

European Commission

Rue de la Loi / Wetstraat 200

B-1049 Brussels

Belgium

Prague, 19 September 2018

Subject: Suspicion of breach of EU law, namely infringement of Article 61 of Regulation (EU, Euratom) 2018/1046 and infringement of Article 57 of Regulation (EU, Euratom) No 966/2012

I.

Transparency International – Česká republika, o.p.s. (hereinafter referred to as “TI”) is a non-governmental organization monitoring the state of corruption in the Czech Republic. TI tries to actively contribute to its limitation, focusing on promoting systemic changes in public administration and legislation not only at national level, and emphasizing the cost-efficient, purposeful and effective management of public funds. TI belongs to an international network of non-governmental organizations, Transparency International, which is the only organization involving the civil society, businesses and governmental institutions in the fight against corruption.

II.

In the light of the following, TI has a reasonable suspicion that, as a result of inaction by the competent national authorities of the Czech Republic, there has been a persistent violation of European Union (EU) and Czech Republic regulations because the competent national authorities have not yet taken appropriate measures to prevent conflict of interest of Andrej Babiš, the current Prime Minister of the Czech Republic and the past Minister of Finance of the Czech Republic, contrary to the requirements of the EU regulations.

Andrej Babiš can be considered a person involved in the budget implementation within the meaning of Article 61 (1) of Regulation (EU, Euratom) 2018/1046, given his status as a member of the national authorities of the Czech Republic, namely a member of the Government of the Czech Republic (the Prime Minister and in the past the Minister of Finance).

Andrej Babiš is also the so-called real owner within the meaning of Article 3(6)(b), points (i) and (iv) of Directive (EU) 2015/849 in relation to AGROFERT, a.s., i.e. the managing

company of the AGROFERT Group, through trust funds of which he is the founder and at the same time the beneficiary. Companies, which are also part of the AGROFERT Group, are involved in the projects subsidized by the so-called Rural Development Programme of the Czech Republic, which is funded by the European Agricultural Fund for Rural Development.

TI considers the infringement of Article 61(1) of Regulation (EU, Euratom) 2018/1046, and Article 57(1) of Regulation (EU, Euratom) No 966/2012. With regard to the economic interest of Andrej Babiš it cannot be ruled out that there has been and continues to be a conflict of interests of Andrej Babiš as the so-called other person involved in the implementation of the budget with the interests of the EU, which threatens the impartial and objective decision on the allocation of EU funds at national level. This inaction by the competent national authorities is perceived by TI as a serious deficiency in the management and control system of EU-funded operational programmes that jeopardize EU funds already spent on operational programmes that were and are affected by the existence of a conflict of interest of Andrej Babiš.

From the point of view of national legislation, there is also a breach of Section 4(c) of Act No 159/2006 Coll., On Conflict of Interest, as amended (hereinafter the “Conflict of Interest Act”), which prohibits the provision of subsidies to commercial companies in which an entity owned by a public official owns a share exceeding 25%. Since TI works on the presumption that Andrej Babiš continues to be the controlling person in relation to AGROFERT, a.s., i.e. the parent company of the AGROFERT Group, granting subsidies to these companies breaches the prohibition laid down by the Conflict of Interest Act.

III.

In 2012, the newly formed political movement ANO 2011 (hereinafter referred to as the “Movement”) was registered in the Czech Republic. Since the beginning of the Movement, Andrej Babiš has been its chairman. Based on the result of the parliamentary election in 2013, the Movement acquired 47 mandates in the Czech Chamber of Deputies and thus became the second strongest political party in the Czech Republic. Andrej Babiš became a Member of the Parliament of the Czech Republic on 26 October 2013. On 29 January 2014, Andrej Babiš was appointed the Minister of Finance and also the first Deputy Prime Minister in the government of Bohuslav Sobotka. On 24 May 2017, Andrej Babiš was dismissed as the Minister of Finance.

