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# Anti-corruption enforcement in CEE countries – Is it moving in the right direction?

By Jitka Logesová and Kristýna Del Maschio

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Corruption has long been viewed as a standard part of the political and social life and culture in the countries of Central and Eastern Europe (CEE), due in good part to their communist past. For example, one of the manifestations of the communist legacy is that whistleblowing has long been and still is considered by many as a negative thing, which connotes the idea of an “informant.” The most famous Czech whistleblower, Libor Michálek, lost his job in connection with bringing attention to corruption at the Czech National Property Fund.<sup>1</sup> A major problem continues to be the very close symbiosis of politics and business, which creates a very good environment for corruption and related offences such as fraud, misuse of EU funds, etc.<sup>2</sup>

However, with the help of various international organisations, such as the OECD and Council of Europe, calling for the implementation of anti-corruption legislation into national legal systems – as well as the growing discontent of civil society with the level of corruption – we can see that things have been changing lately. A good example is the recent demonstrations in Romania, where mass protests took place throughout the country, triggered by an emergency government decree that would have decriminalised certain types of corruption. While the fight against corruption in CEE countries seems to be advancing – through the adoption and enforcement of anti-corruption legislation – there is still a long road ahead.

The purpose of this article is to introduce the main legislative instruments that can be leveraged to effectively fight against corruption and also to map their existence (or nonexistence) and level of enforcement in the national legal systems of some CEE countries, namely the Czech Republic, Slovakia, Poland, Hungary, Bulgaria and Romania.

1 Nicolescu-Waggonner, C. (2016): *No rule of law, no democracy: conflicts of interest, corruption, and elections as democratic deficits*. Albany: State University of New York Press, pp. 112-113.

2 Stanislav Mečl in an interview for Czech Radio: [rozhlas.cz/plus/interviewplus/\\_zprava/soud-posle-ratha-znovu-do-vezeni-muze-mu-ale-snizit-trest-rika-advokat-mecl-1732730](https://www.rozhlas.cz/plus/interviewplus/_zprava/soud-posle-ratha-znovu-do-vezeni-muze-mu-ale-snizit-trest-rika-advokat-mecl-1732730)



## Perception of corruption in CEE

The latest Corruption Perceptions Index published by Transparency International, which was released at the beginning of 2017 and surveyed 176 countries and territories on perceived levels of corruption (0 being highly corrupt, while 100 stands for very clean), shows that more than two-thirds of these countries still rank below the midpoint on the scale, with the global average score being 43, “indicating endemic corruption in a country’s public sector”, according to the introduction to the Index.<sup>3</sup>

As regards CEE countries, only Poland, the Czech Republic and Slovakia scored above the 50-point mark; most others are still tackling serious corruption problems. Except for Romania, whose score and rankings improved slightly in 2016 compared with 2015, all other countries across the region faced stagnation or even setbacks in their anti-corruption efforts. According to Transparency International, CEE countries still have numerous high-profile corruption scandals that often go unpunished, which creates general public discontent and mistrust of the political system<sup>4</sup>. The dearth of regulations on lobbying then often helps create an environment for companies, networks or individuals to unduly influence both institutions and the lawmaking process, allowing them to shape policies to their own interests. Along with other indicators, such as the lack of transparency in public procurement procedures and insufficient progress in implementing anti-corruption legislation in most CEE countries, the overall perceived level of corruption in the region remains relatively high.

According to the latest EU Anti-Corruption Report, which was published in 2014, the sectors most vulnerable to corruption among EU member states are mainly construction, energy, defence and healthcare. This is true also for CEE countries; this is primarily due to these sectors typically being linked to public procurement – an area prone to corrupt practices since it involves the allocation of public funds. Moreover, CEE countries often lack sector-specific strategies to tackle corruption in these sectors. Another sector that falls within this category is IT services.

