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VORŠILKA PROKŮPEK – ADVOKÁTNÍ KANCELÁŘ S.R.O.

Constitutional Court of the
Czech Republic, Joštova 8
602 00 Brno

In Prague, on 2
August 2019

Complainant:AKRO investiční společnost, a.s
Company ID No.: 492 41 699
with the registered office at Slunná 25, 162 00, Prague 6, Represented by:JUDr. Jiří Voršilka,

attorney and partner in the company:
Voršilka Prokůpek – advokátní kancelář s.r.o., with its registered office at Opletalova 1535/4, 110 00 Prague 1

JUDr. Voršilka
Digitally signed by JUDr. Jiří Voršilka
Date: 2 August 2019 13:53:51 +02'00'

Other participants in the proceedings:

1 **District Court for Prague 6,** with its registered office at: ul. 28.pluku 1533/29b, 100
2. **Municipal Court in Prague,** with its registered office at: Spálená 2,112 16 Prague 2
3. **Supreme Court of the Czech Republic**, with its registered office at: Burešova 20, 657 37 Brno

Intervener: **Czech Republic, Ministry of Finance**
Letenská 15, 1189 00 Prague 1
Represented by: Office of the Government Representation in Property Affairs, Rašínovo nábř. 42, 128 00 Prague 2

The constitutional complaint against:

1. **Judgement of the District Court for Prague 6 dated 24 May 2018, Ref. No.: 8 C 445/2014-456**
2. **Judgement of the Municipal Court in Prague Ref. No.: 30 Co 366/2018-524 dated 27 November 2018**
3. **Ruling of the Supreme Court CR dated 4 June 2019, Ref. No.: 29 Cdo 1297/2019-625**

applied in accordance with the provisions of Section 72, para 1, letter a) and para 4 of Act No. 182/1993 Coll., On the Constitutional Court (hereinafter referred to only as the "ACC"), as amended,

Filed electronically by the means of a signature container

Annexes:
Power of attorney for legal representation of the complainant in proceedings before the Constitutional Court
Judgement of the Municipal Court for Prague 6 dated 24 May 2018 Ref. No.: 8 C 445/2014-456
Judgement of the Municipal Court in Prague Ref. No.: 30 Co 366/2018-524 dated 27 November 2018
Ruling of the Supreme Court CR dated 4 June 2019, Ref. No.: 29 Cdo 1297/2019-625

Other annexes related to the present case:
Judgement of the District Court for Prague 2, Ref. No.: 21 C 44/2000-215 dated 25 January 2005
Judgement of the Municipal Court in Prague dated 22 November 2005 Ref. No.: 35 Co 379, 380/2005-324
Judgement of the Supreme Court of the Czech Republic dated 27 January 2009, Ref. No.: 25 Cdo 2193/2006/242
Judgement of the Municipal Court in Prague dated 3 September 2009 Ref. No.: 35 Cdo 379/2005-544
Judgement of the Supreme Court of the Czech Republic Ref. No.: 28 Cdo 349/2010-627 dated 7 December 2011
Judgement of the Municipal Court in Prague Ref. No.: 35 Co 34/2012 dated 27 September 2012
Judgement of the Supreme Court of the Czech Republic Ref. No.: 30 Cdo 493/2013 dated 25 June 2014
Ruling of the District Court for Prague 6 dated 25 April 2016, Ref. No.: 8 C 445/2014-145 to discontinue proceedings
Ruling of the Municipal Court in Prague Ref. No.: 30 Co 260/2016-170 dated 22 July 2016
Ruling of the District Court for Prague 6 dated 23 September 2016, Ref. No.: 8 C 445/2014-179 to interrupt proceedings
Ruling of the Municipal Court in Prague Ref. No.: 30 Co 511/2016-202 dated 3 January 2017

I

1. The complainant is an investment company that manages the following mutual funds: AKRO Global Equity Fund, AKRO Progressive Companies Fund and AKRO Balanced Fund. These are former C.S. Fondy mutual funds, which were "tunnelled" (defrauded) in 1997 by unauthorized withdrawal of assets from the mutual funds account in the total amount of CZK 1,236,284,000 which caused damage to a group of approximately 60,000 unit-holders of these mutual funds (owners of assets in mutual funds), mostly small investors, natural persons, who obtained units of these funds within the voucher privatization.

2. After taking over the management of the injured C.S.Fondy mutual funds, the complainant has been claiming damages for the injured mutual funds against persons liable for the damage caused by the “tunnelling” of these funds. One of the entities liable for the origination of the damage concerning the assets of the mutual funds is the Czech Republic whose authorities allowed the damage to originate as a result of their failure to fulfil their tasks, inter alia by not preventing a suspicious deal after an unusual transaction was reported and allowed the transfer of money abroad. Therefore, the complainant has been claiming damages against the Czech Republic since 2000 for the injured mutual funds by virtue of the liability of the state for maladministration.

3. Disputes for the compensation for damage caused to C.S.Fondy’s unit-holders between the complainant and the Czech Republic have been taking place for 19 years without any possibility to arrive at a clear and predictable conclusion as to what the expected outcome of the judgements delivered by the general courts could be, based on the procedure taken by these

courts (judgements were being repeatedly delivered and then annulled), which placed the complainant and the injured mutual funds in a situation of complete legal uncertainty and, ultimately, led to a forced transfer of all risks associated with the claiming of the compensation for damage by virtue of the state's liability onto the complainant (by reason of the payment of the claimed compensation for damage by the Czech Republic based on a court judgement and the later annulment of this final judgement in appellate proceedings). Given the complainant's position of an investment company (an entity regulated by the law, subject to supervision by the Czech National Bank) and the ongoing unlawful judgements delivered by general courts in the dispute for compensation for damage with the Czech Republic, a situation eventually arose whereby the injured mutual funds are, due to the complainant's failure in a long-standing dispute with the Czech Republic, obliged to issue to the Czech Republic not only the recovered compensation for damage (which was the subject matter of the dispute) but also all the other assets of the injured mutual funds which have managed to be recovered for the injured unit-holders from other entities liable for the damage since 1997. The injured unit-holders of C.S.Fondy are thus again injured as a result of the procedure of the Czech Republic and its bodies and the Czech Republic will enrich itself to the detriment of the injured mutual funds by the amount of CZK 717,164,357.98.

II

4. By ruling of the Supreme Court of the Czech Republic Ref. No.: 28 Cdo 1297/2019-625 of 4 June 2019, delivered to the complainant on 18 June 2019, the Supreme Court dismissed the complainant's appeal against judgement of the Municipal Court in Prague Ref. No.: 30 Co 366/2018-524 of 27 November 2018 confirming judgement of the District Court for Prague 6 of 24 May 2018 Ref. No.: 8 C 445/2014 by which the complainant was ordered to pay to the intervener the amount of CZK 2,080,447,226.12 with default interest of 8.05% from 1 September 2014 until paid. This amount was paid by the intervener to the account of 3 injured mutual funds on 12 December 2012, based on judgement of the Municipal Court in Prague of 27 September 2012, Ref. No.: 35 Co 34/2012 which was annulled by judgement of the Supreme Court of 25 June 2014, Ref. No. 30 Cdo 493/2013-863. The only reason why the complainant did not succeed in the subsequent dispute over the issuance of the payment made based on the judgement that was later annulled was the conclusion at which general courts eventually arrived, after 19 years of ongoing proceedings, that the right of the mutual funds (the former C.S. Fondy) to the compensation for damage from the state was in fact, statute-barred. The ruling was delivered to the complainant on 18 June 2016 so the deadline for filing a constitutional complaint is maintained.

5. The complainant hereby submits the

constitutional complaint

against this ruling of the Supreme Court of the Czech Republic and also against the final judgement of the Municipal Court of 27 November 2018, Ref. No.: 30 Co 366/2018-524 and the judgement of the District Court for Prague 6 of 24 May 2018 Ref. No.: 8 C 445/2014-456, claiming that, due to the general courts' procedure:

A. the constitutional right to a fair trial has been violated

- since substantial evidence, consisting in the interrogation of the former Chairman of the complainant's Board of Directors, Ing. Vít Vařeka, failed to be presented,
- the principle of speed and economy of the proceedings was fundamentally violated and, due to this violation, the default interest increased to the amount of CZK 717,164,357.98,
- the judgements delivered are in extreme contradiction with the requirements on a factually appropriate and reasonable settlement of the legal relation under

consideration and with the generally shared principles of justice (so-called exaggerated formalism) because they have created a condition whereby the state, as an entity co-liable for the damages, as a result of its liability being statute-barred, not only fails to provide any compensation for damage but, in addition, receives from the mutual funds default interest in the amount of CZK 717,164,357.