In the parliamentary election of 2017, the Movement gained 29.64% of votes and became the strongest political party in the Czech Republic. Andrej Babiš was the Prime Minister of the Czech Republic from 6 December 2017 and resigned on 24 January 2018. On 6 June 2018, he was reappointed and commissioned to form the government.

In addition, Andrej Babiš was a member of the Budgetary Committee of the Chamber of Deputies of the Czech Republic in the years 2013 - 2014 and also a member of the Supervisory Committee of the Chamber of Deputies of the Czech Republic in 2017.¹

IV.

Between 2005 and 2017, Andrej Babiš was the only shareholder of AGROFERT, a.s., company ID: 26185610, with its registered office: Pyšelská 2327/2, 149 00 Praha 4, Czech Republic.² This company is the parent company of AGROFERT Group and manages the activities of all subsidiaries.

According to the information included in the AGROFERT consolidated annual report for 2017, the AGROFERT Group consists of 198 companies controlled and managed by AGROFERT, a.s.³ It is the largest group in the Czech and Slovak agriculture and food industry, the second largest chemical group in the Czech Republic, which is also the second largest producer of nitrogen fertilizers in Europe. The AGROFERT Group is also active in forestry and timber, land technology and technology, logistics and transport and renewable resources. In addition, AGROFERT Group is the largest Czech investor in Slovakia and Germany.

The group can be perceived as an economic unit that creates rules for the unified operation of all regulated entities. In a group such as the AGROFERT Group, it is assumed that each of the subsidiaries is subject to a unified and long-term, but not accidental, economic policy of the whole group towards the intended strategic goal.

On 9 February 2017, the Act No 14/2017 Coll., amending the Act No 159/2006 Coll., On Conflict of Interest, as amended, and other related acts (hereinafter referred to as the “Amendment to the Act ON Conflict of Interest”) came into effect, which restricts access of public officials, including the members of the government, to subsidies and public contracts forbidding them to directly or indirectly run radio or television broadcast or publish the press.

As AGROFERT Group operates also companies which are the radio and television broadcasters⁴ and press publishers,⁵ Andrej Babiš, as a public official and the sole shareholder

¹ <http://www.psp.cz/sqw/detail.sqw?id=6150&o=7>

² <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=525681&typ=UPLNY>

³ The consolidated annual report of AGROFERT for 2017 is available at: <https://or.justice.cz/ias/ui/vypis-sl-detail?dokument=54029704&subjektId=525681&spis=78767>

⁴ Company LONDA spol. s.r.o., company ID: 49241931, registered office: Na příkopě 859/22, 110 00 Praha 1, Czech Republic, the information from the business registry available at: <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=452886&typ=UPLNY> Since 2014, AGROFERT, a.s. has owned 100% of LONDA spol. s.r.o. company. LONDA spol. s.r.o. is, among other things, the provider of nationwide radio broadcasts, such as Radio Impuls, the most popular radio in the Czech Republic according to the statistics and RockZone Radio.

⁵ It is the company MAFRA a.s., company ID: 45313351, registered office: Karla Engliš 519/11, 150 00 Praha 5, Czech Republic, data from the business registry available at: <https://or.justice.cz/ias/ui/rejstrik->

of AGROFERT, a.s., which manages the entire group, was forced to address the above legal limitations.

The then Prime Minister Andrej Babiš resolved the above-mentioned restrictions when he set up two trust funds, AB private trust I and AB private trust II, with effect from 3 February 2017, in which he deposited registered shares representing a 100% stake in AGROFERT a.s. at a ratio of 89.97 % (565 shares) in favour of AB private trust I and 10.03 % (63 shares) in favour of AB private trust II (henceforth collectively as “trust funds”).

V.

