on the SME status, as, until 31 December 2007, ZZN AGRO Pelhřimov a.s. was in the ownership of its sole shareholder, company ZZN Pelhřimov a.s., belonging to the Agrofert group.

2.3.11 Relations between Farma Čapí hnízdo a.s. and company IMOBA a.s.

The company IMOBA a.s. was the owner of the land parcels where the congress centre was to be constructed, as well as of some real estates located on these parcels. In order to be able to implement the project in question by the company Farma Čapí hnízdo a.s. it had rented these parcels and real estates from IMOBA a.s. for the period of 22 years (from 1 May 2008 to 31 December 2030) on the basis of two lease contracts No 1/2008 and 2/2008, both signed on 27 February 2008. The company IMOBA a.s. ordered an expert opinion from Mr [redacted] on assessing the market value of the respective parcels and real estates. As a part of the supporting documentation the expert was provided with two unsigned lease contracts to be concluded by the companies Farma Čapí hnízdo a.s. and IMOBA a.s. According to these contracts, the company Farma Čapí hnízdo a.s. was supposed to pay a monthly rent of CZK 42 000 and CZK 100 000 for the lease of the two plots of land. Eventually, the two companies signed two lease contracts for the monthly rent of CZK 42 000 and CZK 13 272 respectively.

The preparatory works preceding the construction of the congress centre Čapí hnízdo, e.g. preparation of the concept, architectural study, engineering studies, etc. were ensured and paid for by the company IMOBA a.s. In the period 2006-2007, the company SGL project s.r.o. (Reg. No: 267 42 594) issued invoices for the company IMOBA a.s. in the total amount of CZK 8 489 460. The European and national control bodies have not been informed whether this amount was ever compensated by the project beneficiary to company IMOBA a.s.

On 13 October 2017, company IMOBA a.s. provided OLAF with a copy of an invoice for the amount of CZK 16 561 900 / EUR 642 000 and subsequently also with the corresponding contract, according to which IMOBA a.s. sold the project documentation and licences linked to the planned construction of the congress centre Čapí hnízdo to Farma Čapí hnízdo a.s. in October 2008.

2.3.12 Website of the company Farma Čapí hnízdo a.s

According to information provided by the company ACTIVE 24 s.r.o., the company Agrofert a.s (Reg. No: 61 85 610) ordered registration of the internet domain „capihnizdo.cz". This company is also the holder of this domain. The domain was registered on 27 December 2007 and services provided in relation to its operation, have been paid for until 27 December 2017. The financial costs related to the operation of this domain, were covered in the period 2007-2015 by bank transfers from the bank account of the company Agrofert Holding a.s. / Agrofert a.s. (on 1 October 2013 its name changed).

In its reply to the opportunity to comment letter, the company IMOBA a.s. provided OLAF with a copy of invoices issued by Agrofert Holding a.s. for IMOBA a.s. and by this company further to Farma Čapí hnízdo a.s. to cover the costs of the website registration in December 2007. No other invoices for the annual costs of the website operation in the following years were provided to OLAF. Representatives of IMOBA a.s. explained that it was Agrofert Holding a.s. who ensured the registration of the website in 2007 as the company ZZN AGRO Pelhřimov a.s. did not yet have the new management. However, no explanation why Agrofert Holding a.s. / later Agrofert a.s. was paying for the costs of the website operation in the following years was included in their comments.

2.3.13 Selected business activities registered by Farma Čapí hnízdo a.s. and Agrofert Holding a.s. in the reference period[5]

According to publicly available information published in the online Czech Business Register, the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. had registered the following business activities in the period of 2008-2011:

- purchase of goods for resale and sale, except for goods requiring a special permit
- agriculture
- services for agricultural and forestry primary production, except services requiring special permits
- accommodation services
- property management and maintenance
- rental and lending of movable assets
- organising professional courses, training and other training events, including lecturing
- organising cultural productions, entertainment and operation of entertainment facilities
- operation of gymnastic and sports facilities and equipment for regeneration and reconditioning
- Mediation of business and services
- breeding of domestic and ZOO animals and provision of related services
- advisory services on agriculture and nutrition

According to publicly available information published in the online Czech Business Register, the company Agrofert Holding a.s. / Agrofert a.s. had registered the following business activities in the period of 2008-2011:

- purchase of goods for resale and sale
- advisory activities in agriculture
- services in the field of administrative administration and services of an organisational and economic nature to natural and legal persons
- Rental of agricultural equipment
- rental and lending of movable assets
- real estate activities
- organising professional courses, training and other training events, including lecturing
- intermediary activity in the area of trade and services
- Activities of accountants, bookkeeping, tax records management
- manufacture of feed and compound feed
- business, financial, organizational and economic advisory activities
- manufacture, trade and services not listed in appendices 1 to 3 of the Trade Licensing Act

Representatives of IMOBA a.s. claim that links between two companies cannot be assessed on the basis of the activities that these two companies recorded in the Business and Entrepreneurship Registers. According to them, the registration of these activities only demonstrates an authorisation of a company to conduct such activity. In order to assess links between two companies in practice, their actual business activities (confirmed by invoices) must be reviewed.

OLAF notes that the list of registered activities has been presented in the Opportunity to comment letter and in this report due to the fact that four years before submitting the project application, the company ZZN AGRO Pelhřimov a.s. did not conduct any economic activity as demonstrated in their annual accounts published in the electronic Collection of Documents (profit and loss statements from 2004-2008 Are in Annex 11 of this report). In

[5] Source: https://or.justice.cz/ias/ui/rejstrik

order to evaluate potential links between the company and Agrofert Holding a.s. at the moment of submitting the project application, it is necessary to look at the current and possible future activities of a company. For this purpose, only data available in the Business Register could be used.

However, for the period of 2008 - May 2010), OLAF also evaluated invoices that Farma Čapí hnízdo a.s. issued to its customers, copies of which were provided to OLAF by the Czech Police who requested the complete accounting records from IMOBA a.s. Although IMOBA a.s. claimed that the principal area of business of Farma Čapí hnízdo a.s. was providing 4* accommodation and restaurant services (which, according to them, cannot be considered an adjacent market to activities conducted by companies from the Agrofert group), the evaluation of invoices from the reference period (included in Annex 12 of this report) shows otherwise. While all income of Farma Čapí hnízdo a.s. in 2008 was from activities conducted in the area of agriculture, the vast majority of the company's activities in 2009 - May 2010 were conducted in the area of advertising (specifically 99% in 2009 and 90% in January – May 2010), which can be considered an adjacent market to the business areas like agriculture, food processing of chemical production. These were, according to IMOBA a.s., the main activities of the companies belonging to Agrofert group, see summary of comments of IMOBA a.s. provided on 27/11/2017. It is further noted that 100% of clients of Farma Čapí hnízdo a.s. in the area of advertising in the reference period were companies from the Agrofert group. OLAF notes that the dominance of advertising in the overall business activities of Farma Čapí hnízdo a.s. continued also in 2010-2013, after the project implementation was completed in May 2010 and the full operation of accommodation and restauration services was launched, see analysis in point 2.3.14.

2.3.14 Expert opinion on the project prepared by Česká znalecká a.s., Annex 23 of this report

The project application of the company Farma Čapí hnízdo a.s. was also subject to an evaluation by a court-designated expert company Česká znalecká a.s. (IČ: 252 60 138).

According to the conclusions of this evaluation:

- *As regards the provision of the loan from the HSBC Bank plc in the amount of CZK 350 Mil; the company Farma Čapí hnízdo a.s. would not have received such loan without guarantees provided by the companies IMOBA a.s. and Agrofert Holding a.s. due to high risk of the planned investment and low creditworthiness of the company.*

- *Analysis of the invoices issued by the company Farma Čapí hnízdo a.s. in 2010-2013 indicates that compared to the total amount of sales of own products and services, the income for advertising represented 91,25% (2010), 80,81% (2011), 88,19% (2012), a 71,49% (2013) respectively. These advertising services were provided exclusively to companies belonging to the Agrofert concern, namely Agrofert Holding a.s. (1. října 2013 společnost přejmenována na Agrofert a.s.), SKW Stickstoffwerke Piesteritz GmbH, NAVOS, a.s., ZZN Havlíčkův Brod a.s., Primagra, a.s., AgroZZN a.s., ZENA – zemědělský nákup a.s., ZZN Pelhřimov a.s., Cerea, a.s., OSEVA, a.s., PRECHEZA a.s., Synthesia, a.s., Fatra a.s., AFEED a.s., DEZA, a.s., Agroservis Tachov, a.s., Duslo, a.s., ZZN Polabí, a.s., PREOL, a.s., ZZN POMORAVÍ a.s., PENAM, a.s., Kostelecké uzeniny a.s., HYZA a.s., AGROTEC a.s., Lovochemie, a.s., OLMA, a.s., Agrona, a.s., Mlékárna Hlinsko, a.s.*

- *The accounting data of the company Farma Čapí hnízdo a.s. for 2010-2013 demonstrates a significant difference between the estimated and the real economic indicators of the given investment project. The highest planned value of the long-term tangible assets (2010) was CZK 374 Mil, including the non-movable property of CYK 349 Mil. In reality, the value of the non-movable property reached CZK 455 Mil and incomplete properties the value of further CZK 90 Mil. Such significant differences*

could not have been caused by increased prices of the contractors work or unexpected extra-works. In relation to these differences, the value of actual foreign resources significantly differed from their estimated value. Apart from the announced loan, the investment required further significant financing from non-banking private sector. On 31 December 2012 the value of short term liabilities of the company reached the value of CZK 336 Mil, while their estimated value for that year was only CZK 7,6 Mil.

- *In spite of practically double value of the implemented investment and significantly increased foreign financial resources, the actual value of the interest rate costs was much lower than their estimation listed in the project application.*

- *The real staff costs demonstrate significant difference from their estimation, especially when it comes to the managerial staff. In 2011, the overall costs of the managerial staff (1 person) were CZK 5.3 Mil (CZK 448 000 per month), in 2012 it was CZK 7.5 Mil (CZK 629 000 per month) and in 2013 it was CZK 7.6 Mil (3 persons; CZK 211 000 per month), while the planned monthly salary of a company manager was CZK 100 000.*

- *Analysis of the actual sales shows significant disproportion compared to the project prognosis. This disproportion is mainly present in the composition of the sales. Advertising services are represented on the total sales in 2010 – 2013 with the share ranging from 71.49% to 91.25%. Without the income from advertising, the overall sales reached only CZK 6 Mil in 2010 which would not be sufficient to cover even the staff costs for that year (CZK 13 Mil). The same situation reoccurred in 2011-2012.*

- *Without the advertising sales to companies being part of the Agrofert concern, the company would not be able to meet its obligations resulting from the loan contracts concluded with the HSBC Bank plc.*

2.4 Interviews conducted by OLAF

On 27 March 2017, **JUDr.** [redacted] (notary who recorded minutes from the General Assembly meetings of Farma čapí hnízdo a.s.) was interviewed as a witness by the OLAF investigators in relation to the preparation and implementation of the project of the construction of the multifunctional congress centre Čapí hnízdo and inter-related ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the period 2007-2011. At the beginning of the interview, Mr [redacted] referred to the professional secrecy that he was bound with according to the notary code. As his secrecy obligation had not been lifted he did not answer questions of the OLAF investigators related to the organisation of the General Assembly meetings of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. and related documentation. He stated that all his professional activities are related to the legitimate interests of his clients in compliance with the notary code.

