

## JAN KALVODA LAW OFFICE

BĚLOHORSKÁ 35, 169 00, PRAGUE 6, TEL: +420 233351810, FAX: +420 233351804, E-MAIL: office@akjk.cz

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In Prague, on 1 February 2010

Ústavní soud  
*Constitutional Court*  
Joštova 8  
660 83 Brno 2

*via registered mail with confirmation of receipt  
preceded by fax (542 161 309)*

*(Official Stamp - Confirmation of filing)*

<b>CONSTITUTIONAL COURT CR</b>	
Joštova 8, 660 83 Brno	
Received	
on:	- 1 - 02 - 2010
<u>2x + 2 PoA</u> times	<u>Annexes:</u> ____
No. see number code	By:

**Claimants:**

1. **RPG INDUSTRIES SE**

Reg. no. SE 1, with registered office at Anemomylos Office Building 8, Michael Karaolis Street, 1095 Nicosia, Republic of Cyprus

2. **RPG Byty, s.r.o.**

ID No.: 27769127,

with registered office at Ostrava, Moravská Ostrava, Gregorova 2582/3,

Postal Code: 701 97,

a company registered in the commercial register administered by the Regional Court in Ostrava, Section C, Entry 29253

Both represented by:

Jan Kalvoda, Attorney at law, with registered office at Praha 6 – Břevnov, Bělohorská 262/35, Postal Code:, reg. no. ČAK 00260

**Participant:**

**Poslanecká sněmovna Parlamentu České republiky**

*(Chamber of Deputies of the Parliament of the Czech Republic)*

Sněmovní 4, 118 26 Praha 1 – Malá Strana

**Constitutional Complaint**

**against the statement of clause II. of the Resolution no. 1506 of the Parliament of the Czech Republic, Chamber of Deputies, adopted at the 66th meeting of 3 December 2009, on the Report of the Government on the Current Status of the OKD Housing Issue**

T w o f o l d

Annexes: as per list of annexes

List of Annexes:

1. Powers of attorney for Claimants' representative;
2. Resolution no. 1506 of the Chamber of Deputies of the Parliament of the Czech Republic, adopted at the 66th meeting of 3 December 2009, on the Report of the Government on the Current Status of the OKD Housing Issue, from the website of the Chamber of Deputies of the Parliament of the Czech Republic;
3. Protocol from the meeting of the Chamber of Deputies of the Parliament of the Czech Republic held on 3.12.2009;
4. Decision of the District Court for Prague 1 dated 16.12.2009, no. č.j. 33 Nc 1427/2009, on the ordering of a preliminary injunction;
5. Share Purchase Agreement dated 16.9.2004;
6. Full extract from the commercial register for KARBON INVEST, a.s.;
7. Full extract from the commercial register for RPG Byty, s.r.o.;
8. Final auditor's statement from November 2009;
9. Appeal against part II of verdict of decision of the District Court for Prague 1 no sp. zn. 33 Nc 1427/2009 dated 16.12.2009;
10. Article from EURO magazine "Ministry to file for an injunction in the OKD housing affair" dated 3.12.2009;
11. Article "KDU-ČSL in favor of preferential purchases of tenants" dated 3.12.2009;
12. Request of the Minister of Finance dated 6.1.2010, no. č.j. 45/99327/2009;
13. Reaction of Defendants to Plaintiff's application for a preliminary injunction dated 14.12.2009;
14. Article from [www.ct24.cz](http://www.ct24.cz) entitled "OKD Apartments in the Chamber: Deputies adopted two Resolutions", dated 3.12.2009;
15. Article from [www.ihned.cz](http://www.ihned.cz) entitled "OKD Housing Issue: Deputies Called Upon Janota to Seek a Court Order", dated 3.12.2009;
16. Petition of the Minister of Finance for issuance of a preliminary injunction.
17. Protocols from meetings of the Chamber of Deputies in year 2009;
18. Statement of defense of PhDr. Lubomir Zaoralek on personal rights action dated 4.8.2009;
19. Protocol from first hearing of court proceedings dated 19.11.2009
20. Recording of the speech of Jiří Paroubek dated 4.9.2009 (on CD), published at <http://www.cssd.cz/inews/video/tezce-zkousenemu-moravskoslezskemu-kraji-pomuzeme>;
21. Advertisement published in Mlada fronta DNES on 21.8.2009 (pg. 10);
22. Advertisement published in Karvina Daily on 11.9.2009 (pg. 12).

## I.

1. Under const. act no. 1/1993 Coll., as amended, the Constitution of the Czech Republic (hereinafter the "**Constitution**"), state power, the source of which is the people, and which may be administered only pursuant to the law, within its limits, and in a manner prescribed by law, **is exercised through the bodies of the legislative, executive and judicial powers** (art. 2 par. 1 of the Constitution). The said provision sets forth the basis of the principle of division of powers in the Czech constitutional order. The Constitution further establishes the bodies of each of the powers: **legislative power pertains to the Parliament** (art. 15 par. 1 of the Constitution); **the government is the supreme body of the executive power** (art. 67 of the Constitution); **the judicial power is exercised in the name of the republic by independent courts** (art. 81 of the Constitution). The Chamber of Deputies is a house of the Parliament of the Czech Republic; it is a body of public power exercising legislative power; as for its other competencies, it has those for which it has constitutional empowerment, that is expressly set forth in the constitutional order, and in accordance therewith in the provision of sec. 50 of act no. 90/1995 Coll. The Code of Procedure of the Chamber of Deputies, as amended (hereinafter the "**Code of Procedure of the Chamber of Deputies**").
2. On 16.9.2004, a share purchase agreement was concluded between the National Property Fund of the Czech Republic (*Fond národního majetku*) (hereinafter the "**NPF**"), on one hand, as seller, and KARBON INVEST, a.s. (hereinafter "**KARBON INVEST**"), on the other hand, as purchaser. The object of sale and purchase were the shares of OKD, a.s. (hereinafter "**OKD**"), which shares represented approximately a 45.8831 % stake in the registered capital of the company (hereinafter "**Share Purchase Agreement**"). Article 7.6 of the Share Purchase Agreement set forth certain obligations of the purchaser in relation to the ensuring of the maintenance, and disposals with the so-called OKD housing fund; i.e. with buildings containing apartment units, apartments and independent apartment units, owned by the company as at execution of the Share Purchase Agreement, specified in its annex 5 (hereinafter the "**OKD Housing Fund**"). According to art. 7.8 of the Share Purchase Agreement, the obligations of the purchaser were to persist, even in the event that the purchaser transfers the sold shares or any other shares of the company to a third party, or if the sold shares or any other shares of the company cease to be owned by the purchaser for any reason, even if the purchaser ceases to be a shareholder of the company entirely for any of the above reasons.
3. On 3 December 2009, at its 66th meeting, the Chamber of Deputies of the Parliament of the Czech Republic, adopted the following resolution no. 1506 on the *Report of the Government on the Current Status of the OKD Housing Issue*, which contained the conclusion, that a contractual obligation was breached in a certain private legal relationship between the first claimant and the Czech Republic. It did so in a form otherwise prescribed for the exercising of the decision making power of the Chamber of Deputies (art. 39 of the Constitution), and resolved as follows:

### *"The Chamber of Deputies*

- I. *suggests to the government, to file a petition for the issuance of a preliminary injunction, which would order the owner of the apartments RPG Industries SE, or RPG Byty, s.r.o. respectively, to refrain from disposing with the concerned apartments in any other manner, than as set forth in the purchase agreement from 2004, i.e. to preferentially offer them to their tenants, under the terms and conditions set forth in the agreement;*
- II. *proclaims, that the demerger of OKD, a.s., and the spin-off of the housing fund to RPG Byty, s.r.o. real estate company constituted a breach of contractual obligations;*
- III. *requests of the government, that the Ministry of Finance enforces all applicable contractual penalties."*

(hereinafter the "**resolution of the Chamber of Deputies**").

4. The first claimant is the legal successor of KARBON INVEST and assumed all rights and obligations from the Share Purchase Agreement, including the obligation to ensure the maintenance and disposals with the OKD Housing Fund under art. 7.6 of the Share Purchase Agreement (that is, the obligation touched upon in the resolution of the Chamber of Deputies), concurrently, exercises control over the second claimant, which is, as of the dissolution of OKD by virtue of the de-merger, the owner of the OKD Housing Fund. The second claimant is the owner of the OKD Housing Fund. Although the resolution of the Chamber of Deputies in its clause II. is worded indirectly ("*constituted a breach of contractual relations*"), it clearly follows from the context that the person, to whom the Chamber of Deputies attributes a breach of contractual obligations, by means of the actions described therein, is the first claimant (i.e. the legal successor of KARBON INVEST – the sole shareholder of OKD, a.s. at the time of the de-merger), and the second claimant (explicitly named in the contested clause of the resolution) is the person exercising ownership rights over property, which it allegedly acquired as a result of a breach of a contractual obligation.
  
5. The Chamber of Deputies thus resolved, following the public proclamation of various untruthful statements on, and misinterpretations of, the legal contractual agenda of the claimants by a certain group of Deputies during interpellations, that a certain contractual obligation was breached, by an act attributable to the first claimant. However, resolving upon individual rights and obligations, that is the application of law, is entrusted by the Constitution to the judicial power. The Chamber of Deputies thus surpassed the bounds between the legislative and judicial powers and in doing so acted in a manner which lacks constitutional authorization. The claimants assert, that by adopting the above cited clause II of the resolution, the Chamber of Deputies breached the fundamental principles of the democratic rule of law, chiefly the constitutional principles of:
  - (i) the **division of powers** pursuant to the provision of art. 2 par. 1 of the Constitution, which is, according to past rulings of the Constitutional Court, the basis for the proper functioning of a democratic system;<sup>1</sup> and
  - (ii) **legality in exercising public power** and enumeration of public pretenses set forth in art. 2 par. 3 of the Constitution, and art. 2 par. 2 of the Charter of Fundamental Rights and Freedoms, promulgated by the a resolution of the presidium of the Czech National Council no. 2/1993 Coll., as amended (hereinafter the "**Charter of Fundamental Rights and Freedoms**"), the basis of which is the requirement that all public power is exercised on the basis of the law, within its bounds, and in a manner prescribed by the law.

Both of the said principles represent the infeasible essentials of a democratic state governed by the rule of law (art. 9 par. 2 of the Constitution).