According to AGROFERT’s consolidated annual report for 2017, the individual companies of the group drew funds from Czech subsidy programmes or the European Structural and Investment Funds (ESIF) in the amount of almost CZK 1,960,000,000⁶ in 2017. According to the public sources, the amount is three times higher than was drawn by the group through its subsidiaries in 2012.⁷

The subsidiaries of AGROFERT Group using the public subsidies granted by Czech or European institutions include:

- 2014, ZZN Polabí, a.s., company ID: 45148210, registered office: K Vinici 1304, 280 66 Kolín, Czech Republic⁸ for the construction of the liquid fertilizer store Mělník European funds: CZK 8.3 million⁹
- 2017, OLMA, a.s., company ID: 47675730, registered office: Pavelkova 597/18, Holice, 779 00 Olomouc, Czech Republic¹⁰ for the Specific training of the non-transferable know-how of the production process of OLMA a.s. company European funds: CZK 5.5 million¹¹

firma.vysledky?subjektId=14225&typ=UPLNY. AGROFERT, a.s. is the sole shareholder of MAFRA a.s. The main business activities of the joint stock company MAFRA a.s. include television and radio broadcasting, journalistic and editorial activities and the distribution and sale of newspapers. Media group MAFRA a.s. provides printed, online, television and radio coverage in the Czech Republic and Slovakia. Among its products are, for example, three national printed newspapers (Mladá fronta DNES, Lidové noviny, Hospodářské noviny), one Prague daily (Metro), printed weeklies (5plus2, TĚMA), Internet portals (iDNES.cz, Lidovky.cz, HNonline.sk) or a TV station (Óčko).

⁶ Approximately EUR 76,146,076 (exchange rate on 23 August 2018)

⁷ Holub, P., Agrofert, šroub na vymačkávání státních dotací, Echo.cz online daily, 1 August 2018,

<https://www.echo24.cz/a/ScGc5/agrofert-sroub-na-vymackavani-statnich-miliard>

⁸ <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=445325&typ=UPLNY>

⁹ <http://www.strukturalni-fondy.cz/cs/Evropske-fondy-v-CR/Programove-obdobi-2007-2013/Cerpani-v-obdobi-2007-2013>

¹⁰ <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=60240&typ=UPLNY>

¹¹ <http://www.strukturalni-fondy.cz/cs/Evropske-fondy-v-CR/Programove-obdobi-2007-2013/Cerpani-v-obdobi-2007-2013>

- 2018, Kostecké uzeniny a.s., company ID: 46900411, registered office: Kostelec 60, 588 61 Kostelec, Czech Republic¹² for the Complex energy savings project in Planá, 2018
European funds: CZK 5.7 million¹³
- 2017, Vodňanská drůbež, a.s., company ID: 25396480, registered office: Radomilická 886, 389 01, Vodňany, Czech Republic¹⁴ for the Specific training of the non-transferable know-how in Vodňanská drůbež
European funds: CZK 32.5 million¹⁵
- 2014 – 2016, Mlékárna Hlinsko, a.s., company ID: 48169188, registered office: Hlinsko – Kouty 53, 539 01, Czech Republic¹⁶ for the Support of milk consumption at schools
Czech funds: 10.1 CZK million¹⁷

The Supreme Audit Office (hereinafter referred to as the “SAO”)¹⁸ concluded in its audit¹⁹ for the period 2014-2020 that AGROFERT, a.s. and its subsidiaries are a group receiving large subsidies from the funds allocated to the measures of Cooperation under the Rural Development Programme of the Czech Republic when the biggest subsidies were received by large food companies (not small and medium-sized businesses). Beneficiaries of the highest subsidies from the Rural Development Programme were also AGROFERT companies. Generally, the SAO notes that the conditions set for the provision of grants under the above Programme show weaknesses that affect the economy and efficiency of public funds spent on the Programme, which has the effect of jeopardizing the achievement of the objectives set by the Cooperation measure.

VI.

Although Andrej Babiš is no longer the formal owner (shareholder) of AGROFERT, a.s. with effect from 3 February 2017, TI considers that in relation to AGROFERT, a.s. he is still the controlling person, for the following reasons.