With a view of possible difficulties to obtain information from Mr [redacted] due to professional secrecy, OLAF contacted the Czech authorities – first the Ministry of Finance (OCM(2017)4645) and then the Czech Chamber of Notaries (OCM(2017)5666) – with a request for assistance during the interview of Mr [redacted]. Both institutions refused to provide the requested cooperation to OLAF claiming they were not competent in this matter (OCM(2017)6243 and OCM(2017)5869).

On 29 March 2017, **Mr Václav Knotek** (legal representative of the successor company of Farma Čapí hnízdo a.s., participant of the beneficiary company's General Assembly meetings, one of the three persons who sold shares of Farma Čapá hnízdo a.s. to IMOBA a.s. in 2013) was interviewed as a witness by the OLAF investigators in relation to the preparation and implementation of the project of the construction of the multifunctional congress centre Čapí hnízdo and inter-related ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010. At the

beginning of the interview, Mr Knotek referred to the professional secrecy that he was bound with, which does not allow him to provide a witness statement related to his clients. Mr Knotek agreed that he would ask his client whether he was interested in lifting his secrecy obligation and he would subsequently inform OLAF of the outcome. Following the interview, Mr Knotek has not contacted OLAF regarding this particular matter.

With a view of possible difficulties to obtain information from Mr Knotek due to professional secrecy, OLAF contacted the Czech authorities – first the Ministry of Finance (OCM(2017)4645) and then the Czech Chamber of Attorneys (OCM(2017)5665) – with a request for assistance during the interview of Mr Knotek. Both institutions refused to provide the requested cooperation to OLAF claiming they were not competent in this matter (OCM(2017)6243 and OCM(2017)7667).

On 30 March 2017, **Mr Josef Nenadál** (legal representative of the beneficiary company who signed the project application and the SME declaration) was interviewed as a person concerned by the OLAF investigators in relation to the preparation and implementation of the project of the construction of the multifunctional congress centre Čapí hnízdo. During the interview Mr Nenadál repeatedly referred to the "exhaustive statement" that he had already provided on this issue to the Czech Police and he stated he would not answer any further questions.

In the explanation Mr Josef Nenadál provided to the Police he, inter alia, stated the following:

„In my capacity of the Chairman of the Board of Directors of the company Farma Čapí hnízdo a.s. I was responsible for the construction of the farm while Ms Nagyová was responsible for the preparation and application of the subsidy implementation, and Mr Kalivoda was responsible for operating activities. The shareholders of the company, or anyone else, did not interfere with the affairs of the company. I co-signed the grant application prepared by Ms Nagyová in the position of the chairman of the Board of Directors. I figured out that the company Farma Čapí hnízdo a.s. was a small or a medium-sized enterprise and could therefore apply for a grant. I was therefore surprised by some of the press reports that suggested otherwise."

On 5 April 2017, **Ms Jana Mayerová, born Nagyová** (legal representative of the beneficiary company who signed the project application and the SME declaration) was interviewed as a person concerned by the OLAF investigators. At the beginning of the interview, Ms Nagyová presented her statement, in which, inter alia, she informed the OLAF investigators of the following:

"The minutes of the Extraordinary General Assembly Meeting of the company ZZN AGRO Pelhřimov a.s. held on 17 January 2008 clearly indicate that the company had three shareholders already on the date of this meeting. In the process of the multifunctional congress centre project preparation, after my election to the board of directors, I was interested in learning who the shareholders of the company were with respect to the qualification of the company as an SME. Based on the above-mentioned minutes of the General Assembly meeting, I turned to the shareholders' representatives, who declared that all the shareholders were natural persons – not involved in a business. As the actual company shareholders did not participate in person in the General Assembly meetings when I exercised my position in the Board of Directors and there was no way for the company to determine which particular individuals were the actual shareholders, we assessed that, in line with the Commission Recommendation of 6 May 2003 No. 2003 / 321 / EC, we could declare that the company was an SME. From all available information, it was clear that the company was not, even partially, linked to any legal entity and was therefore an independent business. This statement was part of the grant application. The company was outside the Agrofert group. In addition to the above, it was clear that the company with its new owners and new business activities was standing on a non-related relevant market in relation to companies owned by Mr Andrej Babiš, thus making its SME status indisputable, as recommended by the Commission. Of course, I was studying the available definitions, and I consulted the relevant grant-providing authorities, and I was

assured that if the conditions of the Commission Recommendation on the definition of SMEs were met, so that even with regard to the history of the company – when the company was part of the Agrofert concern - there was no doubt that it was an SME. "

The OLAF investigators attempted to raise further questions to Ms Mayerová in addition to her opening statement. When they raised this request Ms Mayerová only noted that she had already stated everything that she considered important at that moment.

On 28 March 2017, **Mr Jaroslav Faltýnek** (a member of the Management Board of the company ZZN Pelhřimov a.s. which sold shares of the company ZZN AGRO Pelhřimov a.s. to new owners on 31 December 2007) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010. At the beginning of the interview, Mr Faltýnek explained that he was acting as a deputy chairman of the Management Board of the company ZZN Pelhřimov a.s. and was never working in the beneficiary company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s.

Mr Faltýnek remembered neither the details of the shares transaction that took place in December 2007, nor the act of issuing the initial shares of the company ZZN AGRO Pelhřimov a.s. when it became a shareholders company on 1 December 2007. He confirmed that the price of the shares of the company ZZN AGRO Pelhřimov a.s. was established on the basis of an expert opinion before they were sold. He confirmed that he signed the sale/purchase contract on the shares concerned on 31 December 2007 but he could not remember details of this act or the specific contractual provisions.

Mr Faltýnek did not provide OLAF with requested information about the hand over of the shares, payment of their price or preparatory works on the construction of the congress centre Čapí hnízdo in 2006-2007 when the company ZZN Pelhřimov a.s. was the only owner or shareholder of the company ZZN AGRO Pelhřimov s.r.o./ a.s. When answering the questions, Mr Faltýnek either stated that he could not remember these details or that he did not know the answer.

On 28 March 2017, **Mr** [redacted] (one of the alleged owners of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the period 2008-2010) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. At the beginning of the interview, Mr [redacted] presented to the OLAF investigators his declaration, in which he stated the following:

According to Mr [redacted], at the beginning of 2008 he acquired 60% of shares of the company Farma Čapí hnízdo a.s. from his sister Ms Monika Babišová, and from two adult children of Mr Andrej Babiš - Ms Adriana Bobeková and Mr [redacted] Mr [redacted] was holding these shares for his sister and two minor children of hers and Mr Andrej Babiš.

At the beginning of 2008, he became a member of the Supervisory Board of the company. Being in this position he was supervising public procurements organised by the company and was present during the control days on the construction site.

As of 1 September 2010 he became a deputy chairman of the management Board of the company and joined its daily operations. He was specialised in marketing.

According to Mr [redacted] the company Farma Čapí hnízdo a.s. fully complied with all requirements related to the subsidy it received.

He further noted that the company suffered from the global economic crisis after its operation was launched in 2010. As the financial problems of the company persisted, in 2013 it became inevitable to look for a new investor to ensure further running of the company.

Mr [redacted] refused to answer further questions of the OLAF investigators. He only confirmed that he acquired the company shares as a natural person, not as an entrepreneur, or on behalf of a legal entity.

On 29 March 2017, **Mr** [redacted] (a member of the Management Board of the company ZZN Pelhřimov a.s. which sold shares of the company ZZN AGRO Pelhřimov a.s. to new owners on 31 December 2007) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010. At the beginning of the interview, Mr Platil clarified that he was active in the company ZZN Pelhřimov a.s. approximately in the period 2006-2008. He never worked for the company ZZN AGRO Pelhřimov s.r.o. / a.s.

Mr [redacted] could not remember details of the shares transaction that took place in December 2007, neither the act of issuing the initial shares of the company ZZN AGRO Pelhřimov a.s. when it became a shareholders company on 1 December 2007. Mr [redacted] did not provide OLAF with requested information about the hand over of the sold shares, payment of their price or preparatory works on the construction of the congress centre Čapí hnízdo in 2006-2007 when the company ZZN Pelhřimov a.s. was the only owner or shareholder of the company ZZN AGRO Pelhřimov s.r.o./ a.s. When answering the questions, Mr [redacted] either stated that he did not know the answer or that he could not remember the details. He claimed that he learned about the project of the congress centre Čapí hnízdo only from the media. He was aware that the company ZZN Pelhřimov a.s. owned a daughter company which was not economically active, but he was not aware of its name. He only learned the details from the press.

On 6 April 2017, **Mr Luděk Kalivoda** (a member of the Management Board of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s.) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010. At the beginning of the interview, Mr Kalivoda presented to the OLAF investigators his declaration, in which he stated the following:

As of 17 January 2008 he became a member of the Management Board of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. After the construction works were launched, he was responsible for the construction-related matters. The Management Board of the company had regular meetings, where issues related to the preparation of the project application as well as its financing were discussed.

Considering the fact that Mr Kalivoda is related to Mr [redacted] (they are cousins) he decided not to make further comments or to answer the OLAF investigators' questions.

On 6 April 2017, **Mr** [redacted] (the chairman of the Management Board of the company ZZN Pelhřimov a.s. which sold shares of the company ZZN AGRO Pelhřimov a.s. to new owners on 31 December 2007) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010. At the beginning of the interview, Mr [redacted] stated that he could only answer questions related to the changes in the ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. but he could not provide OLAF with any information about the preparation of the project of the construction of the congress centre Čapí hnízdo as he did not know anything about it.

As for the sale of the shares, Mr [redacted] stated that this transaction was discussed and approved in the management board of the company ZZM Pekhřimov a.s. approximately in the mid-December 2007. The shares were issued in paper form as bearer shares. Before they were sold, their value was estimated by an expert. The price of the shares was paid by a bank transfer from the bank account of Mr Andrej Babiš. The shares were sold to three natural persons - [redacted], Adriana Bobeková and Monika Babišová. On 17

January 2008, Mr Kalivoda participated in the General Assembly meeting of the company ZZN AGRO Pelhřimov a.s. in the function of the registrar. In this moment, the company ZZN Pelhřimov was the only shareholder of the company ZZN AGRO Pelhřimov a.s. On this day, new members of the management board and the supervisory board of the company were selected and approved by the General Assembly. By the nomination of new members of the management board, his functioning in the company ended.

Mr [redacted] provided OLAF investigators with documentation related to the sale of shares of the company ZZN AGRO Pelhřimov a.s. on 31 December 2007. He denied making further comments on the matter.

When the investigators studied the documentation, they asked Mr [redacted] additional questions, which, however, he did not answer. In reaction to questions posed by the OLAF investigators, Mr [redacted] either stated that he could not remember the details or he did not know the answer, or that he referred to his opening statement.