6. The claimants assert that the above cited resolution of the Chamber of Deputies in its clause II. is a measure of a public authority which violated their fundamental rights and freedoms guaranteed by the constitutional order, in the sense of sec. sec. 72 par. 1 subpar. a) of act no. 182/1993 Coll., The Constitutional Court Act, as amended (hereinafter the "**Constitutional Court Act**"), and further, breached the fundamental principles of the rule of law, especially:
  - (i) **the right to protection of one's good reputation and name** in the sense of art. 8 and art 10 par. 1 of the Charter of Fundamental Rights and Freedoms, which is in itself a right which pertains also to

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<sup>1</sup> See for example ruling no. 264/2005 Sb.

legal entities,<sup>2</sup> as well as art. 8 and 10 par. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, published by announcement no. 209/1992 Coll., (hereinafter "**Convention for the Protection of Human Rights and Fundamental Freedoms**"), and further, pursuant to art. 17 of the International Covenant on Civil and Political Rights, published under no. 120/1979 Coll. (hereinafter the "**International Covenant I**");

- (ii) **the right to a fair trial, to equal treatment in legal proceedings, and the right to one's lawful judge** in the sense of art. 36 par. 1 and 2, art. 37 par. 3 and art. 38 par. 1 and 2 of the Charter of Fundamental Rights and Freedoms, art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 47 of the Charter of Fundamental Rights of the European Union (hereinafter the "**EU Charter**")<sup>3</sup>, and art. 14 par. 1 of the International Covenant I; and
- (iii) **the right to own property** pursuant to art 11. of the Charter of Fundamental Rights and Freedoms, as well as art 17 par. 1 of the EU Charter, and **the right to protection against interferences with the peaceful enjoyment one's property**, pursuant to art. 1 of the Supplemental Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and the **freedom of trade** pursuant to art. 26 of the Charter of Fundamental Rights and Freedoms, and art. 16 of the EU Charter.

**Evidence:** – *Resolution of the Chamber of Deputies no. 1506 from the 66th meeting of 3.12.2009 (Annex no. 2)*  
– *Protocol from the meeting of the Chamber of Deputies of 3.12.2009 (Annex no. 3)*  
– *Share Purchase Agreement dated 16.9.2004 (Annex no. 5)*  
– *Full extract from the commercial register for KARBON INVEST, a.s. (Annex no. 6)*  
– *Full extract from the commercial register for RPG Byty, s.r.o. (Annex no. 7)*  
– *Protocols from meetings of the Chamber of Deputies in year 2009 (Annex no. **Error!**)*

**Reference source not found.)**

For the above reasons, and with regard to the fact that the resolution of the Chamber of Deputies cannot be contested in any other manner – as will be further described below – the claimants are hereby filing, within the term required by law, this

*constitutional complaint,*

which they found upon the following:

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<sup>2</sup> Ruling no. sp. zn. I. ÚS 201/01

<sup>3</sup> The EU Charter is an international convention on human rights and the "proviso" contained in announcement no. 111/2009 Coll., Int., of the Ministry of Foreign Affairs does not affect its validity, enforceability, and legal force.

## II. CLAIMANTS' STATEMENTS OF FACT

7. *Description of contractual agenda of claimants and Czech Republic and chronology of relevant events.*  
The legal frame of the intervention of the Chamber of Deputies with the constitutional rights of the claimants are the rights and obligations legally created by the Share Purchase Agreement executed between the legal predecessor of the first claimant and the Ministry of Finance of the CR.
- (i) The subject of sale and purchase under the Share Purchase Agreement was a minority (i.e. less than 50%) ownership stake in OKD, a.s. The transfer of the shares took place at a time when Karbon Invest as purchaser was already a majority shareholder of OKD, a.s. It therefore already exercised full control over OKD, a.s., and could, to the extent permitted by law, decide on its economic operations (including disposals with the OKD Housing Fund), and at that times was not bound by any contractual arrangement with the state (or respectively the NPF). Thus upon the conclusion of the Agreement, it voluntarily accepted certain contractual restrictions of the scope of rights it had at that time, including the obligation to ensure the maintenance and disposals with the OKD Housing Fund in the sense of art. 7.6 of the Share Purchase Agreement.
  - (ii) The first claimant (whom at the time did not yet assume the legal form of a European company) acquired control over KARBON INVEST after the Share Purchase Agreement was executed. Thus from the beginning, the first claimant, in defining the strategic goals of OKD, a.s., which at that time undertook in a wide scope of activities, needed to focus especially on the company's key activity, i.e. mining; the first claimant did not have its other business plans for the other activities of the company elaborated in detail as yet, until it became more particularly acquainted with the company, its operations, its assets, and financial indicators.
  - (iii) The preliminary plans of the first claimant regarding the business of OKD, a.s. did not include any specific strategy concerning the maintenance and use of the extensive real estate assets of OKD, a.s., including the OKD Housing Fund.
  - (iv) The NPF was dissolved as of 31.12.2005, pursuant to act no. 178/2005 Coll., on the dissolution of the National Property Fund and on the authority of the Ministry of Finance in the privatization of the property of the Czech Republic, as amended, its legal successor being the Ministry of Finance of the Czech Republic, which thus became a party to the Share Purchase Agreement.
  - (v) As of 31.5.2006 OKD was dissolved by virtue of a corporate de-merger, by means of which the OKD Housing Fund passed to a newly created company, RPG Byty, s.r.o. (its former business name being RPG RE Residential s.r.o.), ID No.: 27769127, with registered office at Ostrava, Moravská Ostrava, Gregorova 2582/3, Postal Code: 701 97, registered in the commercial register administered by the Regional Court in Ostrava, Section C, Entry 29253 (the second claimant).
  - (vi) As of 3.8.2006 KARBON INVEST was dissolved by virtue of a merger with RPG Industries Public Limited, reg. no. 146906, with registered office at Neocleous Building, 199 Arch. Makarios Avenue, 3030 Limassol, Republic of Cyprus, and in the process of which RPG Industries Public Limited converted to a European company (Societas Europea) and its business name was changed to RPG INDUSTRIES SE (the first claimant).
  - (vii) By virtue of the said merger, RPG INDUSTRIES SE became a party to the Share Purchase Agreement, i.e. the obligations regarding the maintenance and disposals with the OKD Housing Fund under art. 7.6 of the Share Purchase Agreement passed to RPG INDUSTRIES SE. The fulfillment of these obligations was regularly evidenced to the counterparty, i.e. the Ministry of

Finance of the CR, in relation to art. 7.7 of the Share Purchase Agreement. The fulfillment of the said obligations was never questioned by the Ministry of Finance of the CR.

- (viii) Following the above described restructuring steps, the activities carried out until then by OKD, with respect to the OKD Housing Fund were then onward carried out by RPG Byty, s.r.o. (i.e. the second claimant), which commenced repairs and renovations of the OKD Housing Fund.
  - (ix) It should be stressed, that the said restructuring was required by of the owners of the RPG group as private investors to create an effective property management company, and in no respect did it constitute a breach of any contractual obligations.
8. As of 1.5.2009, the obligations set forth in art. 7.6 par. (a) to (c) of the Share Purchase Agreement terminated, by virtue of the expiry of the "restriction period" set forth in the agreement. The obligation set forth in art. 7.6 par. (d) of the Share Purchase Agreement was to last for an "indefinite" period. RPG INDUSTRIES SE terminated this obligation for an indefinite period by a notice delivered to the Ministry of Finance of the CR on 29.6.2009. The Ministry of Finance of the CR did not accept the said termination, and filed an action to the Arbitration Court attached to the Economic Chamber of the CR and the Agricultural Chamber of the CR, to pronounce the invalidity of the of the termination of art. 7.6 par. (d) of the Share Purchase Agreement, whereas the action was later changed, to request the pronouncement of the validity of art. 7.6 par. (d) of the Share Purchase Agreement. The arbitration proceedings are pending to date.
  9. It is natural, that the subject of the OKD Housing Fund became, over time, much more a political topic (rather than a legal, or at least a material issue), and many politicians began to make use of the situation, including the fact that the matter affects a large part of the population of the Ostrava region, in order to achieve their own political aims (regrettably, this included making misleading declarations and various purposeful interpretations), as further described under point 44. below. As a result of extensive political debates which followed, the Ministry of Finance naturally fell under tremendous political pressure to prove, whether the defendant is in breach of the Share Purchase Agreement.
  10. Under such circumstances, the Ministry of Finance of the CR requested an independent auditor to analyze whether certain obligations set forth in art. 7.6 par. of the Share Purchase Agreement have been duly observed. The audit was complete in the fall of year 2009, and reached the conclusion, that the obligations which were the subject of review (which did not though include the obligation described in clause II. of the resolution of the Chamber of Deputies) were continuously duly fulfilled. The claimants make note of the auditor's report and its final report, because its presentation in the Chamber of Deputies on 3.12.2009 launched a series of attacks against the claimants (without first holding any debate on the legal analysis of the Share Purchase Agreement, and without allowing the RPG group to express its own standpoint) and subsequently led to the adoption of the contested resolution.
  11. Resolution of the Chamber of Deputies. Towards the end of the debate over the said audit, the Chamber of Deputies adopted the above cited resolution article I, point 2. Clause. I of the resolution of the Chamber of Deputies "**suggests to the government, to file a petition for the issuance of a preliminary injunction, which would order the owner of the apartments, RPG Industries SE, or respectively RPG Byty, s.r.o., to refrain from disposing with the concerned apartments in any other manner, than as set forth in the purchase agreement from 2004, i.e. to preferentially offer them to their tenants, under the terms and conditions set forth in the agreement.**"
  12. On 10.12.2009, the Ministry of Finance of the CR filed a petition for the issuance of a preliminary injunction to the District Court for Prague 1. On 16.12.2009, the District Court for Prague 1 issued its decision no. č.j. 33 Nc 1427/2009, in which it imposed upon the second claimant to "*refrain from*

disposing with houses with apartment units, or with independent apartment units, in the Czech Republic which owns, which would be in breach of art. 7.6 par. (d) of the agreement for the purchase of shares of OKD, a.s. dated 16.9.2004, between the NPF of the CR and KARBON INVEST, a.s., with registered office in Kladno. Víta Nejedlého 1575, ID No.: 25691431, previously registered in the commercial register administered by the Municipal Court in Prague, Section B, Entry 5524, until the arbitration proceedings are terminated by a legally effective decision of the Arbitration Court attached to the Economic Chamber of the CR and the Agricultural Chamber of the CR, on the action filed by the plaintiff against the defendant [Note of claimants: i.e. the first claimant] on 4.11.2009, on the determination of the validity of the said contractual provision". On pg. 6-7 of its decision, the District Court in stated that "The purpose of a preliminary injunction is to preserve a peaceful legal status of matters until the issuance of a decision on the merit of the case. The Court finds that the fulfillment of the condition set forth in the provision of sec. 22 of the arbitration act [Note of Claimants: i.e. the existence of a possible threat to the enforceability of the Arbitral Award] arises from the fact that the **Chamber of Deputies of the Parliament of the CR** resolved on the matter, and therefore undoubtedly, the fulfillment of the obligation set forth in the contract concluded by the National Property Fund, the validity of which is the subject of the arbitration proceedings, is jeopardized." The claimants filed an appeal against this decision on 29.12.2009.