¹² <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=700616&typ=UPLNY>

¹³ <https://www.strukturalni-fondy.cz/cs/Statistiky-a-analyzy/Mapa-projektu/Projekty/01-Operacni-program-Podnikani-a-inovace-pro-konkur/01-3-Ucinne-nakladani-energie,-rozvoj-energeticke/Kosteckee-uzeniny-komplexni-projekt-uspory-ener>

¹⁴ <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=730499&typ=UPLNY>

¹⁵ <http://www.strukturalni-fondy.cz/cs/Evropske-fondy-v-CR/Programove-obdobi-2007-2013/Cerpani-v-obdobi-2007-2013>

¹⁶ <https://or.justice.cz/ias/ui/rejstrik-firma.vysledky?subjektId=711840&typ=UPLNY>

¹⁷ <https://www.szif.cz/cs/seznam-prijemcu-dotaci?ji=1000005526&opatr=&year=2017&portalAction=detail>

¹⁸ An independent controlling body independent of the legislative, executive and judicial authorities controlling the state property management, as well as the management of funds provided to the Czech Republic from abroad.

¹⁹ <https://www.nku.cz/cz/pro-media/tiskove-zpravy/dotace-na-spolupraci:-vetsina-penez-se-rozdeli-mezi-velke-firmy--podpora-malych-a-strednich-podniku-vazne-id9643/>

TI considers the management of the AGROFERT Group by Andrej Babiš from the publicly available data in the Slovak Register of Public Sector Partners (hereinafter referred to as "RPVS"), which, unlike the Czech Register of Data on Real Owners, can be freely accessed. Specifically, this fact is inferred by TI from a so-called verification document to a public sector partner, AGROFERT, a.s.,²⁰ which shows that Andrej Babiš is a so-called end-user of benefits within the meaning of Section 6a(1)(c) point 1, or point 4 of Act No 297/2008 Coll., on Protection against the Legalization of Income from Crime and on the Protection against the Financing of Terrorism and on Amendments to Certain Acts, as amended, since, in relation to the trust funds, he is their founder and 100% end-user of benefits (i.e. beneficiary).

The verification document also shows that the main purpose of both trust funds is to manage the shares of AGROFERT, a.s. and through them the whole AGROFERT Group.

The term "end-user of benefits", as used by the Slovak Act No 297/2008 Coll., corresponds in Czech law to the term "real owner", the definition of which is contained in the provision of Section 4(4) of Act No 253/2008 Coll. on Certain Measures against the Legalization of Proceeds from Crime and on Financing of Terrorism, as amended (hereinafter referred to as the "Act against the Legalization of Proceeds from Crime"). Both terms are based on the term "beneficial owner" used in the AML Directive,²¹ which the EU Member States had to transpose into their law. The "beneficial owner" (the real owner, the end-user of the benefits) is jointly defined in the EU, Czech and Slovak law as "the person or persons with decisive influence", i.e. the controlling person.

According to the Act against the Legalization of Proceeds from Crime, it is considered that in an association of assets without the legal personality, such as in trust funds, the founder or the beneficiary is considered the real owner.²² In the case of trust funds, Andrej Babiš is the founder and also the beneficiary so it is necessary to see him as the real owner. The Act against the Legalization of Proceeds from Crime in the introductory part of Section 4(4) provides that the real owner is also the natural person who is, in fact, capable of exercising directly or indirectly the decisive influence in the trust fund; on the basis of the following facts, we assume that Andrej Babiš is also a person with a decisive influence.