On 31 March 2017, **Mr Tomáš Rak** (chairman of the Management Board of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s.) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010.

At the beginning of the interview, Mr Rak noted that the events which are subject to this OLAF investigation took place 10 years ago and therefore he could not remember all the details. Mr Rak was approached by Ms Nagyová in 2009 with a request for help in preparing construction of the congress centre Čapí hnízdo. Later in 2009, Ms Nagyová offered him to be part of this project. In November 2009, he started working for Farma Čapí hnízdo a.s. as an employee and his task was to supervise the construction works on the congress centre. Mr Nenadál was his supervisor. Later in the project implementation Mr Rak left the construction works and started dealing with the daily operation of the centre.

During his work at Farma Čapí hnízdo a.s., Mr Rak could not remember any General Assembly meeting that he would have called or participated in. During that time he never met the company owners and he did not know who these persons were.

In the framework of the project implementation, the accountancy of the company was ensured by Ms Knobová and other two external companies. As for the project financing, the company drew several bank loans. Mr Rak claimed that he was not dealing with the financial aspects of the investment. According to him, it was Mr [redacted] who was responsible for this field of competence. Mr Rak was not aware of any financial problems the company could have been facing.

Mr Rak further stated that at the end of his employment in Farma Čapí hnízdo a.s.- mid-2010 - the company started operating its business. The income coming from these activities was sufficient to cover the operational costs. Mr Rak had no information about the ability of the company to pay back the bank loans. He was convinced that the business operations of the company were designed the way that they would ensure proper running of the company.

On 29 June 2017, **Mr** [redacted] (auditor approving the annual books of the company Farma Čapí hnízdo a.s. during the period 2008-2010) was interviewed as a witness by the OLAF investigators in relation to the matter of ownership of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. in the reference period 2007-2010.

Mr [redacted] has been working as an auditor since 1995. His company (A&CE Auditoři a znalci Praha spol. s r.o.) was among the first ones that started cooperating with Mr Andrej Babiš and his company Agrofert. This audit company was also engaged by company ZZN Pelhřimov a.s. which is also part of the Agrofert group. It was via this company that Mr

[redacted] learned about the existence of the company ZZN AGRO Pelhřimov a.s. / Farma Čapí hnízdo a.s. He was not personally conducting audits in this company; he only signed the audit reports.

Company A&CE Auditoři a znalci Praha spol. s r.o. was conducting audits of the annual accounts in ZZN Pelhřimov a.s. since the late 90's based on a contract. The company had separate contracts for audits with the company Farma Čapí hnízdo a.s. for the period of 2008 - 2013. As far as Mr [redacted] could remember, these annual contracts were signed by the members of the Management Board of Farma Čapí hnízdo a.s. (Ms Jana Nagyová and Mr Josef Nenadál) on behalf of the company.

Mr [redacted] could not provide the OLAF investigators with details concerning the audits his company conducted in Farma Čapí hnízdo a.s. He refused to answer further questions that were related to specific aspects of the annual reports of Farma Čapí hnízdo a.s. (specifically, the missing report on relations between the company and its controlling company) which were subject to approval by his audit company. Mr [redacted] referred to the statement recorded in the respective audit file, i.e. that the company Farma Čapí hnízdo a.s. was not part of the Agrofert group. Further, he stated that during the audits in Farma Čapí hnízdo a.s. representatives of his audit company communicated mainly with Ms Knobová and Ms Procházková, the person responsible for accounting service in Farma Čapí hnízdo a.s.

In response to other questions of the OLAF investigators, Mr [redacted] stated that he was bound by the professional secrecy that his client had not lifted for the purposes of the OLAF interview. At the end of the interview, the investigators asked whether now, having sufficient information about the focus of the OLAF investigation, he would ask his client for lifting the secrecy obligation, Mr [redacted] replied that he probably would not.

2.5 Operational meetings with the Czech Police and the Public Prosecutor's Office

During the investigation, the OLAF investigators organised several operational meetings with the Czech Police and the supervising public prosecutor in charge of the national investigation (case No KRPA- 505939/TČ-2015-000093-NL). During these meetings, the national and OLAF investigators discussed specific aspects of the case, coordinated their investigative activities and exchanged relevant information and documentation. OLAF and Police exchanged results of their investigative activities, including information on possible applicable provisions of the EU and national legislation.

As for the national proceedings, on the last operational meeting of 6 October 2017, the Police informed OLAF that the criminal proceedings in this case had been launched and all persons accused were officially notified of their accusation.

2.6 Expert opinion prepared on order of the company IMOBA a.s., one of the persons concerned in the case, Annex 10 of this report

In their replies to opportunity to comment, two persons concerned provided OLAF with the expert opinion prepared on the order of company IMOBA a.s. (No3/11/2016 of 22 February 2016 prepared by Mr [redacted]. This expert opinion was focused on the eligibility of the subsidy provided to company Farma Čapí hnízdo a.s for the construction of the congress centre (project No CZ.1.15/2.1.00/01.00095). This opinion No 3/11/2016 was prepared by Mr [redacted] and completed on 22 February 2016. The full text of this opinion in CZ is in Annex 6 of this report.

First, the expert summarises the content of the project application and the conditions of the call for project No 4 under which the project in question was approved. For every aspect of the call for projects, the expert makes a short assessment and concludes that the conditions of the call were met.

In point 4 of the opinion, the expert analyses in detail the SME qualification. First, he summarises the legal framework of the SME definition, referring to Act. No 47/2002 on

the support of small and medium-size enterprises (with the SME definition in Art. 2), Commission Regulation No 70/2001, and the interpretative guidance on SME definition prepared by the agency CZECHINVEST.

With respect to the SME definition, included in this guidance paper: *"In the case of an enterprise that prepares consolidated accounts or is included in consolidation, the economic indicators (No of employees, turnover, and the balance sheet total) may be determined on the basis of the consolidated financial statements."*, the expert states that the company Farma Čapí hnízdo a.s. was not connected to any other company via its ownership structure, and was not included in any consolidated financial statement. Therefore, as a conclusion, the expert states that the company Farma Čapí hnízdo a.s. qualified as an SME.

In point 6.2 of the opinion, the expert elaborates on the ownership structure of the company Farma Čapí hnízdo a.s.

It is noted by OLAF that in his report, the expert does not provide confirmation of the ownership structure of Farma Čapí hnízdo a.s. or its development in the reference period of 2007-2010. OLAF notes that in a view of provisions of Annex to the Commission Recommendation No 2003/361/EC, without a duly documented knowledge of a company's ownership, it is impossible to make a sound judgement on the existence of a partner or a linked enterprise to this company.

The expert provides information about the issuance of the 20 bearer shares by the company Farma Čapí hnízdo a.s. and description of general conditions of manipulation, use and transfer of this type of shares. He claims that submission of such share at the General Assembly meeting is the only relevant means of verification of the actual share owners.

OLAF notes that according to Articles of Association of Farma Čapí hnízdo a.s., shareholders did not need to present the shares when participating in a General Assembly meeting. Specifically, the articles state the following: *"The shares are free at any moment; rights connected to the shares' ownership shall be executed by a person that is able to provide the shares; or is able to demonstrate – via a written confirmation of the share's deposit – that these shares had been deposited for him in accordance with the applicable rules."*

Further the expert claims that the ownership of shares can change from one day to another and these transfers are not recorded anywhere. Therefore, the decisive moment is when the shares are presented at the beginning of the General Assembly meeting and the record of their owners is made. According to the expert, the notary participating in the General Assembly meeting cannot verify the shares ownership, as they could have been transferred to a new owner just before the General Assembly meeting.

OLAF understands the nature of bearer shares. However, a company that issued such shares and consequently applied for and received a subsidy, for which only small and medium enterprises qualified, needs to bear in mind its obligations resulting from the grant agreement. Considering the fact that a company can acquire or lose the SME status from one day to another with a simple change of the ownership structure and the representatives of such company are obliged to inform the respective authorities of such change (and the consequent loss of the SME status), they need to keep reliable records of its owners. There are means to keep such records, the use of which, however, was not demonstrated to OLAF during the investigation process.

In the next part of the report the expert provides information about the exclusion of the company Farma Čapí hnízdo a.s. from the consolidation of Agrofert Holding a.s. and its linked companies. In the Annual report of Agrofert Holding a.s. for 2007, it is stated that due to the sale of the company ZZN AGRO Pelhřimov s.r.o. it was excluded from its consolidation unit. When the legal form of the company changed to a shareholders company on 1 December 2007, the newly established company was not included in the Agrofert consolidation unit. Based on these facts, the expert concluded that the company

Farma Čapí hnízdo a.s. formed part of the Agrofert consolidation unit until 31 December 2006. Farma Čapí hnízdo a.s. was merged with the company IMOBA a.s. on 1 June 2014. It never became part of the Agrofert consolidation unit.

OLAF notes that company ZZN AGRO Pelhřimov s.r.o. / a.s. was in the ownership of the company ZZN Pelhřimov a.s., a 100% daughter company of Agrofert a.s., during the whole year of 2007 until its shares were sold by ZZN Pelhřimov a.s. to new owners on 31 December 2007. From the accounting point of view, company ZZN AGRO Pelhřimov s.r.o. was for the last time included in the annual consolidated accounts of the Agrofert group in 2006.

Due to the exclusion of ZZN AGRO Pelhřimov s.r.o. from the Agrofert consolidation unit in 2007, data on the number of employees, turnover or the balance sheet total relevant for Agrofert a.s. and its companies included in the holding should not have been taken into account when the project application and declaration of the SME qualification was submitted by Farma Čapí hnízdo a.s. in February 2008.

The expert presents his opinion that *"In the subsidy scheme of 2007-2013 it was not at all decisive who the shareholders in the grant beneficiary companies were. It was not necessary and even possible for the managing authority to identify the companies' owners."*

OLAF notes that information about the ownership of the applicant company is elementary in subsidy schemes designed for the support of small and medium enterprises, considering the applicable rules on possible links between companies via natural persons (Art. 3.3 of the Annex of the Commission Recommendation No 2003/361).

In addition, the European Union has devoted considerable attention to the prevention of using the financial system for the purpose of money laundering and terrorist financing over the last two decade, see the Directive No 2005/60/EC of 26 October 2005 (later repealed by the Directive (EU) 2015/849 of 20 May 2015).

The expert further explains definition of an independent enterprise, referring to Art. 3(2) of the Commission Recommendation No 2003/361/EC:

"...However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

(a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses ('business angels'), provided the total investment of those business angels in the same enterprise is less than EUR 1 250 000; ..."

The expert is of the opinion that shareholders meeting the above criteria do not represent an obstacle to providing a subsidy to an SME. According to him, Farma Čapí hnízdo a.s fully complies with the SME definition and it does not matter whether it was an individual or a group of investors who invested their financial resources in its business provided that they comply with the definition of "business angels".