13. In clause III. of the resolution , the Chamber of Deputies further "**requests** of the government, that the Ministry of Finance enforces all applicable contractual penalties." On 6.1.2010, the Minister of Finance, Ing. Eduard Janota, served the first claimant a letter entitled "Assertion of the claim of the Ministry of Finance against RPG Industries SE for payment of a contractual penalty for the violation of the agreement on the purchase of shares of OKD, a.s. dated 16.9.2004 between National Property Fund of the Czech Republic as seller, and KARBON INVEST, a.s. as purchaser", in which it invited the first claimant, on the basis of the Share Purchase Agreement, to pay a contractual penalty of CZK 30,000,000. In its letter, he specifically mentioned that "the Chamber of Deputies of the Parliament of the Czech Republic stated, in its resolution no. 1506, adopted at its 66<sup>th</sup> meeting of 3 December 2009, that by virtue of the de-merger of OKD, a.s. and the spin-off of the housing fund to RPG Byty, s.r.o , the obligations contained in the contract were breached, and further requested of the government that the Ministry of Finance enforces all applicable contractual penalties."

- Evidence:**
- Share Purchase Agreement dated 16.9.2004 (Annex no. 5)
  - Full extract from the commercial register for KARBON INVEST, a.s. (Annex no. 6)
  - Full extract from the commercial register for RPG Byty, s.r.o. (Annex no. 7)
  - Final auditor's statement from November 2009 (Annex no. 8)
  - Protocol from the meeting of the Chamber of Deputies of the Parliament of the Czech Republic, held on 3.12.2009 (Annex no. 3)
  - Petition of the Minister of Finance for issuance of a preliminary injunction (Annex no. 16)
  - Reaction of Defendants to Plaintiff's application for a preliminary injunction dated .12.2009 (Annex no. 13)
  - Resolution no. 1506 of the Chamber of Deputies adopted at the 66th meeting of 3.12.2009 (Annex no. 2)
  - Decision of the District Court for Prague 1 dated 16.12.2009, no. č.j. 33 Nc 1427/2009, on the ordering of a preliminary injunction (Annex no. 4)
  - Appeal against part II of verdict of decision no sp. zn. 33 Nc 1427/2009 dated 16.12.2009 (Annex no. 9)
  - Request of the Minister of Finance dated 6.1.2010, no. č.j. 45/99327/2009; (Annex no. 12)
  - Protocols from meetings of the Chamber of Deputies in year 2009 (Annex no. 17)

### III. CONDITIONS OF ADMISSIBILITY OF CONSTITUTIONAL COMPLAINT

#### 1. Personal admissibility (claimants)

14. As stated above, the claimants are legal entities and are therefore entitled to file a constitutional complaint pursuant to the express provision of sec. 72 par. 1, subpar. (a) of the Constitutional Court Act, subject only to them claiming that their fundamental right or freedom guaranteed by the constitutional order were breached by either a legally effective decision issued by a public authority in any proceeding to which they were a party, or by an act or other measure of a public authority (hereinafter "**measure of a public authority**").

#### 2. Legally Effective Decision or Other Measure

15. The term "*act*" used in sec. 72 par. 1 subpar. a) of the Constitutional Court Act is not explicitly mentioned in art. 87 par. 1 subpar. d) of the Constitution, it is though subsumed under the term "*other measure of a public authority*", which is, by general interpretation, and the context of sec. in sec. 72 par. 1 subpar. a) of the Constitutional Court Act, is a measure against which the claimants are constitutionally protected. This discrepancy is explained in detail in the commentary of the Constitutional Court Act published by C. H. Beck, this discrepancy may be explained as follows: "*how a certain act is entitled, is not of relevance, but rather if an act may, in itself, by its character and content, affect the fundamental rights and freedoms. An act in the sense of the said act [Note of Claimants: i.e. the Constitutional Court Act] may therefore be regarded as an "other measure" within the meaning of the Constitution.*"<sup>4</sup> The term "other measure of a public authority" should be according to other commentaries "*interpreted in the light of each specific case. An other measure is a specific act of a public authority, although entitled a decision, which was issued within the authority of a certain body, or contrarily, entirely outside the scope of its authority or also the failure to act (an act of omission) where the relevant body was required to act.*"<sup>5</sup>
16. The claimants thus deduce that that the cited resolution of the Chamber of Deputies is undoubtedly an "other measure of a public authority". The term was generally defined by the Constitutional Court in ruling no. 4.j. III. ÚS 62/95 (and similarly in ruling no. sp. zn. IV. ÚS 170/98): "*The term other measure of a public authority is to be understood to mean a habitually non-recurring, unlawful and unconstitutional offense of such authority against the fundamental, constitutionally guaranteed rights (freedoms), and which constitutes, at the time of the offense, a continuing threat to a lawfully existing state of matters, and whereas such offense is not in itself an extension (result) of the proper decision making power of such public authority, and as such is not subject to any general appellate hearing or other authoritative review; and further, it must follow from the so-described factuality, that the consequences of such "other measure of a public authority", not deriving from any authoritative decision, cannot be prevented in any other manner that by means of a constitutional complaint, respectively by a decision of the Constitutional Court, ordering the prohibition of such measures. Naturally, the said condition is not fulfilled, if the aggrieved party may seek regress by means of the general instruments provided by the entire legal system of the country.* The restrictive conditions for the admissibility of a constitutional complaint thus consist especially of (i) a measure of a public authority intervening with fundamental rights/freedoms, which (ii) at the time of the offense constitutes a *continuing threat* to a lawfully existing state of matters, (iii) is not the result of the proper decision making power of the public authority (and therefore is not subject to ordinary appellate procedures), (iv) *no defense or remedy against it exists, than a constitutional complaint*; which condition does not apply in case the aggrieved party may

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<sup>4</sup> Filip, J., Holländer, P., Šimíček, V., The Constitutional Court Act: A Commentary, 1<sup>st</sup> Edition, Prague: C. H. Beck, 2001, pg. 295, sec 72

<sup>5</sup> dtto, pg. 296

seek regress by means of the general instruments provided by the entire legal system. The claimants infer, in the text above and below, that all of the said conditions are fulfilled.

### **3. Public Authority**

17. Where the term public power is concerned, rulings of the Constitutional Court analyze it in the light of the criteria of the *public law*. Should it be a typical characteristic of public law regulations, that the participants of legal relations are unequal, one may also derive, that public power is such power which authoritatively decides upon the rights and obligations of persons (II. ÚS 86/95). The term "other measure" is not defined by the Constitution; it does though state that it is such a measure, which does not have the characteristics of a decision, which cannot be contested by appeal or other means of authoritative review. Together with the above mentioned definition of the Constitutional Court (II. ÚS 62/95) it may be added, that it is a measure consisting of *factual behavior* of a public authority, and must necessary be a legal act (typically for example the idleness of a court).
18. In determining, whether the statement contained in the resolution of the Chamber of Deputies qualifies as a measure of a public authority, it is crucial to scrutinize the character of the said act, and the *procedure in which it was issued*. *The said statement of clause II. of the resolution* of the Chamber of Deputies bears, in the claimants' opinion, the attributes of an act of public power, and at the same time, it may be considered an other measure in the sense of art 87 par. 1 subpar. (d) of the Constitution, as it was not issued in any judicial, administrative, or other proceeding, and concurrently, the law provides no form of defense against the resolution in any such proceedings. Moreover, such defense is not conceivable with regard to the character of resolutions of the Chamber of Deputies in general, which are adopted pursuant to art. 39 of the Code of Procedure of the Chamber of Deputies, as amended, where an appellate or other procedure of review is not provided for, and is excluded by definition.
19. Where the first above mentioned attribute is concerned, the contested clause of the resolution of the Chamber of Deputies is the result of a meeting of the Chamber of Deputies as a state body, as the concerned resolution was adopted by the Chamber of Deputies as a whole. It thus represents the resulting will of the Chamber of Deputies, generated in a manner which is typical for this state body (i.e. by means of a vote, in which the opinions of each of the individual representatives of the people are expressed). It is therefore not the expression of the will/viewpoint/opinion of individuals (i.e. the deputies), or political groupings, but a declaration of a state body, whose legitimacy is derived from the results of public elections. In addition, this act was adopted by means of a formal procedure, in which all acts of the Chamber of Deputies are generally adopted.

### **4. Violation of Constitutionally Guaranteed Rights and Freedoms**

20. The claimants are convinced that the adoption of clause II. of the resolution of the Chamber of Deputies dated no. 1506 of 3 December 2009 which "***proclaims that the demerger of OKD, a.s., and the spin-off of the housing fund to RPG Byty, s.r.o. real estate company constituted a breach of contractual obligations***", is an act, or other measure of a public authority, which violated – as further described below – their constitutionally guaranteed fundamental rights and freedoms in the sense of sec. 72 par. 1 subpar. a) of the Constitutional Court Act, and concurrently, breached the basic principles of the rule of law, which results in the fulfillment of all conditions necessary for the admissibility of a constitutional complaint against the said measure adopted by a public authority.

### **5. Exhaustion of Available Procedural Instruments**

21. **The claimants are of the view that, the requirement for exhaustion of available procedural instruments does not apply to an "other measure" by virtue of sec. 75 par. 1 of the CCA.** The said

provision directly cross-refers to sec. 72 par. 3 of the CCA, which applies only to legally effective decisions in proceedings, to which the claimant was a party. The same conclusion may be supported by the ruling of the Constitutional Court cited above no. 4.j. III. ÚS 62/95, which emphasizes the condition of exhausting all available procedural instruments; however, the Court derives that in the case of an *other measure*, it represents "*an otherwise inevitable exception, however the condition of impossibility of remedying unconstitutionality by other means must be preserved.*"

22. The claimants assert that **Czech law does not provide them any procedural instrument** of defense against the resolution of the Chamber of Deputies declaring the breach of contractual obligations in an individual case, **by means of which they could defend their rights**. Therefore the claimants believe that a constitutional complaint against this "measure of a public authority" is admissible from the start. The said belief of the claimants is supported by commentary literature, according to which the provision of sec. 72 par. 5 of the Constitutional Court Act "*typically addresses cases where an act of a public authority cannot be challenged otherwise than by means of a constitutional complaint*".<sup>6</sup> This conclusion is further supported by previous rulings of the Constitutional Court, which names, as one of the characteristics of an "other measure", the very fact that no means of defense against it exist, other than a constitutional complaint itself. Thus under such circumstances, the exhaustion of appeals or other procedural instruments cannot be required.
23. In addition, the claimants are convinced, for reasons stated below, that this constitutional complaint **due to its significance, substantially surpasses their own interests**, and is therefore also filed on the basis of sec. 75 par. 2 subpar. (a) of the Constitutional Court Act.
24. The principle of the division of powers is the basis of the rule of law and democracy, which is a general interest of the people as a whole, not merely an interest of the claimants. In the past, the Chamber of Deputies attracted constitutional powers of other state bodies. For example, it sought legally admissible to annul a measure of a municipality, adopted in its independent authority.<sup>7</sup> The act contested by the present constitutional complaint is a similar, normatively defective act, surpassing the authority of a legislative body. The arbitrariness of the decision making of the Chamber of Deputies, which is a circumvention of the said principles of the rule of law, undoubtedly leads to a breach of the constitutional order, its purpose and its sense, and therefore calls for an intervention by the Constitutional Court, which is, pursuant to art. 83 and art. 87 of the Constitution, a judicial body for the protection of constitutionality and legality. The notion, that the said rules could be suspended expediently and in an individual case, would mean, in the view of the claimants, to accept arbitrariness and a breach of the rule of law. **Therefore, the claimants believe that the substantiality in which this constitutional complaint surpasses the proper interests of the claimants is therefore given by the need to set the limits of constitutionally acceptable interventions of a legislative body with private legal relations in a democratic state governed by the rule of law and founded on the respect for the rights and freedoms of each person and citizen.** On a factual level, the case at hand is largely discussed in the media and notably politicized.
25. The claimants are aware, that from the legal perspective, clause II. of the resolution of the Chamber of Deputies is likely null and void (and therefore non-existent), as it was adopted by a state body outside the scope of its authority; yet the claimants propose its annulment. The principles of the rule of law, legality in exercising public powers, and enumeration of public pretenses set forth in art. 2 par. 3 of the Constitution must be considered; which principles do not permit the issuance of such a resolution. The Constitutional Court proceeded in a similar fashion in ruling no. sp. zn. II. ÚS 559/99, in which it declared that "*our legal system does not facilitate the issuance of declaratory rulings stating nullity*"; yet the Court

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<sup>6</sup> Wagnerová, E., Dostál M., Langášek, T., Pospíšil, I., The Constitutional Court Act with Commentary, 2007, source: ASPI LIT 29414CZ.