Based on the fact that Andrej Babiš, as a natural person, can exercise at least indirectly a decisive influence on the management of trust funds in relation to trustees, Andrej Babiš is to be considered a controlling person within the meaning of Section 74(1) of Act No 90/2012 Coll., On Commercial Corporations, as amended, as:

- (i) he is the only founder and at the same time the only beneficiary of the trust funds, and from the position of the founder he appointed the administrators of the two trust funds, which gives Andrej Babiš the highest degree of control over both funds since he

²⁰ See annex 1, current data from RPVS: <https://rpvs.gov.sk/rpvs/Partner/Partner/Detail/7859>

²¹ Directive 2015/849/EU on the Prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

²² See Section 4 (4) (c) points 1 and 4 of Act No. 253/2008 Coll. and Article 3 (6) (b) Directive 2015/849/EU on the Prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

oversees the administration of both trust funds. According to Section 1463(1) of Act No 89/2012 Coll., The Civil Code, as amended, the supervisor of the trust fund is always supervised by the founder and the beneficiary (or any other person, if in the status). As the commentary to the Civil Code points out, “With regard to the entire legal concept, it can be judged that the supervision provisions are inherently cogent. This means that the status cannot be ruled out.”²³ “This right cannot be given up by the founder and the beneficiary. In order to prevent the losses, the purpose of supervision is, inter alia, to directly or indirectly direct the fund manager in his activities in the sense of the purpose for which the fund serves”²⁴;

- (ii) the fund manager has an obligation of loyalty towards Andrej Babiš,²⁵ Andrej Babiš who is a beneficiary can revoke the function of the fund manager in the event of a breach of his obligations to manage the fund;
- (iii) logically, the founder or beneficiary may not be revoked or otherwise deprived of his functions by the bodies of any trust fund, while alone or together with some other persons involved in the two trust funds, he may deprive of the function any of the members of the board of trustees because:
 - as a beneficiary, he has the right to appoint and dismiss the so-called family protector,
 - by means of the so-called family protector, he can influence the composition of the board of trustees by the fact that the withdrawal of any of the remaining two members of the board of trustees is not possible without the consent of the family protector who is the third member of both board of trustees and who is revoked by Andrej Babiš as the beneficiary of both trust funds, thereby indirectly influencing the activities of the trustees;
- (iv) he can indirectly exercise decisive influence, either alone or through exerting influence on one or more members of the board of trustees, against one or both fund managers regarding the exercise of shareholder rights in relation to the AGROFERT Group because
 - both managers must protect the interests of Andrej Babiš, as the sole beneficiary of both trust funds, to treat him as a beneficiary with the duty of loyalty and good stewardship,

²³ Švestka, J.; Dvořák, J.; Fiala, J. a kol. *Občanský zákoník. Komentář. Svazek III.* Praha: Wolters Kluwer, a. s., 2014, p. 1249, k § 1463.

²⁴ Švestka, J.; Dvořák, J.; Fiala, J. a kol. *Občanský zákoník. Komentář. Svazek III.* Praha: Wolters Kluwer, a. s., 2014, p. 1248, k § 1463.

²⁵ Petrov, J.; Výtisk, M.; Beran, V. a kol. *Občanský zákoník. Komentář. 1. vydání.* Praha: C. H. Beck, 2017, p. 1437, k § 1456.

- both managers are dependent on the AGROFERT Group because they act as members of the statutory body at AGROFERT, a.s. (member of the board of directors or chairman of the board of directors),
 - Andrej Babiš can, by himself or through his influence on one or more members of the board of trustees, indirectly achieve the withdrawal of both trustees of these trust funds as described above;
- (v) as a founder and beneficial owner, under the law of supervision, he has the legal right to receive all the contracts, documents, accounts, or any other information relating to the performance of the management of the two trust funds (provision of Section 1465 (2) of the Civil Code);
- (vi) may terminate one or both trust funds at any time and take back the direct exercise of shareholder rights in AGROFERT, a.s. because the sole beneficiary may give up exercising the rights in the trust fund, thereby ending one or both of the trust funds (provision of Section 1471 of the Civil Code).

Besides the facts described above, which prove the real position of Andrej Babiš as the controlling person, it is also possible to use the definition from the Act No 164/2013 Coll., The Act on International Cooperation in Tax Administration. This act stipulates in Section 13d(2)(b) that the controlling person of the trust fund is the founder, the trustee, the person supervising the fund's management, the beneficiary or any other natural person with the highest effective control over the trust fund. Given that Andrej Babiš is both the founder and the beneficiary, he is, without a doubt, the controlling person.

