

# PUBLIC MONEY AND CORRUPTION RISKS

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A COMPARATIVE ANALYSIS

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# Frank Bold

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# CONTENTS

A	INTRODUCTION	8
B	RISKS OF SYSTEM POLITICAL CORRUPTION IN THE USAGE OF EU FUNDS IN THE CZECH REPUBLIC, SLOVAKIA AND POLAND	15
	B.1. Politicization of the public administration in the usage of EU funds	20
	B.2. Anonymous ownership and the usage of EU funds	31
	B.3. Control and audit of EU funds by supreme audit institutions	38
C	STATE-OWNED ENTERPRISES IN THE CZECH REPUBLIC, SLOVAKIA AND POLAND	45
	C.1. The conflict of interests and the politicization of the corporate governance of SOE	58
	C.2. Anonymous ownership and state-owned enterprises	64
	C.3. Access to information about SOE	67
	C.4. Controls and audits of SOE by supreme audit institutions	71
D	RECOMMENDATIONS	75
	D.1. Recommendations for public administration in the usage of EU funds	76
	D.2. Recommendations to tackle the issue of anonymous companies and the EU funds	77
	D.3. Recommendations on the control and audit of the usage of EU funds conducted by supreme audit institutions	79
	D.4. Recommendations for the corporate governance of the state-owned enterprises	80
	D.5. Recommendations to tackle the issue of anonymous companies and the SOEs	82
	D.6. Recommendations on the access to information related to the SOEs	82
	D.7. Recommendations on the control and audit of the state-owned enterprises conducted by supreme audit institutions	83
E	REFERENCES	84
	E.1. Case studies	85
	E.2. Data analyses	85
	E.3. Another analyses	86

# BOXES

Box A.1	What is the added value of our analysis?	9
Box A.2	Clientelist groups as a serious problem in the individual states	13
Box B.1	Fluctuation of officials in the management and control bodies of the operational programmes	18
Box B.2	Czech Republic: profitability of anonymous companies	19
Box B.3	Czech Republic: usage of public funds by anonymous companies	19
Box B.4	The influence of clientelist groups on the disbursement of EU funds in SR and PR	19
Box B.5	The politicization of the management and control bodies of operational programmes through personnel changes	21
Box B.6	Czech Republic: No clear distinction between political and apolitical functions within the Regional Operational Programme North-West	21
Box B.7	Czech Republic: an example of whistle-blowing in the public administration	22
Box B.8	Definition of an “anonymous company”	31
Box B.9	Czech Republic: ACs involved in cases concerning the usage of EU funds	31
Box B.10	Slovakia: an example of AC drawing from EU funds	32
Box B.11	Definition of supreme audit institutions in the countries compared	38
Box B.12	Czech Republic: politicization of internal mechanisms	39
Box B.13	Poland: deficiencies in the internal control of public procurement	39
Box B.14	The low effectiveness of internal control mechanisms and the problem of ignoring SAO audit conclusions in the Czech and Slovak Republics	40
Box B.15	Poland: ignoring of SAO recommendations in practice	40
Box C.1	The influence of the clientelist groups on the bodies of SOE in the individual states	47
Box C.2	Consequences resulting from the absence of a state ownership policy in CR and PR	50
Box C.3	A position in the SOE as a bribe for the deputies	50
Box C.4	Staff turnover in executive bodies of the Czech and Slovak SOE	51
Box C.5	Staff turnover in supervisory boards of the Czech and Slovak SOEs	53
Box C.6	Czech Republic: The numbers of politicians in the selected categories illustrating the practical experience relevant for an office in the supervisory board of a SOE	55
Box C.7	Examples of influence of a clientelist group over contracts concluded with SOE in the monitored states	56
Box C.8	Public access to information about SOE	57
Box C.9	The effects of publishing disadvantageous contracts concluded with SOE in CR and SR	58
Box C.10	Czech Republic: list of ten most profitable SOE suppliers	64

# LIST OF ABBREVIATIONS

<b>AC</b>	ANONYMOUS COMPANY
<b>BIS</b>	SECURITY AND INFORMATION SERVICE OF CZECH REPUBLIC
<b>CARGO</b>	ŽELEZNIČNÍ SPOLEČNOST SLOVENSKO CARGO SLOVAKIA, A.S.
<b>CR</b>	CZECH REPUBLIC
<b>CZK</b>	CZECH CROWN (MONETARY UNIT)
<b>EU</b>	EUROPEAN UNION
<b>EU FUNDS</b>	EU FUNDS CONSISTED OF EUROPEAN STRUCTURAL FUNDS (EUROPEAN FUND FOR REGIONAL DEVELOPMENT AND EUROPEAN SOCIAL FUND) AND SO CALLED EUROPEAN COHESION FUND
<b>EUR</b>	EURO (MONETARY UNIT)
<b>GDP</b>	GROSS DOMESTIC PRODUCT
<b>GRECO</b>	GROUP OF STATES FOR COMBATING CORRUPTION
<b>INTOSAI</b>	INTERNATIONAL ORGANISATION OF SUPREME AUDIT INSTITUTIONS
<b>MOE</b>	MUNICIPALITY-OWNED ENTERPRISE
<b>NERV</b>	NÁRODNÍ EKONOMICKÁ RADA VLÁDY ČR (NATIONAL ECONOMIC COUNCIL OF THE CZECH REPUBLIC)

<b>NGO</b>	NON-GOVERNMENT NON-PROFIT ORGANISATION
<b>NIK</b>	NAJWYŻSZE IZBA KONTROLI (POLISH SUPREME AUDIT OFFICE)
<b>OECD</b>	ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT
<b>OGP</b>	OPEN GOVERNMENT PARTNERSHIP
<b>OP</b>	OPERATIONAL PROGRAMME
<b>PPTC</b>	PRAGUE PUBLIC TRANSIT COMPANY
<b>PR</b>	RZECZPOSPOLITA POLSKA (REPUBLIC OF POLAND)
<b>ROP</b>	REGIONAL OPERATIONAL PROGRAMME
<b>SAI</b>	SUPREME AUDIT INSTITUTION
<b>SAO</b>	SUPREME AUDIT OFFICE
<b>SIS</b>	SLOVAK INFORMATION SERVICE
<b>SOE</b>	STATE-OWNED ENTERPRISE
<b>SR</b>	SLOVAK REPUBLIC
<b>ZSSK</b>	ŽELEZNIČNÍ SPOLEČNOST SLOVENSKO, A.S.
<b>ŽSR</b>	ŽELEZNICE SLOVENSKE REPUBLIKY, A.S.

The analysis “The risks of system political corruption in the management of EU funds and state-owned enterprises in the Czech Republic, Slovakia and Poland” relates the information on system political corruption to the legal framework, within and due to which the particular cases indicating the system political corruption in the monitored states take place. The goal of our analysis is to identify the regulatory gaps that fundamentally increase the risk of system political corruption. We believe that these gaps in the legal regulations for the protection of public property, together with the laws regulating the decision-making and supervisory procedures related to the public property are clear **indicators of an increased risk of system political corruption**. Apart from the legal indicators, this analysis also uses some economic indicators, as well as indicators resulting from the analysis of the individual actors in the decision-making process.

As for its content, the analysis focuses on two closely connected areas of **public funds administration and management, i.e. the drawing of resources from the EU funds** (in particular the structural funds and the cohesion fund) and **the corporate governance of state-owned enterprises**

(SOE) in all three compared states. The analysis is supported by the data and practical experience of six non-governmental organizations from all three states. Based on the cases handled or monitored by the project partners, and based on the analyses of further data, we aim to identify the key gaps in the legal framework for the management of public property that allow for the given form of corrupt practices. For each area of public property management, the relationship between the regulatory gaps and the corrupt practices is explained through “model cases”. For this purpose, the analysis works with 10 case studies prepared by our project partners, also referring to 8 cases handled by other NGOs in the region and to the cases discussed in the media. Apart from this, the comparative analysis is based on the results of 10 partial data analyses (economic and actor analysis) carried out by the project partners, referring to 11 data analyses carried out by other regional organizations. This analysis compares the total of 40 legal regulations applicable in the three monitored states.

On the basis of our model cases, we have established four areas of the legal framework regulating the management



of the public funds that are connected with the management and the elimination of the risks of corruption:

1. de-/politicization of public administration (the acts on officers, the nomination criteria for filling the posts in the supervisory boards of the SOE), which shows the risks of abusing the decision-making powers in the area of public property in favour of the clientelist groups,
2. risk management related to the conflict of interests caused by the fact that anonymous companies conclude public procurement contracts with the public administration bodies or the SOE, or that anonymous companies draw financial resources from EU funds,
3. access of the general public to the information about the management of the public funds, including the data on the recipients of subsidies and public procurement contracts,
4. efficiency of external audits in eliminating the risks of system political corruption.

These four issues have been selected and analysed because of the fact that both the procedures of misuse of the public money from EU funds and from the state-owned enterprises are the same. According to our case studies in both types of cases of misuse of the public money there have been always examples of politicization of the public administration or SOE boards followed by the conflict of interests of the persons responsible for spending the public funds because those persons were possibly the beneficiaries of the anonymous companies that received those public money either in the form of grants or tenders. At the same time, the external control procedures could not prevent such corruption, namely because of the fact that the supreme audit institutions cannot enforce their recommendations.

In addition, the selection of topics was also guided by the fact that the above mentioned four issues have so far been neglected or disdained by international organisations such as GRECO, OECD, INTOSAI or OGP<sup>1</sup> in favour of other problems related to the corruption or transparency.

### **Box A.1** What is the added value of our analysis?

1. The problems related with the **depoliticization of the public administration** were analysed during the GRECO's second evaluation round in all three states.<sup>2</sup> Despite the fact that GRECO used very detailed questionnaires, GRECO's reports did not provide answers to some of the questions that we consider important. Therefore, in our analysis we examine not only the problems already covered in GRECO's reports (like recruitment of public servants or protection of whistle-blowers) more thoroughly<sup>3</sup>, but we also describe how exactly the public administration can be politicized by abusing the deficiencies of the legal regulations. We analyse whether there is a clear separation between the political and apolitical positions in public administration or not; how difficult it is to discharge or call out public servants from their positions<sup>4</sup> and how the public servants are (not) protected against the unlawful orders or instructions from their superiors. Other problem is that GRECO's second evaluation round took

<sup>1</sup> It should be also noted here that only the Czech Republic and Slovakia are members of the Open Government Partnership. OGP itself did not publish its own analyses and is dependent on the activities of its member states.

<sup>2</sup> The GRECO examined, among else, the 9th and 10th Guiding principle from the Twenty Guiding Principles for the Fight against Corruption, available here: [http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924_EN.pdf)

<sup>3</sup> For example, we analysed all three laws on public servants in Poland, not only the Act on Civil Service that had been analysed by GRECO. Also, in case of analysis of the Slovakian Act on Free Access to Public Information, GRECO admits that they cannot assess the implementation of this act in practice.

<sup>4</sup> This is because the laws on recruitment of public servants do not prevent the possibility of replacing one public servant by another one who would be willing to obey orders from the members of a clientelist group.

place between years 2003–2006 and even the later compliance reports did not cover the issues in much detail. Our analysis provides up-to-date information. It should be noted here that the EU law can influence only some aspects of the public administrative law of its member states and the SIGMA papers<sup>5</sup> did not provide sufficient and up-to-date information on this particular issue.

As for the **corporate governance of the state-owned enterprises**, this issue has been analysed by OECD in general.<sup>6</sup> However, the last OECD survey of corporate governance of SOEs is from 2005 and the survey itself provides only basic information about the law and practice in the Czech Republic, Slovakia and Poland. Our analysis, on the other hand, provides the latest and detailed information on some of the aspects of the corporate governance of SOEs in the Czech Republic, Slovakia and Poland, and takes into account recent changes in relevant laws and practice.

2. The issue of **anonymous companies** was not even mentioned in GRECO's second evaluation round reports despite the fact that issues of legal persons, money laundering and conflict of interests<sup>7</sup> have been analysed. OECD mentioned the problem with anonymous companies and their abuse by those engaging in self-dealing and defrauding of assets briefly in its publication "Behind the Corporate Veil—using corporate entities for illicit purposes" from 2001 on the example of Russia. Our analysis provides concrete cases and up-to-date examples from the Czech Republic, Slovakia and Poland.

The problems connected to anonymous ownership of corporations have been tackled recently by the leaders of the G8 states<sup>8</sup> in Lough Erne in 2013. They agreed on creating national action plans to tackle the issue of anonymous companies by making information on who really owns and profits from such companies available through central registries of company beneficial ownership.<sup>9</sup> The reason behind such measure is to prevent the tax avoidance through offshore companies and other anonymous companies in the first place, as it is derived from the Financial Action Task Force recommendations.<sup>10</sup> Our analysis shows that the identification of the real owners of anonymous companies is necessary also to prevent misuse of public money through manipulations with the usage of EU funds and through public procurement and contract-making between the state-owned enterprises and anonymous companies. Our analysis provides clear example that in every case of corruption caused by a clientelist group there is at least one anonymous company involved and misused.

3. The **access to information** about the public administration (which is also connected to the issue of SOEs) was evaluated in all three states during the GRECO's second evaluation round; however, the evaluation reports contain only the very basics and lacks the description of the practice. As for the transparency of the SOEs and the access to information on SOEs, only the aforementioned OECD survey from 2005 briefly describes the situation in all three states. Our analysis addresses particular issues which had not been described or mentioned in those

<sup>5</sup> <http://www.oecd.org/site/sigma/>

<sup>6</sup> See OECD Guidelines on corporate governance of the state-owned enterprises.

<sup>7</sup> Even the fourth evaluation round (which is still ongoing) aimed at the conflict of interests of the members of parliament did not, however, mention the legal loophole caused by the existence of anonymous companies.

<sup>8</sup> Members of the Group of the Eight are Canada, the United States, France, Germany, Great Britain, Italy, Japan and Russia.

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207771/Lough\\_Erne\\_2013\\_G8\\_Leaders\\_Communique.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf)

<sup>10</sup> See [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf), recommendations no. 24 and 25 and its interpretive notes.

documents, namely the question whether the SOEs are obliged to provide information to the public and how are the laws on the free access to information implemented in practice in all three states.

4. The **efficiency of external control** of the usage of EU funds and of the SOE's corporate governance conducted in all three states by the supreme audit institutions was not analysed during the GRECO's second evaluation round (except for the very basics in one paragraph). The INTOSAI recommendations enumerated in Lima and Mexico declarations did not deal with the issue of enforcing the supreme audit institution's findings and recommendations and of their implementation in practice which seems to be an important problem that we analysed.