- in the case of the ruling of the appellate court, one of the key legal issues was assessed using an invalid legal regulation (i.e. Act No. 40/1964 Coll., the Old Civil Code, instead of Act. No. 89/2012 Coll., the New Civil Code)

B. the constitutionally guaranteed right to own property guaranteed by Section 11 (1) of the Bill of Basic Rights and Liberties was breached when the contested judgement deprived, in its consequences, unit-holders of the mutual funds of all their assets held in the mutual funds since, as a result of incorrect legal assessment of issues related to the expiry of the limitation period and also issues of the exercise of the right contrary to good morals, obliges the complainant to pay to the state, out of the assets of the injured mutual funds, the payment provided to the mutual funds as the compensation for damage for maladministration by the state, together with default interest in the amount of CZK 717,164,357.98. The mutual funds will thus lose not only the compensation for damage from the state but also all other assets, with this situation being caused by incorrect decision-making of the state in its exercise of public authority. This judgement fundamentally interferes with the constitutionally guaranteed right of the mutual funds to own property.

C. the constitutionally guaranteed right to the compensation for damage caused by maladministration by a public authority pursuant to Article 36 (3) of the Bill of Basic Rights and Liberties was breached when the contested judgements, as a result of an incorrect assessment of the issue of the expiry of the limitation period, required the complainant to return the payment provided to the mutual funds as a compensation for damage for maladministration by the state and the mutual funds thus are not to receive any compensation for damage for the state's wrong procedure.

III

Recapitulation of the Case

6. On 7 - 10 March 1997, as a result of acts of third parties, assets of the mutual funds, administered at that time by the C.S. Fond, a.s. investiční společnost company, were withdrawn in an unauthorised way. The amount of CZK 1,233,274,143 was transferred from the account of the mutual funds concerned to foreign countries where it disappeared irrecoverably on the basis of sham transactions carried out by third parties and due to the inactivity of the state that did not prevent suspicious transactions.

7. On 1 July 1997, the Ministry of Finance of the Czech Republic, which, at that time, supervised investment companies, decided to transfer the management of the mutual funds to the complainant, to which the state thus transferred the duty to claim the compensation for damage for the injured mutual funds in complicated legal proceedings.

8. On 29 February 2000, the complainant filed an action for compensation for damage in the amount of CZK 1,114,275,017 against the Czech Republic, the Ministry of Justice (for reasons of maladministration by a notary in the exercise of public authority under Act No. 358/1992 Coll.) and, subsequently, on 11 August 2003, for the same damage, the complainant extended the action also against the Czech Republic, the Ministry of Finance, claiming that the damage was also caused by an incorrect procedure of the Ministry of Finance, the Financial Analytical Unit (hereinafter referred to also as “FAU MF CR”), which, contrary to Section 10 (2) of Act No. 61/1996 Coll., failed to file a criminal complaint and did not prevent a suspicious transaction although it was obliged to do so. The intervener applied, from the outset, the objection that the limitation period expired against the complainant's claim for the compensation for damage and argued, from the outset, that the procedure of the FAU MF CR, consisting in its decision not to file a criminal complaint, was correct.

9. By judgement of the District Court for Prague 2 of 25 January 2005, Ref. No.: 21 C 44/2000-218, the court ordered to the Czech Republic to pay to the petitioner the amount of CZK 1,114,275,017 with 18% interest from 6 March 1997 until paid when it found maladministration on the part of both the Ministry of Finance and the Ministry of Justice. The court dismissed the objection that the limitation period expired, stating that the action was filed on 29 February 2000, thereby suspending the limitation period in relation both to the Ministry of Justice and to the Ministry of Finance. At the same time, the court concluded that it was only from the indictment that the complainant learned of the facts from which the complainant could infer the liability of the Czech Republic due to the maladministration by the Ministry of Finance.

10. By judgement of the Municipal Court in Prague of 22 November 2005, Ref. No.: 35 Co 379,380/2005-324, the court of appeal, concerning the appeal by the defendant, changed the judgement of the court of first instance by dismissing the action, inferring that the complainant had no right to sue in order to recover the receivable in question, *without addressing the objection of the expiry of the limitation period*.

11. By judgement of the High Court in Prague of 27 February 2007 Ref. No.: 6 To 20/2006 which came into force on 27 February 2007, four people were eventually convicted after ten years for "tunnelling" CS Fondy when the court found, in criminal proceedings, that they had committed the crime of fraud.

12. By judgement of the Supreme Court of the Czech Republic of 27 January 2009, file No.: 25 Cdo 2193/2006, the appellate court annulled the judgement of the Municipal Court in Prague of 22 November 2005 and returned the case back to that court for further proceedings, finding that the petitioner had the right to sue in the case. *The court did not address the objection that the limitation period expired.*

13. By judgement of 3 September 2009, Ref. No.: 35Co 379/2005-544, the Municipal Court in Prague, as the court of appeal, changed the judgement of the court of first instance by dismissing the action when it concluded that the petitioner had not sustained damage yet and, at the same time, it did not find any maladministration on the part of the Ministry of Finance. The court thus dismissed the action for being premature on the ground that the state was liable for any damage only after it became clear that the compensation for damage could no longer be recovered from other entities (direct perpetrators). *Again, the court did not address the objection that the limitation period expired.*

14. By judgement of 7 December 2011, file No.: 28Cdo 349/2010, the Supreme Court again annulled the above judgement of the Municipal Court in Prague when it concluded that the complainant had sustained damage (i.e., the action was not premature) and the failure to file a criminal complaint constituted maladministration if the Financial Analytical Unit of the Ministry of Finance had relevant information constituting a suspicion of a criminal offence. *The Supreme Court did not address the objection that the limitation period expired.*

15. By judgement of the Municipal Court in Prague of 27 September 2012, Ref. No.: 35Co 34/2012 the Municipal Court in Prague, as a court of appeal, ordered to the defendant, the Czech Republic, Ministry of Finance, to pay to the petitioner the amount of CZK 1,043,891,167 with 10% default interest from 5 April 2003 until paid, namely within 3 months of the judgement coming into force. The court concluded that the defendant, the Czech Republic, Ministry of Finance, was jointly and severally liable for the damage sustained by the petitioner due to the "tunnelling" of CS Fondy. The court dismissed the objection that the limitation period expired in relation to the liability for the maladministration on the part of the Ministry of Finance, stating that the action was filed already in March 2000, thereby suspending the limitation period in relation both to the maladministration of the notary and in relation to the liability for the maladministration of the Ministry Finance.

16. Based on the aforementioned judgement, the Czech Republic paid to the mutual funds managed by the complainant, on 11 December 2012, a total amount of CZK 2,080,447,226, consisting of the principal of CZK 1,043,891,177 while the remaining amount consisted of

accessories: 10% default interest from 5 April 2003. The complainant, on the initiative of the Czech National Bank, subsequently introduced a special mode in respect of the received funds, whereby they could not be distributed to unit-holders, and the state, exercising through the Czech National Bank supervision over collective investment, imposed on the complainant and the depositary of the mutual funds increased (daily) supervision over the funds concerned, including the implementation of restrictions on their management by the complainant (transfer of the received compensation for damage to the reserve for a possible future payment of a liability to the Czech Republic and the possibility of depositing the funds only in safe and highly liquid financial instruments).

17. After the payment of the compensation for damage was made, the Supreme Court, after the appellate review of the intervener, annulled the judgement of the Municipal Court in Prague again (already the third time) by judgement of 25 June 2014, Ref. No. 25 Cdo 493/2013-863, and returned the case back to that court for further proceedings. The Supreme Court ordered to the Municipal Court in Prague to reconsider the issue of the expiry of the limitation period, shared liability, maladministration, causal link and default interest. Concerning the expiry of the limitation period, the Supreme Court did not accept the opinion of the court of appeal that the suspension of the limitation period in relation to the Ministry of Finance had already taken place by filing an action against the Ministry of Justice since the extension of the action against the Ministry of Finance is based on another factual event. The Supreme Court ordered to the court of appeal to deal with the issue of when the complainant learned about the operative events constituting the liability of the state for maladministration by the Ministry of Finance.

18. After the judgement was annulled, the complainant evaluated how to proceed for a long time. The complainant found itself in a situation whereby, based on the annulled judgement, the amount had already been credited to the accounts of the injured mutual funds1 and the complainant was convinced that, from the substantive law point of view, the payment was legal, i.e., the payment was made due to the existing right of the mutual funds to receive the compensation for damage. Just before the judgement was annulled, the Grand Chamber of the Supreme Court delivered a unifying case-law judgement No. 31Cdo 3309/2011 of 23 April 2014 in which it concluded that the payment in respect of a substantive-law liability, albeit based on a later annulled judgement, does not constitute unjust enrichment and results in the termination of the liability. Thus, the original petitioner can no longer pursue the dispute since the original petitioner would thus demand a repeated payment of the amount it already got paid and such an action would have to be dismissed.