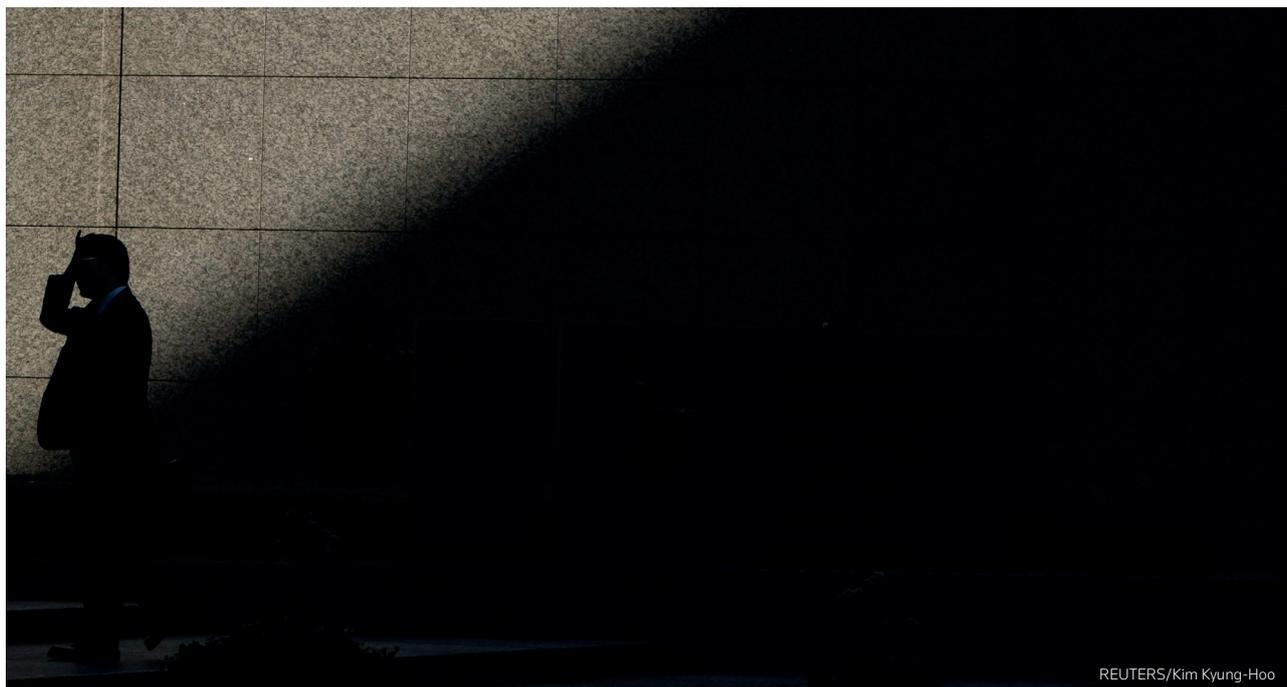
Rank	Country	2016 Score
29	Poland	62
47	Czech Republic	55
54	Slovakia	51
57	Hungary	48
57	Romania	48
75	Bulgaria	41
Global average score		43
EU average score		66

Source: Transparency International Corruption Perceptions Index for 2016

<sup>3</sup> [transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)

<sup>4</sup> [transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)

<sup>5</sup> [ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf)



REUTERS/Kim Kyung-Hoo

## Anti-corruption legislation in CEE

Corruption often goes on undiscovered by the authorities, remaining a “hidden crime” due to the lack of legal mechanisms that would motivate offenders or other persons to cooperate with authorities and report corrupt practices. As it is very difficult to find sufficient evidence of corruption after the fact without people willing to notify the authorities and give testimony, the legislation should primarily focus on implementing mechanisms which would facilitate such cooperation. Another very important tool that could be leveraged to effectively fight corruption is the prosecution of companies for corruption, which, among other things, motivates companies to implement measures to prevent it.

This section expounds on the main legislative pillars in the fight against corruption and their current status across CEE countries – namely, corporate criminal liability, protections provided to whistleblowers, (i.e., persons who voluntarily report misconduct that they have become aware of), and the mandatory reporting of certain committed crimes. Furthermore, it will touch upon the current state of the regulation of lobbying, which is another potential corruption trigger.

### Corporate criminal liability

As a result of pressure from various international organisations (such as the Council of Europe), since the early 2000s, countries in CEE have been introducing into their domestic legislation the concept of corporate liability for criminal offences committed by company representatives. Slovakia, one

of the last countries to join the European Union, adopted such rules with effect from 1 July 2016.

Subject to certain conditions, companies (or more precisely, any legal entity other than state bodies, local self-governmental bodies and public international organisations) may be subject to corporate criminal liability if members of their senior management, representatives or employees have committed certain criminal offences. In the Czech Republic, Slovakia and Romania, a company can be prosecuted even if no individual has been convicted. At the same time, in most CEE countries, individuals (e.g., senior management, directors and employees) and companies may both be held criminally liable for the same crime.

The theory recognises two main types of corporate criminal liability, namely, strict corporate criminal liability, where companies can be directly criminally liable, and quasi corporate criminal liability, where companies may be held administratively liable for crimes committed by certain persons (the latter applies to Hungary and Bulgaria).