This analysis, together with the case studies, clearly shows that the described corruption cases may only represent the tip of an iceberg as regards the abuse of the public funds by the clientelist groups linked to politics. The regulative gaps that allowed for the given cases usually form part of the legal framework of at least two, or even all three, compared states. For example, the law fails to protect the officers who wish to announce corrupt or other objectionable practices (i.e. protection of whistle-blowers) against retaliation, the Czech and Polish legal regulations do not efficiently prevent the conflict of interests of public officers with business shares in anonymous companies, and the absence of a law regulating the process of appointing members to the bodies of SOE in the Czech and Slovak Republics makes it possible to fill these posts with just anybody.

” The described corruption cases may only represent the tip of an iceberg as regards the abuse of the public funds by the clientelist groups linked to politics.

The economic and actor analyses show that the increased risk of system political corruption applies to complete areas of public property management in the monitored states. For example, the total value of public procurement contracts and European subsidies awarded to anonymous companies during 2008–2013 in the Czech Republic alone amounts to more than CZK 200 bn.; the analyses of the staff turnover in the managing and supervisory bodies within the particular operational programmes in Slovakia show that the highest number of changes regularly take place within the first three months after the new minister takes office; our analyses of the changes in the offices within the managing and supervisory boards in Czech and Slovak SOE clearly prove a link between the changes of the members of parliament and government and the changes of staff in the bodies of the SOE.

” In the Czech and Slovak Republics, the clientelist groups are linked to the political system to such extent that we can use the “state capture” socio-economic model in order to understand the situation in these states.

As for its methodology, the analysis is based on the assumption that at least in the Czech and Slovak Republics the clientelist groups are linked to the political system to such extent that we can use the “state capture” socio-economic model in order to understand the situation in these states. This term was first introduced by J. Hellman, G. Jones and D. Kaufmann<sup>11</sup> and later elaborated by the World Bank.

<sup>11</sup> See <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-2444>

For the purposes of this analysis, “state capture”<sup>12</sup> means a situation when the actual implementation of the policies related to the public funds administration and the legal framework regulating this area are influenced by clientelist groups<sup>13</sup> that include public officers holding key positions in public administration. In our opinion, the influence of the clientelist networks linked to the political representation on the administration of public funds in these two countries is clearly demonstrated not only by the corruption cases, some of which are presented here, but also by the conclusions and recommendations of national and international institutions, including the European Commission and the OECD.<sup>14</sup>

These facts also apply to the legal and institutional frameworks that allow for, or even increase, the risk of system political corruption, and the corruption itself. The legal framework (or its drawbacks) facilitates the creation of conditions and opportunities for corrupt practices. There is a deliberate exertion of influence over the relevant legal and institutional framework, whose goal is not to disturb the corrupt practices of the groups linked to the politics. In practice, this might be represented by changes in laws, or by maintaining inoperative laws (e.g. the situation in the CR—the Act on Public Servants that forms part of the body of laws since 2002 has never become effective) or ignoring the need for a legal regulation (in our opinion, a good example of this is the legal vacuum in the area of state-owned enterprises management in the CR and SR). On the other hand, enforcing legislative changes based on the recommendations of international institutions or good practices in foreign countries is seen as a basic tool

that restricts the “manoeuvring space” of the clientelist corruption networks and increases the risks and transaction costs related to the corrupt practices. The goal of our analysis is to draw attention to the relationship between the corruption cases and the deficient legal system, presenting examples of good legislative practices taken from other countries in the region and exerting pressure on the implementation of legislative changes.

“The legal framework (or its drawbacks) facilitates the creation of conditions and opportunities for corrupt practices.

Therefore, this analysis is targeted at the officers and decision-makers on EU level, to whom it provides independently acquired data on system political corruption related to the EU funds, while suggesting areas of focus that should be taken into account during the negotiations about the legal framework for the distribution of financial resources drawn from the EU funds and its control, and proposing other areas connected with the control of the provision of EU subsidies. Yet another target group are the officers and decision-makers on a national level, to whom the text provides an independent analysis of the link between the corruption, the public funds administration and the political system, identifying regulatory gaps and proposing improvements while using examples of good practices applied in the neighbouring countries. The text is also targeted at all experts from the academic environment, non-profit organizations, and journalists who focus on corruption and good governance, providing information about concrete cases and methods for monitoring certain corruption risk indicators (in reference to other materials published by the project partners and other NGOs, to which the text refers) and outlining the links between the corruption risks and the current legislative situation. Good practices and the recommendations of international institutions that the text uses might be a concrete sign of the genuineness and quality of the attempts of a particular political representation to fill the identified regulatory gaps.

<sup>12</sup> State capture differs from ordinary political corruption in public administration. State capture means exerting influence over the legal framework itself, which subsequently facilitates channelling funds from public budgets *de iure*, i.e. legally.

<sup>13</sup> Clientelist groups tend to manage the decision-making processes in the public administration; their goal is to gain influence over the distribution of public funds—by the provision of subsidies, placement of public tenders or conclusion of contract—through public officers.

<sup>14</sup> See the OECD study “Fighting Corruption and Promoting Integrity in Public Procurement”, 2005, Chapter 7, p. 59–76.

### Box A.2 Clientelist groups as a serious problem in the individual states

**Czech Republic:** In its Annual Reports for 2010 and 2011<sup>15</sup>, the Czech Security Information Service (BIS) repeatedly warns against the risks related to the clientelist groups: *“Czech organized crime at the highest level consists of clientelist networks and structures of business-power relations. Using legal economic entities, it profits mainly from systematic accumulation of wealth from public budgets and companies with a state ownership share. However, the entrepreneurial activities of representatives of such structures (via legal commercial entities) also involve exertion of influence on state and local administration authorities, on the legislative process, as well as on state-controlled enterprises, etc. Efforts to escape prosecution through influence exerted on prosecuting authorities and courts are also associated with their operations.”*

The reports of GRECO<sup>16</sup> from the second evaluation round also focus on public administration, corruption and the links between corruption, organized crime and money laundering, identifying a number of problems that affect the operations of clientelist groups in the Czech Republic. The main problem revealed by the reports is the ineffectiveness of practically the entire Act No. 218/2002, Coll., on the Service of Public Servants and the lack of protection of whistle-blowers, i.e. persons employed in public administration, against possible retaliation. The recommendations included in the report reflect the above-mentioned drawbacks.<sup>17</sup>

**Slovakia:** In relation to corruption and clientelism, the Slovak Information Service (SIS) states in its Activity Report for 2001 that: *“In 2011 SIS acquired information warning against corruption cases and clientelism in state and local administration authorities and companies with a state ownership share that were connected with the placement of public procurement contracts and the distribution of funds from the state budget. Corrupt and clientelist practices were found also in the decision-making processes related to the absorption of irrecoverable financial means from EU funds and to the absorption of subsidies from the state budget”*.<sup>18</sup>

**Poland:** Polish Central Anti-corruption Bureau reported several cases of clientelism related to the spending of EU funds in 2010 and 2012. For example, in 2010 several dozens of business entities, associations and employees of The Agency for Restructuring and Modernisation of Agriculture (ARMA) together overpriced the value of investments co-financed from the EU funds (SAPARD, The Sectoral Operational Programme “Rural Renewal” and The Integrated Regional Operational Programme). Business entities that were applying for grants prioritized fictitious invoices that overestimated the value of real-made investment. They also used the documentation relating to the investments that were previously funded from other EU programs. Agency staff enabled obtaining funds and its settlement in exchange for the receipt of financial benefits which were submitted as payment for a fictitious consulting services. The total amount of accepted bribes exceeded 1 million zł.

Another example of misuse of the public money is from 2012. One of the directors of the General Directorate of National Roads and Motorways com-

<sup>15</sup> BIS Annual Reports are available at: <http://www.bis.cz/vyrocnizpravy.html>

<sup>16</sup> See [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports%28round2%29\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports%28round2%29_en.asp)

<sup>17</sup> GRECO Evaluation Report of 12 May 2006, p. 18, par. 58, 59, and p. 20, par. 63

<sup>18</sup> [http://www.sis.gov.sk/vyr\\_sprava.html](http://www.sis.gov.sk/vyr_sprava.html)

mitted a breach of the award of contracts under the program “Roads of Trust”, financed from EU funds under the Operational Programme Infrastructure and Environment. The infringement consisted of awarding public contracts to three particular companies under the free-hand procedure and of dividing some of the public procurements into smaller parts so as to exclude them from the scope of the Public Procurement Act. The aforementioned director also made illegal renewing of contracts with companies that were executors of those contracts.

# B

## RISKS OF SYSTEM POLITICAL CORRUPTION IN THE USAGE OF EU FUNDS IN THE CZECH REPUBLIC, SLOVAKIA AND POLAND

The first part of the analysis is aimed at the risks of system political corruption in the usage of EU funds in the Czech Republic, Slovakia and Poland. The data on the overall allocation of funds, the resources spent so far, and corrections—meaning returned amounts—reveal at best inefficiency in the usage of EU funds. We believe that the low efficiency in the usage of funds correlates with the inadequate overall condition of the public administration in the Czech Republic. In our opinion, the same problem is indicated by the still declining position of the Czech

” The low efficiency in disbursing funds is exacerbated by instability in the public administration, which among other reasons is caused by politicization of public administration officials.

Republic compared with other countries in, for example, corruption perception index. The low efficiency in disbursing funds is exacerbated by instability in the public administration, which among other reasons is caused by politicization of public administration officials

Corruption perception index in CR, SR a PR according to Transparency International<sup>1</sup>:

YEAR / STATE	CZECH REPUBLIC	SLOVAKIA	POLAND
2007	41. PLACE	49. PLACE	61. PLACE
2008	45. PLACE	52. PLACE	58. PLACE
2009	52. PLACE	56. PLACE	49. PLACE
2010	53. PLACE	59. PLACE	41. PLACE
2011	57. PLACE	66. PLACE	41. PLACE
2012	54. PLACE	62. PLACE	41. PLACE

<sup>1</sup> More than 170 states are evaluated every year using CPI. The higher position in the CPI charts, the lower is the perception of corruption in such state. See also <http://www.transparency.org/research/cpi/>

and the weak response of the government to the findings of audit institutions. (In the Czech Republic, the Czech Supreme Audit Office previously warned about many issues, due to which the Transport Operational Programme was suspended by the Commission; unfortunately, no response from the government and the Ministry of Transport was forthcoming.) These problems also open the door to political corruption.

Indicators of corruption risks were chosen on the basis of real cases and the analysis of national legislation on the usage of EU funds. In the analysis, we have identified indicators throughout the system of disbursing EU funds, including: the staffing of public authorities and the consequent politicization of the public administration (chapter B.1); the risk of conflict of interest, which is made possible by the anonymous ownership of companies that receive public funds (chapter B.2); problems concerning the efficiency of independent audits conducted by the Supreme Audit Institutions of the individual countries (chapter B.3). We believe that these gaps and deficiencies in the legislation indicate a high risk of system political corruption. This statement is based on an analysis of existing cases in which

the corrupt behaviour of specific persons has already been proven, or in which the occurrence of corrupt behaviour on the political level is suspected, while in all cases there was a misuse of public funds and specific, quantifiable losses of the same.

The cases this analysis is based on point at the following problems:

1. **The Řebíček system:** The politicization of the Czech Ministry of Transport and its subordinate bodies of public administration (the Road and Motorway Directorate, the State Fund for Transport Infrastructure) from 2007 to 2009, made possible by the ineffectiveness of almost the entire Act 218/2002 Coll., The Civil Service Act, led to the awarding of public procurement contracts co-financed by EU funds to a narrow circle of companies whose co-owners belonged to a clientelist group. There is a reasonable suspicion that the Minister for Transport, A. Řebíček, was a member of this clientelist group. The value of procurements awarded in this way exceeds CZK 14 billion. This case illustrates the politicization of public administration, conflict of interest, non-

### Czech Republic: The use of funds by individual subjects in the programming period 2007–2013:

YEAR	ALLOCATED (MILL. CZK)	SPENT (MILL. CZK)	NUMBER OF SUBJECTS	NUMBER OF PROJECTS
2007	6 755	6 181	7	38
2008	111 715	98 384	2 556	3 681
2009	104 341	85 500	8 457	12 127
2010	106 986	77 976	6 908	10 131
2011	116 541	64 606	7 395	10 579
2012	82 000	26 055	5 754	8 151
2013	48 215	4 439	3 775	4 946
TOTAL	576 553	363 141	34 852	49 653



transparent assessment of project applications and other misconduct.

2. **Regional Operational Programme North-West:** This case is concerned with the politicization of management and audit bodies of the Regional Operational Programme in the Programming period 2007–2013, and its consequences: provision of subsidies and granting of public procurement contracts to a narrow circle of people who are probably members of clientelist groups. In the described cases only, these are grants and public procurements of a value significantly exceeding CZK 1 billion. The case illustrates the politicization of public administration, conflict of interest, non-transparent assessment of project applications and other misconduct.
3. **The Rath case:** This case deals with a clientelist group that allegedly influenced the activities of the management and control bodies of the Regional Operational Programme of Central Bohemia in the period 2008–2012. The result was manipulation of at least eight public procurements; the clientelist group wanted to obtain CZK 300 million from EU funds in this way, illegally. The case illustrates the politicization of public administration, conflict of interest in disbursing funds from the EU, and managing a company with equity participation of the Central Region (MOE). In this case, the Governor of the Central Region, D. Rath, and several other persons were accused<sup>19</sup>.
4. **The Notice Board Tender case:** This concerns the non-transparent procurement of a public contract, co-financed by EU funds, for the promotion of EU funds in Slovakia and the provision of legal services in the framework of technical assistance; the total value was € 120 million. This case illustrates influence on the procurement pro-

cedure, conflict of interest and the subsequent closure of onerous contracts with a public works contractor.

The above cases give a fairly clear idea of the corrupt practices model and show how such behaviour uses specific gaps in legislation. The first prerequisite of the operation of clientelist networks is the high **politicization of management and control bodies OP**. Every change of public officials (ministers, regional representatives, etc.) leads to the fluctuation of some senior officials in the public administration who are responsible for dispensing funds from the EU. The legislation does not guarantee transparent tenders for positions in the institutions implementing the use of EU funds; it does not state the specific qualifying requirements that persons in such institutions must meet. Public administration officials are not adequately protected against political pressure on their decision making, because the legislation does not distinguish between political and apolitical posts in public administration, public administration officials can be dismissed easily and there is no legislation protecting whistle-blowers from the ranks of public officials. This increases the system risk that political representatives will occupy leading positions in the bodies implementing the use of EU funds on the basis of their economic, social or political ties; these persons will subsequently participate in corruption in the assessment of project applications and when making decisions on the granting of subsidies to specific projects (in some cases, politicians also took part in the assessment of projects). For more details, see chapter B.1.