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1 The payment was provided in three payments directly to the accounts of the injured mutual funds

The dispute is thus transferred to other proceedings, specifically the proceedings for the issuance of unjust enrichment. The judgement in question of the Grand Chamber was then followed by a number of other judgements of the Supreme Court in which the appellate court supported the dismissal of the action for reasons of the payment in those cases where the petitioner continued the original dispute even after the payment.

19. In view of the existing case law (in particular the above judgement delivered by the Grand Chamber of the Supreme Court), the complainant concluded that by the payment (albeit on the basis of a judgement that was later annulled) the right of the injured mutual funds to the compensation for damage from the state expired for reasons of the fulfilment of the liability. The right once expired is not renewed by returning the payment. Therefore, the complainant cannot return the payment, especially since the payment was not provided to the complainant but directly to the accounts of the mutual funds. This viewpoint was communicated to the intervener, at the same time, the intervener was offered we would keep the payment received on a special account until the dispute on the issue of unjust enrichment was terminated which

was refused by the intervener. The special mode for the treatment of the disputed funds received as the compensation for damage continued to be applied (see item 16).

20. By an action filed on 8 December 2014, the intervener sought the payment of the amount of CZK 2,080,447,226.12 by the complainant claiming that the intervener paid this amount to the defendant on the basis of the judgement of the Municipal Court in Prague of 27 September 2012, Ref. No.: 35 Co 34/2012-761 which was later annulled stating that the judgement on the basis of which the intervener paid was annulled by the judgement of the Supreme Court of 25 June 2014, Ref. No.: Cdo 493/2013-863 and the payment thus became unjust enrichment.

21. In the proceedings before the general courts, the complainant proposed that the action is dismissed, pointing out that the complainant accepted the payment for the mutual funds as a compensation for damage caused to them by maladministration by the Ministry of Finance of the Czech Republic, the Financial Analytical Unit which, in conjunction with the tunnelling of CS Fondy, failed to file a criminal complaint pursuant to Section 10 (2) of Act No. 61/1996 Coll. In conjunction with this, the complainant argued by the case law of the Supreme Court which was unified by judgement of the Grand Chamber 31 Cdo 3309/2011 (see item 18).

22. The proceedings before the District Court for Prague 6 lasted almost 4 years and were delayed also by purposeful motions on the part of the intervener whereby, for example, the proceedings were delayed by more than 6 months due to the intervener's motion to suspend the proceedings which was, eventually, upheld by the court of first instance.

23. By judgement of the District Court for Prague 6, Ref. No.: 8 C 445/2014-456 of 24 May 2018, the intervener's action was upheld in its entirety and the complainant was ordered to pay the amount of CZK 2,080,171,231.12 with default interest at the rate of 8.05% from 1 September 2014 until paid, the reason being the fact that the complainant's right to the compensation for damage from the intervener was statute-barred when the court of first instance concluded that the complainant knew, already in 1999, the operative events which enabled the complainant to file an action for the compensation for damage, i.e., the complainant knew that it sustained damage and that the Czech Republic was liable for it due to maladministration by the Ministry of Finance. The court of first instance rejected the argument that, at this stage of the proceedings, the objection that the limitation period expired2 could no longer be taken into account as well as the argument that the complainant's right to the compensation for damage was not statute-barred. The court of first instance did not address the complainant's objection that, provided that the right to the compensation for damage was statute-barred, the application of the objection that the limitation period expired would be contrary to good morals. For reasons of redundancy, the court of first instance dismissed the petitioner's motion to interrogate Ing. Vít Vařeka who, at the specified period was the Chairman of the Board of Directors and, according to the court's conclusions, should have had available crucial information on the occurrence of the damage. According to the complainant's motion, Ing. Vít Vařeka was to comment on whether or not he knew about the facts relevant to filing an action and should be the key evidence of the defendant to challenge and refute the court's conclusions about the defendant's knowledge of the information relevant to filing the action against the intervener.

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2 It should be noted here that the court also did not have a clear idea on this issue when, during the first hearing concerning the case, on 27 June 2017, it communicated its preliminary legal opinion that it would not take into account the expiry of the limitation period. It was only during the hearing on 20 February 2018 that the court informed the participants to have reconsidered its original legal opinion and would take the expiry of the limitation period into account.

24. By judgement of the Municipal Court in Prague of 27 November 2018, Ref. No.: 30 Co 366/2018-524, the judgement of the District Court for Prague 6 as a court of first instance was upheld and the right to the compensation for damage was statute-barred for the petitioner; in this context, the court of appeal also deemed redundant the interrogation of Ing. Vít Vařeka. The court of appeal acknowledged that the court of first instance did not address the issue of a possible contradiction of the objection that the limitation period expired with good morals, however, it did not consider this to be a defect in the judgement which should render the judgement unreviewable and the court of appeal itself concluded that the objection that the limitation period expired was not in contradiction with good morals. With regard to the complainant's extensive argumentation concerning the contradiction with good morals in the case of a request for the payment of default interest, the court of appeals stated that the right to default interest arises from the law and did not find grounds for refusing that right to the complainant.

25. Based on the aforementioned judgement of the Municipal Court in Prague, the complainant returned the total amount of CZK 2,080,447,226.12 to the intervener (the refund was made in three payments from the account of each of the injured mutual funds). Concerning the default interest, it represents the amount of CZK 717,164,357.98 which is now being exacted by the intervener in the execution proceedings conducted at the District Court for Prague 6 maintained under file No. 34 EXE 384/2019. *If this amount is exacted, the mutual funds will lose all of their assets.*

26. By ruling of the Supreme Court, Ref. No.: 28 Cdo 1297/2019-625, the complainant's appellate review was dismissed when the appellate court upheld the conclusions of the general courts that the complainant's right to the compensation for damage in respect of the intervener was statute-barred and that the expiry of the limitation period had to be taken into account. As for the objection concerning the contradiction of the objection that the limitation period expired with good morals, the appellate court stated that, at the stage of the appellate proceedings, the contradiction with good morals could only be taken into account for very exceptional reasons which it did not find in the specific case. Regarding the objection that Ing. Vít Vařeka, as the Chairman of the complainant's Board of Directors, failed to be interrogated, the appellate court pointed out that this could be a procedural defect which, however, the appellate court could not take into account. With regard to the complainant's extensive argumentation concerning the award of default interest in terms of the contradiction with good morals, the appellate court merely stated not to have found sufficiently intensive reasons for not granting the petitioner its right to default interest.

IV
Violation of constitutionally guaranteed rights

A. Violation of the right to a fair trial

27. The right to a fair trial is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to only as the “Convention”). Under Article 6 of the Convention, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The above right is further elaborated in Section 36 of the Bill of Basic Rights and Liberties (hereinafter referred to only as the “BBRL”), according to which everyone may assert, in the determined procedure, his or her right at an independent and unbiased court of justice and, in specified cases, in another body. Under Section 36 (3) of the BBRL, everyone is entitled to compensation for damage caused to him or her by an unlawful decision of a court, another government body or public administration body or through maladministration. The right to a fair trial thus includes the right to an impartial, prompt and, in particular, fair addressing of the case by the general courts. This right was violated by the general courts' procedure in the specific case to the detriment of the

complainant and the mutual funds concerned, administered by the complainant.

Failure to interrogate the former Chairman of the Board of Directors Ing. Vít Vařeka.

28. General courts addressed the issue of whether or not the right to the compensation for damage was statute-barred as at 11 August 2003. In this respect, the courts addressed the issue of whether or not the complainant knew, before 11 August 2000, about the facts establishing the right to the compensation for damage caused by maladministration. What was specifically known by the complainant's Board of Directors was therefore material. The intervener based its arguments on the fact that the operative events were known by the then Chairman of the Board of Directors of the complainant, Ing. Vít Vařeka, because

a) before 11 August 2000, he inspected the file of the Police of the Czech Republic in the matter of criminal prosecution of direct perpetrators of criminal activity and
b) in proceedings before the Regional Court in Hradec Králové against another of the liable persons, Plzeňská banka, a.s., the complainant's then legal representative, in one of the statements made in writing in response to the defence of Plzeňská banka, a.s., argued, inter alia, that the Financial Analytical Unit of the Ministry of Finance of the Czech Republic violated its obligation.