The expert does not clearly stipulate in his report whether the three natural persons that purchased the shares of the company ZZN AGRO Pelhřimov a.s. on 31 December 2007 are to be considered "business angels" within the meaning of the quoted definition included in the Annex of the Recommendation. The expert neither presents evidence that these three persons represent *'individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses'* as required by this definition.

The expert excludes the possibility of purposeful action of the investor due to the fact that at the moment of submitting the project application in February 2008, Farma Čapí hnízdo a.s. was not part of the Agrofert group. When presenting the timeframe of events, the

expert states that company ZZN AGRO Pelhřimov s.r.o. was part of the Agrofert group until 31 December 2006 and that as of 1 January 2007 it was excluded from the holding.

OLAF notes that the respective call for projects No 4 was published on 20 December 2007. The available facts demonstrate that shares of the company ZZN AGRO Pelhřimov a.s. were sold by its previous owner, company ZZN Pelhřimov a.s., which is a 100% daughter company of Agrofert Holding a.s., to three new owners on 31 December 2007.

The expert further states that the company ZZN AGRO Pelhřimov a.s. prepared separate accounting books for the period starting on 1 December 2007, without mentioning the end date. These accounting books were not included in the consolidated books for the Agrofert Holding a.s. and its linked companies for the year 2007. The expert proclaims that the reference period for assessing the SME qualification of Farma Čapí hnízdo a.s. is the year 2007. As the annual consolidated accounts of Agrofert Holding a.s. and its linked companies for 2007 do not include company ZZN AGRO Pelhřimov s.r.o. / a.s., the expert concludes that Farma čapí hnízdo a.s. was correctly qualified as an SME.

OLAF notes that the expert made no comments on the declaration of the project applicant representatives who confirmed with their signatures that *"compared to the previous accounting period there is no change regarding the data, which could result in a change of category of the applicant enterprise (Micro, small, medium-sized or a big enterprise)."* If the expert correctly confirmed that the reference period for the purposes of the SME declaration was 2007, than the previous accounting period was the year 2006, for which annual accounts are available and which demonstrate that the company ZZN AGRO Pelhřimov s.r.o. was 100% owned by the company ZZN Pelhřimov a.s., a 100% daughter company of Agrofert Holding a.s.

3. Legal evaluation

Call for projects No 4 published by the managing authority of the Regional Operational Programme Central Bohemia

Art. 5

The eligible beneficiaries are:

- entrepreneurs pursuant to Art. 2 of the Business Code No 513/1991 Coll., who qualify as small or medium enterprises, have been conducting a business activity for at least 2 years and are conducting their activities in the field of tourism.

- entrepreneurs pursuant to Art. 2 of the Business Code No 513/1991 Coll., who qualify as small or medium enterprises, they have been conducting a business activity for at least 2 years, are conducting their activities in the field of tourism, and have been conducting a business activity for less than two years (only applicable for project beneficiaries located in municipalities with less than 2000 inhabitants).

Instructions for the applicants and beneficiaries of the ROP Central Bohemia

In point A of the "Definitions" included in the instructions published in the framework of the Regional Operational Programme for Central Bohemia, definition of a small and a medium enterprise refers to following:

"When calculating the number of employees and the annual turnover or the balance sheet total, it is necessary to consider data about the partner enterprises or linked enterprises (if applicable) in compliance with the EU legislation - Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises Official Journal L 124 of 20 May 2003, p. 36–41), an extract from this recommendation is cited in the Annex of the Commission Regulation (EC) No 364/2004 of

25 February 2004 amending the Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development."

Pursuant to point VIII.2 of the instructions: *"The applicant / beneficiary is obliged to demonstrate* that *he is a small or a medium enterprise. Not respecting this requirement, he is automatically to be considered a big enterprise. Small and medium enterprises are defined via compliance with two criteria, i.e. number of employees and annual turnover or the balance sheet total. When calculating these, the enterprise is obliged to consider data of partner enterprises and linked enterprises."*

In the Annex 2 of the instructions, the obligatory annexes of a project application have been listed. According to this text, the obligatory annex No 4 is Declaration on the fulfilment of the small or medium enterprise definition. *"This declaration is only submitted by those applicants who declare in their project applications that they meet the SME definition. They fill in the model for declaration on the qualification of an enterprise as an SME. This form stems from the Commission User Guide which aims to provide support in the implementation of the Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises which replaces the Recommendation No 96/280/EC of 3 April 1996. The form has been published on the website www.ropstrednicechy.cz".*

Grant agreement concluded by the project beneficiary, company Farma Čapí hnizdo a.s. and the managing authority of the Regional Operational Programme Central Bohemia 2007-2013

Pursuant to Art. V(1)(i) of the Grant Agreement:

"The project beneficiary is obliged to inform the grant provider in writing of any facts and changes which have impact on the implementation of the grant agreement, to prove the facts at stake, and to take part in possible negotiations and proceedings related to the subject of this grant agreement, whenever invited by the grant provider to do so."

Pursuant to Art. V(1)(r) of the grant agreement:

"The beneficiary is obliged to keep the complete documentation related to the subject of the grant agreement, including the accounting, for the period specified in the applicable national or EU law, at the same time not shorter than by 31 December 2025, by means set out in the applicable national or EU law, specifically the Czech law on accounting No 563/1991 Coll."

REGULATION (EU, EURATOM) No 966/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002

"Article 59

Shared management with Member States

1. Where the Commission implements the budget under shared management, implementation tasks shall be delegated to Member States. The Commission and the Member States shall respect the principles of sound financial management, transparency and non-discrimination and shall ensure the visibility of Union action when they manage Union funds. To this end, the Commission and the Member States shall fulfil their respective control and audit obligations and assume the resulting responsibilities laid down in this Regulation. Complementary provisions shall be laid down in sector-specific rules.

2. When executing tasks relating to the implementation of the budget, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the Union's financial interests, namely by:

(a) ensuring that actions financed from the budget are implemented correctly and effectively and in accordance with the applicable sector-specific rules and, for that purpose, designating in accordance with paragraph 3, and supervising bodies responsible for the management and control of Union funds;

(b) preventing, detecting and correcting irregularities and fraud.

In order to protect the Union's financial interests, Member States shall, respecting the principle of proportionality, and in compliance with this Article, and the relevant sector-specific rules, carry out ex ante and ex post controls including, where appropriate, on-the-spot checks on representative and/or risk-based samples of transactions. They shall also recover funds unduly paid and bring legal proceedings where necessary in this regard.

Member States shall impose effective, dissuasive and proportionate penalties on recipients where provided for in sector-specific rules and in specific provisions in national legislation.

As part of its risk assessment and in accordance with sector-specific rules, the Commission shall monitor the management and control systems established in the Member States. The Commission shall, in its audit work, respect the principle of proportionality and shall take into account the level of assessed risk in accordance with the sector-specific rules.

..."

COUNCIL REGULATION (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999

"Article 56

Eligibility of expenditure

...

3. Expenditure shall be eligible for a contribution from the Funds only where incurred for operations decided on by the managing authority of the operational programme concerned or under its responsibility, in accordance with criteria fixed by the monitoring committee."

"Article 60

The managing authority shall be responsible for managing and implementing the operational programme in accordance with the principle of sound financial management and in particular for:

...

(f) setting up procedures to ensure that all documents regarding expenditure and audits required to ensure an adequate audit trail are held in accordance with the requirements of Article 90;"

"Article 90

1. Without prejudice to the rules governing State aid under Article 87 of the Treaty, the managing authority shall ensure that all the supporting documents regarding expenditure and audits on the operational programme concerned are kept available for the Commission and the Court of Auditors for:

(a) a period of three years following the closure of an operational programme as defined in Article 89(3);

(b) a period of three years following the year in which partial closure took place, in the case of documents regarding expenditure and audits on operations referred to in paragraph 2.

These periods shall be interrupted either in the case of legal proceedings or at the duly motivated request of the Commission."

Treaty on the Functioning of the European Union - Rules on competition - Aids granted by States - Article 107 (ex Article 87 TEC)

"Article 107 (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

b) aid to make good the damage caused by natural disasters or exceptional occurrences;

c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

d) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

e) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

f) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

g) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

h) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

Czech Act No. 47/2002 Coll. on the Support of Small and Medium-Size Enterprises Coll.

"Article 2

Small and medium-size enterprises

For the purposes of this Act, an enterprise that meets the criteria laid down by a directly applicable European Community legislation is considered a small and medium-sized enterprise[6]."

"Article 4

[6] Annex of the Commission Regulation No 70/2001 of 12 January 2001

(1) Granting of aid must be in compliance with the rules governing the granting of public aid."

Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests

"Article 4

...

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal."

Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises

Article 1

1. Small and medium-sized enterprises, hereinafter referred to as 'SMEs', are defined as enterprises which:

- have fewer than 250 employees, and

- have either,

- an annual turnover not exceeding EUR 40 million, or

- an annual balance-sheet total not exceeding EUR 27 million,

- conform to the criterion of independence as defined in paragraph 3.

2. Where it is necessary to distinguish between small and medium-sized enterprises, the 'small enterprise' is defined as an enterprise which:

- has fewer than 50 employees and

- has either,

- an annual turnover not exceeding EUR 7 million, or

- an annual balance-sheet total not exceeding EUR 5 million,

- conforms to the criterion of independence as defined in paragraph 3.

3. Independent enterprises are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definitions of an SME or a small enterprise, whichever may apply. This threshold may be exceeded in the following two cases:

- *if the enterprise is held by public investment corporations, venture capital companies or institutional investors, provided no control is exercised either individually or jointly,*
- *if the capital is spread in such a way that it is not possible to determine by whom it is held and if the enterprise declares that it can legitimately presume that it is not owned as to 25 % or more by one enterprise, or jointly by several enterprises, falling outside the definitions of an SME or a small enterprise, whichever may apply.*

4. In calculating the thresholds referred to in paragraphs 1 and 2, it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises that it directly or indirectly controls through possession of 25 % or more of the capital or of the voting rights.

5. Where it is necessary to distinguish microenterprises from other SMEs, these are defined as enterprises having fewer than 10 employees.

6. Where, at the final balance sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the

status of 'SME', 'medium-sized enterprise', 'small enterprise' or 'microenterprise' only if the phenomenon is repeated over two consecutive financial years.

7. The number of persons employed corresponds to the number of annual working units (AWU), that is to say, the number of full-time workers employed during one year with part-time and seasonal workers being fractions of AWU. The reference year to be considered is that of the last approved accounting period.

8. The turnover and balance sheet total thresholds are those of the last approved 12-month accounting period. In the case of newly-established enterprises whose accounts have not yet been approved, the thresholds to apply shall be derived from a reliable estimate made in the course of the financial year."

Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises contains in its annex Definition of micro, small and medium–sized enterprises adopted by the Commission.

*"**Article 2***

Staff headcount and financial ceilings determining enterprise categories

1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million."

...

Article 3

Types of enterprise taken into consideration in calculating staff numbers and financial amounts

1. An 'autonomous enterprise' is any enterprise which is not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3.

2. 'Partner enterprises' are all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

(a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses ('business angels'), provided the total investment of those business angels in the same enterprise is less than EUR 1 250 000;

(b) universities or non-profit research centres;

(c) institutional investors, including regional development funds;

(d) autonomous local authorities with an annual budget of less than EUR 10 million and fewer than 5 000 inhabitants.