“ Every change of public officials leads to the fluctuation of some senior officials in the public administration who are responsible for dispensing funds from the EU.

<sup>19</sup> A brief description of the entire clientelist group functioning is available here: [http://www.lidovsky.cz/jak-se-uplacao-v-kauze-rath-obzaloba-odhalila-zlocineckou-symbiozu-115-zpravu-domov.aspx?c=A130417\\_161021\\_in\\_domov\\_ogo](http://www.lidovsky.cz/jak-se-uplacao-v-kauze-rath-obzaloba-odhalila-zlocineckou-symbiozu-115-zpravu-domov.aspx?c=A130417_161021_in_domov_ogo)

### Box B.1 Fluctuation of officials in the management and control bodies of the operational programmes

The existence of the above mentioned system risk of politicization of the public administration can be illustrated by the results of the analysis of the post-election fluctuation of employees in the management and control bodies of operational programmes in the Czech Republic and Slovakia.

The analysis of staff fluctuation in the management and control bodies of the public administration involved in the use of EU funds in the Czech Republic showed that in the post-election year, 2007 (when a new government was formed and ministers were replaced), 15 changes of director occurred in the 22 operational programmes that were analyzed<sup>20</sup>. In 2009, when a caretaker government was appointed, 5 directors of operational programmes were replaced. After the election in 2010, 5 directors of operational programmes were replaced. Most changes in the directorship of regional council offices in regions where the EU cohesion policy applies occurred in the Regional Operational Programme North-West, where 8 persons succeeded in one particular position, which indicates an increased risk of politicization in the use of EU structural funds within this operational programme.

However, fluctuation of staff in the Czech Republic is not limited only to executives of the bodies of individual operational programmes: for example, the turnover of staff at the Department of Structural Funds in the Ministry of the Interior, with approx. 55 employees, is more than 30%. Only 10 employees

from 2009 are still employed four years later, which corresponds with the turnover of 81% of officials in this department. Dismissals occur for reasons of redundancy and after an organizational change, and a higher number of officials are employed for the same work (by which the Labour Code is circumvented). For example, on the decision of the Ministry for Regional Development, 25 organizational changes have taken place within the last 2.5 years.

The analysis of post-election fluctuation in key positions in the structure for the implementation of EU funds in Slovakia revealed significant changes in the composition of the management and control bodies after parliamentary elections, which influenced the political composition of the individual ministries. The political changes in the elections were reflected in the changes of directors of agencies and directors-general in the sections. From 2007 to 2013, in 6 operational programmes that were examined and in 8 relevant positions, there were 13 cases out of 18 changes of ministers where the change in position of directors and directors-general was connected with the implementation of EU funds. This indicates an increased risk of the politicization of the implementation of the EU structural funds.

” There is a risk where the same persons or groups will, on the one hand, decide about granting subsidies or awarding a public contract, and, on the other hand, will profit out of these due to their equity investment in anonymous companies.

**Anonymous companies** are not excluded from submitting a project or an application for a subsidy from EU funds, and in general the legislation does not require proof of the full ownership structure, even if they succeed with the application, or in a tender for a public contract. Together with the insufficient legislation concerning the conflict of inter-

<sup>20</sup> Out of the total number of 26, there are 22 operational programmes being administered in the Czech Republic. The remaining 4 operational programmes were thus not included in our analysis.

est of politicians and officials, a system risk is being created that cases will occur where the same persons or groups will, on the one hand, decide about granting subsidies or awarding a public contract, and, on the other hand, will profit out of these due to their equity investment in these companies. This risk becomes very tangible when there are indicators of the existence of a direct correlation between the transparency of the ownership structure of companies supplying public procurements and their profitability.

### Box B.2 Czech Republic: profitability of anonymous companies

The zIndex case study, “Profitability of companies with bearer documentary securities in Public Procurements”, was concerned with the profitability of companies which became suppliers of public procurements in the Czech Republic between 2007 and 2009. Two samples of companies were compared: joint-stock companies with bearer documentary securities (BDS) and other types of joint-stock company. The study shows that joint-stock companies with bearer documentary securities reach profits 23–70% higher than other joint-stock companies and may have significantly higher margins than other joint-stock companies. The transparency of the ownership structure is therefore a highly relevant factor in terms of cost effectiveness as well as public procurements.

This kind of **conflict of interest** is practically impossible to prove and its existence may be inferred only indirectly, from a non-standard course of project assessment or the subsequent awarding of a public procurement contract co-financed out of the EU funds (e.g. grants and public contracts are always obtained by the same circle of companies; the specifications contain criteria discriminating against certain applicants; suppliers of public contracts connected to public officials show a significantly higher

profitability and turnover while they remain in the managing bodies of OPs, etc.). The individual indicators of corruptions risks connected with anonymous companies using the funds are described in detail in chapter B.2.

### Box B.3 Czech Republic: usage of public funds by anonymous companies

The severity of this problem is illustrated by the data from the period 2008–2013: *“Within the past 5 years, the firms with owners from tax havens have won public procurement contracts worth at least CZK 153 billion. They have been granted more than six billion crowns out of EU funds, from which they have spent over CZK 3.3 billion so far. Anonymous companies have won public procurements worth a total of CZK 38.5 billion, and they have obtained CZK 8.7 billion out of EU funds and spent less than CZK 5 billion. In the last 5 years at least CZK 200 billion have flown out of public funds to companies from tax havens and anonymous companies. Approximately one percent of the analyzed firms have (traceable) links to politically active persons. This information emerges from the joint analysis of Transparency International and the Bisnode consulting company.”*<sup>21</sup>

### Box B.4 The influence of clientelist groups on the disbursal of EU funds in SR and PR

**Slovakia:** The draft of the Strategic Plan for the Fight against Corruption in the Slovak Republic from 2011 states that: *“In ‘more sophisticated’ forms of the crime of corruption in drawing on and reallocating EU funds resources, companies create a comprehensive system which*

<sup>21</sup> “Analýza anonymních a offshoreových společností a jejich čerpání veřejných finančních prostředků v ČR” (analysis of anonymous and offshore companies and their public funds drawing in the Czech Republic), Transparency International Czech Republic and Bisnode, 2013. Available here: <http://www.transparency.cz/nejmene-153-mld-ke-verejnych-prostredku-proteklo-firem-danov/>

*includes counselling in overestimation of the project, securing project approval through pre-agreed winning subjects, and having companies and business entities ready through which they can realize fictitious services and performances. Through consulting service contracts, the financial resources accumulated this way are transferred to organizers and implementers of the stated 'business'.*

**Poland:** According to the reports of the Polish Internal Security Agency in 2010, there have been some cases in which the clientelist groups use more sophisticated forms of corruption. For example in the area of road constructions, some construction companies that were interested in obtaining contracts from the procurement of the General Directorate of National Roads and Motorways made a bid rigging. Under the agreement between them, they chose a company which offered the lowest price in the tender. Still, the price was too high in relation to the market price. Chief Executive Officer and director of the Warsaw division of GDDKiA<sup>22</sup> who took bribes from road construction companies also participated in this deal.

The passive bribery allegations were also charged to Director and Deputy Director of the Katowice branch of GDDKiA. They both received financial benefits from construction companies in exchange for preferential treatment in the tenders—for each invoice submitted from the contractors they receive 5% of the value of the procurement. The dealings lasted for 10 years. As a result, the executives from Katowice branch of GDDKiA were to receive 4 million zł. financial gain. Representatives of road construction companies which transmitted the funds were charged with active bribery.

**Control mechanisms** that would reveal the above stated corrupt behaviour in the use of EU funds are not sufficiently effective. Public supervision is ineffective if the public is denied the access to information on the use of EU funds. The control exercised by the Supreme Audit Institution might identify the shortcomings and errors concerning the use of EU funds. Nevertheless, its findings are not binding and there are no guarantees given that the system will be remedied based on the findings of these control institutions. See chapters B.3 and B.4.

“Control mechanisms that would reveal corrupt behaviour in the use of EU funds are not sufficiently effective.”

## B.1. Politicization of the public administration in the usage of EU funds

In this part of the analysis, we are concerned with bodies that decide about subsidies and public procurements within “national” and regional operational programmes and the position of officials who carry out the agenda connected with operational programmes. For a better understanding of the problem of the politicization of the public administration, a combination of corruption risk indicators with the above given corruption model can be used, supplemented by examples of concrete cases. The following are the indicators:

**Indicator I: The fluctuation of executive staff in the management and control bodies of individual operational programmes, depending on the change in political representation**

The politicization of the public administration is indicated, in the first place, by changes in the positions of public of-

<sup>22</sup> Generalna Dyrekcja Dróg Krajowych i Autostrad (General Directorate for National Roads and Motorways).

officials in the governing bodies of individual operational programmes, depending on the change of political representation. Securing of important positions in the public administration bodies can be achieved in two ways. Either by replacement of a sufficient number of senior officials (which will be manifested by a significant fluctuation of officials) or by a change in the organizational structure of public administration bodies, so that all the important positions will be subordinate to a small group of persons appointed by a minister. Therefore, we examined how the process of selection is regulated, the conditions of appointment and dismissal of public administration officials, and the inclusion of stipulations concerning the basic qualification requirements. This answers the question of to what extent legislation prevents the risk of the politicization of the public administration.

**Box B.5** The politicization of the management and control bodies of operational programmes through personnel changes

**Czech Republic:** The above outlined “Řebíček system” case is a typical example. The Minister for Transport, A. Řebíček, appointed as his first Deputy his friend and party colleague, J. Hodač (who had to be granted exemptions from requirements for both university qualifications and security clearance). Unlike the other Deputy Ministers for transport, who managed 1 or 2 ministry departments, J. Hodač managed eight departments that dealt with public contracts or decisions on investment in transport infrastructure. This means that 233 out of 465 employees of the Ministry of Transport were under J. Hodač’s jurisdiction. A. Řebíček then appointed as Director General of the Road and Motorway Directorate M. Hala, who (with the agreement of the Minister of Transport) changed the organizational structure of the Road and Motorway Directorate. This change led to a concen-

tration of key powers in the position of the Director of Interior Affairs, which M. Hala subsequently took over after the transport minister chose a new Director General of RMD. A. Řebíček subsequently replaced the Director of the State Fund for Transport Infrastructure. In this way, he gained a decisive influence in the bodies responsible for building roads and motorways. There is reason to suspect that A. Řebíček used this influence for the benefit of the company Viamont, a.s., whose founder and shareholder he is. Similarly, M. Hala (now accused, along with two other managing directors of the Motorway and Road Directorate, of taking a bribe to influence the rent at motorway rests on D5 and D47) could use his influence for the benefit of the company Edikt, a.s that sponsored Hala’s private activities.

#### Indicator II: The separation of political and apolitical positions in the public administration

The law clearly states which specific positions are to be staffed on the basis of a political key and which positions are apolitical, meaning purely official, and should therefore be staffed on the basis of transparent selection procedures. A clear division of responsibilities between politicians and officials and the prevention of the politicization of decision-making on the level of officials would ensure the independent functioning of the public administration.

**Box B.6** Czech Republic: No clear distinction between political and apolitical functions within the Regional Operational Programme North-West

The typical example of politicization of a purely apolitical activity is the case of the Assessment Committee of the Regional Operational Programme North-West (hereinafter referred to as “ROP North-West”),

which assessed projects in addition to officials and independent experts. The ROP assessment commission assessed the usefulness and benefit of projects for the region, while awarding each project up to 30 points (the total number of points was 100). Members of this committee were appointed by the board and approved by the chairman of the Regional Council (politicians). In the end, out of 20 committee members who assessed projects between 2010 and 2012, only 4 persons were not members of political parties.

### Indicator III: Insufficient protection of officials against illegal orders

Another indicator of politicization is the answer to the question of whether and in what way public administration officials are protected in the case of an illegal order issued by their superiors (top-level officials and politicians), i.e. whether and in what way public administration officials can refuse an illegal order or instruction without the risk of legal recourse.

### Indicator IV: Insufficient protection for whistle-blowers in public administration

The last indicator of the politicization of the public administration is the answer to the question of whether public administration officials are protected from persecution if they expose alleged corruption or other illegal behaviour in the public administration body which employs them.

#### Box B.7 Czech Republic: an example of whistle-blowing in the public administration

Cases of whistle-blowers who exposed illegal practices at the ministries concerning public procurement (the case of Libor Michálek and Ondřej Závodský, and the case of Jakub Klouzal), which were dealt with

by the Endowment Fund against Corruption, prove that effective legal protection of whistle-blowers is missing in the Czech Republic.

#### B.1.1. Are candidates for the position of a public administration officer selected on the basis of public and transparent selection procedures regulated by a law?

To start with, it needs to be said that in all three countries we compare the legal regulation of public administration officers who are members of governance bodies of different operational programmes and who thus participate in drawing EU funds. These officers are subject to the following legal regulation: Czech legal regulation of public administration distinguishes government officers (who are members of governance bodies of thematic operational programmes—e.g. OP Transport) and officers of territorial self-governing units (whose legal regulation also applies to officers of regional councils of the relevant operational programmes—e.g. Regional Operational Programme North-West<sup>23</sup>). The main imperfection of the Czech regulation is the ineffectiveness of almost the entire Act No. 218/2002 Coll., the Civil Service Act. Therefore, while a law regulating the service of public administration officers formally exists, its effect has been repeatedly postponed since 2002.

” The main imperfection of the Czech regulation is the ineffectiveness of the Civil Service Act.

By contrast, in case of Slovak legislation, only the legal regulation of government officers is relevant for this analy-

<sup>23</sup> Similarly, the employees of the Office of the Regional Council (which is the managing body of regional operational programmes), are subject to Act No. 312/2002 Coll., on Officers of Territorial Self-Governing Units.

sis. Polish legislation distinguishes as many as three groups of officers, with each group subject to a special legal regulation: Act on Service in State Administration, Act on Employees of Government Offices (the place of employment is the basic criterion setting apart this professional group) and Act on Employees of Self-governments, which also has an impact on voivodship councils, which are the managing bodies of regional operational programmes.