It follows from the above that Andrej Babiš is the controlling person of the trust funds²⁶ and since these trust funds own a 100% stake in AGROFERT, a.s., he is the controlling person of the AGROFERT Group through these trust funds.

VII.

As described above, Andrej Babiš was and is the highest representative of state power in the Czech Republic. At the same time, he is the controlling person of the AGROFERT Group.

From the point of view of the possible violation of EU regulations, it is necessary to focus on the period when Andrej Babiš was the Minister of Finance and a member of the Government of the Czech Republic, i.e. from 29 January 2014 until 24 May 2017,²⁷ as well as the period

²⁶ He can exercise decisive influence when alone and/or together with other persons acting in trust funds AB private trust I and AB private trust II.

²⁷ From the point of view of breaching the Czech legislation, the decisive period is the period when Andrej Babiš held the post of the Minister of Finance under the amendment to the Act on Conflict of Interest, i.e. the period from 9 February 2017 to 24 May 2017, and the period when has been the Prime Minister, i.e. the period from 6 December 2017 until now.

since Andrej Babiš has held the office of the Prime Minister of the Czech Republic, i.e. the period since 6 December 2017 until now (hereafter referred to as the “period concerned”).

TI sees a conflict of interest in activities of Andrej Babiš during the period concerned as a member of the Government and at the same time the controlling person of AGROFERT a.s., which manages the entire AGROFERT Group, and the resulting violation of Article 61 of Regulation (EU, Euratom) No 2018/1046, infringement of Article 57 of Regulation (EU, Euratom) No 966/2012 and the violation of prohibition laid down in Section 4(c) of the Conflict of Interest Act.

TI considers, for the reasons set out above, that all funds originating primarily from the ESIF and further provided through the National Fund²⁸ to all companies of the AGROFERT Group during the period concerned were allotted or paid in breach of the provisions of EU and Czech law concerning the prohibition of conflict of interest or the prohibition on drawing subsidy, which concerns companies controlled by public officials.

a) Conflict of interest under Article 61 of Regulation (EU) No 2008/1046

Article 61(1) of the Regulation (EU) No 2008/1046 (hereinafter referred to as “the New Financial Regulation”), which entered into force on 2 August 2018, stipulates that: *“Financial actors within the meaning of Chapter 4 of this Title and other persons, including national authorities at all levels involved in the implementation of the budget in direct, indirect and shared management, including preparation, audit, or control, shall refrain from any action likely to bring their interests into conflict with the interests of the Union. They shall also take appropriate measures to prevent conflicts of interest arising from functions under their responsibility and address situations which can be objectively perceived as a conflict of interest.”*

Andrej Babiš has been involved in and continues to contribute to the implementation of the EU budget in a direct, indirect and shared management, including preparation, audit, or control as he is a member of a national authority, specifically a member of the government, currently the Prime Minister and in the past the Minister of Finance.

As the Minister of Finance, within the organizational structure of the Ministry, for which the relationship of superiority and subordination is also characteristic, he was superior to a

²⁸ In accordance with the agreement signed on 12 October 1998 between the Minister of Finance Mgr. Ivo Svoboda for the Government of the Czech Republic and Hans Van Den Broek, member of the European Commission for the European Community in the form of a Memorandum on the Establishment of the National Fund, has been established at the Ministry of Finance of the Czech Republic since 31 December 1998 as the central state administration body for transferring funds from the European Union funds designated for the Czech Republic to finance programmes and projects in accordance with the relevant Financing Memoranda. Community funds are kept in accounts opened for this purpose in the Czech National Bank. Funds in these accounts are treated as funds on government financial assets accounts. The drawing and use of funds of the National Fund and their control are governed by the Czech Republic’s budgetary rules and the relevant implementing regulations.