3. 'Linked enterprises' are enterprises which have any of the following relationships with each other:

(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

There is a presumption that no dominant influence exists if the investors listed in the second subparagraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders.

Enterprises having any of the relationships described in the first subparagraph through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

Enterprises which have one or other of such relationships through a natural person or group of natural persons ***acting jointly*** *are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.*

An 'adjacent market' is considered to be the market for a product or service situated directly upstream or downstream of the relevant market.

4. Except in the cases set out in paragraph 2, second subparagraph, an enterprise cannot be considered an SME if 25 % or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

5. Enterprises may make a declaration of status as an autonomous enterprise, partner enterprise or linked enterprise, including the data regarding the ceilings set out in Article 2. The declaration may be made even if the capital is spread in such a way that it is not possible to determine exactly by whom it is held, in which case the enterprise may declare ***in good faith*** *that it can legitimately presume that it is not owned as to 25 % or more by one enterprise or jointly by enterprises linked to one another. Such declarations are made without prejudice to the checks and investigations provided for by national or Community rules."*

Interpretation of the term 'acting jointly'

The User Guide to the SME Definition of 24/02/2016 issued by the European Commission contains the following interpretation of the term 'acting jointly': *within the context of links via natural persons under Article 3.3 of the Annex to the SME Recommendation, family links have been considered sufficient to conclude that natural persons act jointly".* In this interpretation, the Commission refers to the Commission Decision of 7 June 2006 on State Aid No C 8/2005 which Germany is planning to implement for Nordbrandenburger UmesterungsWerke NUW, OJ L353, 13 December 2006, p.60. This decision states that apart from the family relations, it was necessary to examine other various factors when assessing the links between companies that are owned / controlled by family members,

e.g. their business relations and organisational links. In this respect, overlaps in the registered business activities in 2007-2008 and actual business relations between Farma Čapí hnízdo a.s. and companies included in the Agrofert group in 2009 -2010 have been analysed in point 2.3.13 of this report.

Good Faith in the Czech legal framework

With respect to the term of 'good faith', the Czech legal framework provides for numerous interpretations.

Pursuant to judgement of the Supreme Court of the Czech Republic No 2 Cdon 1178/96 of 27 April 1997, *"an assessment of whether, considering all circumstances, the holder is in good faith that the matter or the right belong to* him cannot be based solely on the assessment of the holder's subjective views. The good faith of the holder must also apply to the circumstances under which the right in fact could arise, that is to say, to the legal ground (title) that could give rise to the right".

Pursuant to judgement of the Supreme Court of the Czech Republic No 3 Cdon 395/96 of 31 March 1996 *"good faith must be based on specific circumstances that can be judged to be well founded. Circumstances which may be used to establish the existence of good faith are, as a rule, the circumstances relating to the legal reason for the acquisition of the right and the evidence of the fairness of the acquisition".*

Pursuant to judgement of the Supreme Court of the Czech Republic No 20 Cdo 112/2006 of 28 March 2006, *"Good faith must be substantiated by specific circumstances that can be judged to be well founded. Circumstances which may be used to establish the existence of good faith are, as a rule, the circumstances relating to the legal reason for the acquisition of the right and the evidence of the fairness of the acquisition."*

In order to obtain good faith about the qualification of the beneficiary company as a small enterprise, its legal representatives needed to have access and possibly make copies of reliable information and documentation concerning the SME criteria, including the data on the actual ownership of the company shares, as 'linked' or 'partner' enterprises could be connected to the beneficiary company also via natural persons.

The assurance on the ownership of the beneficiary company during a certain period could have been established for example on the valid copies of the sale contracts related to the shares' transfers, hand-over protocols (if issued separately), or confirmation of the long-term deposit of the shares with a third party.

Considering the fact that providing a declaration on SME qualification is made without prejudice to the checks and investigations provided for by the national or Community rules as stipulated in Art. 3.5 of the Annex of the Commission Recommendation 2003/361/EC, the company representatives were obliged to keep records of the relevant information which contributed to building their good faith on the company's SME qualification.

During the investigation, the persons concerned – Ms Mayerová and Mr Nenadál, as well as relevant witnesses - Mr Knotek and Mr [redacted] - were given opportunity to provide OLAF with documentation which would demonstrate how the company qualified as an SME in the relevant time period - at the time of submitting the project application and during the project implementation. In this process, OLAF acquired copies of the sale / purchase contracts of 31 December 2007 and 16 February 2008. These contracts, however, do not represent sufficient evidence of the company's ownership in the whole relevant period. Due to the nature of the shares, their ownership could have changed from one day to another. Therefore, bearing in mind the alleged SME status of the company and rights/obligations resulting from it required the long-term assurance of the company's legal representatives of the actual ownership of the company – e.g. via contracts on the deposit of the shares concluded between the share owners and the attorneys, banks, etc.

According to the SME User guide[7] (p.14):

"Enterprises that are subject to a change in ownership need to be assessed on the basis of their shareholder structure at the time of the transaction, not at the time of closure of the latest accounts (6). Therefore, the loss of SME status may be immediate."

The company's legal representatives were obliged to report a loss of the SME status to the subsidy provider. With the above interpretation in mind, such loss could have resulted from the changes in the shares' ownership. Therefore, the company representatives needed to have permanent knowledge of the company shareholders.

Pursuant to Article 7.2 of the company's Articles of Association approved on 22 November 2007: *"The shares are free at any moment; rights connected to the shares' ownership shall be executed by a person that is able to provide the shares; or is able to demonstrate – via a written confirmation of the share's deposit – that these shares had been deposited for him in accordance with the applicable rules."*

Application guide for the classifications of micro, small and medium enterprises

Article 7 of the application guide issued by the Managing Authority for the Operational Programme Enterprises and Innovations 2007 -2013 (provided to OLAF by company IMOBA a.s. as a part of its comments to the summary of facts) sets up provisions for situations where a grant beneficiary loses its SME qualification.

For this particular case, only provisions relevant for operational programmes / calls for projects, which do not support large enterprises apply. In case an enterprise loses its SME qualification (due to an endogenous, or exogenous increase, i.e. by a natural growth or a merger with another company respectively) before the grant agreement is concluded, such agreement is not signed. In case a beneficiary loses its SME qualification due to an exogenous increase after the grant agreement is signed but before the project expenditure is reimbursed, such beneficiary loses its eligibility for the respective subsidy. In case an enterprise loses its SME qualification due to an exogenous increase after the project expenditure is reimbursed and the project is completed, the sustainability period of such project is extended from three to five years.

Judgement of the European Court of Justice (ECJ) of 29 April 2004 in Case C-91/01 Italian Republic v Commission of the European Communities

This court ruling provides interpretation of the Commission Recommendation No 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996 L 107, p. 4).

In point 50 of the judgement, the court ruled that:

"The 18th; 19th and 22nd recitals of the SME Recommendation; as well as point 3.2 of the SME Guidelines, make it clear that the purpose of the independence criterion is to ensure that the measures intended for SMEs genuinely benefit the enterprises for which size represents a handicap and not enterprises belonging to a large group which have access to funds and assistance not available to competitors of equal size. It also follows that, in order to ensure that only genuinely independent SMEs are included, there has to be a way of eliminating legal arrangements in which SMEs form an economic group much stronger than such an SME. It must also be ensured that the definition is not circumvented on formal grounds."

In point 54 of the judgement, the court ruled that:

"...if an enterprise concerned does not in reality suffer from the handicaps typical of an SME, the Commission is entitled to refuse such increased aid. Approving increased aid for

[7] http://ec.europa.eu/DocsRoom/documents/15582/attachments/1/translations

enterprises which, although meeting the formal criteria defining an SME, do not suffer from the handicaps typical of an SME would be in contrary to Article 87 EC, since, as pointed in point 43 of his Opinion, such an increase in aid is likely to produce more severe distortions of competition and thus adversely affect trading conditions to an extent contrary to the common interest within the meaning of Article 87(3)(c)."

According to point 56 of the judgement, the links between companies could be based on the economic, financial and organisational grounds. It further states that situation where a company contends with the handicaps from which SMEs usually suffer, constitutes one of the fundamental justifications for granting an increase in the maximum amount of aid allowable for such enterprises.

Referring to the comment of company IMOBA a.s. of 13 October 2017 claiming that this court ruling was not applicable because the Recommendation 96/280/EC that was subject of its interpretation was replaced by Recommendation 2003/361/EC and the text of the judgement was not translated into Czech[8] language, OLAF notes the following:

- Relevant articles of the judgement do not provide interpretation of specific articles of the Recommendation 96/280/EC, but are related to the general objective of this legal act which is common with the objective of the replacing Recommendation No 2003/361/EC, i.e. to provide support to small and medium enterprises that genuinely suffer from disadvantages on the market due to their size. Furthermore, the SME definitions contained in the two recommendations do not differ in their formulations in any substantial aspect. Therefore, the interpretation of the first one can also be used in the acts preceded by the adoption of the second recommendation in 2003. This fact is demonstrated in another judgement of the European Court of Justice issued in 2014 (C-110/13), which also refers to the ruling of 2004; therefore, OLAF considers its application in this report justified.
- In what concerns the absence of the Czech translation of the respective judgement, OLAF notes that judgements of the European Court of Justice do not form part of the generally binding legal acts, publication of which in the Official Journal is required to confirm their validity (only the generally binding acts are subject of the judgement C-161/06 mentioned in the comments of IMOBA a.s.). Furthermore, pursuant to Article 342 TFEU, "The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations." As for the language arrangements at the European Court of Justice, the second subparagraph of Article 64 of the ECJ Statute, which refers to the Rules of Procedure of the Court of First Instance and the General Court (specifically Articles 36-42), applies. The final version of a judgement or an order of the Court of First Instance is governed by Article 41 of the Rules of Procedure, which refers to the language of the proceedings in question. Moreover, the legal force of judgements and orders of the Court of First Instance is not subject, as in the Czech legal order, to their publication in the Official Journal or the Collection of Decisions.

The following recitals in the two recommendations are relevant for the respective judgement:

Recommendation 96/280/EC

18) Whereas independence is also a basic criterion in that an SME belonging to a large group has access to funds and assistance not available to competitors of equal size; whereas there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME;

[8] Court ruling No C-161/06 of 11 December 2007

19) Whereas, in respect of the independence criterion, the Member States, the EIB and the EIF should ensure that the definition is not circumvented by those enterprises which, whilst formally meeting this criterion, are in fact controlled by one large enterprise or jointly by several large enterprises;

22) Whereas; therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap.

Recommendation 2003/361/EC

12) Account should also be taken, in suitable cases, of relations between enterprises which pass through natural persons, with a view to ensuring that only those enterprises which really need the advantages accruing to SMEs from the different rules or measures in their favour actually benefit from them. In order to limit the examination of these situations to the strict minimum, the account taken of such relationships has been restricted to the relevant market or to adjacent markets — reference being had, where necessary, to the Commission's definition of 'relevant markets' in the Commission notice on the definition of relevant market for the purposes of Community competition law (4).