Certain links between the crime and the company are typically required in order for the company to be held liable. Such links are considered to exist when the criminal offence was committed in the course of the company’s activities/business; the company has enriched itself or could have enriched itself or benefited from the criminal offence; or the company’s management has failed to prevent the crime.

The types of criminal offences that can trigger corporate liability vary across countries and can be quite broad (e.g., in Romania and the Czech Republic). Some countries provide a list of criminal offences applicable to companies. Corruption-related offences invariably feature on the lists in all CEE countries mentioned.

Fines of various amounts and confiscation of the unlawfully obtained proceeds are typical forms of sanctions in all CEE countries when the company is convicted. In addition to the unwanted “criminally liable” label, companies in the Czech Republic, Romania and Slovakia may also face dissolution (“Death Penalty” for companies) and be banned from certain activities, grants and subsidies, as well as from participating in public tenders.

As the next section shows, the nascent enforcement of corporate liability rules has been gathering pace over the last three years. In the Czech Republic and Romania, for example, the number of entities prosecuted on such grounds has risen two- to three-fold over the past several years, according to official statistics.

### Potential defence against corporate criminal liability

In some cases, companies may avoid criminal liability or at least reduce sanctions if they have measures in place to prevent, identify and/or report misconduct in a timely manner. The relevant laws are usually quite vague as to what constitutes such an effective compliance system that could serve as a compliance defence. For example, under Czech law, a company would not be criminally liable if it has taken all measures to prevent an offence that could have been fairly requested from the company. Under Polish law, companies can be criminally liable only for offences committed as a result of lack of due diligence in selecting an individual acting on behalf of the company, lack of due supervision over that person, lack of due diligence in a certain situation, or if the operations of the company were not organised in such a manner that prevented an offence by the person acting on behalf of the company. In Romania, the law does not explicitly stipulate the compliance defence, but existence of a compliance system might be assessed on a case-by-case basis and, under certain circumstances, it might be taken into account by a court.

In absence of specific rules on what constitutes an effective compliance system, companies usually rely on foreign guidelines (for example, UK Bribery Act Guidelines on “adequate procedures” to prevent bribery by corporations) or other internationally recognised best practices (such as ISO 19600:2014 and ISO 37001:2016).

As a result, we are seeing more and more companies adopting internal compliance systems, including codes of conduct, internal regulations and processes, whistleblowing guidelines, etc., as a means of defence against potential criminal liability.

### Protecting whistleblowers

Encouraging people to report unlawful or unethical behaviour and ensuring that subsequent legal protection be provided to them when they do so is vital if we wish to effectively fight against corruption. Nowadays, whistleblowers and their protection are receiving increasing international recognition and discussion. Nevertheless, most CEE countries still lack comprehensive legal regulation of whistleblowing, and, as such, protection of whistleblowers remains fragmented in various legal acts (e.g., civil codes, criminal codes and labour codes). Some CEE countries went further and adopted comprehensive legal frameworks that apply to both the public and private sectors.

In October 2014, to further the Action Plan adopted by the Slovak Government in 2012, the Slovak Parliament adopted the Whistleblowing Act (Act No. 307/2014 Coll. on certain aspects of whistleblowing), which took effect on 1 January 2015. The law provides for the protection of whistleblowers employed in the private or public sectors, as well as incentives to report certain types of “serious antisocial behaviour”, which the act further defines.

A whistleblower who has filed a report providing conclusive evidence of serious antisocial behaviour in criminal or administrative proceedings is entitled, upon request, to the protection of the Labour Supervisory Authority against prospective retaliation by the employer. He/she may also receive free legal aid from the Centre of Legal Aid. Finally, whistleblowers can apply to the Ministry of Interior for a reward (max. EUR 19,000), which is granted if the perpetrators are found guilty in criminal or administrative proceedings.

Furthermore, the Whistleblowing Act obliges companies that employ more than 50 people and any public employer to adopt internal bylaws specifying the internal review procedure for whistleblowing reports and to appoint a person (legal or natural) responsible for receiving and investigating such reports and informing whistleblowers of the investigation’s outcome.

Hungary serves as another example of a CEE country that adopted a comprehensive legislative framework on whistleblowing by its adoption of Act no. 165/2013, on complaints and reports of public concern with effect from 1 January 2014.