With regard to the Supreme Court's judgement Ref. No.: 25 Cdo 2168/2015 of 25 May 2016 that the knowledge of the relevant facts must be proved directly to the injured party and not to the injured party's legal representative, what was important in assessing the case was what the Chairman of the Board of Directors specifically knew (not what the then legal representative in the complainant's dispute with Plzeňská banka, a.s. knew). In this context, the complainant proposed, at the hearing on 24 May 2018, the direct interrogation of the former Chairman of the Board of Directors, Ing. Vít Vařeka, to comment on when specifically he learned about the operative events. However, the motion to carry out this evidence was rejected by the court of first instance, namely, with a very brief reasoning that the court considered the evidence redundant. Thus, on one hand, the court, beyond the scope of the concentration of proceedings pursuant to Section 118b (1) of the rules of civil procedure, admitted requests for production of evidence of the intervener, whereby Ing. Vařeka, as the Chairman of the complainant's Board of Directors, was to learn about the operative events relevant to the newly alleged limitation period objection; on the other hand, the key evidence of the complainant, the interrogation of Vít Vařeka, by which the complainant intended to refute the intervener's claims and evidence and the court's conclusions, was not made due to the alleged redundancy of such evidence.

29. The court of appeal, concerning the complainant's arguments, merely stated that the interrogation of Ing. Vít Vařeka, could not change anything about the factual findings made (i.e., not because it did not relate to the case). In so doing, the court of appeal helped itself by saying: "…it is difficult to assume that the defendant, after it intervened in place of the original participant, would not have learned what the content of the action was" (paragraph 41 of the judgement). Thus, the general courts anticipated the content of the evidence in advance without carrying it out. At the specified period, Ing Vít Vařeka could have assumed that there was no violation of obligation by the Financial Analytical Unit of the Ministry of Finance, he could have simply trusted in the correctness of the decision of the government body. He did not have to know the complicated legal argumentation in the petitioner's secondary dispute with Plzeňská banka, including the side line concerning the Financial Analytical Unit of the Ministry of Finance, he did not have to know all the details of the action against Plzeňská banka, a.s. and, when inspecting the file of the Police of the Czech Republic, he did not have to learn relevant facts concerning the liability of the intervener for damages when, in addition, this issue was not the subject of the criminal proceedings at all. A testimony of the former Chairman of the Board of Directors, Ing. Vít Vařeka, would thus certainly be material and capable of changing the factual conclusion of the general courts about the knowledge of operative events before 11 August 2000. The objectivity of the proposed evidence is given by the fact that Ing. Vít Vařeka

has not been the complainant's Chairman of the Board of Directors for more than 10 years.

30. The appellate court also refused the complainant's arguments objecting the failure to carry out the key interrogation of Ing. Vít Vařeka,

pointing out that any procedural defects could no longer be taken into account in the appellate review proceedings.

31. However, the fact is that the interrogation of Ing. Vít Vařeka was a material interrogation and certainly related to the subject matter in the context of the specific case and failed to be carried out contrary to the complainant's proposal. The courts cannot anticipate in advance what findings can be made based on an evidence until they carry it out.

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3 This is understood to mean proceedings at the Regional Court in Hradec Králové 39 Cm 221/1997 against Plzeňská banka and Umana
s.r.o

If the evidence is related to the present case (*in this case, the relationship of the evidence to the case is unquestionable because it is precisely the knowledge of Ing. Vít Vařeka on the basis of which general courts concluded that the complainant knew the relevant facts before 11 August 2000*) and the court can draw information from the evidence that is relevant for its judgement, the courts are obliged to carry out such evidence and evaluate it only subsequently. The general courts failed to comply with this procedure, failing to substantiate this evidence or duly substantiate it, thereby violating the principle of impartiality in court proceedings, as they significantly disadvantaged the complainant over the intervener when the key evidence proposed by the complainant failed to be carried out. On the other hand, all the evidence proposed by the intervener relating to the expiry of the limitation period was carried out and, in addition, the court of first instance, in the reasoning of the judgement, helped itself with an evidence that was not proposed by anybody (a record from the hearing at the Regional Court in Hradec Králové, file No. 39 Cm 221/1997 of 1 November 1999) which the court did not even read during the hearing. This violated the right to a fair trial.

Violation of the right to have the case tried within a reasonable time

32. There was an absolutely clear violation of the right to a fair trial on this issue. The complainant's dispute with the intervener has been taking place since 2003. From the outset, the intervener has defended itself with an objection that the limitation period expired. If the right was indeed statute-barred, the courts should have dismissed the action without undue delay primarily on grounds of the expiry of the limitation period. However, that was not the case. The District Court for Prague 2 by its judgement of 25 January 2005, Ref. No.: 21C 44/2000-218 upheld the action and concluded that the right was not statute-barred. Subsequently, the case was being addressed twice by the Municipal Court in Prague and twice by the Supreme Court and they did not deal with the issue of the expiry of the limitation period at all.

33. Following the repeated annulment of the judgement by the appellate court, the Municipal Court in Prague upheld the action by its judgement of 27 September 2012, Ref. No.: 35 Co 34/2012-761 stating that the right was not statute-barred because the limitation period was suspended by filing an action against the Czech Republic, the Ministry of Justice. The intervener then reimbursed the adjudicated amount to the mutual funds. Subsequently, by the judgement of the Supreme Court of the Czech Republic dated 25 June 2014, Ref. No.: 30Cdo 493/2013-863, the above-mentioned judgement of the Municipal Court in Prague was annulled again while it was stated that the courts should address the issue of the expiry of the limitation period again. The violation of the right to a fair trial can also be seen in the fact that the issue of the expiry of the limitation period should have been addressed and properly assessed by the general courts considerably earlier than after the third annulment of the judgement of the court

of appeal. The fact that they did not address this issue adequately and properly led to the transfer of the risk of default interest to the complainant in the event of a failure in the dispute which should certainly not be the case in actions for the compensation for damage due to maladministration.

34. After filing an action for the issuance of unjust enrichment on the part of the intervener (the action was filed on 11 December 2014), the complainant sought a quick hearing of the case, repeatedly urged the District Court for Prague 6 and pointed out that, precisely due to the risk of the default interest, it was appropriate to address the case as quickly as possible. If the right to the compensation for damage was indeed statute-barred, there was nothing to prevent the court from making a judgement on the case quickly. Instead, the first oral hearing before the court of first instance, after the unsuccessful suspension and termination of the proceedings, took place only three years after the action was filed; later, the court of first instance was providing evidence concerning the merits of the right to the compensation for damage and, eventually, after the complete reassessment of the legal opinion communicated to the participants in the proceedings during the first hearing in the case, the court concluded that it would take into account the objection that the limitation period expired and upheld the action in its entirety, including the default interest, without taking into account that the proceedings took clearly unnecessarily a long time.

35. Violation of the complainant's right to issue a judgement within a reasonable time resulted in an unnecessary increase in default interest interest and, for this reason, to admit such default interest is contrary to good morals. General courts did not comment at all on the issue of the delays on the part of the state in relation to the completely unnecessary increase in default interest in their judgements as objected by the complainant.

Violation of the constitutionally guaranteed right to a fair and duly reasoned judgement

36. Within the context of the right to a fair trial, the participants have the right to a fair organisation of their legal relationship. The Constitutional Court has stated many times in its judgements that judgements of general courts cannot be contrary to the principle of justice, i.e., the judgement cannot be contrary to the requirement of a factually appropriate and reasonable settlement of the legal relationship under consideration and contrary to generally shared principles of justice: the so-called exaggerated formalism. The courts must always seek a fair solution. This was not the case in this specific case. It is clear that the state, in 1997, did not protect the assets of the mutual funds when it did not file a criminal complaint, although it was required by law to do so. The state should therefore bear the consequences of its misconduct. Instead, the intervener seeks, through complex legal constructions, full exculpation from this liability at all costs without assuming at least part of the blame for the gross error made by the Financial Analytical Unit of the Ministry of Finance. Moreover, the intervener insists, without any self-reflection, that the failure to act on the part of the Financial Analytical Unit of the Ministry of Finance was correct and levies execution against the mutual funds' property in order to deprive the injured unit-holders of their property. It may not be a reasonable arrangement of the legal relationship if mutual funds received the entire amount of CZK 2,080,447,226.12 as the compensation for damage with accessories. However, it is definitely not a reasonable arrangement of a legal relationship if the funds do not receive any compensation for damage from the state (while referring to the act of an investment company that the mutual funds could not influence) and an obligation is even imposed on them to pay extremely high default interest when the origination of the interest itself was primarily caused by an incorrect court judgement and the amount of such interest was largely caused by delays on the part of the District Court for Prague 6 (i.e., also on the part of the state). Thus, the judgement is manifestly unbalanced and does not correspond to the requirements for a fair judgement which the Constitutional Court has expressed many times in its previous judgements (e.g. Judgement II US 3168/094 , I US

2216/09, II US 76/17, I US 2216/09, IV US 2842/10 etc.).