#### CZECH REPUBLIC

The main shortcoming of the Czech legal regulation is the ineffectiveness of Act No. 218/2002 Coll., the Civil Service Act. Act No. 262/2006 Sb., the Labour Code, which is used instead of the Civil Service Act, does not stipulate the duty to conduct selection procedures, nor does it regulate such procedures in more detail. The gap in the legal regulation of government officers is only partially compensated for by “The methodology of the selection of employees implementing European Union funds in the 2007–2013 programme period”,<sup>24</sup> subordinate legislation (government resolution<sup>25</sup>). It concerns only the selection of government officers who secure the drawing from EU funds. Therefore it cannot be considered an adequate substitution for the ineffective Civil Service Act.

The selection of officers of the Regional Council must take place on the basis of an open call and a selection procedure, regulated in Sec. 6 to 10 of the Act on Officers of Territorial Self-Governing Units, if a position is to be filled for a definite period of time. In case of the position of a senior officer, a vacancy must always be published. An open call is published on the official board of an office and it is also

available electronically. The selection of candidates itself is performed by a selection committee, whose members are appointed by the head of the office (in case of the position of senior officers, the members of a selection committee are appointed by a politician—president of the region). The office’s head must prepare a report of the assessment and evaluation of candidates, available upon request to all candidates (but not published).

We may conclude that the selection of persons for the position of public administration officers is regulated only partially and does not comply with EU requirements regarding the adoption of a special law on public administration officers.

#### SLOVAKIA

The condition for admitting a citizen into civil service is, according to Sec. 19 (1) of Act No. 400/2009 Coll., on Civil Service, the successful participation in a selection procedure or a selection in cases stipulated by the law. A civil position may be filled on the basis of a selection procedure, a selection or in case of temporary positions also without a selection procedure or a selection. Information about an external selection procedure or a selection is published by an office in media or in other publicly accessible means of mass communication at least three weeks before it takes place. The Civil Service Act generally stipulates that a selection procedure is performed by a selection committee. Details about a selection procedure, particularly about the application, performance, evaluation of results or the manner of forming a selection committee and its composition are regulated by individual offices in service rules.

Therefore the Slovak legal regulation secures a transparent selection of persons for the positions of state administration officers.

<sup>24</sup> The first version of the methodology was issued in 2009; the current version of the methodology was prepared in response to the criticism of the Commission in 2012. The methodologies are available at: [http://www.strukturalni-fondy.cz/get-media/58c7dee9-7900-41e9-9118-59304789851b/Vyber-novych-zamestnancu-implementujicich-fondy-EU\\_58c7dee9-7900-41e9-9118-59304789851b.zip](http://www.strukturalni-fondy.cz/get-media/58c7dee9-7900-41e9-9118-59304789851b/Vyber-novych-zamestnancu-implementujicich-fondy-EU_58c7dee9-7900-41e9-9118-59304789851b.zip)

<sup>25</sup> Government resolution No. 313 of 2 May 2012.

## POLAND

In general it can be said that every person meeting the requirements stipulated by laws, stated in subchapter B.2.1.2 (qualification requirements for different groups of officers slightly differ), can apply to take part in a selection procedure to fill a vacancy. Information about recruitment is published in the Bulletin of public information.<sup>26</sup> Laws do not regulate the issue of recruitment in an exhaustive manner and leave certain freedom in this area to the directors and heads of offices performing recruitment.

According to the Civil Service Act, within a selection procedure a committee<sup>27</sup> selects no more than five best candidates who meet the necessary requirements and to the highest extent meet additional criteria and introduces them to the office's director for the purpose of employing a selected candidate. However, the law does not impose a duty on the office's director to select a candidate who achieves the highest assessment score. Some authors therefore indicate that this contradicts the principle of competition in recruitment procedure<sup>28</sup>. Very similar requirements concerning recruitment procedure were expressed in Act on Employees of Self-governments. In case of government officers, however, Act on Employees of Government Offices does not regulate the course of a selection procedure. In practice, a candidate for the position of a government officer is first employed and only then is his qualification examined as part of the preparation for civil service, lasting 12 months.<sup>29</sup>

<sup>26</sup> In report No. LZG-410-19/20 the Supreme Audit Office noted ignoring the rules of openness and competition in selection procedures, which included employing persons not meeting the requirements and unclear assessment of candidates.

<sup>27</sup> Details concerning the creation and the composition of a committee and the manner of its operation were left at the discretion of directors of offices. At the same time, they must take into account Directive No. 3 of the State administration director of 30 May 2012 concerning the standards of human resources management in state administration.

<sup>28</sup> W. Drobny, Komentarz do art. 29(a) ustawy o służbie cywilnej, *Lex/el* 2012.

<sup>29</sup> W. Drobny w: W. Drobny, M. Mazuryk, P. Zuzankiewicz, *Ustawa o pracownikach samorządowych. Komentarz. Lex/el* 2012.

Thus the Polish legal regulation in essence secures a transparent selection of persons to the positions of public administration officers, excluding government officers.

### B.1.2. Does the legal regulation stipulate basic qualification requirements for candidates for the positions of officers?

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## CZECH REPUBLIC

In case of government officers, the Civil Service Act sets in Sec. 17 et seq. basic qualification requirements; unfortunately, these provisions are not effective. "The methodology of the selection of employees implementing European Union funds in the 2007–2013 programme period" cannot substitute for the provision of the Civil Service Act since it does not lay down any specific qualification requirements, only their general framework. Specific requirements on new employees are then set by ministries themselves. The employees of the Regional Council (which is the controlling body of regional operational programmes) are subject to Act No. 312/2002 Coll., on Officers of Territorial Self-Governing Units. This act regulates quite in detail the requirements that have to be met by officers and directors of offices.<sup>30</sup>

Basic qualification requirements that public administration officers must meet can be said to be stipulated only partially.

<sup>30</sup> See Sec. 4 and Sec. 5 of the Act on Officers of Territorial Self-Governing Units. Officers are required to have Czech citizenship, to be legally competent, without criminal records, with knowledge of the language of proceedings or meet additional requirements stipulated by the law. The head of the office also needs to have professional experience. Nevertheless, being apolitical is not among the requirements and officers can therefore be members of a political party.



## SLOVAKIA

The conditions for the admission into civil service and the filling of civil positions are stipulated in Act No. 400/2009 Coll., on Civil Service<sup>31</sup>; however, the qualification requirements alone specifying the needs connected with particular positions are set by individual institutions. The Civil Service Act stipulates a general framework that individual institutions adapt according to specific requirements on the quality of candidates for employment.

## POLAND

The Polish regulation of basic qualification criteria that public service officers must meet splits into three legal regulations (see B.1 above). These laws define general requirements that must be met by each candidate for an officer.<sup>32</sup> Specific requirements on the position of a public administration officer are described within competition recruitment procedure in case of state administration employees<sup>33</sup> and self-government employees. As regards senior state administration positions, the law itself stipulates additional requirements in the form of education (university education) and general experience (3 or 6 years of public service experience depending on the position) and work in senior positions (1 or 3 years). Specific requirements are not determined in case of government officers whose professional competence should be verified by the institute of prepara-

<sup>31</sup> Pursuant to Sec. 19 (1) of Act No. 400/2009 Coll. on Civil Service, a citizen applying for a civil service position can be admitted into civil service if he meets the following requirements: a) he has reached 18 years of age, b) possesses full legal competence, c) is without criminal records, d) meets qualification requirements, e) has a command of the official language, f) successfully completed a selection procedure or a selection, unless the law or special regulation provides otherwise.

<sup>32</sup> Reoccurring requirements include: Polish citizenship, clean criminal record, legal capacity, having moral integrity. Each regulation generally refers to the requirement of showing adequate knowledge, qualifications or education.

<sup>33</sup> At the same time, there is a possibility of being appointed to state administration service after finishing National School of Public Administration, i.e. eighteen-month training.

tion for civil service, which lasts twelve months and is concluded with a qualification assessment.<sup>34</sup>

Polish legislation thus undoubtedly defines basic qualification requirements for public administration officers.

### B.1.3. Are public administration officers protected by a statutory enumeration of grounds for possible dismissal or removal from office?

## CZECH REPUBLIC

The main imperfection of the Czech legal regulation is again the ineffectiveness of Sec. 54 et seq. of the Civil Service Act, regulating the termination of service relation with a government officer. Therefore, the termination of service relation of government officers is subject only to general legal regulations, contained in Act No. 262/2006 Coll., the Labour Code. The Labour Code provides relatively good protection of ordinary officers (who can be dismissed only on grounds stipulated by the law). In case of senior officers (directors of sections, directors of divisions and directors of departments), whose service relation is created by appointment, the legal protection against dismissal is insufficient because they can be removed without being given a reason by the person who appointed them, as follows from Sec. 73 of the Labour Code.<sup>35</sup>

<sup>34</sup> An officer who receives a positive assessment has to be employed in a position for which he was prepared during the application. A negative assessment leaves the possibility of employment in a position which does not require the preparation for civil service.

<sup>35</sup> An employment relationship does not end upon removal; however if the removed officer refuses to perform different work or if no other work position exists, it constitutes a notice of termination of employment pursuant to Sec. 73a in combination with Sec. 52 (c) of the Labour Code.

” In the Czech Republic, senior government officers can be removed very easily, which constitutes quite a high system risk of possible politicization of state administration.

In case of dismissal of officers of regional councils of cohesion regions, the legal regulation distinguishes the removal from office in case of senior officers (including heads of offices) and other officers. Senior officers can be removed only for a very narrowly defined range of reasons, contained in Sec. 12 (1) of the Act on Officers of Territorial Self-Governing Units in an enumerative list.<sup>36</sup> As regards other officers, the range of reasons for terminating employment is stipulated in the Labour Code.

It can be therefore stated that particularly senior government officers can be removed very easily, which constitutes quite a high system risk of possible politicization of state administration.

#### SLOVAKIA

The termination of civil service relation is regulated in Act No. 400/2009 Coll., on Civil Service, which in Sec. 47 enumerates the grounds on the basis of which an office can give a notice of termination of employment to an employee. The legal regulation distinguishes between giving notice of termination of employment relationship to employees in lower positions and grounds for giving a notice to employees in senior positions. The removal from a senior position is allowed by the law for specified grounds (loss of qualification due to criminal records, failure to achieve the required results for six months, the employee is sent abroad on the basis of an application) while the grounds for

<sup>36</sup> Loss of prerequisites pursuant to Sec. 4 of the Act on Officers of Territorial Self-Governing Units, not completing the training of officers within the given time pursuant to Sec. 27 (1) of the Act on Officers of Territorial Self-Governing Units, a breach of a statutory obligation in a serious manner or two less serious breaches of statutory obligations in 6 months.

giving a notice to an employee in a lower position are more general.<sup>37</sup> After the removal of an employee from a senior position, several conditions constituting the possibility of dismissal (removal from a senior position, disagreement of the employee with placement, failure to reach agreement with the civil service office) need to be met cumulatively.<sup>38</sup> The Civil Service Act provides a certain degree of protection from dismissal; however, in case of lower positions, the grounds for dismissal can be fulfilled much more easily than in case of senior employees.

#### POLAND

In general, employment on the basis of appointment carries in itself the stabilisation of an employment relationship, marked by a limited number of grounds on the basis of which an officer can be dismissed. The specific legal regulation differs depending on the type of public administration officers (see chapter B.1).

The Civil Service Act regulates the termination of an employment relationship (including the grounds for termination) of appointed civil service officers in Art. 70–71.<sup>39</sup> However, if the employment relationship of an officer is created upon an employment contract (not appointment), the mentioned list of grounds does not apply. The Act on the Employees of Government Offices contains a similar list of grounds on the basis of which the employ-

<sup>37</sup> For example Sec. 47 (b) enables the dismissal of a government officer due to organizational reasons, (h) repeated breach of discipline in a less serious manner.

<sup>38</sup> For example, Sec. 47 (d) a government officer who has been removed from the post of a senior employee and does not agree to being placed into civil service in the same division and in the same post and fails to reach agreement with the civil service office.

<sup>39</sup> These grounds are: two consecutive negative assessments of a civil service officer; doctor's certificate of permanent inability to work preventing the performance of duties of a civil service officer; loss of moral integrity; serious breach of basic duties of a civil service officer if the fault of the officer is clear; committing an contravention during the term of employment relationship preventing further employment; a loss of competence, by fault of an officer, needed for carrying out the employment relationship in the given position.

ment relationship of an officer can be terminated as contained in the Civil Service Act.

In case of employees of self-governments, appointment as a manner of creation of an employment relationship was abandoned and instead, the employees of self-governments enter into labour contracts for definite and indefinite periods of time. Contracts for a definite period of time can be terminated with a two-week notice period without providing a reason; however, the Polish Labour Code contains a general clause of the legitimacy of a notice.

In conclusion, the employees of self-governments with a contract for a definite period of time are protected much less than government officers and public service officers because they can be dismissed without being given a reason. OECD also notes the lack of consolidated legislation in this area and draws attention to the fact that the existing regulations are insufficient.<sup>40</sup>

#### B.1.4. Is there a special legal regulation of public administration, clearly separating political and non-political positions (posts) in public administration?

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##### CZECH REPUBLIC

The main shortcoming is again the ineffectiveness of Act No. 218/2002 Coll., the Civil Service Act. Clear separation of political and non-political posts in state administration bodies is therefore completely absent in the effective legal regulation. Clear separation of political and non-political posts is also absent in the Act on Officers of Territorial Self-Governing Units.

<sup>40</sup> Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Poland, Report OECD 2013 pp. 41–42.

##### SLOVAKIA

Civil service should be, within Act No. 400/2009 Coll., on Civil Service, built on the principle of political neutrality and impartiality. The act stipulates in Sec. 13 the filling of senior posts, where a minister or directors of other central bodies of state administration have the decisive say. In our opinion, the filling of more senior posts can be influenced by affiliation with the same political party or movement as that of the minister or director. This assumption is also supported by the fact that the law is not strict in Sec. 11 and 12 and does not contain a clear division into political and non-political posts.

” The filling of more senior posts can be influenced by affiliation with the same political party or movement as that of the minister or director.

##### POLAND

In case of civil service, it needs to be noted that its general principle is its apolitical character, stipulated already in Art. 1 of the Civil Service Act, intended to ensure impartial and apolitical execution of the tasks of government administration. A similar legal regulation concerns government officers and employees of self-governments. It can be said that in all three laws relating to public administration officers, political and non-political posts are at least partially separated, including who can intervene in personnel matters. Nevertheless, the separation is not sufficient, let alone complete.

### B.1.5. Does the legal regulation provide protection to public administration officers against unlawful instructions of their superiors?