<https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/1999/1999-12-31-tiskova-zprava-6559-narodni-6559>

department directly managing and governing the flow of EU funds provided by the EU, including ESIF, i.e. the National Fund. Ministry of Finance of the Czech Republic, precisely the National Fund as the paying authority coordinates the management of the flow of funds provided from the EU budget and manages these funds.

Presently, as the Prime Minister, he has both formal and informal powers of authority, which the public office of the Prime Minister entails, over the responsible ministers and heads of other state or public authorities, similar or inferior to the ministry.

This is due to the fact that, for example, the government is the highest executive body in the Czech Republic. The Prime Minister then proposes to the President of the Republic the appointment and dismissal of Ministers of the Government of the Czech Republic, whereby a member of the Government may not carry out activities whose nature is contrary to the performance of his office. Details are to be laid down in this respect, in particular in the Act on Conflict of Interest.

In addition, the Ministry of Finance of the Czech Republic is currently run by the Minister of Finance nominated by the Movement, whose chairman is Andrej Babiš, which leads to further direct political ties between the Ministry of Finance as the body managing the National Fund and Andrej Babiš as Prime Minister of the Czech Republic.

Hence, Andrej Babiš continues to participate in:

- (a) preparing the European budget, for example by:
 - (i) participating in meetings of the European Council determining priorities and the amount of the budget of the European Union and parts of the budget of the European Union;
 - (ii) determining or coordinating national priorities for projects that will later be co-financed from the European Union funds (for example, as the chairperson of the ESIF Council as an inter-sector expert and advisory body of the Government of the Czech Republic, which ensures the focus of interventions of all ESIFs in the Czech Republic in the programming period 2014-2020²⁹);
- (b) implementation of the European budget, for example, through the option of:
 - (i) affecting the conclusions of the Audit Authority in the case of companies from the AGROFERT Group, for their benefit and / or for

²⁹ For the position of the ESIF Council see: <https://www.strukturalni-fondy.cz/cs/Fondy-EU/Narodni-organ-pro-koordinaci/Pracovni-skupiny/Rada-pro-fondy-SSR> The ESIF Council is also foreseen for the programming period after 2020 and is already involved in the preparation for this period: <https://www.vlada.cz/cz/media-centrum/aktualne/rada-esif-projednala-cerpani-prostredku-z-fondu-eu-a-pripravu-na-obdobi-po-roce-2020-167708/>

- the benefit of some AGROFERT companies that were or are recipients of subsidies, such as, for example, the case of the Stork's nest;³⁰
- (ii) affecting the conclusions of the financial control authorities in the case of the AGROFERT Group, such as in the case of a special and completely non-standard recovery of the unjustified disbursement of the subsidy in the case of the Stork's nest.³¹

Article 61(3) of the New Financial Regulation stipulates that “... *conflicts of interest occur, if for family reasons, for reasons of emotional ties, for reasons of political or national affinity, for reasons of economic interest or for reasons of direct or indirect of the personal interest, the impartial and objective performance of the functions of a financial participant or other person under section 1 is threatened.*”

With regard to the factual relationship of Andrej Babiš to the AGROFERT Group through the relationship of controlling the trust funds in which he is the founder and the beneficiary, it can be concluded that the above-mentioned conditions of existence of primarily economic interest are fulfilled.

b) Conflict of interest under Article 57 of Regulation (EU, Euratom) No 966/2012

Andrej Babiš is in a conflict of interest both under the New Financial Regulation and under the Regulation (EU, Euratom) No 966/2012 (hereinafter referred to as the “Financial Regulation”).