<sup>7</sup> See ruling of the Constitutional Court if the CR dated 5.4.2000 no. 107/2000 Coll.

annulled a part of the resolution in question and reasoned that "*no state body, whether it be one of the most supreme bodies, may not exercise authority, to which it is not empowered*". Incidentally, the Claimant has no other option but to proceed by means of filing a constitutional complaint, as no other legal instrument of defense against the resolution of the Chamber of Deputies exists, and the resolution has significant consequences for the claimants, as it is respected by state bodies of the executive power (i.e. the Ministry of Finance), and judicial power (i.e. the District Court for Prague 1).

## **6. Term**

26. Pursuant to sec. 72 of the Constitutional Court Act, the term for filing a constitutional complaint is 60 days, and begins to elapse from the day on which the claimant learned of the violation of its constitutionally guaranteed rights and freedoms, but no later than one year from the day on which such violation occurred. The resolution of the Chamber of Deputies was adopted on 3 December 2009; therefore this constitutional complaint was filed within the required term.
27. For all the above-mentioned reasons, the claimants believe that all the conditions for the filing of their constitutional complaint are fulfilled, and that the constitutional complaint is to be heard *in merito*. With regard to the fact that their constitutional complaint substantially surpasses, due to its significance, the proper interests of the claimants, the claimants **request that the Constitutional Court grants this constitutional complaint priority**.

## **IV.**

### **FOUNDATIONS FOR CONSTITUTIONAL COMPLAINT**

#### **A.**

#### **Unconstitutionality of the Contested Clause of the Resolution of the Chamber of Deputies**

##### **1. Breach of the Division of Powers Principle**

28. The claimants assert that the statement of clause II. of the resolution of the Chamber of Deputies breached the fundamental principle of the rule of law, that is, the principle of the division of state powers.
29. The claimants are of the view, that the immediate purpose and basis of the division of powers is the regulation and limitation of public power. However, the said principle is not merely organizational and self-serving, as its general purpose is to protect and guarantee the freedom of individuals and to prevent arbitrariness in exercising public power. No relation of superiority or mutual dependence exists between the constitutional bodies, which are empowered to exercise each of the powers; the individual powers are separate, with the exception of relations explicitly set forth in the constitutional order. However, there is no exemption to the postulate, that neither of the powers may exercise the authority of the others, whereas in relation thereto, the ruling of the Constitutional Court no. III. ÚS36/98 may be cited: "*...the exercising of public power is, within the sense of classic doctrine, constitutionally arranged in such a manner, that it is divided and is exercised by constitutionally authorized bodies in mutually separate areas as the legislative, executive and judicial powers (art. 2 par. 1 subpar. 2 of the Constitution of the Czech Republic (hereinafter the "Constitution")). All the said components of state power are not only separate from one another, but in addition, each is entirely independent of the others and their any mutual interventions are constitutionally permissible only in cases where the constitutional order, chiefly the Constitution itself, explicitly allows it...*".
30. If the constitutional order is founded on the principle of the division of powers, where neither is superior to another, and each has its independent competence, than the legislature is empowered with general

regulation, and decision making in individual cases principally rests with the judicial power (in detail, please see ruling of Constitutional Court no. Pl. ÚS 55/2000). The general reason being, that even derogated regulation and decision making of the administration is subject to review by an independent body (the Convention for the Protection of Human Rights and Fundamental Freedoms, published as announcement of the MFA no. 209/1992 Coll., sets forth in its art. 6, the right to a fair trial ("*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...*"). The inadmissibility of a legislative body applying the law is given from the very basis of the constitutional definition of the Czech Republic, and the constitutional division of powers is an essential characteristic of a democratic state governed by the rule of law.

31. The doctrine of the division of powers is related to the fact that each person, whose rights and obligations are being authoritatively decided on by the state, has the right to a fair trial and to equal treatment therein. This aspect was too conceived by the Constitutional Court. In ruling no. Pl. ÚS 40/02, it rejected the regulation of individual rights by means of a generally binding legal norm: "*The regulation of individual rights in a generally binding legal norm, which deprives the addressees of their right to judicial review of the fulfillment of the general conditions for normative regulation of the specific individual, and which lacks transparent and acceptable reasoning with regard to the feasibility of generally binding regulation, must be looked upon as a violation of the principle of the rule of law.*" In the same ruling, the Court derives that a breach of the principle of the division of powers is concurrently an infringement of a second aspect the right to a fair trial, that is an infringement of the right to one's lawful judge.
32. As the Constitutional Court ruled in the past, "*the principle of the division of state powers lies at the very foundations of our constitutional system. It is expressed in art. 2 par. 1 of the Constitution, which states that the source of all state power is the people, which exercises it through the bodies of legislative, executive and judicial power. Its purpose is to prevent the concentration of powers and its misuse. In order for this basic purpose to be fulfilled, these three powers must be independent of one another; which does not mean, that they are not intertwined, but yet they must be sufficiently independent, to prevent either power attracting the authority of the others. This mutual balance of the three powers is the basis for the proper functioning of a democratic system*".<sup>8</sup> The division of powers is an essential building block for the system of rights guaranteed also by the Convention for the Protection of Human Rights and Fundamental Freedoms, as a fundamental pillar of the rule of law. The decisions of the European Court for Human Rights in *Stafford vs. the United Kingdom*, 28.5.2002, ECHR 2002-IV, or *Benjamin and Wilson vs. United Kingdom*, 26.9.2002, or *Sovtransavto Holding vs. Ukraine*, 25.7.2002, may be referred to in this respect.
33. The Chamber of Deputies (being one of the individual houses of the Czech Republic) is a body of public power, granted with constitutional and legislative powers (arts. 15 to 53 of the Constitution). As follows from the principle of division of powers, **a body of legislative power is not authorized to surpass the powers granted to it by the Constitution, and to intervene with the constitutionally given powers of the bodies of the executive and judicial powers.** The aforesaid was expressed by the constitutional Court on 5.4.2000 in ruling no. 107/2000 Coll., in which it stated that our constitutional system is "*based on the division of state powers between the legislative, executive and judicial powers, in which the Parliament of the Czech Republic, consisting of the Chamber of Deputies and the Senate, has but legislative power, and thus lacks any executive or judicial powers*".
34. The Chamber of Deputies is therefore **not entitled to authoritatively express any conclusions on a breach of private legal relations in individual cases**, or to declare, that a breach of private legal contractual obligations occurred in its opinion, as decision making upon subjective rights and obligations

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<sup>8</sup> See ruling no. 264/2005 Coll., or ruling of the Constitutional Court of 12.4.2000, no. sp. zn. II. ÚS 559/99

in private legal relations is the exclusive authority of the judicial power (art. 90 of the Constitution), which is exercised by independent courts (art. 81 of the Constitution).

35. The claimants deem the adoption of clause II. of the resolution of the Chamber of Deputies to be an act *ultra vires* and an infringement of the constitutional order and the private legal domain of the claimants. The proclamation of the Chamber of Deputies on the breach of contractual obligations (that is, the proclamation contested by this constitutional complaint), as a state authority indeed has authentic negative consequences for the claimants. The fact that the concerned resolution of the Chamber of Deputies is respected by other state authorities, inclusive of courts, may be demonstrated by the issuance of a preliminary injunction by the District Court for Prague 1 on 16.12.2009, no. Nc 1427/2009, which imposed upon the second claimant (RPG Byty, s.r.o.) an obligation to refrain from disposing with the OKD Housing Fund.
36. The court based the reasoning of its decision on the fact that the **matter was dealt with by the Chamber of Deputies, which allegedly undoubtedly demonstrates** that the fulfillment of the concerned contractual obligation, the validity of which is the subject of arbitration proceedings, is jeopardized (see also argumentation set forth below). The preliminary injunction became enforceable upon its delivery and an appeal does not suspend this legal consequence.
37. Clearly, the Chamber of Deputies, as a body of the legislature, lacked any entitlement whatsoever to act in the given matter, i.e. a matter of an agreement of private law, and the assessment of the fulfillment of the contractual obligations set forth therein, or to adopt any resolutions thereupon. In addition, the Chamber of Deputies adopted the contested clause of the resolution, while being fully aware of its excessive conduct, as during the general debate preceding the adoption of clause II. of the resolution of the Chamber of Deputies of 3 December 2009, Deputy Radim Chytka pronounced: "***I cannot imagine, that we should vote on the resolution proposed by vice-chairman Zoaralek, that the Chamber of Deputies proclaims that the agreement was breached. For God's sake, only a court may do so, let us not rave! Should we begin to confuse the legislative, executive and judicial powers, this Chamber of Deputies shall indeed emerge very poorly. I raise an objection on the inadmissibility of such a resolution. Thank you.***" – pg. 21 of the protocol from the meeting of the Chamber of Deputies.
38. It is therefore necessary to regard the procedure undertaken by the Chamber of Deputies as unconstitutional, and as flagrantly in breach of the constitutional principle of divisions of state powers, and in violation of the fundamental constitutionally guaranteed rights of both claimants, as no state body in this country (in the case at hand one of the supreme bodies) may not attract authority, to which it is not empowered.

**Evidence:**

- *Resolution of the Chamber of Deputies no. 1506 from the 66th meeting of 3 December 2009 (Annex no. 2)*
- *Protocol from the meeting of the Chamber of Deputies dated 3.12. 2009 (Annex no. 3)*
- *Decision of the District Court for Prague 1 dated 16.12.2009, no. č.j. 33 Nc 1427/2009, on the issuance of a preliminary injunction (Annex no. 4)*

## **2. Breach of the Principle of Legality in Exercising Public Power and Enumeration of Public Pretenses**

39. As the supreme body of legislative power, the Chamber of Deputies is bound, in exercising its authority, by the principle of legality and enumeration of public pretenses set forth in art. 2 par. 3 of the Constitution and art. 2 par. 3 of the Charter of Fundamental Rights and Freedoms. Their essence is the requirement for the administration of all public power to be performed only on the basis of the law, within its limits, and in a manner prescribed by law.