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#### CZECH REPUBLIC

The provision of Sec. 68 of the Civil Service Act, which would provide legal protection to officers against unlawful instructions, is not effective. Therefore, government officers are not protected against unlawful instructions, in contrast to officers of territorial self-governing units. If an officer of a territorial self-governing unit believes that the instruction given to him is in violation of legal regulations, he has to notify immediately the person who gave him the instruction. Subsequently, he is obliged to carry out the instruction only if he receives a written order from the head of the office to do so. Only where the officer would commit a crime or an administrative infraction by following the instruction or order, must he not carry out such instruction or order and he must notify the head of the office of this fact.

#### SLOVAKIA

In accordance with the Civil Service Act, if an employee thinks that an instruction given to him is in violation of general binding rules or service rules (i.e. also an unlawful order), he is obliged to notify the senior employee in writing before starting to carry out the instruction. If the head insists on the carrying out of the instruction, he is obliged to notify the employee of this fact in writing.

#### POLAND

Polish legislation enables a public administration officer to refuse to carry out a service order if it is in violation of law or if it constitutes a crime or a contravention. An officer must notify his direct superior in writing of the unlawfulness of the order. If the superior insists on the carrying out of the order, the officer is obliged to carry it out; however, he can request a written order from the superior. If an order fulfils the elements of a crime, an official does not carry it out at all and immediately notifies the director general of the office.

### B.1.6. Does the law protect officers –whistle-blowers– against possible punishment or retaliation?

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#### CZECH REPUBLIC

In case of government officers, the ineffective Civil Service Act does not provide sufficient protection to whistle-blowers (not even if the relevant provisions were effective). A government officer has a general duty to notify according to Sec. 367 and Sec. 368 of Act No. 40/2009 Coll., the Criminal Code.

In case of officers of regional councils of cohesion regions, an officer has to refrain from all acts that could violate in a serious manner the credibility of the territorial self-governing unit and also maintain confidentiality about facts that he learnt during the performance of his employment. At the same time, information about possible corruption or problematic practice undoubtedly violating the credibility of the office is in conflict with the duty of confidentiality. An officer can be released from the duty of confidentiality by the head of the office; however, the Act

on Officers of Territorial Self-Governing Units does not anticipate a situation when an officer makes a request that he should be released from the duty of confidentiality with the office's head whose possible corruption acts he wants to report.

## SLOVAKIA

A government officer is obliged to maintain confidentiality about facts that he learnt during the performance of civil service and also protect the property of the state from non-effective and uneconomical handling. A government officer is obliged to notify a senior employee or an investigative, prosecuting and adjudicating body of the loss, damage, destruction or misuse of property.<sup>41</sup> Government officers are subject to the same rules as regards criminal liability as any citizen of the Slovak Republic and with respect to the character of work of such employees, other specific provisions of the Criminal Code apply.<sup>42</sup> The Civil Service Act imposes duties on an employee; however, in case of a notification of unlawful or dishonest practices it does not provide any protection to an employee against possible punishment. The legal regulation of whistle-blowers reporting unlawful or dishonest practices does not exist in the Slovak Republic at present.

” In case of a notification of unlawful or dishonest practices, the Civil Service Act does not provide any protection to an employee against possible punishment.

<sup>41</sup> Sec. 60 of the Civil Service Act

<sup>42</sup> Provision of Sec. 189 of the Criminal Code related to extortion, Sec. 329 related to passive bribery, Sec. 353 related to jeopardising the safety of confidential and restricted information, Sec. 319 and Sec. 320 jeopardising the safety of classified information

## POLAND

Given the regulation expressed in Art. 304 of the Criminal Code, a Polish officer of public administration has a social duty to notify the relevant investigative body of acquiring information about a suspicion of a contravention. He is not criminally liable for not providing the information, in contrast to the head of an office, whose failure to inform investigative bodies can be qualified as a contravention according to the Polish Criminal Code. With respect to the enumerative list of grounds for dismissal of an appointed officer and with respect to the judicial control of notices in case of office employees, it can be said that a public administration officer should not encounter negative consequences if reporting impropriety/suspicion of a contravention. Nevertheless, a specific legal regulation providing the protection to whistle-blowers is lacking.

### B.1.7. Conclusions on politicization of the public administration in the usage of EU funds

The comparison of legislation in various countries shows that the selection of officials into the management and control bodies of the individual operational programmes is at least partially (CR) or completely (SR, PR) regulated by legislation on public tendering and, for example, participation of selection committees. The Slovak legislation is an example of a good legislation on appointment of officials. On the contrary, the Czech legislation cannot prevent cases like the “Řebíček System” as there is an absence of legislation on appointment of state officials. Protection against dismissal of senior officials or their removal from office is implemented in different ways.

There is a paradoxical situation in the Czech Republic, where the top-level officials in local government bodies are provided the best protection while the protection

of the top level officials in the state administration is the worst, as they can be removed from office any time (due to absence of legislation). In all three countries, there is no clear definition of the line between political and apolitical positions in the public administration. In Poland only, the political and apolitical positions are partially differentiated, including the definition of who can intervene in personal matters. Neither Czech nor Slovak legislation can prevent cases of “Řebíček System” type (in which a concentration of departments involved in the usage of EU funds under a jurisdiction of a few politician-appointed persons occurred) and the case “ROP North-West” (in which there was a politicization of assessment committee which, by definition, should have been composed of apolitical officials and independent experts, not members of political parties).

” In all three countries, there is no clear definition of the line between political and apolitical positions in the public administration.

In all three countries, the legislation on the protection of officials against illegal orders from their superiors is practically identical—the question is, however, whether in practice, officials will require this written confirmation, as they might fear possible adverse consequences. None of the compared countries provides special protection of whistle-blowers, who might become a target of retaliatory actions leading even to their dismissal from the service. In the case of the Czech Republic, this fact is illustrated by the above described cases.

**B.1.8. Comparative table: The politicization of the performance of public administration in drawing from EU funds**

QUESTION / STATE	CR	SR	PR
ARE CANDIDATES FOR THE POSITION OF A PUBLIC ADMINISTRATION OFFICER SELECTED ON THE BASIS OF PUBLIC AND TRANSPARENT SELECTION PROCEDURES REGULATED BY A LAW?	PARTIALLY	YES	YES
DOES THE LEGAL REGULATION STIPULATE BASIC QUALIFICATION REQUIREMENTS FOR CANDIDATES FOR THE POSITION OF OFFICERS?	NO	NO	YES
ARE PUBLIC ADMINISTRATION OFFICERS PROTECTED BY A STATUTORY ENUMERATION OF GROUNDS FOR POSSIBLE DISMISSAL OR REMOVAL FROM OFFICE?	NO	NO	YES
IS THERE A SPECIAL LEGAL REGULATION OF PUBLIC ADMINISTRATION, CLEARLY SEPARATING POLITICAL AND NON-POLITICAL POSITIONS (POSTS) IN PUBLIC ADMINISTRATION?	NO	NO	PARTIALLY
DOES THE LEGAL REGULATION PROVIDE PROTECTION TO PUBLIC ADMINISTRATION OFFICERS AGAINST UNLAWFUL INSTRUCTIONS OF THEIR SUPERIORS?	NO	YES	YES
DOES THE LAW PROTECT OFFICERS—WHISTLE-BLOWERS—AGAINST POSSIBLE PUNISHMENT OR RETALIATION?	NO	NO	NO

## B.2. Anonymous ownership and the usage of EU funds

This subchapter deals with the problem of system risks posed by the possible conflict of interest of public officials who decide about granting of subsidies and public contract procurements, in relation to the existence of anonymous companies (see the definition in the box).

### Box B.8 Definition of an “anonymous company”

The term “anonymous company” (hereinafter also “AC”) includes joint-stock companies with bearer documentary securities, offshore companies based in tax havens and shell corporations (also called dummy corporations), as well as the cases of deliberate creation of complicated ownership structure.

In all corruption cases mentioned in the introduction to the chapter, anonymous companies were a tool used by clientelist groups. The legislation on anonymous companies in the Czech Republic is an extreme case of possible risk of conflict of interest in connection with anonymous companies. To become an owner of bearer documentary securities (and therefore the co-owner of AC), only a physical handover of these securities was required. These transfers were not recorded anywhere and they were not limited by law (no written contract was required; the change in the ownership of an anonymous company was thus a matter of seconds). In practice, this meant that in case of ACs with bearer documentary securities, it was not possible, at any moment, to know who was a current owner of a company. For comparison: In the Slovak Republic, bearer documented securities can be issued only in a book-entered form after the registration of these securities at the Central Securities Depository, the securities are credited to the owner’s account.

### Box B.9 Czech Republic: ACs involved in cases concerning the usage of EU funds

The “Řebíček System” case involves two anonymous companies which realized public contracts co-financed out of EU funds through the Operational Programme Transport. The first of them is the company VIAMONT, a.s., which is co-founded and co-owned by A. Řebíček. In 2004, A. Řebíček ranked among entrepreneurs of regional importance. His construction company VIAMONT, a.s. was in loss. Whereas in 2005 its profit was circa CZK 40 million, in 2007, when A. Řebíček became Minister of Transport, there was strong growth and the company reached a profit of almost CZK 200 million. In 2008, the company’s profit reached almost CZK 300 million. Estimates of the overall value of contracts in the transport sector awarded to VIAMONT, a.s. differ. The highest estimate was calculated by the paper “Hospodářské noviny” in 2010—it estimated the total value of these contracts at CZK 14 billion. Following Řebíček’s removal from the office of Minister of Transport in January 2009, there was a decline in the value of the contracts procured by VIAMONT, a.s., and it led to the company’s insolvency in 2012. There is a reason to suspect that Minister A. Řebíček, prior to his taking up the post of Minister of Transport in 2006, did not give up his real connection with the company despite his formal sale of his stake in it. Due to VIAMONT’s anonymous securities, his share in the company has never been proven. Řebíček refused to provide the contract of the sale. *“I have no obligation to publish the contract, I will just have to live with these suspicions,”* he wrote in his SMS to the minister. *“If I wanted to own the company, no contract would prove anything anyway.”*

Another company with alleged connections to public officials which was a frequent winner of big orders at

the time when A. Řebíček was in the post of Minister of Transport was EDS Holding, a.s.

This company with an anonymous ownership structure was also exceptionally successful in gaining European funding in the Ústí Region. Media attention was attracted mainly by the case of a contract for the construction of a lift bridge in Kolín to the value of nearly one billion CZK. It turned out that the lifting technology was unnecessary, as the Elbe is not navigable throughout the whole year and therefore not suitable for large boats. The suppliers in this contract were Viamont DSP a.s., Eurovia CS a.s. and EDS Holding a.s.

#### **Box B.10** Slovakia: an example of AC drawing from EU funds

The Slovak Transparency International analysis concludes that the Slovak Ministry of Health modernized three Slovak hospitals using money from EU funds *“through the network of shell corporations and with almost non-existent competition.”* Two professional companies concentrating on the founding of shell corporations feature in this case—the Venice group (based in Manchester) and BPMS (based in Belize). Shell corporations won four hospital tenders. They all belonged to the Venice group and BPMS. *“No information could be found on these four companies. Their addresses are shared by tens of other companies; they have no websites or publicly accessible telephone numbers. Records on other contracts or reference on other realized projects are not available.”*

In two tenders, the companies faced no competition and the price competition was weak. One of the tenders was won by a company whose price offer was less than one tenth lower than the competing com-

pany (the expected value of the contract was EUR 2,406,000, which means that the difference between the offers was EUR 2 000). In the second case, the competing company asked EUR 359 more than the winning shell corporation (the expected value was EUR 1.3 million).

In the following comparison, we will concentrate on the legislation on the usage of EU funds by anonymous companies on the basis of two indicators of possible corruption risks.

#### **Indicator I: ACs are allowed to be the beneficiaries of EU funds**

The first indicator is an answer to the question of whether ACs can draw EU funds within the operational programmes of the individual countries. If yes, whether there is legislation requiring of subsidy recipients and suppliers of public contracts disclosure of their ownership structure to the level of physical persons, as only such legislation will enable a possible conflict of interest to be proven.

#### **Indicator II: Ineffectiveness of legislation preventing a possible conflict of interest**

The second indicator is the answer to the question of whether there is legislation that would prevent the risk of the conflict of interest of public officials who decide on the usage of EU funds or public contracts. The effectiveness of legislation is assessed in terms of possible circumvention through equity participation in anonymous companies. It is not the purpose of this comparison to carry out a detailed analysis of the legislation preventing the conflict of interest of public officials.



### B.2.1. Can anonymous companies draw from EU funds within operational programmes?

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#### CZECH REPUBLIC

The Czech legal regulation does not contain an across-the-board ban that would prevent anonymous companies from applying for a subsidy or bidding in a public tender, which means that the legislation does not prevent anonymous companies from drawing from EU funds.

#### SLOVAKIA

The legal regulation does not prevent anonymous companies from drawing from EU funds.

#### POLAND

Polish legislation does not contain a regulation preventing companies with non-transparent ownership structure to draw from EU funds.

### B.2.2. Does the law require that recipients of subsidies or public procurement suppliers document their ownership structure?

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#### CZECH REPUBLIC

In the Czech Republic there is a different legal regulation of providing subsidies (including subsidies from EU funds), which is further differentiated depending on whether a subsidy is provided within a thematic operational programme or a regional operational programme, and a dif-

ferent legal regulation of awarding public procurement contracts (including those co-financed from EU funds).

In case of thematic operational programmes, the basic legal regulation is constituted by Act No. 218/2000 Coll., on Budgetary Rules (hereinafter only “the Budgetary Rules Act”). A subsidy can be provided by a central body of public administration—typically a ministry as a managing body upon an application, which must contain the elements stated in Sec. 14 (3) of the Budgetary Rules Act. If the applicant for a subsidy is a legal entity, pursuant to Sec. 14 (3) (e) of the Budgetary Rules Act it must state in the application the identification of persons acting in its name (executive directors or members of an authorised representative), further, it must state persons with a share in the applicant (e.g. shareholders) and, finally, persons in which a share is held by the applicant itself (including subsidiary persons) and also persons that are in a business relation with the applicant for a subsidy and have a benefit from its business activities or other gainful activities different from a benefit that would be obtained among independent persons in regular business relations under identical or similar circumstances.

In case of regional operational programmes, Act No. 250/2000 Coll., on Budgetary Rules of Territorial Budgets applies, which, however, does not require applicants, or recipients of subsidies, to give evidence of the ownership structure.