37. Contrary to the requirement for a fair and duly reasoned judgement is also the manner in which the courts dealt with the complainant's argument that the state's objection that the limitation period expired is contrary to good morals. The court of first instance did not deal with this objection at all, the court of appeal merely formally and the appellate court dismissed the argument stating that, as a rule, the issue of good morals can no longer be examined in the appellate review proceedings. The complainant's argument that the objection that the limitation period expired is contrary to good morals was thus practically decided by the court of appeal at one instance with a brief justification that the complainant was not prevented from bringing the action earlier, that the intervener's contribution to the damage was minimal compared to other entities that caused the damage and that CZK 1.256 billion managed to be returned to the mutual funds. This argument cannot be accepted. The complainant could not afford to bring an action against the Ministry of Finance which supervised investment companies solely on the basis of speculation, i.e., without real facts. Mutual funds themselves, which are affected by the expiry of the limitation period, could not bring an action for lack of legal personality.

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4 E.g. in its judgement of 5 August 2010, file No.: US 3168/09, it pointed out the following in item 17: “The principle of legal predictability, as an important attribute of the rule of law, is essentially related to the principle of legal certainty and is a prerequisite for the general confidence of citizens in law.” In item 20, it then noted: “In its constant case law, the Constitutional Court has proved many times that it does not tolerate to public authorities and, in particular, to general courts, a formalistic procedure that uses sophisticated reasoning to enforce obvious injustice. It stressed, inter alia, that a general court is not absolutely bound by the literal wording of the law, but
may and must deviate from it, if required by the purpose of the law, the history of its origin, systematic context or any of the principles that have their basis in the constitutionally legal conforming legal system as a semantic whole and that the duty of the courts to find the law does not only mean to seek direct and explicit instructions in a legal text but also the obligation to ascertain and formulate what is a specific law even where an interpretation of abstract norms and constitutional principles is concerned.”

The state's share in the sustained damage is not relevant to the issue of whether or not the objection that the limitation period expired is or is not contrary to good morals and cannot be a reason for rejecting the complainant's objection that the expiry of the limitation period is contrary to good morals. Similarly, the factual conclusion of the court of appeal that CZK 1.256 billion managed to be returned to the funds is irrelevant, in addition, since this conclusion is false, because CZK 122,000,000 managed to be returned from abroad and CZK 650,000,000 managed to be returned by assigning a receivable in respect of Plzeňská banka. The mutual funds are to be deprived of these financial assets due to judgements delivered by courts. Thus, the general courts neglected a substantial part of the complainant’s argument that the objection that the limitation period expired, raised in the specific case, was immoral and thus they failed to fulfil their obligation to achieve such a settlement of the legal relationship between the participants that would be consistent with the idea of justice.

38. Similarly, also the court's conclusion that the requirement to pay default interest is not contrary to good manners, in the specific case, is contrary to the requirement for a fair and duly substantiated judgement. The reasoning of the court of appeal that the complainant could return the payment at the request of the intervener cannot be accepted. The general courts completely disregarded the fact that the complainant relied on the unified case law of the appellate court given by judgement of the Grand Chamber of the Supreme Court No.: 31Cdo 3309/2011 dated 23 April 2014 that concluded that it was not unjust enrichment if, based on a judgement that was later annulled, a payment of an existing liability was made, and it was not possible to continue in the original dispute since the liability has been paid and has terminated. The dispute

is thus transferred to other proceedings for the issuance of unjust enrichment. Since the complainant was convinced to have received the payment legally, the complainant had to undergo this new procedure. The risk of default interest due to the procedure of the courts was thus transferred to the injured mutual funds.

39. It is difficult to predict how the dispute would develop if the complainant returned the payment. If the judgement of the Grand Chamber were to be taken for basis, the returned payment would not lead to the renewal of the once expired liability for the compensation for damage. Thus, the complainant could not very well claim compensation for damage from the intervener but would have to claim the payment of unjust enrichment, arguing that the complainant had returned the payment which it was not to return. However, this action could in fact be dismissed with reference to Section 2997 (1) second sentence of the Civil Code according to which the entity that enriched another entity, knowing that it was not obliged to do so, does not have the right to be returned the payment. In addition, the complainant would return the payment that was not provided to the complainant but to the accounts of the mutual funds managed by the complainant. A different situation arises if the payment obligation is imposed on the complainant by a judgement made by the court, which, in the present case, happened due to the contested judgements and the complainant then returned the payment in the amount of the principal. As a result of the procedure of the courts, the complainant was thus forced to address extremely complicated legal issues and proceeded in good faith to be acting in the interest of the injured mutual funds. However, mutual funds which were not in a position to influence the complainant's actions are penalised for the complainant's acts by the courts.

40. It is certainly not right if the court's judgement is annulled as a result of an extraordinary remedy. However, if this happens three times in one judicial proceeding, this should be reflected in other judgements made by courts and it should be taken into account (especially in proceedings against the state) that the complainant, not by its own fault, found itself in an extremely difficult situation and should not bear extreme consequences of the judicial dispute. This is particularly true in a situation whereby, in proceedings against the state, the risk of default interest has been transferred to the complainant as a result of the judgements made also by the state (through the courts) and whereby the subject matter of the dispute is the payment belonging not to the complainant but to the mutual funds. The judgements of the general courts completely disregard individual investors who are again injured by the state and create new potential disputes, now actions of individual unit-holders, for the state's failure to protect their property.

Assessment of the case by the appellate court under an invalid legal regulation

41. The appellate court addressed the issue of which legal regulation should be used to address the issue of the return of unjust enrichment after the annulment of the final judgement in compliance with which the payment was made, concluding that, if the later annulled judgement on the matter was delivered by 31 December 2013, the potential obligation to return unjust enrichment was governed by the legislation effective by the end of 2013 (i.e., the legislation in force on the date when the judgement was delivered on the basis of which the payment was made and not on the date of the annulment of the judgement). Therefore, in the opinion of the appellate court (different from that of the court of appeal), the assessment of the obligation to return the payment received in respect of the statute-barred debt on the basis of the judgement that was later annulled should have been carried out in accordance with the provisions of Section 455 of the Old Civil Code (“OCC”) and not in accordance with the provisions of Section 2997 of the New Civil Code (“NCC”). For that reason, the appellate court did not address at all the appellant's objection that the new wording of the Civil Code precludes the interpretation that, in the case that a statute-barred debt is paid based on a judgement that was later annulled, this could represent unjust enrichment. Indeed, the provisions of Section 2997 (2) of the NCC stipulates exceptions to the principle that the payment of the statute-barred debt does not constitute unjust enrichment since none of these statutory exceptions contains the merits of the payment of a liability based on a judgement later annulled and any other exception

cannot be possibly construed without a legal basis. The court of appeal considered it redundant to deal with this issue when it concluded that the specific legal relationship between the participants was subject to legislation valid until 31 December 2013, i.e., the provisions of Section 455 of the OCC which does not contain exceptions. It is the complainant's conviction that the appellate court assessed the case under the invalid legislation since the original judgement, on the basis of which the payment was made, was delivered in 2012 but was only annulled in 2014. The legal reason for the payment which is either the existing right to the compensation for damage or the procedural judgement on the basis of which the payment was made if the right to the compensation for damage did not exist, thus ceased to exist only in 2014 and therefore the legal relationship, unjust enrichment, could not arise before year 2014. Also the limitation period for bringing an action for the issuance of unjust enrichment has been running only since 2014 and not since 2012 when the judgement, which was later annulled, was delivered.

42. Pursuant to Section 3028 of the NCC, this Act governs the rights and obligations arising as from the date of its entry into force. Pursuant to Section 3028 (3) of the NCC, unless otherwise provided herein, other legal relationships arising prior to the effective date of this Act as well as the rights and obligations arising therefrom, including rights and obligations arising from breaches of contracts concluded prior to the effective date of this Act are governed by the existing legal regulations. Since, in the specific case, the legal relationship between the participants was established, a possible right to the returning of unjust enrichment, originated in 2014, it is necessary to apply the legislation under the NCC and not the OCC, as the appellate court did. If the appellate court concluded that the case had to be addressed under the old legislation, the appellate court thereby infringed the complainant's right to a fair trial since the appellate court assessed the case under the legislation that could not be applied to the case. In other words, the appellate court's procedure violated the complainant's right to have its legal relationship assessed under the applicable legislation and thus the judgement was made in breach of the principle of legality.