40. In the opinion of the claimants, by adopting the contested clause of the resolution of the Chamber of Deputies, the Chamber of Deputies exercised its powers in breach of the said principles of legality and enumeration of public pretenses. The primary task of the Chamber of Deputies is to resolve on statutes of law, i.e. adopting positive or negative resolutions on proposed statutes. An explicit statutory legal basis or authorization must at all times exist for the adoption of a resolution in other matters. The claimants assert that the Chamber of Deputies has no support for the adoption of a statement on the occurrence of a breach of contractual obligations, in the Constitution or in any other legal regulation. The claimants consider the adoption of clause II. of the resolution of the Chamber of Deputies to be an **unacceptable and inadequate measure and an intervention with contractual relations between equal contractual parties in their private legal relations**, which constitutes an act of public power which is unfounded by the law.
41. In the opinion of the claimants, it is in its character an absolutely void act of a body, which completely lacks authority, and which in adopting it contravened its constitutional powers. In legal theory, such acts are called null acts, which are binding for no one. As expressed by the Constitutional Court, in ruling no. 107/2000 Coll. dated 5.4.2000, "*by merely declaring that an act is null and void, a quasi-legal act, which no one must observe and follow, and the dismissal of a constitutional complaint solely for this reason, as it contested only a normatively (legally) nonexistent act of the Chamber of Deputies, the Constitutional Court would not fulfill its duty as a guarantor of constitutionality and the rule of law*".
42. In a democratic state governed by the rule of law, it is entirely **inadmissible, for a supreme body of legislative power, to attract unlimited authority of other state bodies, specifically of the judicial power, and in the midst of such authority, to which it is not empowered, resolve upon private legal relations and proclaim the occurrence of a breach of contractual obligations, regardless of whether they are presented as non binding and thus causing damage to no one**. Furthermore, the resolution of the Chamber of Deputies and the "opinion" expressed therein was the basis of the legal reasoning of the District Court of Prague 1 in deciding upon the issuance of a preliminary injunction (practically, the court implicitly deducted, from the Chamber of Deputies' "proclaimed" breach of obligations, that the future fulfillment of obligations is jeopardized), by virtue of which the second claimant was significantly curtailed in exercising its ownership rights, and thus its fundamental rights arising from art. 11 par. 1 and 4 of the Charter of Fundamental Rights and Freedoms were impaired.
43. It is evident, that although the cited resolution is clearly an excessive act surpassing the authority of the Chamber of Deputies, it practically bears a substantial effect on the bodies of the executive and judicial powers, which the claimants consider to be especially significant. Another conclusion follows from the context in which the concerned matter was debated in the Chamber of Deputies. The contested resolution is not an incidental excess, but rather a clear intention of the majority of Deputies against the claimants. This may be supported by various statements made during the debate of 3.12.2009 preceding the adoption of the resolution, and also the responses to questioning of cabinet members on the same matter. And finally, the purpose of the unconstitutional activities of the Chamber of Deputies is evident from the statement of Deputy Zaorálek (quoted in full below): to put pressure on the government. Furthermore, Deputy PhDr. Lubomír Zaorálek has used the Chamber of Deputies in another context, as an instrument to relieve himself from responsibility for his statements. In this relation, the claimants would like to make note of the fact that proceedings are currently being held before the Municipal Court in Prague under no. sp. zn. 31 C 128/2009, on the protection of the good reputation of Mr. Zdeněk Bakala (a representative of the group of companies, to which both claimants belong) against PhDr. Lubomír Zaorálek, who is the vice chairman of the Chamber of Deputies and who committed several verbal offences at a press conference dated 13.10.2008 in relation to the Share Purchase Agreement and the OKD Housing Fund. In the said proceedings, Mr Zaoralek defended by claiming that he acted: "*as a Deputy of the Chamber of Deputies of the Parliament of the Czech Republic, and appeared as such at the press conference*", and thus he is

allegedly not passively legitimated in the said dispute. JUDr. Ivan Prikryl, the head of the secretariat of the chairman of the Chamber of Deputies, a witness in the said proceedings, stated the following "*I am not aware that Dr. Zaoralek was authorized by the Chamber of Deputies to hold the press conference, however I cannot exclude it.*" Thus if the court were to admit Mr Zaoralek's objection that he is not passively legitimated in the said dispute, his statements represent another extension of the conduct of the Chamber of Deputies in breach of the principles of legality and the principles of the rule of law. To summarize, the matter at hand demonstrates the *modus operandi* of the current majority of Deputies, based on the conscious rejection of the division of powers by the Chamber of Deputies.

44. As described above, the contested clause of the resolution of the Chamber of Deputies is clearly excessive of the authority of the Chamber of Deputies. The claimants though consider the contested clause of the resolution to be not only illegal, but also illegitimate, as its purpose is not the proper administration of public power, but to exert illegitimate pressure on a private person (the claimants and their owners). It is not merely an attempt to guarantee the fulfillment of the obligations arising from the Share Purchase Agreement, i.e. to compel the claimants to respect the pre-emptive rights of the tenants to the apartments in the event of their sale (whereas it should be stressed that the claimants never breached this obligation), but it is a clearly articulated effort to compel the owner to sell the apartments, without itself autonomously deciding to do so, and without having undertaken an obligation to do so. In other words, the claimants are put under pressure to surrender their property rights and justifiable interests, especially the right to own and manage the OKD Housing Fund. Moreover, the contested resolution is not an isolated act, but is one of many acts of a long-term, purposeful, and gradually escalated campaign against a private person (the claimants and their owners), for which now even the Chamber of Deputies and its constitutional authority is misused. The aforesaid may be documented by a number of acts and threats to the claimants and their owners. Among the more illustrative acts are the speech of Mr Jiri Paroubek, a Deputy and chairman of the Czech Social Democratic Party, in Ostrava on 4.9.2009, or advertisements published in *Mlada fronta DNES* on 21.8.2009 and in the *Karvina Daily* on 11.9.2009. To summarize, the contested resolution cannot be considered a proper act of the administration of public power, as it represents an escalation of illegitimate pressure applied on the claimants and their owners, by means of misusing the Chamber of Deputies and its authority. The goal is to compel the claimants to exercise their rights in a manner forced upon them, which has no support in the Share Purchase Agreement or in any other contractual provision. This causes an infringement of the rights of the claimants, among other, in breach of art. 18 of the Charter of Fundamental Rights and Freedoms in a similar fashion as in the cited decision of the European Court for Human Rights in the Russian Gusinskiy case (for details please see point 79. below), in which, similarly, the fundamental rights of the complainant were purposefully restricted with the aim of forcing a certain business transaction upon him, to which he was not bound by any contractual arrangement.
45. The contested clause of the resolution of the Chamber of Deputies must be perceived within the entire context of the resolution, including its clauses I. and III., which declares certain suggestions and requests to the government. With regard to the concept of division of powers in the Czech Constitution, it is inadmissible for the legislator to give commands to the government; a *suggestion* or a *request* are the strongest instruments the Chamber of Deputies has towards the authority of the executive power. The government is not an executive body of the parliament, but the supreme body of the executive power which is responsible to the Chamber of Deputies merely on a political level. It is not a relationship of superiority, *but liability*. In this context, a suggestion given to the executive power, on how to proceed in a certain matter vis-a-vis a person of private law, which enjoys constitutional protection (such as the right to peacefully enjoy one's property, or the right to a fair trial) is a very strong political and constitutional instruction. The said suggestion is, from the viewpoint of the executive power and its constitutional responsibility, on the limit of the principle of the division of powers. The Chamber of Deputies is suggesting a certain procedure in a matter of private law, where the state acts as a private person and as a party to a relationship of private law, however does not have an autonomous will in *its legal acts*. This otherwise obligatory component of a legal act is, in the case of the state, replaced by statutory instruction

(as the Constitutional Court stated for example in ruling no. č.j. III. ÚS 495/02); in the case of state property, set forth in the act on state property (act. no 219/2000 Coll.). However, the responsibility for any such conduct rests with the state, acting through its specifically designated body, *which is – in administering the property of the state – obliged to follow statutory commands of the law, not ad hoc instructions of a legislative body.*

46. The claimants view as a serious consequence of the contested unconstitutional measure especially the circumstance of how simply and flagrantly it eliminated the independence of judicial decision making. This is especially apparent from the decision of the District Court of Prague 1 on the issuance of a preliminary injunction, as it follows from the reasoning of the said decision, that the legal basis for the decision was not the independent consideration of the relevant facts of the case, but rather, the contested clause II. of the resolution of the Chamber of Deputies. Undoubtedly, the Chamber of Deputies is regarded as such an authority, that a court of law referred to – merely – its meeting (especially the conclusions that the Chamber of Deputies arrived at). This demonstrates that the court does not feel compelled to consider other relevant arguments in a situation, when it can refer to the conclusions of the Chamber of Deputies. It is traditional, and also amply adjudicated, that the premises for the issuance of a preliminary injunction (including pursuant to sec. 22 of act. no. 216/1994 Coll., on Arbitration Proceedings and the Enforcement of Arbitral Awards) are concrete factual findings, which indicate a possible threat to a future legal decision. Yet, the court considered such a finding to be the sole fact that the Chamber of Deputies dealt with the matter. Whereas all relevant arguments were presented by the claimants to the District Court for Prague 1 prior to the issuance of the preliminary injunction – please see the pronouncement of the defendants [i.e. the claimants hereunder], on the action of the plaintiff's petition for a preliminary injunction dated 14.12.2009. The court though ignored all the arguments presented by the defendants [i.e. the claimants hereunder] and the only factor it considered in determining the fulfillment of the condition of a threat to the future enforcement of an arbitral award and for the issuance of a preliminary injunction against the second claimant, was the resolution of the Chamber of Deputies, and further, it did so in excess of the plaintiff's (the Ministry of Finance) claim.
47. An unreserved subjection to the resolution was displayed also by bodies of the executive power (specifically in respect of clauses I. and III.).
- (i) On the basis of the contested resolution of the Chamber of Deputies on the breach of the Share Purchase Agreement, the minister of finance, Ing. Eduard Janota, immediately changed the standpoint of the Ministry of Finance and served the first claimant a request on 6.1.2010, for the payment of a contractual penalty of CZK 30,000,000 on the basis of the Share Purchase Agreement. Nevertheless, at the meeting of the Chamber of Deputies dated 3 December 2009, he proclaimed that "*the Ministry of Finance did not incur any damage and concurrently, according to information available to the Ministry of Finance... **the continuing obligations of the purchaser from the agreement were not breached.***" In the letter, he stated the following: "*In this relation, we note that the Chamber of Deputies of the Parliament of the Czech Republic stated, in its resolution no. 1506 adopted at its 66<sup>th</sup> meeting of 3 December 2009, that the **de-merger of OKD, a.s. and the spin-off of the housing fund to RPG Byty, s.r.o**, constituted a breach the obligations contained in the Agreement and further requested of the government that the Ministry of Finance enforces all applicable contractual penalties.*"
- (ii) In addition, the minister of finance, Ing. Eduard Janota filed, on the basis of the resolution of the Chamber of Deputies, the above mentioned petition for the issuance of a preliminary injunction, notwithstanding the fact that at the meeting of the Chamber of Deputies dated 3 December 2009, he stated that "*In the case at hand, the Ministry of Finance cannot successfully file an action against the owner of the apartments, RPG Byty, s.r.o. regarding the restriction to dispose with the said apartments, as there is no contractual relation between the owner of the apartments and the*