The Public Procurement Act, which applies in case of drawing EU funds from all operational programmes, requires in Sec. 68 (3) that a supplier, if it is in the form of a joint-stock company, provide a list of the owners of shares whose aggregate nominal value exceeds 10% of registered capital, and if a supplier uses subcontractors, the list of subcontractors along with the list of the owners of shares whose aggregate nominal value exceeds 10% of registered capital.<sup>43</sup>

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<sup>43</sup> Provision of Sec. 147a (1) (c) in combination with Sec. 147a (5) of the Public Procurement Act.

It follows from the Czech legal regulation that documenting the full ownership structure is required only in case of subsidies from thematic operational programmes and in case of public procurement.

#### SLOVAKIA

In case of thematic operational programmes, the basic legal regulation is constituted by Act No. 523/2004 Coll. on Budgetary Rules of Public Administration. A subsidy is awarded by a state administration body, typically a ministry, which operates as a managing body of the relevant operational programme, upon an application. Pursuant to the law, a subsidy can be awarded to legal entities or individuals only on the basis of a special law, which stipulates in detail the extent, manner and conditions of the provision of a subsidy.<sup>44</sup> The Budgetary Rules Act does not stipulate a duty for recipients of subsidies to show evidence of the ownership structure. In case of the only regional operational programme, the Ministry of Agriculture and Rural Development of the SR is the managing body while regions are the intermediary bodies providing subsidies. An intermediary body is subject to the rights and duties of a managing body to the extent set in an authorization<sup>45</sup>. Intermediary bodies operate on the basis of an Authorization to delegate powers from the Managing body to the Intermediary body under the Managing body; therefore, the Act on Budgetary Rules of Public Administration is a general regulation for providing subsidies.

Issuing calls for public tenders co-financed from EU funds is carried out pursuant to Act No. 25/2006 Coll. on Public Procurement. A contracting entity states in a notification of a call the conditions of participation related to personal, financial and economic standing and the documents needed

<sup>44</sup> For example, Act No. 526/2010 Coll. on the Provision of Subsidies within the Competence of the Ministry of Interior of SR, Act No. 71/2013 Coll. on the Provision of Subsidies within the Competence of the Ministry of Economy of SR.

<sup>45</sup> Sec. 8 of Act No. 528/2008 Coll. on Aid and Support Provided from European Community Funds, as amended.

to prove the competence of an applicant. In an amendment effective from 1 July 2013, while assessing the fulfilment of the conditions of participation, a contracting entity may request applicants for a subsidy that they submit the list of all their members and known shareholders containing the identification details of individuals and legal entities. In case of public tenders worth at least EUR 10 million, however, a contracting entity is obliged to request that applicants that are companies submit the list of all members and known shareholders. The duty applies to shareholders and members who own at least 30% of shares. The amendment brought a positive change in uncovering anonymous ownership structures of applicants and recipients of subsidies.

#### POLAND

An analysis of Polish laws did not prove the existence of general regulation requiring the recipients of subsidies or suppliers of public tenders to document the precise ownership structure. Neither is there a consensus whether it is possible to require that subsidy recipients or public tender suppliers show evidence of their ownership structure or whether such requirement would be unlawful. The practice of individual government bodies therefore varies depending on what legal opinion these bodies hold.

In case of public procurement, the requirement that a subsidy recipient or a public tender supplier disclose the entire ownership structure of shareholders could be regarded as unlawful. An analysis of a document issued by the ministry “A guide to the selection criteria for activities financed within The Innovative Economy Programme, 2007–2013” did not establish that as part of a formal assessment, a subsidy recipient or a public tender supplier would be required to document the shareholder structure.

Despite that, some institutions required within the published samples of applications for project financing the disclosure of the ownership structure of a subsidy recipient. Nevertheless, even in such cases the aim was not to reveal the specific individuals, for example those disposing of bearer shares. Documentation of the ownership structure, which is required in some applications for a subsidy, means showing identified shareholders or possibly the list of bearer shares—such practice and the form of publishing the ownership structure is indicated in an analysis of declarations of state-owned enterprises. However, it cannot be expected that specific individuals, for example those disposing of bearer shares, will be disclosed.

### B.2.3. Does the law require the documentation of a complete ownership structure to the level of individuals?

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#### CZECH REPUBLIC

The Czech legal regulation requires that subsidy recipients or public tender suppliers or subcontractors disclose only the first level of the ownership structure. Therefore, the statutory requirement is met for example by a subsidiary whose majority shareholder is an anonymous company by stating this anonymous company and the size of its share; however, the Public Procurement Act does not require the disclosure of the ownership structure to the level of specific individuals. An anonymous company which is the parent company of an applicant for a subsidy does not have to document its ownership structure. Moreover, the disclosure of partners of the applicant for a subsidy is required only in case of an application for a subsidy from thematic operational programmes and not in case of regional operational programmes.

” An anonymous company which is the parent company of an applicant for a subsidy does not have to document its ownership structure.

#### SLOVAKIA

The documentation of the complete ownership structure is not stipulated in the Act on Budgetary Rules of Public Administration or special regulations. Therefore, failure to document the ownership structure is not an obstacle to the approval of a project or to the provision of a subsidy to an anonymous company.

” A failure to document the ownership structure is not an obstacle to the approval of a project or to the provision of a subsidy to an anonymous company.

#### POLAND

The Polish legal regulation does not require the recipients of subsidies or suppliers of public tenders to document their complete ownership structure to the level of individuals. However, in a number of cases, companies seated in a country other than Poland cannot be recipients of subsidies from EU funds.

### B.2.4. Does the national regulation of a conflict of interest of public office holders prevent the risk of disguised ownership of companies connected to public tenders or EU funds?

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#### CZECH REPUBLIC

The legal regulation preventing a conflict of interest is based on Act No. 159/2006 Coll., on Conflict of Interest, which requires public office holders to submit a declaration of personal interest, a declaration of activities and a declaration of property acquired during the performance of the office.<sup>46</sup> A public office holder has to report accurately, truthfully and fully that he is a partner or a member of a legal entity conducting business and what the legal entity is. Additionally, he has to report the acquisition of securities or other share in a company if the total purchase price of securities or the total value of the business share exceeds a certain amount stipulated by the law.

The Czech legal regulation of a conflict of interest, however, has three fundamental imperfections.<sup>47</sup> First of all, the public control of the above-mentioned declarations is practically ineffective. Declarations of public office holders are not kept in one common database but are kept with different record-keeping bodies, and these bodies de facto hinder the access of citizens to such declarations.<sup>48</sup> Secondly, record-keeping bodies themselves often check declarations only formally.<sup>49</sup> As regards public control, administrative infraction proceedings are not public and, moreover, proceedings are conducted by individual municipal authorities in whose district a public office holder resides. The central

<sup>46</sup> Pursuant to Sec. 7 to 12 of Act No. 159/2006 Coll., on Conflict of Interest.

<sup>47</sup> Freely based on an analysis of Transparency International Czech Republic: <http://www.rekonstrukcestatu.cz/na-stazeni/ti-stret-zajmu-cr.pdf>

<sup>48</sup> See <http://www.bezkorupce.cz/nase-temata/stret-zajmu/pristup-do-registru/>

<sup>49</sup> For more information see <http://www.bezkorupce.cz/nase-temata/stret-zajmu/monitoring-sz/>

database of administrative infractions does not exist and therefore it cannot be established in practice how many times the Conflict of Interest Act has been violated.<sup>50</sup> Thirdly, the Conflict of Interest Act can be circumvented through an unreported property interest in an anonymous company, for example by a property interest in a joint-stock company with bearer, materialised shares, which can be acquired or alienated by mere tradition, which is not recorded in any records and the law does not require a written contract either. Given the size of a potential fine for an incomplete declaration and given the fact that public office holders must only submit a declaration of property acquired during the performance of their office, the Conflict of Interest Act can be said not to be effective in practice because a property interest in anonymous companies cannot be proven. A public office holder may argue, even in case of the acquisition of property with a value exceeding the amount of income and property reported by him, that he obtained the funds by selling earlier-acquired property, which he acquired before the assumption of the office and which he does not have to report.<sup>51</sup>

#### SLOVAKIA

The legal regulation preventing a conflict of interest is based on a constitutional Act No. 357/2004 Coll. on the Protection of Public Interest during the Performance of Office by Public Officers, which requires, among other things, the declaration of personal interest and also of offices, employments, activities and the property situation.<sup>52</sup> A public office holder participating in the dealings of a body regarding a matter in which he has interest is obliged to declare his personal interest in the matter, including cases when

<sup>50</sup> <http://www.bezkorupce.cz/nase-temata/stret-zajmu/sankce-za-poruseni-zakona-o-stretu-zajmu/>

<sup>51</sup> According to <http://www.rekonstrukcestatu.cz/na-stazeni/ti-stret-zajmu-cr.pdf>, p. II.

<sup>52</sup> Sec. 5 to Sec. 7 of the Act on the Protection of Public Interest during the Performance of Office by Public Officers.

a political party or a movement of which he is a member would have property benefit from the matter. On the basis of the law, a person in a public office is obliged to report in writing whether he meets the conditions of incompatibility of offices and declare the property owned. A public office holder must not make an agreement on silent partnership or acquire bearer shares except for cases when he inherits them. In case of anonymous companies, however, it is possible that a conflict of interest will occur exactly because of the impossibility to ascertain partners or shareholders.

On the basis of “A report on the conclusions and recommendations resulting from questionnaire Legal protection against non-transparency, abuse and conflict of interest in relation to the decision-making about the utilisation of EU funds in the Slovak Republic” and relating government resolutions,<sup>53</sup> with respect to all decision-making processes related to drawing from EU funds, attention must be paid to ensure that applicants and members of decision-making and assessment entities are not in a conflict of interest.

## POLAND

The Act on Restricting the Conduct of Business Activities by Persons in Public Offices (the Anticorruption Act) has an impact on officers and politicians (therefore public office holders). Special attention is paid to public office holders who are parts of institutions formally engaged in the process of awarding EU funds—they cannot be members of the board of directors or the board of supervisors of companies, members of supervisory bodies of foundations conducting business activities or perform other activities in companies that could give rise to doubt as to their impartiality or a conflict of interest. Public of-

fice holders cannot own more than 10% of shares in companies or stakes representing more than 10% of the registered capital. Public office holders must submit a declaration of property relating to their property and also to community property. Unfortunately, the Anticorruption Act can be circumvented by an (undeclared) property interest of public office holders in anonymous companies.<sup>54</sup>

### B.2.5. Conclusions on anonymous companies and the usage of EU funds

“ The public administration bodies and the public themselves do not know the final recipient of public funds provided in the form of subsidies or public contracts.

In the three countries compared, ACs can use public funds through operational programmes in the form of EU subsidies as well as public contracts co-financed from EU funds—they are not excluded from this usage. Regarding the requirement to disclose the ownership structure of legal entities as a condition for drawing EU funds, this requirement is contained only in the legislation of the Czech and Slovak Republics, and only partially (in the Czech Republic, disclosure of ownership structure is required for subsidies from thematic operational programmes). In case of public contracts, Czech legislation requires only a disclosure of shareholders with an equity share higher than 10%. The Slovakian legislation requires the disclosure of all known partners of the applicant for the public contract. Nevertheless, the legislation explicitly requires only the disclosure of shareholders and partners with more than a 30% equity share. The legislation of the countries compared does not require the disclosure of the com-

<sup>53</sup> Government resolution No. 141 of 16 February 2005 and Government resolution No. 449 of 23 May 2007.

<sup>54</sup> For more detail, see [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/GrecoEval4%282012%294\\_Poland\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/GrecoEval4%282012%294_Poland_EN.pdf)

### B.2.6. Comparative table: anonymous companies and drawing from EU funds

QUESTION / STATE	CR	SR	PR
<b>CAN ANONYMOUS COMPANIES DRAW FROM EU FUNDS WITHIN OPERATIONAL PROGRAMMES?</b>	Yes	Yes	Yes
<b>DOES THE LAW REQUIRE THAT RECIPIENTS OF SUBSIDIES OR PUBLIC PROCUREMENT SUPPLIERS DOCUMENT THEIR OWNERSHIP STRUCTURE?</b>	Yes	Yes	No
<b>DOES THE LAW REQUIRE THE DOCUMENTATION OF A COMPLETE OWNERSHIP STRUCTURE TO THE LEVEL OF INDIVIDUALS?</b>	No	No	No
<b>DOES THE NATIONAL REGULATION OF A CONFLICT OF INTEREST OF PUBLIC OFFICE HOLDERS PREVENT THE RISK OF DISGUISED OWNERSHIP OF COMPANIES CONNECTED TO PUBLIC TENDERS OR EU FUNDS?</b>	No	PARTIALLY	No

plete ownership structure to the level of physical persons. Therefore, the public administration bodies and the public themselves do not know the final recipient of public funds provided in the form of subsidies or public contracts. The legislation preventing the conflict of interest of public officials is similar in all three countries (Polish legislation can, however, serve as an example of good practice). Nevertheless, in all three countries, the legislation can be circumvented through equity share in anonymous companies.

### B.3. Control and audit of EU funds by supreme audit institutions

This part of the analysis is aimed at comparing the powers and results of audits conducted by the supreme audit institutions (hereinafter also “SAI”) for entities that are involved in the usage of EU funds, receiving subsidies or awarding public contracts. This audit represents an independent external control of the usage of EU funds.

#### Box B.11 Definition of supreme audit institutions in the countries compared

In the Czech Republic, the Supreme Audit Office is the highest audit institution (hereinafter only “SAO”). Its competences are generally determined in Art. 97 of the Constitution and detailed in Act no. 166/1993, Coll. The highest audit institution in Slovakia is the Slovak Supreme Audit Office, whose existence is treated in the original Constitution of the Slovak Republic 460/1992 Coll. In Poland, the supreme audit institution is “Najwyższa Izba Kontroli”, treated in Art. 202 to 207 of Polish Constitution and in Act on the Polish SAO of 23 December 1994. 12. In all three states, SAIs can control the operation of public authorities, including those of management and control bodies of operational programmes. SAIs can also control the management of EU funds.

**Box B.12** Czech Republic: politicization of internal mechanisms

The reason why we are concerned with the independent external (and not internal) control of the use of EU funds is the corruption model we work with. The model is based on the politicization of the bodies involved in the management and control of the usage of EU funds (see chapter B.1 of this analysis). In the case of the Czech Republic, this assumption was also confirmed in 2012 by the Commission's conclusions.