B. Violation of the constitutionally guaranteed right to the protection of property

43. Pursuant to Article 1 of the Supplementary Protocol to the Convention, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Under Section 11 (1) of the Bill of Basic Rights and Liberties, everyone has the right to own property. Owner's right of all owners has the same legal content and protection. Pursuant to Article 11 (4) of the Bill of Basic Rights and Liberties, expropriation or forced restriction of owner's rights is possible in the public interest, namely pursuant to the law and for compensation.

44. The complainant alleges that the procedure of the general courts, in particular regarding the assessment of the issue of the expiry of the limitation period and also the assessment of the right to payment of any default interest from the point of view of good morals, violated the constitutionally guaranteed right to own property of the mutual funds concerned when the courts did not provide sufficient protection of the proprietary right of the mutual funds managed by the complainant. In doing so, the specific circumstances of the present case were not taken into account.

45. First of all, the complainant emphasizes that the general courts did not distinguish in their judgement the difference between the investment company, the complainant, and the mutual funds that the investment company (complainant) only manages. Pursuant to Section 102 (2) of Act No. 240/2013 Coll., On Investment Companies and Investment Funds (hereinafter referred to as "AICIF"), it is the manager that exercises, in its own name and on behalf of the mutual fund, the proprietary rights to assets in a mutual fund. Pursuant to Section 102 (4) of the AICIF, receivables corresponding to the debts in a mutual fund are satisfied from the assets in that mutual fund. Pursuant to Section 105 of the AICIF, if a legal regulation or a

legal act requires information on the owner, the information on all unit-holders shall be replaced by the appellation of the mutual fund and the information on the manager of this mutual fund. The property that was affected by the judgement of the general courts, is the property of mutual funds and not of the complainant, the investment company. It is not possible to attribute, to the detriment of the mutual funds, any act of the investment company, seeking compensation for damage. The procedure of the general courts in the case under review did not protect the proprietary right of the mutual funds, or rather individual owners of units. The general courts refused to grant protection to mutual funds, basically with reference to the act of the investment company which found itself in a difficult situation due to the procedure of the general courts in a legal dispute with the intervener. This situation has been assessed by the investment company in a certain way and if, after protracted legal proceedings, such an assessment was ultimately not in accordance with the opinion of the general courts, this should not affect the assets of mutual funds in such a radical manner that they should lose all their property as a result of the procedure of the general courts.

46. The constitutionally guaranteed right to own property was violated by the procedure of the general courts which concluded that the right of the mutual funds to the compensation for damage from the Czech Republic, the Ministry of Finance, was statute-barred, without taking into account the specific circumstances of this specific case. The right to the compensation for damage is based on the existence of maladministration by the Financial Analytical Unit of the Ministry of Finance of the Czech Republic which, in violation of Section 10 (2) of Act No. 61/1996 Coll., failed to file a criminal complaint although there were facts constituting a suspicion that a criminal offence was perpetrated and the perpetrators of the criminal offence were eventually lawfully convicted, for the act that was to be the subject of the unfiled criminal complaint, by judgement of the High Court in Prague of 27 February 2007 Ref. No.: 6 To 20/2006 which came into force on 27 February 2007.

47. General assumptions of the origination of the liability for damage are unlawful conduct (maladministration), damage and a causal link. In the case of the liability for damage caused by maladministration as a result of the failure to file a criminal complaint pursuant to Section 10 (2) of Act no. No. 61/1996 Coll., in addition to the general assumptions of the liability for damages, there is another special assumption, namely, that the conduct which should have been reported in the criminal complaint that failed to be filed is indeed a criminal offence. The reason for this is that if it is not a criminal act, the liability of the state for damage caused by the failure to file a criminal complaint cannot originate. Indeed, such a criminal complaint could not be even justified and the failure to file it cannot be causally linked to the occurrence of the damage. Therefore, it must first be adjudicated in criminal proceedings against direct perpetrators that this is indeed a criminal act (a judgement of conviction). Only then, can the injured party claim damages from the state on the grounds that the criminal act was committed, the criminal complaint failed to be filed and, as a result, the property, that would return back to the injured mutual funds after the perpetrators have been convicted, failed to be secured. Thus, it is not only a question of the merits of the action brought, as the appellate court infers, but a question of the premature nature of the action before all the conditions for the state’s liability for damage are met. Since the complainant filed an action against the intervener prematurely (solely on the basis of the indictment or rather the non-final judgement delivered), the courts should not have adjudicated about the complainant's claim for the compensation for damage until the final judgement was made in the criminal proceedings about the perpetration of the criminal act and should have waited for the outcome of the criminal proceedings. However, at the same time, this also means that the claim for the compensation for damage could not have been statute-barred when the legal action was extended in 2003 while, as a result of the incorrect assessment of the objection that the limitation period expired, the mutual funds lost their assets.

48. General courts absolutely disregard the requirement for the objectification of the damage sustained and construct their conclusions while considering the obligation of the complainant to sue the state for its failure to file a criminal complaint immediately after finding

that the criminal complaint failed to be filed, namely, without taking into account any other aspects relevant to the probability of success of such an action from the point of view of its merits. The Ministry of Finance decided not to file a criminal complaint pursuant to Section 10 (2) of Act no. No. 61/1996 Coll. because it did not find the described conduct to constitute a criminal act. From the point of view of the principle of trust in the decision-making of state authorities, the complainant did not necessarily have to consider the procedure of the FAU MF unlawful. Therefore, the limitation period could not begin to run before the complainant learned that the conduct which led to the withdrawing of the funds from the accounts of the mutual funds was a criminal offence which is the fact which the complainant learned with certainty only from the judgement of conviction and, with certain probability, from the delivered indictment.

49. From the point of view of the principle of objectification of the damage sustained, the complainant could not bring an action until he had a sufficient degree of certainty as to the merits of such an action. This is not about a 100% certainty, as is constantly repeated by the general courts, but about sufficient certainty (higher probability) which the complainant certainly did not have before the indictment was delivered because there was still the possibility that investigative, prosecuting and adjudicating bodies would incline to the opinion which led another government agency, FAU MF CR, (which was, in addition, specialised in this area) to its failure to file a criminal complaint, i.e., that it was not a criminal act. In principle, the complainant could not bring an action before he could conclude that the criminal act had actually been committed and that any criminal complaint pursuant to Section 10 (2) of Act No. 61/1996 Coll. would lead to the conviction of the perpetrators and the recovery of the seized funds. The complainant could not have a sufficient degree of probability that a criminal act was committed on the basis of which he could reasonably contemplate an action against the Czech Republic, the Ministry of Finance, before the indictment was delivered to the complainant. Even so, in the complainant's opinion, the complainant could have waited for the final outcome of the criminal proceedings since the conviction of the perpetrators constitutes, in the complainant's view, one of the conditions for the state's liability for maladministration in cases where the reason for the liability is maladministration consisting in the failure to file a criminal complaint. The state could not be held liable for damages if the perpetrators were not eventually convicted on the basis of a criminal complaint filed later. In this context, the defendant considers very significant judgement of the Constitutional Court No. IV US 642/05 of 28 August 2007 which addressed, in connection with the commencement of the limitation period, the concept of the so-called objectification of the damage sustained. The Constitutional Court's judgement infers that the limitation period may not begin to run before the damage and its amount, including the fulfilment of the prerequisites required for the establishment of the liability for such damage, are objectified. Otherwise, the petitioner would be forced to assert also the right to compensation for such damage in which it is uncertain whether the petitioner's right to the compensation for the damage will arise, or rather, whether all the conditions of the defendant's liability for the caused damage will be met. Similarly, in the tried case, the objectification of the damage in relation to the intervener's liability occurred only after it was stated in the criminal proceedings against the direct perpetrators that the criminal act had been committed. Previously, all the conditions for claiming the compensation for damage caused by maladministration were not yet recognisable. The complainant could not have anticipated whether the perpetrators would be brought to justice for their conduct and convicted or not.

50. The general courts did not take into account that the limitation period objection was raised contrary to good morals. The general courts have not taken into account at all that this is a specific case whereby the liability of the state is that for the damage caused to the mutual funds and they, contrary to the case law of the Constitutional Court, completely disregarded the constitutional origin of the right to the compensation for damage caused by maladministration.