Judgement of the Court of 27 February 2014 in Case C-110/13 HaTeFo GmbH Finanzamt Haldensleben

This court ruling provides interpretation of the Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

In point 33 of the judgement, the court ruled that:

"In those circumstances, in order to include only enterprises that are genuinely independent SMEs, it is necessary to examine the structure of SMEs which form an economic group, the power of which exceeds the power of an SME, and to ensure that the definition of SMEs is not circumvented by purely formal means (see Italy v Commission, paragraph 50)."

In point 34 of the judgement, the court ruled that:

"Therefore the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted in the light of that objective, so that enterprises which do not formally have one or other of the relationships referred to in paragraph 28 above, but which, because of the role played by a natural person or group of natural persons acting jointly, nevertheless constitute a single economic unit, must also be regarded as linked enterprises for the purposes of that provision, since they engage in their activities or in part of their activities in the same relevant market or in adjacent markets (see, by analogy, Italy v Commission, paragraph 51)."

In point 37 of the judgement, the court ruled that:

"It must also be noted, as is apparent from the order for reference, that there is a family relationship between A, B and D, who own the two enterprises, and that A and C simultaneously manage both. Those links appear to be such as to give those persons the opportunity to work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another."

In point 38 of the judgement, the court ruled that:

"In view of the foregoing, it seems that two companies which are in an analogous situation to that of the companies in the main proceedings may be regarded in fact as constituting,

through a group of natural persons acting jointly, a single economic unit, so that they should be regarded as linked enterprises for the purposes of the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation; that is, however, a matter for the referring court to assess, and it must be open to the interested parties to prove otherwise."

In point 39 of the judgement, the court ruled that:

"It follows from all of the above considerations that the answer to the questions referred is that the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted as meaning that enterprises may be regarded as 'linked' for the purposes of that article where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3(3) of that annex. Natural persons who work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of each other are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of that annex. Whether that condition is satisfied depends on the circumstances of the case and is not necessarily conditional on the existence of contractual relations between those persons or a finding that they intended to circumvent the definition of a micro, small or medium-sized enterprise within the meaning of that recommendation."

Interpretation of Art. 3(3) of the Annex to the Commission recommendation No 2003/361/EC included in the Judgement No C-110/13 was later used in the order of the Court of 11 May 2017 – Bericap Záródástechnikai Cikkeket Gyártó Bt. V Nemzetgazdasági Minisztérium:

"***Operative part of the order***

Article 3(3) of Annex I to Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 TFEU and 108 TFEU] (General block exemption Regulation) must be interpreted as meaning that enterprises may be regarded as 'linked', within the meaning of that provision, where it is clear from the analysis of both the legal and economic relations existing between them that they constitute, through a natural person or a group of natural persons acting jointly, a single economic unit, even though they do not formally feature any of the relationships referred to in the first subparagraph of Article 3(3) of that annex. Natural persons who work together in order to influence the commercial decisions of the enterprises concerned, with the result that those enterprises cannot be regarded as being economically independent of one another, are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of that annex. Whether such a condition is satisfied will depend on the circumstances of the individual case and is not necessarily conditional on the existence of contractual relations between those persons or even on a finding that they intended to circumvent the definition of micro, small or medium-sized enterprises within the meaning of Annex I to Regulation No 800/2008."

Company IMOBA a.s. as well as Ms Mayerová as the persons concerned commented on the application of the Judgement No C-110/13, arguing that it was issued and published only in 2014, six years after the project application was submitted, and therefore could not be applied in the OLAF report. Company IMOBA a.s. also referred to the Judgement of the Court No 43/75 Defrenne II.

In this respect, OLAF would like to refer to the Judgement of the European Court of Justice No 61/79 Denkavit of 27 March 1980, point 16: *"The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming*

into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relations arising and established before the judgement ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied."

Czech Business Code No 513/1991 Coll.

"Art. 156 of the Business Code states the following:

1) Shares may be issued on a name or an owner (bearer shares)[9].

7) Shares on owner are unlimitedly transferable. Rights linked to a registered share on owner shall be exercised by the person who submits it or by the person who presents a written declaration of the person who performs the safekeeping or deposition pursuant to specific legal provisions that the shares are deposited for him pursuant to specific legal provisions. Presenting a share or a declaration pursuant to the second sentence may be replaced by an identification of the share pursuant to 184 (2) of this law. The declaration shall contain the purpose for which it is issued and the date of its issuance. The person who issued the declaration shall not release the respective share to the custodian(s) or a third party until the expiry of the period prescribed for exercising the right to which the declaration has been issued or the actual exercise of the right. The rights linked to the book-registered share on an owner are exercised by the person listed in the register of the book-entry securities pursuant to specific legal provisions."

Czech Penal Code No 40/2009 Coll.

OLAF notes that it refers to provisions of the Penal Code which entered into force in 2010 (and not the one valid in the reference period of 2007 - May 2010) due to the applicable practice to use such legal framework in the criminal proceeding that is more advantageous for the accused persons.

"Article 212 - Subsidy fraud

(1) Whoever provides false or grossly distorted data, or whoever conceals substantial data, when applying for the grants, subsidies, subventions or contributions, shall be punished by imprisonment for a term of up to two years or prohibition of the activity.

(2) Such punishment shall also be imposed on whoever, uses substantial resources, obtained through the purpose of the grants, subsidies, subventions or contributions, for something other than the intended purpose.

(3) An offender shall be punished by imprisonment for a term of six months to three years if s/he commits an act referred to in paragraph 1 or 2 and s/he has already been convicted or punished for such an offence in the previous three years.

(4) An offender shall be punished by imprisonment for a term of one year to five years or a pecuniary penalty if, by an act referred to in paragraph 1 or 2, s/he causes larger damage.

(5) An offender shall be punished by imprisonment for a term of two to eight years if

a) s/he commits an act referred to in paragraph 1 or 2 as a member of an organised group,

b) s/he commits such an act as a person who has a special duty to defend the interests of the victim,

c) s/he causes by such an act substantial damage.

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[9] In Czech: "akcie na jméno a akcie na majitele"

(6) An offender shall be punished by imprisonment for a term of between five to ten years if

a) s/he causes by an act referred to in paragraph 1 or 2 large-scale damage,

b) s/he commits such an act in I? to enable or facilitate to commit a criminal offence of treason (Section 309), terrorist attack (Section 311) or terror (Section 312).

(7) Preparation shall be punishable."

"Article 260 - Damaging financial interests of the European Union

"(1) Whoever issues, uses, or presents false, incorrect, or incomplete documents or states false or grossly misleading information relating to the revenue and expenditure of the summary budget of the European Union or budgets managed by the European Union in such documents, or conceals such information or documents on their behalf and thereby enables the misuse or withholding of funds from any such budgets or the reduction of resources of any such budget shall be punished by imprisonment for a term of up to one year, by a prohibition of activity or by forfeiture of a thing or other property.

(2) Such punishment shall also be imposed on whoever reduces or uses funds that make up the revenue and expenditure of the summary budget of the European Union or budgets managed by
the European Union, without being authorised thereto.

(3) An offender shall be punished by imprisonment for a term of one year to five years or a pecuniary penalty if, by an act referred to in paragraph 1 or 2, s/he causes larger damage.

(4) An offender shall be punished by imprisonment for a term of two to eight years if

a) s/he commits an act referred to in paragraph 1 or 2 as a member of an organised group,

b) s/he commits such an act as a person who has a special duty to defend the interests of the European Union, or

c) s/he causes by such an act substantial damage.

(5) An offender shall be punished by imprisonment for a term of five to ten years if s/he causes by an act referred to in paragraph 1 or 2 large-scale damage."

4. Estimated financial impact of the facts established

Total amount of the public expenditure certified in relation to the ERDF project in question is CZK 49 997 443.29 / EUR 1.93 Mil. If the co-financing rate of 85% is applied, the ERDF co-financing amounts to CZK 42 497 826.8 / EUR 1 647 676.4 (financial data provided by the website of the Ministry of Regional Development (www.strukturalni-fondy.cz).

5. Comments of the persons concerned

On 25 September 2017, OLAF provided the three persons concerned with an opportunity to provide comment on facts (OCM(2017)18924, OCM(2017)18920, OCM(2017)18922), see Annexes 1-3 of this report. On 10 November, company IMOBA a.s. was provided with an opportunity to comment on additional facts (OCM(2017)22700), see Annex 4 of this report.

5.1 Comments of the company IMOBA a.s. sent to OLAF on 13 October 2017 (OCM(2017)20700) and 27 November 2017 (OCM(2017)22700), Annex 5 of the report.

According to the representatives of IMOBA a.s. the company cannot be a person concerned in this OLAF investigation suspected of a fraud due to the fact that it is a legal person and as such can be considered as a person concerned by a penal proceeding only as of 1 January 2012 when the respective national legislation on penal responsibility of legal persons entered into force.

Company IMOBA a.s. expressed its opinion that due to the subsidiarity principle the OLAF investigation should never have been opened. There is an ongoing national investigation No KRPA-505939-/TČ-2015-000093-NL led by the Czech Police. Competences of OLAF do not overreach the competences of the Police and therefore there is no added value in having its own investigation along the national one.

Representatives of IMOBA a.s. are of the opinion that OLAF had not provided them with sufficient information about the scope of its investigation. OLAF only informed them of the ERDF project related to the case and relied on other persons to inform company IMOBA a.s. of further details.

Concerning the facts provided to IMOBA a.s. for comments, its representatives consider these purposefully constructed, biased and irrelevant. They quote Art. 9(1) of the Regulation 883/2013, pursuant to which "In its investigations the Office shall seek evidence for and against the person concerned. Investigations shall be conducted objectively and impartially and in accordance with the principle of the presumption of innocence and with the procedural guarantees set out in this Article". However, in the summary of fact only those elements that seem to be against the person concerned had been listed. In addition, some facts had only been extracted from certain documents and are presented without a wider context.

Considering the fact that company IMOBA a.s. was not provided by OLAF with an access to its investigation file, its representatives have no means to verify whether all relevant facts have been provided them for comments.

According to IMOBA a.s. most of the facts listed in the summary that was provided by OLAF for their comments are not relevant for the scope of its investigation. As IMOBA a.s. has been informed, the scope of OLAF investigation was aimed at facts related to the ownership of the beneficiary company Farma Čapí hnízdo a.s. and its eligibility for obtaining a subsidy under the call for projects No 4 published in the framework of the implementation of the Regional Operational Programme Central Bohemia 2007-2013. The time period that the OLAF investigation was focused on was preparation of the project application until the reimbursement of the project costs which is June 2010. Nevertheless, during the investigation, OLAF did not respect this limitation and collected facts which go beyond the material and time scope of its investigation.

IMOBA a.s. considers the following documents irrelevant for the investigation:

- ECJ judgement No C-110/01 HaTeFo v Finanzamt Haldesleben of February 2014
- Purchase /sale contracts from 2013
- Public statements of Andrej Babiš of 19 October 2013
- Conclusions of the alleged expert opinion prepared by Česká znalecká a.s.