In Romania, there is a specific law protecting staff members of public institutions who report breaches of the law, but no such regulation has been enacted for the private sector. Nevertheless, various laws, particularly the Labour Code, protect employees of private companies who report wrongdoing from retaliatory measures by the employer (e.g., wrongful dismissal).

Similarly, the Czech Republic and Poland provide only limited protection to whistleblowers through their labour codes and other legislation; however, the rights of whistleblowers per se are not protected.



## Reporting

Most CEE countries recognise to a varying degree the concept of mandatory reporting of certain crimes to criminal authorities. Failing to do so may even constitute a criminal offence – that of failure to report a crime.

In the Czech Republic, the reporting obligation relates only to certain listed crimes which include bribery crimes (but not other related crimes, such as public procurement manipulation or abuse of office).

A similar situation is in Slovakia where the list of crimes includes, apart from bribery crimes, also any crimes for which the Criminal Code stipulates a maximum sanction of imprisonment of at least 10 years (which is rather odd, as it requires persons to make a criminal law analysis in order to determine whether they have reporting duty, which might not be easy without a lawyer).

In Romania, persons with controlling duties (e.g., executives, board members, senior compliance officers) have a reporting duty in relation to crimes listed in the Anti-Corruption Act (which, apart from bribery, also includes, for example, use of publicly restricted information and allowing access of unauthorised persons to such information; presenting false, inaccurate or incomplete documents or statements in relation to EU funds; etc.).

Polish and Bulgarian laws also stipulate certain reporting duties, but since these laws fail to stipulate any sanction in the event of a breach of these duties, they are considered mostly as moral obligations.

Despite the reporting obligations in CEE countries, individuals as well as companies are often reluctant to report alleged crimes to criminal authorities. This unwillingness results from the lack of incentives that criminal authorities could offer in

exchange for reporting a criminal offence, e.g., the possibility of effective settlement, "effective remorse" (i.e., discharge from criminal liability if the offender voluntarily takes certain steps) or exculpation. As a result, many corruption offences remain undiscovered.

## Regulation of lobbying

Stricter regulation of lobbying is another legislative area that should be addressed in order to fight effectively against corruption. Similarly to whistleblowing, most CEE countries have not gone very far in this respect. The regulation of lobbying is most often only in the form of vague future plans or failed attempts.

The Romanian Ministry for Business, Commerce and Entrepreneurship is reportedly working on a draft act on lobbying. However, the lobbying regulation has been on the agenda of the Parliament of Romania since 2010 with no visible results. Similarly, in Slovakia, there have been several attempts to regulate lobbying (e.g., September 2016, August 2015, December 2014) but all draft acts were rejected by its Parliament.

One of the very few countries to have had a lobbying regulation was Hungary. However, the 2006 Act on Lobbying turned out to be ineffective in practice and was actually abolished in 2011. Since then, Hungary has not adopted any new legislation in this respect.

In Poland, lobbying is regulated by the Act of 7 June 2005 on Lobbying Activities, which provides for, among other obligations, the mandatory registration of lobbyists. A person who carries out activities defined in the act as professional lobbying activities without being registered can be sanctioned by a fine of up to approximately EUR 12,000.

## Anti-corruption enforcement in CEE

While most CEE countries have adopted laws to combat corruption, even more important is how these laws are enforced in practice. The level of enforcement of anti-corruption laws has usually been rather lax throughout CEE. However, some progress in this area can be seen over the last few years. The enforcement efforts are more vivid in relation to corruption in the public sector than in the private sector. Taking Hungary as an example, the number of charges for corruption crimes (including abuse of office) has risen: from 256 in 2014 to 651 in 2015, and then up to 907 in 2016. As at May 2017, 217 charges have been brought this year. The general success ratio of such charges is more than 90 percent.

The Hungarian story is less stellar when looking at the prosecuting of companies. While Hungary had already introduced corporate criminal liability in 2004, which allowed measures to be imposed on companies, 10 years after this introduction, only 39 motions had been filed by prosecutors for measures against companies. Of those motions, in only nine cases did the courts actually impose some measures.