In addition to other problems, the Commission audit of 2012<sup>55</sup> warned the Czech government about shortcomings in the management and supervision of the Audit Authority (the Ministry of Finance) over the authorized audit bodies (i.e. the ministries and regional councils in the cohesion regions). The Commission states: *“The position of authorised audit bodies and their employees does not ensure the sufficient independence of audit bodies of their management functions. The authorised audit bodies were under pressure from governing bodies, when pointing out the revealed irregularities.”* The low efficiency of internal control in the operational programmes in the Czech Republic was pointed out not only by the Supreme Audit Office<sup>56</sup>, but also by the European Court of Auditors<sup>57</sup> and the Commission (the Commission also pointed out the deficiencies in the audit methodology<sup>58</sup>).

**Box B.13** Poland: deficiencies in the internal control of public procurement

The so called Infofera case of corruption in public tenders for information technologies (IT) may serve as an example of unsatisfying level of internal control of the usage of EU funds in Poland. The case concerns insufficient oversight of public tenders related to EU funds. It is also one of the largest bribery scandals in Polish public administration. In the case a group of high-ranking public officials from the Ministry of Interior and possibly police colluded with IT companies to rig contracts for most important IT systems for the e-government project. The practice lasted for years, undetected. Many of the projects were co-funded by the EU.

Despite the fact that SAIs are independent and can control public administration bodies as well as persons drawing finances from EU funds, the prevention of corruption mechanisms through their actions have not been successful yet. This paradox is caused by the fact that despite the SAIs pointing out the revealed misconducts in their conclusions, these problems usually need to be remedied by public officials. The result of “state capture” is, therefore, that SAI recommendations are ignored. This assumption was confirmed by the analysis of Czech and Slovak national data, which includes the assessment of SAI audit results and their practical impact in the Czech and Slovak Republic.

<sup>55</sup> See <http://www.mdcr.cz/NR/rdonlyres/573323B4-57D4-423A-A1DB-6E74B8E6BBE8/o/160dp622012.pdf>

<sup>56</sup> See <http://www.nku.cz/cz/publikace/zprava-o-financnim-rizeni-prostredku-evropske-unie-v-cr-eu-report-2011-id6069/>. Media also informed about the problem, see for example: <http://www.ceskatelevize.cz/ct24/ekonomika/184977-nku-kontrola-toho-jak-se-v-cesku-naklada-s-eurodotacemi-nefunguje>

<sup>57</sup> <http://www.ceskatelevize.cz/ct24/ekonomika/203667-evropsky-ucetni-dvur-dohled-ceska-nad-eurodotacemi-je-neucinny/>

<sup>58</sup> Final Audit Report Mission N° 2012/CZ/REGIO/J4/1192/1, available here: <http://www.mdcr.cz/NR/rdonlyres/56CB36D9-FoED-4059-9BC0-B45AFA091AFA/o/2FinalauditreportF3cleandocpdf.pdf>

**Box B.14** The low effectiveness of internal control mechanisms and the problem of ignoring SAO audit conclusions in the Czech and Slovak Republics

**Czech Republic:** SAO audit conclusions from the inspection of selected road constructions and investments co-financed from EU funds show repeatedly the same type of misconduct (lack of conceptual documentation, shortcomings in the assessment of projects, increase in prices of construction during the execution of additional works, etc.). It can be said that despite many audits conducted by SAOs in the programming period 2007–2013, there have been no sufficient corrective measures taken in the audited entities. The correction recommendations included in the SAO audit conclusions are either ignored or their application is ineffective in practice. This follows from the conclusions made by the Czech SAO Report on the financial management of European Union funds in the Czech Republic for 2012, pp. 44–46. The partial conclusion made by the SAO Report on the financial management of European Union funds in the Czech Republic for 2012, p. 45 can also be quoted: *“The conducted analysis and its comparison with the results of the analysis of the previous period (EU Report 2010) shows that weaknesses in the same areas persist, both at the level of implementation bodies, and at the level of final beneficiaries. In comparison with the previous period, there were more cases of final beneficiaries being paid ineligible expenditure.”*

**Slovakia:** In connection with the results of controls of measures taken to address the shortcomings identified in previous audits, the report on the results of Slovak SAO audits for 2012 states that: *“The controls of remedial actions showed that most measures were performed, but there were also several cases of repetitive deficiencies, which showed the ineffectiveness of the*

*adopted measures, as well as inadequacy in the internal control systems in the audited entities.”*

On the other hand, the assessment report of the National Integrity System project states that: *“SAO currently has no mechanisms that would monitor the percentage of recommendations implemented by the National Council of the SAO, the government or other government authorities.”* This is confirmed by the results of the audits on the usage of EU funds carried out by the SAO: *“A breach of various provisions of the Accounting Act, the Act on Financial Regulations and Travel Compensation was a common finding. The audits found many cases of payments of items that were not included in the project budget, the violation of the Public Procurement Act and the law on travel expenses, and the failure to perform was revealed with the improper implementation of preliminary or regular inspections, and therefore the violation of the law on financial control and internal audits.”*

**Box B.15** Poland: ignoring of SAO recommendations in practice

On the basis of its findings, the Polish SAO can formulate possible recommendations for improvement of legislation concerning the organization and efficiency of the public administration. In the past three years, the SAO formulated 114 such proposals (out of a total of 165 proposals). Only 17 of them were implemented and 11 were implemented partially. 86 proposals remained unimplemented.

On the other hand, it should be said that despite its deficiencies Polish SAO is thought to be instrumental in discovering corruption, clientelism and mismanagement in Polish administration and SOEs. Many of the recent corruption scandals started with publication of SAO’s audit reports. Special SAO audits are



also carried out when other agencies or media make accusation of misdeeds in public administration. Even though SAO's recommendations are often not implemented, its reports are respected and widely discussed in the media and therefore exert pressure on politicians.

This part of the comparative analysis aims to find out whether the SAI audit conclusions are being ignored or if it is only bad practice or a legislation system failure, and to suggest a solution. The indicator of the effectiveness of audits is the answer to the question of how the audited entities and their superior bodies in the given countries are reacting to the audit results. We examined whether SAI-audited entities have the legal obligation to accept remedial action (B.3.1), whether they are under the legal obligation to inform SAIs about the remedial actions taken (B.3.2), whether SAIs themselves have the right to enforce remedial actions, if these are not implemented by the audited subjects (B.3.3), and whether the public is informed about the results of SAI audits (B.3.4). The examination is based on the legal regulation of SAIs in Italy, Belgium, Portugal and France. In the first three countries, SAIs may impose fines upon audited subjects to enforce remedial actions. In France, the Court of financial and budgetary discipline may impose the fines instead of the SAI.

### B.3.1. Do the persons audited by Supreme Audit Institutions have a legal duty to adopt the remedial measures set out in the SAI's audit conclusions?

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#### CZECH REPUBLIC

For the audited persons the audit conclusions of the Supreme Audit Office (SAO) alone are not legally binding; they only contain recommendations for remedial actions. However, the Government may discuss a particular audit conclusion and, in accordance with Act No. 166/1993 Coll., Sec. 30, adopt a resolution obliging the corresponding ministries to adopt the remedial actions set out in the audit conclusion. The audited persons are not directly obliged to adopt the remedial actions set out in the SAO's audit conclusions; however the Government can make the remedial actions binding by incorporating them in its resolutions. Nevertheless, these resolutions are binding only for the ministries, not for the bodies of the territorial administration units.

#### SLOVAKIA

The SAO will inform the body that acts on behalf of the State in relation to the activities of the audited person about the defects revealed during the audit. Within its scope of activity and the deadline set out by the SAO, the above mentioned body shall arrange for the rectification of the notified defects and provide the SAO with a written report without delay. If the SAO finds out that the audited person has failed to implement the measures and remedy the defects revealed during the audit, the above

mentioned procedure will be repeated.<sup>59</sup> When reinforcing remedial actions, the SAO has to rely on publicity only.

#### POLAND

The SAO has several tools that can help in enforcing the removal of defects revealed by the SAO and notified to the audited person. One of them is the post-audit conclusion, whose implementation is connected with the recipient's obligation to notify the SAO of the way its recommendations will be handled and its proposals implemented, and about all and any actions that have been adopted, or to state the grounds for its failure to adopt them, within the term set out in the audit conclusion, i.e. a term not shorter than 14 days. The SAO Chairman can inform, in writing, the director of the superior authority or the corresponding state or self-governing authority about the recommendations, evaluations and proposals related to the audited activity included in the audit conclusion. These entities are also obliged to inform the SAO about all initiated actions. If the SAO, while auditing, discovers facts that indicate a criminal or a minor offence, it shall notify the appropriate law enforcement authorities and the director of the audited or supreme entity, as well as the corresponding state/self-governing body.

The SAO's after-audit objections can also include personnel recommendations, that is, pursuant to Art. 53., the Act on SAO, the post-audit conclusion may include facts pointing to there being no grounds for a person to hold a certain office, or highlighting the fact that an office is held by a person liable for the defects revealed in the audited units. This appears to be an efficient disciplinary measure that affects all public administration officers.

<sup>59</sup> See Sec. 20, et seq. of Act No. 39/1993 Coll., on the Supreme Audit Office of the Slovak Republic.

### B.3.2. Do the persons audited by an SAI have a legal duty to notify the SAI of the implemented remedial measures?

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#### CZECH REPUBLIC

Act No. 166/1993 Coll., on the Supreme Audit Office, fails to impose on the audited persons the duty to inform the SAO or other public administration bodies about any adopted remedial measures. On the other hand, the Act does not prevent them from submitting such reports. For instance, if the Czech Government, by its resolution, obliges its ministries to adopt remedial measures included in the SAO's audit conclusion, it can subsequently ask the audited person to submit an implementation report.<sup>60</sup>

#### SLOVAKIA

The audited person is not obliged to report whether it has implemented any measures to remedy the defects revealed by the SAO's audit.

#### POLAND

According to the law, the audited persons must inform the SAO about their way of implementing the recommendations and the proposals, and about any actions taken, or, if no action has been taken, state the grounds for this, within the term set out in the audit conclusions, i.e. a period not shorter than 14 days. The SAO can then notify the corresponding supreme state administration bodies, and they must subsequently inform the SAO whether they have adopted the corresponding measures.

<sup>60</sup> See Art. II, par. 1 of the Rules of Procedure, together with its Appendix 5. Available at: <http://www.vlada.cz/assets/jednani-vlady/jednaci-rad-vlady/Jednaci-rad-vlady.pdf>

### B.3.3. Can an SAI itself enforce the rectification of the discovered defects, and if so, in what way?

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#### CZECH REPUBLIC

The SAO can submit its findings to the corresponding tax administrators (e.g. in case of alleged tax arrears), or to the prosecuting authorities. The SAO is not vested with the power to force the audited persons to adopt remedial measures.

#### SLOVAKIA

After finding defects in the audited entity, the SAO will issue a report concerning the audit and formulate recommendations for their rectification. The applicable legal regulations fail to include tools for the enforcement of remedial actions; the findings function only as recommendations and the SAO is not allowed to impose a fine on the audited person. The SAO does not even keep a file on the number of recommendations actually implemented by the audited persons.

#### POLAND

An exception to the rule is the so called post-audit conclusion created by the SAI on the basis of information received from the audited person about the kind of remedial measures adopted or the fact that remedial measures have been adopted. However, the SAI cannot further enforce the implementation of its proposals set out in the audit conclusions.

### B.3.4. Does the public have access to the audit conclusions of the Supreme Audit Institution in their full or restricted versions?

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#### CZECH REPUBLIC

The Czech SAO publishes audit conclusions in their full versions; however, they do not include classified information. The public, unlike the members of the Chamber of Deputies, the Senate, the Government and the ministries, has access only to the restricted version of the SAO's audit conclusions.

#### SLOVAKIA

The Slovak Act on the SAO fails to deal with the problem of report creation and publishing in more detail. In his report published in 2007, the Slovak SAO's Vice-Chairman, Emil Kočíš, states that the reports on the Slovak SAO's auditing activities are published in the full version.<sup>61</sup>

#### POLAND

As regards public access, in accordance with Sec. 10, par. 1 of the Act on the SAO, the President of the Polish SAO submits the activity report to the Sejm first, and only then to the public. Under Sec. 10, par. 2, of the Act, after presenting the report to the Sejm, the President of the Polish SAO publishes the information pursuant to Sec. 7, par. 1, points 2 to 6, of the Act on the SAO (see above); however, in this case the President of the SAO must proceed in accordance with the legal regulations on the protection of classified

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<sup>61</sup> Kočíš, E. Postavenie NKÚ SR v systéme kontroly a niektoré výsledky z kontrolnej činnosti úradu (The Position of SAO within the Audit System and some results of the SAO's auditing activities). Banská Bystrica: Via Iuris, 2007, p. 13.

information. Therefore, the public has only limited access to the SAO's audit conclusions.

### B.3.5. Conclusions of controls and audits of EU funds by the supreme audit institutions

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The legislation of all three countries does not entitle SAIs to enforce implementation of their recommendations for improvement contained in the audit conclusions formulated by the SAIs and intended for audited entities. SAIs can turn with their conclusions to other specialized public authorities—typically bodies active in law enforcement or administrators. SAIs themselves cannot impose sanctions for a failure to take corrective action. The legislation of all three countries also fails in the “follow-up procedures”, i.e. the obligation of the audited entity to inform the SAI about what corrective actions were performed. This is required only in the Polish legislation (which may in this respect be recommended as a model legislation) through the so-called post audit conclusions.

” The legislation does not entitle supreme audit institutions to enforce implementation of their recommendations for improvement contained in the audit. It also fails in the “follow-up procedures”.

## STATE-OWNED ENTERPRISES IN THE CZECH REPUBLIC, SLOVAKIA AND POLAND

The second part of our analysis deals with state-owned enterprises. State-owned enterprises (SOE) are business companies with a state ownership share that conduct their business, regardless of their legal form, within the legal system of the particular state (joint-stock companies, public enterprises, etc.). The information about the SOE included in this analysis applies also to business companies whose shares are held by territorial self-governing units (municipalities, districts, voivodships, etc.).

” In the Czech Republic alone, the public funds administered by state-owned enterprises amount to nearly 18% of GDP.

There are several reasons why we focus on state-owned enterprises. Firstly, in all compared countries the SOE administer a large amount (de iure and de facto) of public funds, i.e. tens of billions of euros, as shown in the following table. In the Czech Republic alone, the public funds administered by state-owned enterprises amount to nearly 18% of GDP.