*Ministry of Finance, on the basis of which or from which such an action could be filed. In other words, the Ministry of Finance cannot file a petition for the issuance of a preliminary injunction against the owner of the apartments RPG Byty, s.r.o., which would prevent possible sales of the apartments, because it has no legal relation in this matter with RPG Byty, but only with RPG Industrie, s.r.o. [Note of claimants: correct name is RPG INDUSTRIES SE]."*

48. As follows from the above mentioned, the minister of finance proceeded to perform the above described actions, regardless of the fact that until the adoption of the contested resolution of the Chamber of Deputies, he did not believe there is any reason to do so. These actions of the minister of finance were undertaken not on the basis of his own best judgment and on the evaluation of the given circumstances, or even in contradiction thereto. Therefore such conduct in itself may be considered as unconstitutional, as the government and its particular ministers are to act on the basis of their own constitutional responsibility, and are undoubtedly obliged, in exercising their authority, to employ their own best judgment, and to only adopt measures or perform acts which they consider justifiable, that is, if they arrive to the conclusion that that the conditions for proceeding in a certain manner given by the law are fulfilled (also see point 45.). Even in a system of parliamentary democracy and the division of powers, based on governmental liability towards the Chamber of Deputies, the members of the government are not by any means obliged, or even are not entitled, to follow the instructions or requests of the Chamber of Deputies, without using their own best judgment, especially in cases, when such instructions or requests are adopted by the Chamber of Deputies in excess of its authority, and in breach of the Constitution. From the viewpoint of the division of powers principle, a situation where the executive power would unconditionally adhere to the will of the parliament, regardless of the same being formally expressed as a recommendation, would in fact mean its abandoning, as the parliament would practically govern, and the government would not be subject to its constitutional liability to the parliament.
49. The Chamber of Deputies thus attracted the authority (in all three clauses of the resolution, to resolve upon private legal relations merely by the significance of its mandate, without having holding any proper hearing on the matter and without having sufficient legal support for arriving to any conclusions whatsoever. The filed petition for issuance of a preliminary injunction by the District Court for Prague 1, and the subsequently issued preliminary injunction issued on the basis thereof, as well as the request of the Ministry of Finance for payment of the contractual penalty, clearly demonstrate, in the opinion of the claimants, the manner in which the resolution of the Chamber of Deputies is interpreted by third parties, including other public authorities, and at the same time suggests, how the resolution of the Chamber of Deputies may be viewed in the future, if not annulled by the Constitutional Court. Most notably, the matter at hand demonstrates how simply the proper administration of state power in a constitutionally adequate manner may be replaced in Czech public life by informal political authority.

- Evidence:**
- *protocol from the meeting of the Chamber of Deputies dated 3.12.2009 (Annex no.3)*
  - *resolution of the Chamber of Deputies no. 1506 from the 66th meeting of 3 December 2009 (Annex no. 2)*
  - *decision of the District Court for Prague 1 dated 16.12.2009, no. č.j. 33 Nc 1427/2009, on the issuance of a preliminary injunction (Annex no. 4)*
  - *request of Minister of Finance dated 6.1.2010 č.j. 45/99327/2009 (Annex no. 12)*
  - *Interpellation (Annex no. 17)*
  - *Statement of defense of PhDr. Lubomir Zaoralek on personal rights action dated 4.8.2009 (Annex no. 18);*
  - *Protocol from first hearing of court proceedings dated 19.11.2009 (Annex no. 19)*
  - *Recording of the speech of Jiří Paroubek dated 4.9.2009 (on CD), which was published at [http://www.cssd.cz/inews/video/tezce-zkousenemu-moravskoslezskemu-kraji-pomuzeme\\_](http://www.cssd.cz/inews/video/tezce-zkousenemu-moravskoslezskemu-kraji-pomuzeme_) (Annex no. 20)*

- Advertisement published in *Mlada fronta DNES* on 21.8.2009 (pg. 10) (Annex no. 21)
- = Advertisement published in *Karvina Daily* on 11.9.2009 (pg. 12) (Annex no. 22)

## B.

### Violated Fundamental Rights of Claimants

#### 1. Violation of the Right to the Protection of one's Good Reputation and Name

50. The claimants enjoy the right to the protection of their good reputation and name. The claimants base this assertion on the notion that legal entities may seek protection against those rights and freedoms, which by definition pertain not merely to physical persons, but also to legal entities. Legal doctrine shares this opinion, and the Constitutional Court reached the same conclusion in its plenary ruling no. sp. zn. Pl. ÚS 15/93, in which it stated, that the catalogue of protected rights or freedoms is naturally narrower for legal entities, however "*one can derive the state's will to offer protection also to legal entities, with regard to fundamental rights and freedoms.*" (stated in relation to the Convention for the Protection of Fundamental Rights and Freedoms). Similarly, in ruling no. sp. zn. ÚS 201/01, it stated that: "*constitutionally guaranteed rights and freedoms set forth in the Charter and in the Constitution pertain also to legal entities*", if this is given by their nature. Undoubtedly, the nature of the right to protection of one's good reputation and name, as is granted to natural persons by art. 10 par. 1 of the Charter of Fundamental Rights and Freedoms, allows the provision of the same protection to legal entities, that is, to the claimants. Legal literature specifically states that although legal entities do not enjoy the right to "human dignity", they are clearly vested with the rights to protection of their name, reputation (goodwill), and others.<sup>9</sup> The said rights have been guaranteed to legal entities also by the European Court of Human Rights through its judgments.<sup>10</sup>
51. Furthermore, the said conclusion may be supported also by the ruling of the Constitutional Court dated 19.11.2009, no. sp. zn. III.ÚS 1960/09, in which the Constitutional Court heard a constitutional complaint filed by a legal entity for reason of an asserted violation of the fundamental rights and freedoms, among other in the sense of art. 10 par. 1 of the Charter of Fundamental Rights and Freedoms. Although the Constitutional Court rejected the constitutional complaint, it did so on the grounds of its clear unfoundedness, not for reason of its inadmissibility, that is, not because it reached the conclusion that a legal entity does not enjoy the right to the protection of its good reputation and its name, and therefore it may not seek protection of this constitutional right by means of a constitutional complaint.
52. In this relation, for example the German Constitutional Court, e.g. on 29.8.2007 in case no. sp. zn. 1 BvR 1125/07 ruled that even "*a business person, which is a legal entity of the private law, may seek, in the exercising of its professional activities, protection against incorrect information pursuant to art. 12 par. 1 of the Constitution*".<sup>11</sup>
53. In the statement of clause II. of the resolution of the Chamber of Deputies, the Chamber of Deputies expressed that a breach of contractual obligations occurred, and claims that such breach was caused by the demerger of OKD, a.s. and the spin-off of the OKD Housing Fund into the real estate company of the second claimant. Albeit the text of the said clause does not explicitly specify which contractual obligations are being referred to, this clearly follows from the preceding debate held in the Chamber of

<sup>9</sup> Pavlíček and co-authors.: Commentary on the Charter, pg. 109, see also ruling sp. zn. I. ÚS 201/01. Although the Constitutional Court ruled that some fundamental rights and freedoms do not apply to legal entities (see resolution sp. zn. O. ÚS 282/97), however in the said case dealt with the right to information on the environment, which in its nature is specific in that its purpose is to protect living organisms and therefore only natural persons.

<sup>10</sup> Ruling of the European Court of Human Rights in Wieser And Bicos Beteiligungen GMBH. V. dated 16.1.2008.

<sup>11</sup> Viz str. 5: „Es hat jedoch zugleich aufgezeigt, dass auch einem als juristische Person des Privatrechts organisiertem Unternehmen in seiner beruflichen Betätigung durch Art. 12 Abs. 1 GG ein Schutz vor inhaltlich unzutreffenden Informationen zukommen kann.“

Deputies on item no. 156 of the meeting of the Chamber; i.e. the "Government Report on Current Status of OKD Housing Issue", from which it is apparent, that reference is made to the OKD share purchase agreement from year 2004, to which the first claimant is a party, being the legal successor of KARBON INVEST.

54. The claimants believe, that their right to the protection of their good reputation and name, guaranteed to them by art. 10 par. 1 of the Charter of Fundamental Rights and Freedoms and by international conventions, to which the Czech Republic is a party, was violated. The violation is caused by the contested clause II. of the resolution of the Chamber of Deputies on the alleged breach of contractual obligations arising from the Share Purchase Agreement, which was adopted by a legislative body in reaction to the results of an audit of the fulfillment of the contractual obligations under the Share Purchase Agreement, with which the Chamber of Deputies was familiarized at its meeting of 3 December 2009 by the Minister of Finance. However, the results of the said audit confirmed, that **for the entire restriction period, the obligations of RPG INDUSTRIES SE (the first claimant) arising from the Share Purchase Agreement, which were the subject of the auditor's review, were duly fulfilled**. The audit did not examine the question of the de-merger of OKD, a.s., however as a result of the debate on its conclusions, the Chamber of Deputies adopted clause II. of the resolution of the Chamber of Deputies, by means of which it "politically" decided that other contractual obligations were breached, without even specifying which obligations.
55. Incidentally, the Minister of Finance himself stated before the entire Chamber of Deputies, that "*the Ministry of Finance did not incur any damage and concurrently, according to information available to the Ministry of Finance... the continuing obligations of the purchaser from the agreement were not breached in relation to the housing fund. RPG Industries declared that it shall continue to fulfill its obligations from the agreement, and the obligations from the agreement continued to be fulfilled by RPG Industries*". By stating the aforementioned, the Minister of Finance implied that he does not deem the Share Purchase Agreement was breached.
56. It is an obligation of the state and its bodies to conduct themselves in an impartial manner towards all persons of private law, and to protect them from defamatory, discriminatory, misrepresented and false statements. The Chamber of Deputies, although enjoying the right to "*express its will and its moral and political views in a manner, which it considers, within the limits of general legal principles, to be appropriate and adequate*",<sup>12</sup> it is not entitled to assess the fulfillment or breach of obligations of parties to contract of private law, that is of equal persons, and to publicly make critical statements of one party (and thus privileging the other).
57. The conduct of the Chamber of Deputies sharply contrasts with this postulate of impartiality. In the case at hand, the Chamber of Deputies did not maintain the position of a neutral "observer" of the ongoing debate on legal relations of private law preceding the adoption of the contested resolution, but contrarily, intervened with the said legal relations of private law by means of an unlawful resolution. In addition, it expressed conclusions completely out of context from what was presented and explained during the said debate by the relevant bodies (and further, without materially supporting its conclusions whatsoever), which damages the good reputation and name of both claimants.
58. The effect on the public caused by the mere fact that the Chamber of Deputies resolved upon a certain manner from its position of public power, should be emphasized. The said effect occurs, regardless of whether the Chamber of Deputies had the necessary authority or not; or respectively, regardless of the legal nature of the act. The general public does not commonly assess these legal aspects, but does though perceive, that the supreme legislative body arrived at certain conclusions, which are then generally