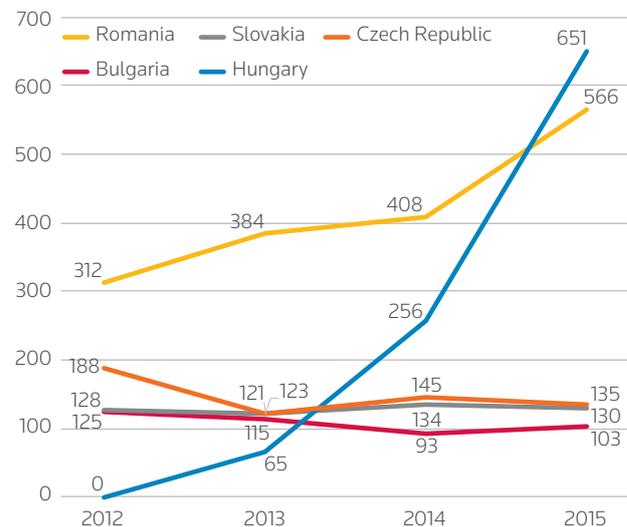
Czech prosecutors are keener to go against companies. Even though the concept of corporate criminal liability is younger in the Czech Republic, as it was introduced only in 2012, the number of corporate prosecutions has been increasing year after year. While only nine companies were prosecuted in 2012, this number increased to 61 in 2013, 139 in 2014 and 200 in 2015 (statistics for 2016 are not yet available). As at May 2017, 181 companies have been finally convicted in the Czech Republic, some of them even liquidated as a result of criminal proceedings. However, the vast majority of cases related to tax evasion and fraud. Only two companies were convicted of bribery, and in both cases, only fines were imposed on them (approximately EUR 110,000 and EUR 180,000).

In Romania, where enforcement seems to be among the highest in the region, a total of 487 companies were set in front of judges, but only six of those were for corruption crimes.

However, these numbers fail to tell the whole story. Firstly, since it is often very difficult to evidence all elements of a bribe, the offenders are often investigated for other related crimes, such as public procurement manipulation, abuse of the powers of a public official or breach of trust.

It is not only about the numbers; also important is whether authorities are prosecuting only “small-fry” companies or whether they are successful in high-profile corruption cases. There seems to be improvement in this area as well. In the Czech Republic, one of the biggest construction companies is being prosecuted for bribery. In Slovakia, two former ministers are in front of the Special Criminal Court facing charges

### Prosecution of Corruption



of public procurement manipulation. In Poland, an official of the Warsaw Town Hall has been charged in connection with accepting a bribe in relation to privatisation of real estate (Palace Square in downtown Warsaw). However, until these cases are brought to final convictions, we cannot be sure whether there truly is a trend towards going after big corruption cases.

One change that has certainly helped in high-profile cases is the establishment of specialised anti-corruption bodies. A prime example is the Romanian Anti-corruption Prosecution Unit (DNA), which has been able to bring to conviction several cases involving high-level officials from across the whole political spectrum, including mayors, county presidents, members of Parliament and ministers (including two former prime ministers). The effectiveness and success achieved by the Romanian Anti-corruption Prosecution Unit have led to it being praised by both EU authorities and authorities in the United States.

Another critical point is cross-border enforcement. When a case involves more than one jurisdiction, a big obstacle to the investigation is the very formalistic approach and long reaction time among cross-border authorities. We will see whether the introduction of the European Investigation Order will increase the effectiveness of cross-border investigations. The European Investigation Order is based on mutual recognition, meaning that each EU country is obliged to recognise and carry out the request of the other country, as it would do with a decision coming from its own authorities, and imposes certain deadlines.

## Case studies

While many cases of corruption remain hidden, occasionally the offenders are prosecuted at least for related crimes.<sup>6</sup> However, even if this happens, it may take a very long time before the cases are finally concluded and the offenders punished.

A good example is the so-called “bulletin-board tender” case. In 2007, the Slovak Construction Ministry found a rather original manner for announcing an EUR 120 million public tender for various legal and advertising services co-financed by EU funds. The call for applicants was placed on only one bulletin board in a corridor at the ministry. Not surprisingly, only one company submitted a bid and won the tender. The state later had to repay Brussels the money spent on the project. After media reports cast doubts on the tender, auditors from the Public Procurement Office and the Supreme Audit Office were sent to the ministry to clarify the details. Both offices found that the ministry had committed serious errors in the controversial tender. Earlier this year – i.e., 10 years after the tender – five persons, including two former ministers, stood in front of the Slovak Special Criminal Court facing charges of public procurement manipulation, abuse of office and breach of trust.

Another example showing the fight of authorities against corruption is the Romanian “Case-file of the transfers”, in which several individuals, including a judge of the Bucharest Tribunal, had been sentenced for committing corruption offences several years ago. In February 2009, three notorious investors and shareholders of the top Romanian football clubs, Dinamo and Steaua, had been indicted for fraud and tax evasion. The prosecuted criminal offences were related to several player transfers made by the Romanian teams to clubs abroad, for which the local clubs declared only fractions of the real transfer prices. These actions caused damages not only to the budget of the state, but also to the football clubs themselves, as the money was directed to the owners of the club.