According to IMOBA a.s. these documents and facts that they contain are not related to circumstances under which the company Farma Čapí hnízdo a.s. applied for a subsidy and received it. These documents cannot be relevant for the investigation as they occurred only afterwards.

In what concerns the economic parameters of the project in question which are subject of the expert opinion are not related to the ownership of the company Farma Čapí hnízdo a.s. According to IMOBA a.s. representatives, it is absolutely normal that original plans and predictions are not achieved due to external economic factors and incorrect estimates.

IMOBA a.s. further claims that the summary of facts submitted for its comments did not contain numerous facts which are relevant for the investigation.

As regards the legal basis for the SME definition, IMOBA a.s. claims that articles 1 and 3 of the Commission Recommendation No 2003/361/EC are the key provisions for the definition of a linked and partner enterprise and have been omitted in the summary of facts. Furthermore, the company representatives claim that OLAF should have mentioned that no other rules than the Commission Recommendation No 2003/361/EC were listed in the Instructions for beneficiaries or the grant agreement or in any other document these two documents referred to.

As regards the application of two ECJ judgements that OLAF referred to in its summary of facts, IMOBA a.s. claims the following:

Judgement No C-110/13 HaTeFo v Finanzamt Haldesleben was issued and published in February 2014, i.e. six years after the grant was approved, and therefore its ruling cannot be applied on acts succeeding it. IMOBA a.s. claims that by the application of this judgement, the guaranteed principle of protection of legitimate expectations as well as prohibition of retroactivity would be breached.

As for the judgement No C-91/01 Italy v European Commission, according to IMOBA a.s. this judgement could not be applied as its ruling, interpreting provisions of the Commission Recommendation No 96/280/EC, had been overruled by the adoption of the Commission Decision 2003/361/EC. Furthermore, this judgement was not translated to Czech language and therefore, according to IMOBA representatives, cannot be applied in this case[10]. With respect to the ruling of the judgement C-91/01 IMOBA a.s. claims that company Farma Čapí hnízdo a.s. was suffering from disadvantages on the market as any other SME and therefore complied with the provisions of the recommendation and ruling of this particular judgement.

Concerning the ownership of the shares of the company Farma Čapí hnízdo a.s., IMOBA a.s. claims that the summary of facts had been missing description of the legal framework valid at the time for the anonymous bearer shares. For this purpose, it quotes provisions of Art. 156 of the Czech Business Code as well as Art.3(2) of the Act No 591/1992 on stocks. Pursuant to these provisions, when transferring the shares from one person to another, no written sale / purchase contract or the actual payment for the shares or a hand-over note were required.

Furthermore, IMOBA a.s. noted that pursuant to Art. 156 of the Business Code: *"right resulting from the ownership of bearer shared are executed by the person, who can present the share or who is equipped with a written declaration issued by the person who ensures the deposit of his/her shares"*. Therefore, according to IMOBA a.s. it was a usual practice that the shareholders rights were executed by presenting the physical shares at the General Assembly meetings. It was irrelevant whether these persons were actual shareholders or only representing these at the General Assembly meetings.

Concerning the first issue of the company shares in 2007, IMOBA a.s. provided OLAF with a hand-over protocol of 2 December 2007 which proves the issuing of 20 individual shares for their first owner, company ZZN Pelhřimov a.s. According to IMOBA a.s. the bulk share was never physically issued because the company issuing the shares and the their first owner agreed on issuing individual shares.

The company IMOBA a.s. provided OLAF with its comments on the recently published information about the bank loan provided to Farma Čapí hnízdo a.s. by the HSBC bank in 2008, although these were not included in the summary of facts prepared by OLAF. The published documents contain information that the company Farma Čapí hnízdo a.s. was directly owned by Mr Andrej Babiš. According to IMOBA representatives, these documents, if their authenticity is confirmed, were never shown or provided to them, and they represent "a wishful thinking of the bank officer instead of reality".

[10] ECJ judgement No C-161/06 of 11 December 2007 Skoma-Lux v Customs Headquarters Olomouc

Concerning the external expert opinions (prepared by Mr [redacted] and Ms [redacted]) that are part of the project evaluation process, company IMOBA a.s. stressed that the overall opinions should be taken into account by OLAF and not only their extracts presented in the summary of facts. (Note. The full text of the expert opinions is provided in Annex 22 of this report)

The company IMOBA a.s. insists on having access to the relevant documents included in the OLAF investigation, otherwise it cannot fully enjoy its rights to provide comments to the facts which serve as basis for OLAFs conclusions. This is in particular relevant for the expert opinions made by Česká znalecká a.s. and Ing. [redacted]. Representatives of IMOBA a.s. are afraid that OLAF only used extracts from these opinions in its summary of facts. IMOBA a.s. claimed that the economic data demonstrating relations between Farma Čapí hnízdo a.s. and Agrofert a.s. in 2010-2013 are irrelevant for the assessment whether the two companies were linked or partner enterprises in the meaning of Ar. 3(3) of the SME definition (Annex of the Commission Recommendation 2003/361/EC). IMOBA a.s. further raised doubts about the relevance and correctness of the conclusions contained in the expert opinion prepared by Česká znalecká a.s.

As regards the conclusions contained in the report of Česká znalecká a.s., representatives of IMOBA a.s. noted that it was normal to deviate from the estimated plans and prediction due to external economic impacts or slightly incorrect estimations of the future development. According to them, Farma Čapí hnízdo a.s. was trying to complete the project in spite of problems and in order to do so it was looking for the most suitable economic solutions.

As for the bank loan guarantee provided to Farma Čapí hnízdo a.s. by the company Agrofert a.s., IMOBA a.s. representatives stated that the guarantee was provided for the usual market price and it was a standard operation in this particular situation, as well as the real estate collateral provided by IMOBA a.s. Such economic operations, however, do not prove links or partnership between Farma Čapí hnízdo a.s. and Agrofert a.s. or companies included in its holding, in the meaning of the Commission Recommendation 2003/361/EC.

IMOBA a.s. referred in its comments to the conclusions of the extraordinary audit of the project in question conducted by the Czech Audit Authority in May 2016, according to which the certified project expenditure was eligible ad the company formally complied with the SME criteria.

In relation to the selective lists of activities registered by companies Farma Čapí hnízdo a.s. and Agrofert a.s. in the Business Register, company IMOBA a.s. noted that this data was irrelevant for the investigation as the registration of the activities in the register only provides the companies with a right but not an obligation to conduct business activities in these fields. IMOBA a.s. claimed that when assessing whether two companies operate on the same or adjacent markets (in the meaning of the Commission Recommendation 2003/361/EC), respective authorities have to evaluate the real economic activities of these companies.

Based on the comments received from the company IMOBA a.s., OLAF added additional facts into its analysis and therefore provided the company IMOBA a.s. with another opportunity to comment on these facts (OCM(2017)22700).

On 27 November 2017, representative of the company provided OLAF with the written comments (OCM(2017)24319), summary of which is below:

First of all, company IMOBA a.s. wished to reiterate that the project in question was successfully completed on 30/04/2010, it generated more than 60 new jobs and has had app. 40 000 visitors per year. At the beginning of the project, the amount of the subsidy formed 24.6% of the project's eligible expenditure. With additional investments since the completion of the project, its share on the total invested amount decreased to 5%.

The company pointed to the conclusions of on-the-spot check conducted on the project by the OP managing authority in 2013, which did not identify any shortcomings.

IMOBA representatives noted that they could not understand the purpose of the recent request for their comments to the facts. According to its representatives, the company IMOBA was not informed of the scope of the investigation or of the intended use of the respective facts provided for their comments. Therefore, any evidence and information illegally gathered by OLAF, including its final report from this investigation can not be used in the national judicial proceeding against the company (which is anyhow impossible, as the penal responsibility of legal persons was not established in the Czech law in the reference period).

IMOBA representatives could not understand what relevance have the provided facts – invoices issued by Farma Čapí hnízdo a.s. in 2008-2010 - for the investigation. They claim that these invoices illustrate one-time, non-regular or only temporary activities of the company related to the management of its own properties. The main business activity of the company in this period results more from the received that issued invoices. Compared to years 2004 - October 2007 when the company had no turnover from the sale of its own products or services, the company started to be economically active as of 2008, when the company Agrofert a.s. left its ownership structure and was replaced by Ms Monika Babišová, Adriana Bobeková and Mr [redacted]

As regards the presented invoices for one-time, non regular activities in the field of agriculture, the company IMOBA stated that they were related to the necessary activities of the company linked to the management of its own resources and rented properties. Further, IMOBA provided detailed comments on each invoice related to the agricultural activities of 2008-2010. IMOBA claimed that the fact that Farma Čapí hnízdo a.s. had these one-time, non-regular activities in the field of agriculture, does not mean that OLAF could conclude that this company was linked to Agrofert a.s. whose long-term business activity is, among others, also agriculture.

As regards the invoices for advertising services, IMOBA claims that the company Farma Čapí hnízdo a.s. provided space for advertising due to the its need for alternative financial resources in the period when the economic crisis hit the Czech Republic and caused complications in launching the project in question. IMOBA representatives do not consider this approach obnoxious. They consider it wiser that letting the company fall into financial difficulties which could cause that the project is prematurely terminated and the company went bankrupt.

According to IMOBA, the fact that the company Farma Čapí hnízdo a.s. temporarily and in a limited scope operated on the market of advertising services does not imply that the company was linked to Agrofert a.s. If this is to be OLAF's conclusion, it would first have to prove that Agrofert a.s. was also operating on the same relevant market in the reference period[11]. According to IMOBA, none of the companies that belong to Agrofert group, does not have its primary income from the advertising services of any kind. The main business activities of the companies belonging to the Agrofert group are agriculture, food industry and chemical production.

IMOBA repeated that the income from the advertising services was for the company Farma Čapí hnízdo a.s. only secondary and was aimed to temporarily balance the negative impacts of the world-wide economic crisis.

IMOBA provided further comments to other invoices included in the list of facts submitted by OLAF for their comments.

Other comments (as of point V in the letter) provided by IMOBA representatives on 27/11/2017 were related to their previous statements provided to OLAF on 13/10/2017.

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[11] Art. 3.3 of the Commission Recommendation states that: "*Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in* ***the same relevant*** *market* ***or in adjacent*** *markets.*

The full text of the comments of the company IMOBA a.s. are attached in Annexes 5 and 8 of this report.

5.2 Comments of Ms Jana Mayerová, born Nagyová sent via the law firm Bartončík & Bartončík on 13 October 2017 (OCM(2017)20695).

First, Ms Mayerová claims that by opening and conducting the investigation related to project No CZ.1.15/2.1.00/04.00095 OLAF breached the principle of subsidiarity due to the fact that this project and circumstances of its approval and implementation are also subject to the national investigation file No KRPA-505939-583/TČ-2015-000093-NL. In the framework of the national investigation led by the Czech Police Ms Mayerová recently received information about her being accused in the penal proceeding. According to Ms Mayerová, the Czech Police has sufficient competence to collect evidence in this case and therefore, there is no added value in conducting another investigation by the European institutions. These objections have also been formulated in the legal complaint that Ms Mayerová submitted to the European Court of Justice in this respect.