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<sup>12</sup> Ruling no. sp. zn. Pl. ÚS 14/94

accepted, which is best demonstrated by the following news reports published in the media on some of the clauses of the resolution of the Chamber of Deputies:

- EURO of 3.12.2009: "*The legislators clearly expressed, that they shall insist in the fulfillment of the beneficial pre-emptive right. 'Our goal is to show, that, the rights of tenants guarantees by the state is not weaker, that of a strong multinational corporation.'* said chairman of KDU-ČSL, Cyril Svoboda."
- internet daily prvnizpravy.cz of 3.12.2009: "*The breach of the former agreement was simply a display of arrogance towards law and order. Jiří Karbol added: ,I am aware that the apartments serve thousands of physically disabled citizens, retired miners, and families with children, and that is why I am glad, **that today, hope was returned to those** whom are relying that they will be able to purchase their apartments in the future.'*"

59. For any entrepreneur, its good reputation and name are a decisive factor. The claimants, as members of a large multinational group, have a multitude of business relations with third parties, for which the ability of the claimants to fulfill their contractual obligations is an essential aspect of their reputation. The claimants therefore naturally have a justified interest in maintaining and developing their good reputation and name. Undoubtedly, if a supreme state body declares that that any person has breached its contractual obligations, it shall at least be considered a significant indication for many of its business partners and the public of the untrustworthiness of that person, and that it is not able to meet its contractual obligations. An "assessment" by the supreme legislative body further bears an immense factual influence. The contested clause II. of the resolution of the Chamber of Deputies on the occurrence of a breach of contractual obligations therefore infringes the good reputation and name of the first claimant (as the legal successor of KARBON INVEST), to which the breach of obligations is in fact attributed, which is allegedly in breach of contractual obligations, which clearly follows from the context, and simultaneously the good reputation and name of the second claimant, which was specifically named in clause II. of the contested resolution. Further, the Chamber of Deputies implicitly declares in the contested resolution, that the second claimant did not acquire the OKD Housing Fund rightly, which leads to the assertion, that the second claimant is exercising its property rights unlawfully, on the basis of an unlawful act, attributable to the first claimant.
60. The resolution was posted on the web pages of the Chamber of Deputies<sup>13</sup> to date continues to be fully available to the public. Furthermore, various articles were published in the media which expressly cited the resolution, making the violation all the more severe.

- Evidence:**
- Resolution of the Chamber of Deputies no. 1506 from the 66th meeting of 3 December 2009 (Annex no. 2)
  - Protocol from the meeting of the Chamber of Deputies dated 3.12.2009 (Annex no. 3)
  - Final auditor's report from November 2009 (Annex no. 8)
  - Article from EURO "Ministry to ask court for injunction in OKD apartments affair" dated 3.12.2009 (Annex no. 10)
  - Article "KDU-ČSL in favor of preferential purchases of tenants" from internet news server prvnizpravy.cz, dated 3.12.2009 (Annex no. 11)
  - Article "OKD Apartments in the Chamber: Deputies Adopted Two Resolutions" dated 3.12.2009 from [www.ct24cz](http://www.ct24cz) (Annex no. **Error! Reference source not found.**)
  - Article "OKD Housing Issue: Deputies requested Janota to seek a court order", dated 3.12.2009 from [www.ihned.cz](http://www.ihned.cz) (Annex no. **Error! Reference source not found.**)

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<sup>13</sup> See <http://www.psp.cz/sqw/hp.sqw?cu=1506&cs=&k=99&ido=169&td=8>

## **2. Breach of the Right to a Fair Trial, to Equal Treatment in Legal Proceedings, and the Right to One's Lawful Judge and Judicial Protection**

61. The right to a fair trial means, among other, that one has the right for one's case to be heard publicly, without undue delays, in one's presence, by an independent and impartial court established by law (and in given cases, before a different body authorized to decide upon civil rights and obligations), in order for one to have the opportunity to express itself with regard to all presented evidence, whereas no one is to be deprived of one's lawful judge, and all parties are equal in the proceedings. As follows from the rulings of the Constitutional Court and the European Court for Human Rights, this right pertains also to legal entities.<sup>14</sup>
62. The clause of the resolution of the Chamber of Deputies contested by this constitutional complaint is not an act issued in a formalized decision making procedure (that is, in judicial or administrative proceedings), which would guarantee the rights to a fair trial (including the right to express oneself), to equal treatment in proceedings, the right to one's lawful judge (which the Chamber of Deputies, clearly, is not), and to judicial protection. Its content does though in fact constitute a decision on the merits of an individual case of private law, the bearer of which is a body of the legislative power, which is entirely unacceptable.
63. In the Czech Republic, judicial power in the sense of art 2 par. 1 and art. 81 of the Constitution, rests entirely with independent and impartial courts of law, and the Chamber of Deputies may thus not, as a legislative body, in any manner attract the authority of the courts and adopt – or anticipate– conclusions stating that the private contractual obligations of any person were or were not breached in a certain case. According to stabilized and consistent rulings of the Constitutional Court, one of the purposes of the division of state powers is to grant the power to decide over individual cases solely to the courts. The public anticipation of a court decision by another state authority, specifically by a political body, violates, in the opinion of the claimants, their right to a fair trial.
64. The provision of art 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms states even more lucidly that: "*Everyone is entitled to a fair and public hearing within a reasonable time by an **independent and impartial tribunal established by law, which shall decide upon its civil rights or obligations...***". In this relation it is appropriate to the question of practical impartiality of the courts, addressed by the European Court for Human Rights in the Ukrainian case *Sovtransavto*, **the subject of which were interventions of the Ukrainian state authorities in national proceedings** on the highest political level, **which uncovered the lack of respect for the basic role of the courts.**<sup>15</sup>
65. In the case at hand, the Chamber of Deputies attracted the authority to make judgments upon private legal relationships and to issue declarations in a fashion typical for the judicial power. The contested statement of clause II. of the resolution of the Chamber of Deputies is however not the result of a judicial proceeding to which the claimants (or at least one of them) were a party, and in which they could bring forward their views and defend themselves, or a proceeding in which a lawful judge, appointed as such by law, heard and ruled upon the matter. The Chamber of Deputies is indeed not such a lawfully appointed judge, yet it adopted a resolution in an entirely individual matter of private law. In addition, it should not be overseen that while courts are bound, in exercising their decision making authority, only by statute and international conventions, which form a part of Czech law (art. 95 par. 1 of the Constitution), the Chamber

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<sup>14</sup> See for example ruling no. sp. zn. I. ÚS 1562/09

<sup>15</sup> See judgment of European Court for Human Rights in *Sovtransavto Holding v. Ukradne*, dated 25.7.2002  
<http://www.echr.coe.int/eng/Press/2002/july/Sovtransavtojudypress.htm>

of Deputies is driven by the interests of the state. Further, the contested clause II of the resolution of the Chamber of Deputies lacks any reasoning whatsoever, or at least an indication of which provisions of the Share Purchase Agreement were allegedly breached. Looking upon it as a legal decision, such a resolution may be considered as completely confusing as it conflicts with the opinions presented in the debate, on the basis of which it was adopted. From this perspective, the contested resolution of the Chamber of Deputies in its clause II. is not reviewable.

66. The decision of the District Court for Prague 1 on the issuance of a preliminary injunction no. 33 Nc 1427/2009 described above may be again mentioned, which forbids the second claimant from making disposals not only with the apartments of the former OKD, but also with apartment houses containing apartments of the former OKD, should it be in breach of the Share Purchase Agreement. It clearly follows from the reasoning of the preliminary injunction that the court was not impartial in making its decision, but rather felt bound by the resolution of the Chamber of Deputies. The resolution thus expelled the independence of the court and directly infringed the rights of the second claimant to a fair trial. The second claimant notes that the said decision may be appealed, however a preliminary injunction has immediate legal effect upon its issuance and delivery, and an appeal against the decision does not have a suspensive effect on the said legal consequences.
67. Therefore, the claimants consider clause II. of the resolution of the Chamber of Deputies to be a violation of their constitutionally guaranteed rights to a fair trial, to equal treatment in legal proceedings, to one's lawful judge, and judicial protection.

**Evidence:** - *Decision of the District Court for Prague 1 dated 16.12.2009, no. č.j. 33 Nc 1427/2009, on the issuance of a preliminary injunction (Annex no. 4)*

### **3. Violation of the Right to Own Property and against Interventions with the peaceful enjoyment of one's property, and breach of the Freedom of Trade**

68. The Charter of Fundamental Rights and Freedoms sets forth in art. 11 par. 1 as a fundamental right: "*Everyone has the right to own property. The ownership right of each owner has the same content and enjoys the same protection.*" Pursuant to art. 1 of the supplemental protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms (see schedule no. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms) each natural person and legal entity has the right to peacefully enjoy its property. The claimants are convinced that the contested clause II of the resolution of the Chamber of Deputies violated not only their personal rights, but also their property rights, specifically the right to own property, the right to peacefully enjoy one's property and to freely trade.
69. The claimants are properly established and existing legal entities and business corporations. In addition, the OKD Housing Fund is a key part of the second claimant's business assets. The respect and protection of peaceful ownership, regardless of the nature of the person enjoying the right of ownership, is one of the basic characteristics of democracy and the rule of law.<sup>16</sup> The right of ownership guaranteed by art. 11 of the Charter of Fundamental Rights and Freedoms includes the right to hold, use, benefit from, and dispose of one's property.<sup>17</sup> Therefore as mentioned above, the contested clause II of the resolution of the Chamber of Deputies in its consequences indicated, that the second claimant acquired the OKD Housing Fund (i.e. its property) unlawfully, which means, in other words, by virtue of unlawful behavior attributable to the first claimant. Political pronouncements on breaches of contractual obligations must also be considered as capable of infringing the peaceful enjoyment of property. The claimants therefore

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<sup>16</sup> Ruling sp. zn. III. ÚS 462/98

<sup>17</sup> Sec. 123 of the Civil Code

find the said clause to infringe their right to own property, or respectively, their right to peacefully enjoy their property.