In April 2012, the first court acquitted all defendants, considering that the facts did not exist. However, the Bucharest Court of Appeal changed the decision issued by the first court and sentenced all the defendants to prison. Following this decision, the prosecutors discovered that the decision of the first court was influenced by a bribe in the amount of EUR 195,000 that was received by the judge from the defendants, in order to issue a favourable decision to them. Moreover, the judge confessed the perpetration of the criminal offence and described the mechanism of receiving the money. Consequently, the judge was sentenced to prison for five years and six months for taking the bribe. In addition, two lawyers were sentenced for false testimony.

Sometimes, a bribe could turn out to be fraud. This was the case for prominent Czech lobbyist Marek Dalík. In January 2006, the Czech government decided to buy 199 Pandur APCs from the Austrian company Steyr for CZK 23.6 billion. According to press reports, the Pandur APCs failed military tests, and the new government started to back out of the purchase. This was the moment Marek Dalík turned up. He asked Steyr’s representatives for a bribe of almost half a billion Czech crowns in exchange for the government not killing the deal. Again, it took some 10 years for the case to get to court. Dalík was charged with bribery, but the appellate court decided that he did not actually have the power to influence the government’s decision and that asking for a bribe was actually an attempt by him to defraud Steyr. Dalík was sent to prison for five years, but the judgment was ultimately cancelled due to the fact that he had not been given sufficient time to defend against this change of legal qualification.

## Conclusion

While the level of corruption in CEE is still high compared to Western Europe, many CEE countries seem to be on their way to improve anti-corruption legislation and enforcement. However, these efforts are only beginning, and we will have to wait a few years to see if there is really a long-term anti-corruption trend in CEE. While the level of corruption

in CEE could in the past be attributed mainly to communist legacy, the region will most probably face other corruption risks in the future, such as increasing oligarchisation in some of the countries of the region or threats to the independency of the media, which played a crucial role in uncovering some of the biggest corruption cases in the past.

<sup>6</sup> The following case studies are collected from various local news articles appearing in the press, e.g.: *The Big Marek Dalík Game* (Respekt; January 15, 2016); One year later, *Dalík’s Pandur trial continues. Former US ambassador giving remote testimony in court* (January 15, 2016, iHNed.cz - Local News); *The Pandurs Case: Former U.S. Ambassador has not confirmed Dalík’s corruption*. Yet, the prosecutor is satisfied (15 January 2016, Newton Media - Daily News – Industry); *Former U.S. Ambassador stood up for lobbyist Dalík in the Pandur case* (16 January 2016, lidovky.cz); *Commentary of Peter Kremšky: Big step for Slovakia – the ministers will go to jail* (6 April 2017, aktuality.sk); etc.

## Author's biographies



**Jitka Logesová** is a Partner in Kinstellar's Prague office and for years has served as the head of the firm-wide Compliance, Risk & Sensitive Investigations practice. She has been appointed Vice-Chair of the IBA's Anti-corruption Committee and acts as country coordinator for the Committee. Jitka is also Czech exclusive member of ICC – FraudNet (worldwide network of specialists in asset recovery).

Jitka has led several corporate investigations – including cross-border matters – in various sectors, notably pharmaceuticals, construction, infrastructure, financial services, chemicals, retail and IT. She also advised a number of companies on FCPA-triggered investigations. Jitka has broad experience in advising her clients on crisis communications strategy in connection to governmental and corporate investigations. She has also represented clients in a number of litigation and arbitration proceedings.

Jitka teaches as guest lecturer of the Business Ethics class at the Anglo-American University in Prague. She has published a number of articles about corporate investigations, compliance and corruption in CEE and in the Czech Republic specifically.



**Kristýna Del Maschio** is a junior associate in Kinstellar's Prague office. She is a member of the Compliance, Risk & Sensitive Investigations team, and her specialization includes white-collar crime defence, corporate criminal liability and corporate investigations. During her studies, she spent a year at the university in Germany and was involved in projects of restructuring of companies in Rwanda and Zambia. She also completed an internship at the District Court for Prague 1. Kristýna has advised various clients in matters relating to internal investigations (including a global pharmaceutical company) and white-collar crime matters (including an international automotive company and a major Czech chemical company).

### About Kinstellar

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