Ms Mayerová further claims that in spite of her repeated requests, she was not provided by OLAF with the access to its investigation file. According to Ms Mayerová, this decision of OLAF represents a disrespect of her right for correct and fair defence. Due to this fact, she is not able to provide OLAF with comprehensive comments to all aspects to the matter at stake.

The summary of facts prepared by OLAF contains extracts of the external expert opinions prepared by Ms [redacted] and Mr [redacted]. Ms Mayerová claims that she as a person concerned by the facts contained in these reports should have access to all information contained in these reports as well as their supporting and background documentation. The extracted parts of these reports are according to Ms Mayerová put out of context and could be misinterpreted.

Furthermore, Ms Mayerová claims that according to her knowledge OLAF collected many pieces of important information which are in her favour and which had not been included in the summary of facts provided her for comments. As an example, she mentions the expert opinion prepared by Mr [redacted] on the request of IMOBA a.s., which makes part of the national investigation file and therefore OLAF could have got hold of it[12].

Ms Mayerová is of the opinion that many facts listed in the summary are not relevant for the investigation. As an example she mentions the expert opinion of Česká znalecká a.s., which had analysed economic data of 2010-2013, while Ms Mayerová left the board of directors of the company Farma Čapí hnízdo a.s. already on 5 January 2010.

In further comments, MS Mayerová presents the same objections as company IMOBA a.s. – concerning the legal framework of the SME definition, and possible application of the two ECJ judgements listed in the OLAF request for comments.

In what concerns the certified eligible expenditure in the project in question, Ms Mayerová noted that its final amount was adjusted and reduced to CZK 203 Mil / EUR 7.9 Mil after an on-the-spot check conducted by the OP managing authority. Any expenditure, eligibility of which could be questioned, was excluded from the project.

In Annex 4 of the project application, representatives of the company Farma Čapí hnízdo a.s. declared and confirmed by their signatures that the company qualified as a small enterprise. With respect to this declaration, Ms Mayerová noted that she was aware of the fact that company ZZN AGRO Pelhřimov a.s. became a small enterprise already in 2007. To her knowledge, the company was sold by its previous owner, and this exogenous change resulted in an immediate acquisition of the SME status. Due to this fact, the company representatives in their application form confirmed by their signatures that

[12] OLAF received this expert opinion from the Czech Police only on 6 October 2017, OCM(2017)....

"Compared to the previous accounting period there is a change regarding the data, which could result in a change of category of the applicant enterprise (micro, small, medium-sized or big enterprise)."

In closing, Ms Mayerová raised her concerns that OLAF had not respected its competences and obligations resulting from the applicable legislation during this investigation, which she considers unfair. She is convinced that she always acted in accordance with the applicable EU and national legislation and she is not aware of any misconduct. She feels appalled by the campaign against her. She believes that OLAF would objectively asses this case as "unreal, senseless, and politically driven". For this reason she expects OLAF to stop the investigation, in which she is a person concerned.

The full text of the comments of Ms Jana Mayerová, born Nagyová are attached in Annex 6 of this report.

5.3 Comments of Mr Josef Nenadál sent to OLAF via his attorney JUDr. [redacted] on 13 October 2017 (OCM(2017)20848).

First, Mr Nenadál informed OLAF that he received a note from the Czech Police, in which he was informed that a criminal investigation had been launched, in which he was accused of committing a subsidy fraud (Art. 212 of the penal Code) and damaged EU financial interests (Art. 260 of the penal Code).

Mr Nenadál claims that by opening and conducting the investigation related to project No CZ.1.15/2.1.00/04.00095 OLAF breached the principle of subsidiarity due to the fact that this project and circumstances of its approval and implementation are also subject to the national investigation file No KRPA-505939-583/TČ-2015-000093-NL. According to Mr Nenadál, the Czech Police has sufficient competence to collect evidence in this case and therefore, another investigation conducted by the European institutions does not respect the principle of subsidiarity formulated in Art. 5 of the Treaty on European Union:

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but *can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."

Mr Nenadál objects against being identified as a person concerned, which he considers in breach of Art. 2(5) of the Regulation (European Parliament, Council) No 883/2013.

According to Mr Nenadál, in the summary of facts OLAF extracted only partial conclusions of the expert opinions prepared by Česká znalecká a.s. as well as the opinions of Ms [redacted] and Mr [redacted]. As Mr Nenadál was not provided with the full text of these opinions, he cannot provide OLAF with his relevant comments.

Further, Mr Nenadál claims that considering the limited period, during which he was active in the management board of the company Farma čapí hnízdo a.s. he cannot understand how he could qualify as a person concerned in the time periods preceding and succeeding this time span.

In closing, Mr Nenadál stated that due to the limited time period, during which he was active in the company's management board as well as the significant time that has passed since the project was prepared and implemented, he did not have sufficient relevant information to be able to provide comments to the summary of facts.

He also referred to the possible comments of other persons concerned identified by OLAF which he would like to use in his favour. He also suggested that OLAF stops his investigation as a person concerned, mainly due to breach of Art. 5(3) of the Treaty on European Union.

The full text of the comments of Mr Josef Nenadál are attached in Annex 7 of this report.

6. Conclusions

Facts described in this report demonstrate that in the period of 2007-2010 when the project of the construction of Čapí hnízdo congress centre was prepared and implemented there was a family relationship between owners of the company Farma Čapí hnízdo a.s. and the owner of Agrofert Holding a.s.

Mr Andrej Babiš, owner of Agrofert Holding a.s., is the father of four children – Mr [redacted], Ms Adriana Bobeková and two minor children - and the partner of Ms Monika Babišová. Initially, as of 31 December 2007, Mr [redacted], Ms Adriana Bobeková and Ms Monika Babišová owned 25%, 25% and 50% of the shares of Farma Čapí hnízdo a.s., respectively. As of 16 February 2008 (covering the reference period), based on the available documentation, OLAF assumes that Mr [redacted] and Ms Adriana Bobeková continued to own 20% each (in total 40% of the shares), while the remaining 60% of shares were formally owned by Mr [redacted] who declared that he was holding these shares in the reference period for his sister, Ms Monika Babišová, and two minor children of hers and Mr Andrej Babiš.

In the order of events, Mr Andrej Babiš paid the purchase price of all shares to company ZZN Pelhřimov a.s. on 15 September 2008 (for the contract concluded on 31 December 2007) as a gift to his children and his partner. Furthemore, Agrofert Holding a.s. provided guarantees to company Farma Čapí hnízdo a.s. in three loan contracts concluded with the Czech branch of the HSBC bank in the total amount of CZK 455 Mil / EUR 17.6 Mil. Company IMOBA a.s., one of the companies included in the Agrofert group, provided a real estate collateral in one of these loan contracts. Furthermore, before the investment project was launched, Farma Čapí hnízdo a.s and Agrofert Holding a.s. concluded a cooperation agreement of 25 February 2008, in which Agrofert Holding a.s. was committed itself to using services offered by the congress centre Čapí hnízdo for its company events. Since the company Farma čapí hnízdo a.s. launched its business activities in 2009, its main area of business in financial terms has been advertising services and all its customers in this area in the period 2009 – 2010 were companies belonging to the Agrofert group.

In the view of the applicable legislation and the case law OLAF concludes that the family links between the persons involved in the ownership of Farma Čapí hnízdo a.s and Agrofert Holding a.s. appear to be such as to give those persons the opportunity to work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another.

OLAF came to the conclusion that all shareholders of Farma Čapí hnízdo a.s. in the reference period could have been considered as persons close to Mr Andrej Babiš, then owner of Agrofert Holding a.s. Therefore, enterprises Farma Čapí hnízdo a.s. and Agrofert Holding a.s. may be regarded as 'linked' for the purposes of Article 3.3 of the Annex of the Commission Recommendation No 2003/364/EC as the analysis of the legal and economic relations between them demonstrate that, through a group of natural persons acting jointly, they constituted a single economic unit, even though they did not formally have any of the relationships referred to in the first subparagraph of Article 3(3) of the referred annex.

Even if Mr [redacted] was not to be considered as a person close to Mr Andrej Babiš, as suggested by the company IMOBA a.s. in their comments of 27 November 2017, and it was proved that he exercised his ownership rights on his own account (contrary to his own

statement and the public statement of Mr Andrej Babiš of 23 March 2016 in the Czech Parliament, as referred to above), Mr [redacted] and Ms Adriana Bobeková owned 40% of the total shares. In such a case, enterprises Farma Čapí hnízdo a.s. and Agrofert Holding a.s. could still be considered 'partner' enterprises within the meaning of the Commission Recommendation No 2003/361/EC.

Due to the legal and economic links between Farma Čapí hnízdo a.s. and Agrofert Holding a.s., and referring to the applicable case law, OLAF further concludes that the beneficiary company did not suffer from the handicaps typical of an SME. Therefore, in the meaning of the applicable legislation, the European Commission is entitled to refuse providing financial aid to such beneficiary. Providing financial assistance to an enterprise, which does not suffer from the handicaps typical of an SME, would be in contrary with the state aid rules, since such assistance is likely to produce more severe distortions of competition.

By decisions of the previous company owners and subsequently the company shareholders, the legal form of the company changed from a limited company to a shareholders company shortly before submitting the project application in February 2008. The form of shares issued by the company allowed for their anonymous ownership during the whole period of the project implementation. The anonymous ownership of the beneficiary company did not allow for continuous monitoring and checking the beneficiary's eligibility for SME support throughout the project implementation what goes against the general principle of transparency applicable to the use of the EU financial resources. In addition, the subsequent sale of the company shares to new owners on 31 December 2007 may be considered as an act having its purpose in obtaining an advantage contrary to the objectives of the applicable EU law by artificially creating the conditions required for obtaining such advantage.

OLAF is of the opinion that the persons concerned – the company IMOBA a.s. (legal successor of the beneficiary company Farma čapí hnízdo a.s.) and its statutory representatives at time, Ms Jana Mayerová, born Nagyová and Mr Josed Nenadál provided false information in the project application when they declared that the applicant company Farma Čapí hnízdo a.s. had not undergone any changes compared to the previous accounting period, which could have had an impact on the company's SME qualification. Furthermore, by providing only a partial copy of the loan contract concluded with the Czech branch of the HSBC bank, representatives of the applicant company concealed information from the national authorities which was of a significant importance in the process of examining the qualification of the applicant for an SME support. These actions may be pursued by the national judicial authorities as a breach of Art. 212 and 260 of the Czech Penal Code. The national judiciel authorities could take into account information collected during the OLAF investigation in their further proceedings.

Signatures	
Lead Investigator	on 18/12/2017 at 15:27 by HARMATHOVA Zuzana [LEAD INVESTIGATOR]
Head of Unit	on 18/12/2017 at 16:49 by James Hugh Sweeney [HEAD OF UNIT]
Director	on 18/12/2017 at 17:15 by Ernesto Bianchi [DIRECTOR]

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