Pursuant to Article 57(1) of the Financial Regulation, “*Participants in financial operations and other persons involved in the implementation of the budget and its administration, including preparation, audit, or control, shall refrain from any action likely to put their interests in conflict with the interests of the Union.*”

Unlike the New Financial Regulation, the definition does not explicitly mention the national authorities. However, in TI's view, the reason for the change (i.e. the explicit mention of “*national authorities*” as one of the categories of so-called other parties involved in budget implementation and administration) is due to possible explanatory ambiguities, not the extension of the existing definition of conflict of interest within the meaning of Article 57 of the Financial Regulation. Therefore, there is no doubt that even when the Financial Regulation was in effect, the so-called *other persons involved in the implementation of the budget and its administration, including preparation, audit, or control*, also included the

³⁰ For example, the conclusions of the Audit Authority report of 2016 in the case of the Stork's nest where the Audit Authority not only violated international auditing standards, but also came to the opposite conclusions than EU OLAF Office. For this, see the critical analysis of the Audit Authority's report in the case of the the Stork's nest: <https://goodgovernance.cz/2017/05/30/quality-review-of-the-audit-engagement-of-the-project-stork-nest-farm-carried-out-by-the-audit-authority-ministry-of-finance/>
Furthermore: <https://goodgovernance.cz/2017/08/18/failure-of-the-control-system-of-the-european-commission-in-providing-subsidies-in-the-czech-republic/>

³¹ See a part of Annex 3 – Evidence documents.

national authorities, namely the Minister of Finance (Ministry of Finance of the Czech Republic as the national central state administration body) or the Prime Minister (the Government of the Czech Republic as the national executive authority).

TI considers that the notion of conflict of interest should be interpreted also in the light of the European Parliament's resolution of 14 September 2017 on accountability, transparency and integrity in the EU institutions,³² which, in connection with the management of EU funds in the point 44, states that:

“If businesses owned by EU officials have the possibility to apply for EU funds or to receive such funds as subcontractors, and the owners and officers themselves are responsible for the proper use of these funds and the control of their use, there is a serious conflict of interest.”

Therefore, it is clear that the situation where a company owned by an official of the European Union has the possibility to receive European Union funds and that person is also responsible for controlling the use of these funds is considered by the European Parliament to be a serious conflict of interest. For a uniform interpretation of EU legislation in the individual Member States of the European Union, a similar approach should be chosen for national officials or members of the national authorities. In addition, when assessing the ownership structure, consideration should be given to the real situation, including the ability of the individual to exercise decisive (also indirect) influence in the company, not just the formal legal arrangements of that structure.

VIII.

The Czech authorities, as managing authorities, are obliged, in accordance with Article 125(4)(a) of Regulation (EU) No 1303/2013 to ensure compliance with EU and Czech legislation. In particular, in the case of Czech legislation, the case concerns specifically the supervision of compliance with Section 4(c) of the Conflict of Interest Act, according to which: *“... it is forbidden to grant a subsidy under a legal regulation regulating the budget rules or an investment incentive under a legal regulation regulating the investment incentives of a company, in which the public official referred to in Section 2(1)(c) or a person controlled by him owns a share representing at least 25% of the shareholder's participation in the company.”*

The aforementioned provision of the Act on the Conflict of Interest also forbids the subsidies granted from the so-called National Fund in accordance with Act No 218/2000 Coll., On Budgetary Rules, as amended. The National Fund is, among other things, a sum of money that

³² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0358+0+DOC+XML+V0//CS>

the European Union entrusts to the Czech Republic to implement programmes or projects co-financed from the European Union budget through ESIF.

IX.

For the above reasons, TI asks whether the EU funds paid to AGROFERT companies were allocated in accordance with EU law during the period under consideration. If the existence of a conflict of interest of Andrej Babiš is confirmed, given the significance of the major weaknesses in the management and control system and their impact on the EU budget, TI asks the European Commission to take appropriate action, including a possible financial correction, in line with the EC commitment to recovering funds obtained or used fraudulently³³.

Finally, TI also calls for the provisions of the New Financial Regulation to be consistently applied in subsequent years of the current programming period as well as in the subsequent programming periods, not only to the AGROFERT Group but also to other entities in a similar position and for subsidies from the ESIF to be allocated in accordance with them.

³³ general principle (http://ec.europa.eu/regional_policy/en/policy/what/glossary/f/financial-corrections)