51 The general courts did not take into account at all the situation that the intervener was, at the specified period, the body performing supervision over the investment company. This

circumstance motivated the complainant to focus on filing an action against the Czech Republic, the Ministry of Justice, for maladministration by a notary (the action was filed already in February 2000) and did not expressly file an action against the Czech Republic, the Ministry of Finance of the Czech Republic because, due to the lack of information, the complainant was afraid of negative consequences in case it was not successful with the action and, in 2000, the action against the Czech Republic, the Ministry of Justice, seemed more justified to the complainant. The complainant could not have assumed that the judicial case law in relation to a notary would develop, after many years, in such a way that the state was not liable for a notary's maladministration between 1 January 1993 and 15 May 1998. In a situation where direct perpetrators were still under investigation and it was uncertain whether direct perpetrators would be brought to justice at all, it was difficult to require the complainant to bring an action against its supervisory authority for not filing a criminal complaint when investigative, prosecuting and adjudicating bodies did not conclude yet that a criminal act had been committed. The mutual funds affected by the loss of their property as a result of the expiry of the limitation period could not influence the conduct of the investment company. In other words, the complainant filed a claim against the Czech Republic, the Ministry of Justice, in 2000. At the time the lawsuit was filed against the Ministry of Justice, the complainant did not know whether the perpetrators would ever be brought to justice and assumed that, unless it was found that a criminal act was committed, the Czech Republic could not be held liable for damages on the ground that it had not filed a criminal complaint. In addition, the courts were of the view for a long time that bringing an action against the Ministry of Justice in February 2000 caused the suspension of the limitation period also in relation to the Ministry of Finance. Therefore, the complainant had legitimate reasons to believe that bringing an action for the compensation for damage against the Czech Republic, the Ministry of Finance, was associated with a significant risk of failure. In any event, the injured mutual funds themselves, which are ultimately affected by the objection of the expiry of the limitation period being applied contrary to good morals, cannot be accused of any act made by the investment company.

52 Many judgements of the Constitutional Court (e.g. judgement II US 1532/16) state that when assessing the objection that the limitation period expired on the part of the state, the courts must not forget the constitutional origin of the right to the compensation for damage by the state, and the objection that the raised objection that the limitation period expired is contrary to good manners, has to be always approached with due diligence. From the point of view of the constitutional law, it is necessary to approach the institute of the expiry of the limitation period of the right to the compensation for damage sustained in the exercise of public authority in such a way that it contains a tension between the protection of rights of the beneficiary on one hand and the protection of the legal certainty of the liable party (the state) on the other hand. On one hand, there is the constitutional requirement that individuals should be given the protection of their rights injured by the conduct of the state consisting in the fact that the individual sustained harm in conjunction with the unlawful conduct of the state, on the other hand, the state should not be uncertain as to how long the right based on an unlawful procedure is enforceable in court. It is therefore necessary to find a fair balance between the protection of the rights of the injured party and the protection of legal certainty. The rights of the injured party in the case of the mutual funds must also be measured in the light of the principle of the protection of investors in the mutual funds.

53 In the specific case, the complainant filed an action against the Czech Republic for the compensation of identical damages from the same event already in 2000 and, therefore, the Czech Republic knew already in 2000 that the claim for the compensation for damage was brought against it. Protection of the principle of legal certainty is thus significantly weakened to the detriment of the intervener. On the other hand, the requirement to protect the rights of the injured party is reinforced in this specific case by the fact that the assets concerned are in mutual funds and are covered by the investor protection principle. The requirement of the general courts for the complainant to bring an action with precise factual statements against the

intervener within 3 years of becoming aware of the absence of a criminal complaint, in the case where the offenders were convicted only after ten years, is unreasonably strict. In addition, the general courts blame the complainant, as an investment company, for not having brought an action against the intervener in a timely manner, completely disregarding the fact that the injured mutual funds are thereby penalised for the fact that their right was not exercised in time by the complainant. The mutual funds definitely did not cause the expiry of the limitation period if any (they could not influence the act of the investment company). The expiry of the limitation period is definitely a disproportionate punishment for them: along with the interest granted, it leads to the loss of all their assets and the state should definitely provide some compensation for its inactivity in March 1997 when it never even apologised for its inactivity to the injured unit-holders, stubbornly insisting that everything was correct on its part. By accepting the state's objection that the limitation period expired, the courts essentially confirmed that the act of the FAU MF CR, which ruled that there was no suspicion of a criminal act and that the FAU MF CR would not file a criminal complaint, thus allowing the transfer of these funds abroad, was correct. Such an approach of the state cannot be accepted as it is contrary to the principles of a democratic rule of law. All of these arguments represent specific circumstances of the case which should have led the general courts to conclude that the applied objection of the expiry of the limitation period was contrary to good morals.

54. A breach of the constitutional right to own assets for the mutual funds is clearly evident in the case of granting the right to the intervener to be paid extraordinarily high default interest. It should be noted that this interest amounts to CZK 717,164,357.98. The complainant, immediately after the judgement of the court of appeal was delivered, returned the sum of CZK 2,080,447,226.12 from the accounts of the mutual funds. From the moment when this amount was received until it was returned, the received funds were held in special accounts of the mutual funds as a reserve, the complainant did not distribute it among the holders of units and waited for the outcome of the proceedings (at first the proceedings on the appellate review against the judgement of the Municipal Court in Prague of 27 September 2012, Ref. No.: 35 Co 34/2012-761 and subsequently the outcome of the proceedings concerning the intervener's action for the issuance of unjust enrichment). Interest climbed to enormous levels due to delays on the part of the District Court for Prague 6 which delays cannot be justified. This fact was not taken into account by the general courts at all. The general courts did not comment on the issue of delays by the District Court for Prague 6 at all.

55. As a result of judgements made by general courts, the mutual funds are just losing all their assets. The value of units which, on average, amounted to CZK 340 per unit before the judgements of the general courts were issued (excluding the compensation paid by the state, which was removed from the calculation of the value of the units for accounting purposes), currently amounts to zero. Judgements of the general courts are essentially equivalent to expropriation for the benefit of the state. The state, on one hand, caused damage to the mutual funds by its maladministration since it could stop the transfer of money abroad and the state did not stop it by its dilatory approach but, on the other hand, the state eventually achieves a judgement based on which not only it does not pay any compensation for damage but receives from the mutual funds, in addition, default interest in the amount of CZK 717,164,357 with this right to claim the default interest arising due to incorrect court judgements, delays on the part of the court and also due to the purposeful motions of the intervener (motion to suspend proceedings which was upheld by the court of first instance). The complainant was entrusted with the management of the tunnelled funds by an act of power made by the state (decision of the Ministry of Finance of 1 July 1997) and was obliged to recover the damage, acting in good faith in the correctness of the complainant’s procedure in the specific situation which was made difficult by the contradictory procedure applied by the general courts. The mutual funds are now to be deprived also of the compensation for damage they have recovered from other entities. Such a judgement is manifestly contrary to the principle of justice.

56. Yet, the mutual funds are under the protection of the state, their position is regulated by

special EU directives (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments etc.) and special Act No. 256/2004 Coll. on Undertaking on the Capital Market which confirm as the primary principle, the principle of investor protection. In the specific case, the state has not only not protected the assets of the mutual funds but also deprives them of all their other assets by the means of courts.

57. The complainant cannot agree also with the assessment of the issue of the suspension of the limitation period as a result of filing an action for the same damage against the Czech Republic, the Ministry of Justice. The District Court for Prague 6 and the Municipal Court in Prague in their annulled judgement of 27 September 2012, Ref. No.: 35 Co 34/2012-761 concluded that the limitation period had already been suspended at the moment of filing an action against the Czech Republic, the Ministry of Justice. The Supreme Court, in its judgement of 25 June 2014, Ref. No.: 30Cdo 493/2013-863 rejected this legal opinion, annulled the judgement of the Municipal Court in Prague, stating that the limitation period was not suspended by filing this action. Subsequently, the District Court for Prague 6 and the Municipal Court in Prague, bound by the previous judgement of the appellate court, based their assessment of the objection that the limitation period expired on this argumentation of the appellate court. The appellate court, addressing the complainant's arguments applied in the appellate review, did not find reasons for a different legal assessment of this issue and maintained its original assessment according to the judgement of 25 June 2014, Ref. No.: 30Cdo 493/2013-863. The complainant considers the general courts' assessment of the issue of the suspension of the limitation period to be overly formalistic and, moreover, internally contradictory when the appellate court relates, on one hand, the claim for compensation for damage caused by maladministration from the point of view of the commencement of the limitation period only with the damage and the liable person (without the necessity to know that the maladministration was the cause of the damage), on the other hand, however, in order to interrupt the course of the limitation period in claiming the compensation for damage, it requires a definition of the specific facts of the case in which maladministration consists (which, however, requires the complainant to presume at least the unlawful conduct of the liable entity, i.e., in the specific case, a presumption of the probable conviction of the perpetrators of a criminal act in the case of which FAU MF CR failed to file a criminal complaint).