70. As derived above, other state authorities of the executive power (the Ministry of Finance) as well as the general courts feel compelled to adhere to the contested statement of the resolution of the Chamber of Deputies, and consider it to be a legally relevant and binding decision on a specific matter. The foregoing follows especially from the decision of the District Court for Prague 1 on the issuance of a preliminary injunction, which ordered the second claimant to refrain from making disposals with the OKD Housing Fund, as the court considers the adoption of the contested clause II of the resolution of the Chamber of Deputies as a possible threat of the future enforcement of a judicial decision – that is an arbitral award. The claimants are aware, that they cannot request the annulling of the preliminary injunction, as it is subject to appellate hearings before the general courts. Yet they would like to again stress the fact that the decision to issue a preliminary injunction in its reasoning is derived from the statement contained in clause II of the resolution of the Chamber of Deputies, which is the subject of this constitutional complaint. Because of the clear causality between the two acts, the claimants believe that that a violation of their constitutionally guaranteed rights and freedoms occurred by virtue of the adoption of the contested clause II of the resolution of the Chamber of Deputies.
71. If the state expresses itself in an offensive manner in respect of any person, and in addition, if the person in question is an entrepreneur, the same has far-reaching proprietary consequences. Therefore it cannot be ignored that that a declaration of the supreme legislative authority in the country on the occurrence of a breach of contractual relations by a certain entity may have a specific reaction of the entity's business partners and other entities involved with the said entrepreneur (for example withdrawal from negotiations on the conclusion of contracts, or the provision of a loan, and otherwise), and may therefore also infringe the freedom of trade pursuant art. 26 of the Charter of Fundamental Rights and Freedoms of such an entrepreneur. The preliminary injunction issued against the claimants, as well as the request of the Minister of Finance to pay the contractual penalty demonstrate this. The claimants refer the Court to the above mentioned for further reasoning.

## V.

### INADEQUACY OF THE MEASURE OF THE CHAMBER OF DEPUTIES

72. The claimants consider the contested clause II. of the resolution of the Chamber of Deputies as a **flagrant and evidently inadequate** infringement of their constitutionally guaranteed fundamental rights and freedoms and the basic principles of the rule of law **having such an intensity, which calls for its annulment**, as it does not withstand in the light of tests of adequacy applied by the Constitutional Court in similar cases.<sup>18</sup>
73. The claimants believe that in a situation, where the state, as one of the parties of the pending disputes of private law, is misusing instruments of public power and attempting to unconstitutionally use the resolution of the Chamber of Deputies to achieve its own interests in the private domain. Incidentally, this follows from the open statement of the vice chairman of the Chamber of Deputies Lubomir Zaoralek, during the general debate of the meeting of the Chamber of Deputies dated 3 December 2009, which preceded the adoption of the contested clause of the resolution of the Chamber of Deputies. In reaction to the speech of Deputy Radim Chytka, who said that it is not possible to hold a vote on whether a contract was breached, Mr. Zaoralek proclaimed: ***"I am convinced that this standpoint, if expressed by the Chamber, shall put pressure on the government, to respect the fact that the opinions which it has available, are very problematic, and should act accordingly."*** (pg. 21 of the protocol from the meeting of

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<sup>18</sup> Se ruling no. sp. zn. Pl. ÚS 43/93, II. ÚS 1328/07, I. ÚS 2477/08 and many others.

the Chamber of Deputies). The means employed to reach the said goal are neither legitimate, nor endorsed by law, and is, from the perspective of constitutional law, fully unacceptable.

74. The claimants further assert, that the elected means is capable of reaching the desired effect, as the character and "power" of an "opinion" of the Chamber of Deputies as a body of public power derived from the will of the people is evident in comparison with decisions or conclusions expressed by of the bodies of public authority.
75. Although the Minister of Finance of the CR publicly declared that (i) "a breach of contractual obligations from the agreement in respect o the housing fund" did not occur, and (ii) "cannot file a petition for issuance of a preliminary injunction against the owner of the apartments, RPG Byty, s.r.o., which would block the possible sales of apartments, as it does not have any legal relation with RPG Byty", yet he filed the application for the issuance of a preliminary injunction against the claimants on behalf of the Ministry of Finance and served the first claimant a request for the payment of a contractual penalty, as it is clear that he did so solely on the basis of the resolution of the Chamber of Deputies.
76. Undoubtedly, the resolution of the Chamber of Deputies was the legal basis for the decision of a court and was further used by various media (which serves as the most effective means for influencing and forming public opinion) , and other parties. It would be at least inadequate from the perspective of the effective protection of rights, which were breached by the resolution of the Chamber of Deputies, if the claimants could not request the annulment of the contested clause of the resolution and would have to in all cases, when the resolution would be taken as the legal basis for any decision in any proceedings, to seek review in individual cases.
77. The claimants view the contested statement of clause II. of the resolution of the Chamber of Deputies to clearly be an instrument of misuse of state power, and simultaneously, an instrument for increasing the state's prospects of success in a pending dispute or in future disputes conducted by a state body, by defaming the counterparty in a specific manner and by using means which pertain only to the state (that is, use of state power).
78. The Constitutional Court previously adopted a standpoint in a case, where the state misused its instruments of public power to enhance its position in a civil dispute of private law. The said case concerned with the criminal authorities, however it is not decisive, whether the principle of equal treatment in proceedings is attacked by the executive, or legislative powers. In ruling no. c.j. II. ÚS 789/06 the Court stated that: *"It must be noted, that the state is the defendant in certain civil cases in which the claimant represents his client. In such proceedings, the state is party with equal rights and in an equal position to its counterparty. To defend its rights, it is supplied personally and financially from the state budget. However if, concurrently with the said proceeding, criminal proceedings are being commenced, whether in the stage of investigation, prior to the prosecution of a specific person, it logically leads to the presumption, that **the state is attempting to enhance its procedural position, at least by gaining additional information through the criminal investigation authorities and other bodies of power, if it is not a direct attempt to daunt the other party of the proceedings. Such actions are entirely unacceptable in democratic society and are condemnable**"* (highlighted by claimants).
79. In this relation the claimants also refer to the decision of the European Court for Human Rights in the Gusinskiy case, in which the European Court for Human Rights ruled as follows: *"the Court's opinion, it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies. The facts that Gazprom asked the applicant to sign the "July Agreement" when he was in prison, that a State Minister endorsed such an agreement with his signature, and that a State investigating officer later implemented it by dropping the charges, insistently suggest that*

*the applicant's prosecution was used to intimidate him.*"<sup>19</sup> According to the European Court for Human Rights, such a process clearly led to a violation of the fundamental rights of the plaintiff, which can be interpreted as an attempt to damage the targeted entity by means of an unlawful violation of its fundamental rights employing instruments of public power with the objective of achieving a certain result desired by the state. Similarly, in the cases at hand, the resolution of the Chamber of Deputies was clearly motivated by the particular political interests to achieve a specific arrangement of private legal relations connected to the Share Purchase Agreement.

80. The claimants are convinced that clause II of the resolution of the Chamber of Deputies, which is clearly in breach of the fundamental principles and pillars of the rule of law, such as the division of powers, the principle of legality and enumeration of public pretenses, and cannot, as a matter of principle, be regarded as necessary in democratic society (as it may be achieved by other means), nor an adequate intervention with fundamental rights and freedoms, and is further inadequate within the general meaning of the word.

81. The Constitutional Court therefore should, on the basis of all the above reasons, proceed to annul clause II of the resolution of the Chamber of Deputies, among other, with reference to its ruling no. sp. zn. II. ÚS 559/99 from 12.4.2000, by which it annulled part II. of a resolution of the Chamber of Deputies dated 13.10.1999 no. 457 with the following reasoning: "*Part II, while it is a null act, is being annulled for a breach of constitutional powers, especially articles 8 and 15 of the Constitution. Otherwise it would create a undesired and unbearable influence on the legal conscience of society, especially with regard to notions on the authority of the Parliament.... The point is that no authority in this country, albeit one of the most supreme state bodies, may not attract authority, to which it is not empowered. That would be a breach of the principles of the rule of law: no one may intervene with the rights and freedoms of another, whether a natural person, legal entity or self governing body, or otherwise, in another manner, than to protect the law, solely in a manner prescribed by law. This is the ratio legis behind all the present thoughts on the possibility to annul the contested resolution of the Chamber of Deputies*".

**Evidence:** - *interrogation of the submitter of the proposal of the contested statement of clause II of the resolution of the Chamber of Deputies, Mr Lubomir Zaoralek, the vice chairman; residing in Ostrava 8 – Poruba, Svojsíkova 1589/9, Postal Code: 708 00, mailing address: Chamber of Deputies of the Parliament of the Czech Republic, Sněmovní 4, 118 26 Prague 1 – Malá Strana*

## VI. CLAIMANTS' REQUEST FOR JUDGMENT

With regard to the above mentioned, the claimants request that the Constitutional Court of the Czech Republic issues a

### *r u l i n g,*

in accordance with sec. 82 par. 1, par. 2 subpar. a), and par. 3 subpar. a) of the Constitutional Court Act, by means of which it shall,

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<sup>19</sup> See *Gusinskiy v. Russia*, European Court of Human Rights, 19 May 2004: „*In the Court's opinion, it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies. The facts that Gazprom asked the applicant to sign the "July Agreement" when he was in prison, that a State Minister endorsed such an agreement with his signature, and that a State investigating officer later implemented it by dropping the charges, insistently suggest that the applicant's prosecution was used to intimidate him*“.

- 1) **s a t i s f y** this constitutional complaint;
- 2) **p r o n o u n c e**, that the statement of clause II of the resolution of the Chamber of Deputies of the Parliament of the Czech Republic no. 1506 adopted at the 66th meeting of 3 December 2009 breaches:
  - the principle of division of powers in the sense of art. 2 par. 1 of the Constitution of the Czech Republic,
  - the principle of legality of public power and enumeration of public pretenses in the sense of art.2 par. 3 of the Constitution and art. 2 par. 2 of the Charter of Fundamental Rights and Freedoms,
  - the right of the claimants to the protection of their good reputation and name, pursuant to art. 10 of the Charter of Fundamental Rights and Freedoms and art. 8 and art. 10 par. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and art. 17 of the International Covenant I;
  - the right of the claimants to a fair trial, to equal treatment in proceedings, to their lawful judge, and to judicial protection in the sense of art. 36 par. 1 and 2, art. 37 par. 3 and art. 38 par. 1 and 2 of the Charter of Fundamental Rights and Freedoms, art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 47 of the EU Charter, and art. 14 par. 1 of the International Covenant I;
  - the right of the claimants to own property pursuant to art. 11 of the Charter of Fundamental Rights and Freedoms and art. 17 of the EU Charter, respectively the right to the protection against the peaceful enjoyment of their property pursuant to art. 1 of the Supplemental Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the freedom of trade pursuant to art. 26 of the Charter of Fundamental Rights and Freedoms and art. 16 of the EU Charter; and
- 3) **a n n u l** the statement of clause II. of the resolution of the Chamber of Deputies of the Parliament of the Czech Republic no. 1506 adopted at the 66th meeting dated 3 December 2009.

With respect to the fact that the claimants are of the opinion that this constitutional complaint in its significance substantially surpasses their own interests, they concurrently **request the Constitutional Court grants this constitutional complaint priority**.

RPG INDUSTRIES SE  
RPG Byty, s.r.o.