58. In the contested judgement, the appellate court states that *the commencement of the course of the three-year subjective limitation period is, pursuant to the provisions of Section 22 (1) of Act No 58/1969 Coll., derived from the moment when the injured person became aware of the damage, i.e., when the injured person became demonstrably aware of the fact that the damage occurred and also that the state is liable for it. On the contrary, it is not linked to the complainant's awareness of maladministration itself, i.e., that a harmful event occurred.* If, according to the Supreme Court of the Czech Republic, the commencement of the limitation period is not connected with the awareness of the injured party of maladministration, the definition of the cause of the damage has no relevance to claiming the liability of the state for damage caused by maladministration but what is of key importance is only the issue of the identity of the damage and the identity of the liable entity. However, it is not possible but to conclude, in relation to the basis thus defined, that the complainant duly exercised its right to the compensation for damage caused to C.S.Fondy by the participation of the Czech Republic (irrespective of the specific facts) within the mutual funds being “tunnelled” already in the original action filed on 29 February 2000 since it is already in this action that the complainant defined its right to the compensation for damage (a specific amount corresponding to the financial resources stolen from the mutual funds) and filed this action against the liable entity, the Czech Republic. From the point of view of the right to the compensation for damage, it was therefore the state's liability for maladministration, i.e., it was the identical damage (the damage corresponding to the C.S.Fondy's tunnelled assets) caused by the identical entity: the Czech Republic. Since the liable entity is still and only the Czech Republic (the Ministry of Justice and the Ministry of Finance are only its organisational units acting on behalf of the Czech

Republic), by filing the action on 29 February 2000 the right of the injured C.S.Fondy to the compensation for damage caused by maladministration was exercised, namely against any authority of the Czech Republic that was involved in the "tunnelling" of C.S. Fondy. It was the same damage and the same amount basically from the same event ("*C. S. Fondy tunnelling*") that the complainant first claimed from the Czech Republic, the Ministry of Justice, and then from the Czech Republic, the Ministry of Finance. Given that the Czech Republic is only one, the complainant is convinced that the suspension of the course of the limitation period would thus have occurred already at the moment of filing an action against the Czech Republic, the Ministry of Justice, since it is the same compensation for damage. Consequently, in later claiming the liability of the Czech Republic for maladministration by the Ministry of Finance, it would not be possible to consider the expiry of the limitation period concerning the right to the compensation for the identical damage caused also by the act of the Czech Republic within the tunnelling of C.S.Fondy.

C. Violation of the constitutionally guaranteed right to the compensation for damage caused by maladministration by a government body pursuant to Section 36 (3) of the Bill of Basic Rights and Liberties

59. The right to the compensation for damage caused by maladministration of the state (*"or the state" in the Czech original, translator's note)* has constitutional origin and arises from Section 36 (3) of the Bill of Basic Rights and Liberties. By the fact that the general courts wrongly assessed the issue of the expiry of the limitation period, or rather they wrongly took account of the expiry of the limitation period, they prevented the complainant from obtaining the compensation for damage for the mutual funds which damage was caused by the intervener's maladministration.

60. The complainant believes that the expiry of the limitation period should not have been taken into account at all, as it is excluded by the provisions of Section 2997 (1), (2) of the New Civil Code. When interpreting simple law, courts may not add exceptions to the law that are not listed in the law. The assessment by the appellate court that any right to reimbursement of unjust enrichment must be assessed under the Old Civil Code, is manifestly incorrect as the annulment of the judgement, based on which the payment was made, took place in 2014. If the beginning of the course of the limitation period for a possible right to reimbursement of unjust enrichment starts from the moment of the legal force of the annulment of the original judgement, then the legal relationship between the participants, unjust enrichment, necessarily originated only at the moment of the legal force of the annulment of the original judgement and not the moment when this judgement was delivered (see also items 41 and 42 of this constitutional complaint).

61. The appellate court used, for the interpretation of the issue of the payment of the statute-barred debt, the provisions of Section 455 of the OCC which also considers the payment of the statute-barred debt on the basis of a court judgement that was later annulled as the grounds, establishing unjust enrichment. This interpretation is based on some of the judgements of the Supreme Court of the Czech Republic concerning Section 455 of the OCC, however, with the adoption of the New Civil Code, the judgements of the appellate court relating to Section 455 of the OCC lost their justification and ceased to be applicable since the legislator newly stipulated, under Section 2997 of the NCC, complex conditions for the assessment of the payment of the statute-barred debt in relation to unjust enrichment and stipulated exhaustive exceptions to the general clause that accepting the payment of the statute-barred debt is not unjust enrichment. The case of the payment of the statute-barred debt on the basis of the court judgement, which was later annulled, which judgement is applied by both the appellate court and the court of appeals in the contested judgements, was not included by the legislator among the exceptions under Section 2997 (2) NCC. The exhaustive list of exceptions to the provisions of the Act cannot be extended by other exceptions. If the legislator wanted the exception of the payment on the basis of a judgement which was later annulled to apply within the context of

the exceptions from the provisions of Section 2997 (1) of the New Civil Code, the legislator would not be prevented by anything from including that exception in Section 2997 (2) of the New Civil Code when the legislator stipulated the list of exceptions while adopting the Act on the New Civil Code, unlike the original regulation stipulated by Section 455 of the Old Civil Code.

62. Taking into account the approach chosen by the legislator to the addressing of the relationship between the statute-barred debt and unjust enrichment in Section 2997 NCC, it is necessary to consider, at the same time, whether the previous interpretation of Section 455 OCC by the appellate court is correct and complies with the basic principles of the Czech private law and is not contrary to the right to property. The reason is that, in the event of the expiry of the limitation period, the receivable continues to exist and the corresponding obligation to pay also exists. In the case of applying the objection that the limitation period expired, the obligation to make payment is merely weakened in that it cannot be awarded in court proceedings. **However, the obligation to pay remains and, if the debtor makes the payment, it is paying its existing debt.** What is essential is that the statute-barred debt continues to exist and that the debtor by making a payment only fulfils what the debtor owes to the creditor, so that the creditor cannot receive unjust enrichment and the debtor, as a result of such a payment to the creditor, does not sustain any real damage. However, if the debtor paid the statute-barred debt for reasons of judgement delivered by a court that was subsequently annulled, there was exclusively an error consisting in the delivery of the judgement by the court whereby the statute-barred debt was awarded judicial enforceability although the court should not have awarded such enforceability on the grounds of the objection that the limitation period expired (thus, although the creditor did not obtain any unjustified benefit to the detriment of the debtor, the debtor sustained injury in relation to the enforcement of the payment of the debt due to the court's error). It is therefore clear that, in this situation, a certain liability relationship arises only between the debtor and the court which made the wrong judgement. For these cases, the debtor is provided with the possibility of protection through the liability of the state for illegal judgements pursuant to Act No. 82/1998 Coll.

63. The assessment itself of the issue of the expiry of the limitation period is incorrect, as the complainant stated in Section B of this constitutional complaint, fully referring to these reasons. As the Constitutional Court has repeatedly stated in its judgements, if the conclusion of the general courts on the expiry of the limitation period is incorrect and unfounded, this effectively prevents the complainant from fulfilling the constitutional right to compensation for damage by the state in this case and it is a violation of the fundamental right guaranteed by Section 36 (3) of the Bill, e.g. judgement II US 1532/16, judgement I US 1744/12, judgement II US 3496/13).

V

64. The complainant is convinced that the judgements of the general courts cannot hold on the constitutional level and that the constitutionally guaranteed rights have been violated. Based on sophisticated reasoning, the general courts found a way to protect the state to the detriment of the injured mutual funds, using an overly formalistic interpretation of legal issues related to the expiry of the limitation period and, after many years, deprived the injured mutual funds also of that part of the compensation for damage that the complainant managed to recover from other entities. Consequently, the contested judgements of the general courts cannot hold on the constitutional level.

On the basis of the above, the complainant proposes that the Constitutional Court delivers the following:

J u d g e m e n t

Judgement of the District Court for Prague 6 dated 24 May 2018, Ref. No.: 8 C 445/2014-456, judgement of the Municipal Court in Prague Ref. No.: 30 Co 366/2018-524 dated 27 November 2018 and the ruling of the Supreme Court of the Czech Republic dated 4 June 2019 Ref. No.: 29 Cdo 1297/2019-625 violated the constitutionally guaranteed right of the complainant to a fair trial guaranteed by Section 36 (1) of the Bill of Basic Rights and Liberties and the right to protection of property guaranteed by Section 11 (1) of the Bill of Basic Rights and Liberties and the right to the compensation for damage guaranteed by Section 36 (3) of the Bill of Basic Rights and Liberties. These judgements are therefore hereby a n n u l l e d.

AKRO investiční společnost, a.s.