### SOE Turnovers:<sup>1</sup>

	TOTAL TURNOVER (MIL. EUR)	TOTAL ASSETS (MIL. EUR)	GROSS DOMESTIC PRODUCT (GDP)	ECONOMIC RELEVANCE <sup>2</sup>	PURCHASES (MIL. NATIONAL CURRENCY)	PROCUREMENT PURCHASES
<b>CZ</b>	26 381	52 031	149 108	17.69%	320 431	23.98%
<b>SVK</b>	11 740	32 466	71 463	16.43%	2 326	77.11%
<b>PL</b>	75 404	89 184	367 239	20.53%	N/A	N/A

<sup>1</sup> The table describes SOE's total turnovers in compared states, total value of their assets, value of gross domestic product of compared states and the so called "economical relevance", total volume of purchases per year carried out by SOEs and the amount of purchases carried out through public procurement.

<sup>2</sup> Economic relevance means ratio Turnover / Gross domestic product (GDP); it does not mean GDP share.

The SOE are also important contracting entities. For example in the Czech Republic, the SOE annually award public procurement contracts in the total value of CZK 76.838 bn., while in the Slovak Republic it is EUR 1.793 bn. In fact, according to the data collected in the Czech

Republic, the volume of public procurement contracts awarded by the SOE in 2007–2012 shows a growing trend despite the overall economic decline. This means that the SOE are an economically significant group, as shown below.

### SOE Procurement in the Czech Republic and Slovakia:

YEAR	CZ (MIL. CZK)	CZ CONTRACTS	SVK (MIL. EUR)	SVK CONTRACTS
2006	9 245	427	N/A	N/A
2007	34 588	1 697	N/A	N/A
2008	57 650	2 134	N/A	N/A
2009	77 642	2 465	3 205	691
2010	76 454	3 106	1 178	535
2011	92 120	2 510	873	685
2012	122 577	2 851	1 918	2 056
2013	80 159	2 713	574	3 135
AVERAGE (ANNUALLY)	76 838,5	2 237,875	1 793,5	1 420,4
TOTAL	550 435	17 903	7 748	7 120

” State-owned enterprises are often the targets of the clientelist groups linked to the politicians who draw public funds from the SOE by means of the SOE's anonymous contractual partners.

The cases we refer to, together with the reports of the national institutions, clearly show that the SOE are often the targets of the clientelist groups linked to the politicians who draw public funds from the SOE by means of the SOE's anonymous contractual partners. The next indicator, which

also applies to the administration of EU funds, is the fact that the public is not allowed to carry out an efficient due diligence audit of SOE, nor control the excesses in their management, as it has no access to any relevant data (i.e. no ownership policy, restricted access to information). The audit bodies do not efficiently prevent system political corruption in this area, as they are not allowed to supervise the SOE (CR) at all, or the recommendations arising from their audits are not implemented.

**Box C.1** The influence of the clientelist groups on the bodies of SOE in the individual states

**Czech Republic:** The Czech Security Information Service (BIS) has repeatedly warned against the attempts of clientelist groups to exert influence on corporate governance of Czech SOE. In its Annual Report 2011 BIS says: *“In the case of important companies (Czech Airlines, Czech Postal Service, Czech Railways, and Czech Railways Cargo) it found influencing of public contracts awarding, preparation for strategic decisions, and of personnel issues. Some sales of assets of the companies aroused great doubts about their transparency and their benefit for the State. Management also provided incomplete or distorted information to the companies’ supervisory authorities.”* BIS sees these activities of the clientelist groups as a form of organized crime, as follows from their Annual Report 2010.

**Slovakia:** In its Annual Report 2011, the Slovak Information Service (SIS) warns against the corruption activities of the lobby groups: *“The recipients were warned against the corruption and lobbying activities of various interest groups and persons engaged in exerting influence over the placement of public contracts in these companies (SOE). The influence was exerted by intentional interventions in the public procurement process and the circumvention of public tenders. The award of public procurement contracts was manipulated mainly in companies active in power and heating industry. Non-transparent management was also found in distribution and water management companies and in companies that use transport infrastructure. Again, cases of harming State’s interest in the area of forest management were revealed. Disadvantageous contracts for the supply of wood and for the sale of a state enterprise property were concluded with interrelated companies.”*

**Poland:** In 2010, the Internal Security Agency completed investigation of significant property damage to the Military Property Agency. The damage consisted of transferring the property to economic entities by non-cash contribution, and then selling them at a price below the market price. In the course of the investigation it was shown that the creation of companies by the Military Property Agency violated their own internal procedures; and that alternative forms of property development or profitability of the project had not been analyzed. As a result, the shares acquired by the Agency in companies in return for the contribution to the properties did not correspond to their actual value. The tendering procedures were omitted. As a result, the Regional Prosecutor’s Office in Warsaw sent a bill of indictment against former presidents and former Director of the Group of Economic Initiatives, alleging mismanagement in the disposal of the property of the State Treasury. Property damage of State Treasury as a result of the above-described procedure amounted to 51 million zł.

This part of our analysis is based on real cases, on the basis of which we were able to identify concrete problems related to the corporate governance of the state-owned enterprises and their economic activities. The case studies, which were prepared and published by the authors of this analysis, were as follows:

5. **Prague Public Transit Company:** The study describes the politicization of Prague Public Transit Company (PPTC) and the subsequent activities of the clientelist groups linked to PPTC that channelled funds from PPTC in the form of non-transparent or manipulated public tenders and unilaterally disadvantageous contracts. We use 9 real contracts concluded with PPTC to demonstrate the alleged operations of the clientelist groups, probably composed of the members of PPTC bodies and

its management, the law office Šachta&Partners v.o.s. and a network of anonymous companies performing individual public procurement contracts.<sup>62</sup> In the case of a public procurement contract for the distribution of tickets alone, a criminal complaint including several criminal offences has been filed against the former director of PPTC, M. Dvořák, the former director of PPTC Services, T. Petan, the former Councillor for Transport of the Capital City of Prague, R. Šteiner, and the director of the anonymous company Cross Point, a contracting party in a public procurement contract. The investigation is still in process and charges are gradually being extended to other problematic public tenders or contracts. The total damage caused by the clientelist groups in PPTC is estimated at approx. five hundred million CZK. The case study illustrates the effects of the absence of ownership policy, the politicization of the bodies of SOE, the conflict of interests, the breach of the Public Procurement Act and the failure of the SOE's internal control mechanisms.

**6. Electronic Tickets:** The case is based on a sample of 10 public procurement contracts concluded by the transport companies of large Czech cities. The case study reveals the close ties between the companies controlling a significant part of the market in the area of public procurement contracts for SMS tickets such as Erika, a.s., Crowsnest, a.s., Crowsnest net a.s. and Direct Pay s.r.o., and anonymous companies and other entities, such as the law office Šachta&Partners v.o.s. (now MSB Legal v.o.s.), which also played part in PPTC cases, and the corresponding transport companies in the particular cities (i.e. SOE) that concluded contracts with those companies. There is a reasonable suspicion that public procurement contracts were manipulated with the goal of selecting a contractor amongst the members

of the above mentioned clientelist group. In four cases, the supplier of SMS tickets was selected without a selection procedure; for example the transport company of Ostrava managed to eliminate five bidders for formal deficiencies, awarding the contract to the only remaining bidder; the selection procedure of the transport company of Brno was suspended by the Office for the Protection of Competition. The case study illustrates the exertion of influence over the public tenders, the conclusion of contracts that were disadvantageous (overpriced) for the SOE, and the fact that public funds are being channelled from some transport companies.

**7. Slovak Railways:** The study describes the use of ownership rights of the State in Železnice Slovenskej republiky, š.p. (ŽSR), Železničná spoločnosť Slovensko, a.s. (ZSSK) and Železničná spoločnosť Slovensko Cargo Slovakia, a.s. (CARGO). The case study reveals the absence of ownership policy and notes the politicization of corporate governance of the railway companies. The politicization results in the so called “virtual holding”, when all the above mentioned companies are governed by a close circle of public office holders who are, at the same time, members of the board of directors of ŽSR and of CARGO's supervisory board. This increases the risk of a possible influence of these clientelist groups on the Slovak SOE, while there is a reasonable suspicion that these groups exert influence over public procurement contracts awarded by the SOE to a close circle of contractors. In case of public procurement contracts alone, awarded to privately-owned repair companies in 2009–2012, the members of the clientelist group received 26.2% of the aggregate value of all public procurement contracts announced by the railway companies, amounting to tens of millions euros. The case study illustrates the politicization of the corporate governance of the SOE, the conflicts of interests, and the influence over the placement of public procurement contracts.

<sup>62</sup> In relation to the contracts concluded by PPTC during the office of M. Dvořák and other persons holding offices in PPTC's bodies, an audit in PPTC revealed that there were 8 criminal complaints filed in total: <http://aktualne.centrum.cz/domaci/regiony/praha/clanek.php?id=754540>



8. **Tipos case:** The study deals with the politicization of the corporate governance of state-owned enterprises (SOE) and the subsequent operation of a potential clientelist group in Tipos (Slovak national lottery) directed by the Slovak Ministry of Finance. At the core of the case is a dispute between Tipos and Športka (a privately-owned lottery company) regarding illegal acquisition of know-how, unauthorised use of trademarks and breach of contracts, where the total amount of compensation that Športka requires is EUR 33 mil.–66 mil.<sup>63</sup> The case also involves the anonymous company Lemikon Limited, which bought the entire claim of Tipos from Športka. The Ministry of Finance then signed a unilaterally disadvantageous agreement with Lemikon Limited on an out-of-court settlement of the dispute, which in reality meant that all funds were channelled from Tipos to Lemikon Limited. There is a reasonable suspicion that the whole case was influenced by a clientelist group composed of the officer of the Ministry of Finance, the co-owners of some law offices and the judges deciding the dispute between Tipos and Športka. The Tipos case clearly illustrates the politicization of the corporate governance of a SOE, the exercise of influence on court proceedings, the conclusion of contracts disadvantageous for a SOE, and the resulting risk of conflict of interest related to the participation of an anonymous company in the case.

After identifying the problems, we hereby present the indicators of the possible corruption risks, based on the analysis of the national legal regulations concerned with the corporate governance of the SOE. The basic indicators of good practice are the recommendations included in the documents<sup>64</sup> of OECD.

<sup>63</sup> The Slovak courts awarded Športka damages in the amount of EUR 33 mil., and after the anonymous company Lemikon Limited purchased the claim from Športka, it was awarded damages of EUR 66 mil.

<sup>64</sup> OECD Guidelines on Corporate Governance of State-Owned Enterprises, available at: <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>

A typical example of a bad practice in the corporate governance of the SOE (the “corruption model”) that we use in this part of our analysis resembles the corruption model that is used for channelling EU funds. The basic problem is the **politicization of the corporate governance of state-owned enterprises** that gives room to the **conflict of interests of public office holders** operating in the bodies of the state-owned enterprises (chapter C.1). The unlimited possibilities of contracts concluded between **anonymous companies** and state-owned enterprises (chapter C.2) provide the clientelist groups with an opportunity to channel funds from the SOE. This results in a difficult **control** of state-owned enterprises by the **general public** (chapter C.3), and the need for an efficient independent audit carried out by the **supreme audit institutions** (chapter C.4).

” The absence of an ownership policy might result in a weak and non-transparent corporate governance of the state-owned enterprises.

The basic problem that, to a large extent, exists in all three states is the **politicization of the corporate governance of SOE**, as is the case of channelling the EU funds. This politicization of the corporate governance of SOE results in the risk of a possible conflict of interests. For the purposes of this analysis, the term “politicization of the corporate governance of SOE” means a high level of influence exerted by senior officers over the goals that the SOE should achieve and the personnel composition of the bodies of SOE. The first indicator of the politicization of the corporate governance of SOE is, therefore, the non-/existence of the so called “ownership policy” and the duty to regularly evaluate the fulfilment of economic goals set out by the particular SOE. The absence of an ownership policy might result in a weak and non-transparent corporate governance of SOE, as indicated in the reports of the Czech Security Information Services (BIS).

**Box C.2** Consequences resulting from the absence of a state ownership policy in CR and PR

*Czech Republic, BIS Annual Report 2010: “A long-term phenomenon having a negative impact on these companies is the relatively weak position of the owner, which makes it difficult to prevent uneconomic behaviour on the part of the management. In the case of some companies the management purposefully restricted the monitoring and managing role of the State. The inconsistent role of the State as an owner is the decisive factor allowing relatively broad space for harm to the interests of state-controlled companies in favour of private entities, via such phenomena as manipulated public contracts, circumvention of the law on public procurement, payment of exaggerated prices for acquisitions, disadvantageous sale of assets and payment of unneeded marketing, consulting and legal services.”* Unfortunately, we must say that in 2011 the situation remained practically unchanged.

**Poland:** According to the information from the SAO’s Department of Economy, Public Assets and Privatization from 2009<sup>65</sup>, inefficient use of State Treasury assets caused that only 15% of the companies with State Treasury participation paid dividend from the profit. The main reason for non-payment of dividend was a continuous weak economic situation. Financial impact of irregularities amounted to approximately 0.5 billion zł and related to one third of the audited companies. According to SAO, the non-existent ownership policy was also undermining supervision—for example, by leaving forming of economic expectations to the companies. Another problem identified by SAO as problematic is a high number of companies, which generates high costs associated with supervision. This led to dispersion of supervisory activities and freezing public funds. Another important issue mentioned

by SAO is susceptibility of poorly managed State Treasury companies to the steps taken to their detriment.

The second problem connected with the politicization of the corporate governance of SOE is the nomination process for the appointment of officers to functions in supervisory and managing bodies of SOE. According to the OECD’s recommendations, the state should establish a well-structured and transparent system for the appointment of officers to enterprises, in which the state has exclusive or majority ownership shares, and actively participate in the appointment of officers to all SOE bodies. The bodies of SOE should be capable and objective enough to be able to fulfil their duty of strategic management and control. The officers should have a reputation for integrity and be liable for their acts. However, we must say that at least in the CR and SR the appointment process is unfortunately under the full control of the public office holders and the members of the SOE bodies are clearly selected on the basis of political, social or economic links to the public office holders. As a result, the members appointed to the SOE bodies are usually (active) politicians rather than independent experts.

**Box C.3** A position in the SOE as a bribe for the deputies

A good example of an office in an SOE being given as a bribe is illustrated on one of the biggest scandals of this kind in the CR in the last few years. Three political party deputies, M. Šnajdr, I. Fuksa and P. Tluchoř, were allegedly promised a bribe in the form of an office in public administration bodies or state-owned enterprises, providing they resign from their parliamentary mandates and are replaced by persons who would pass a bill linked to the vote of confidence, i.e. to very existence of the government. The above-mentioned deputies refused to approve the bill. In order to conceal the causality between their resignation and the new offices, two of them

<sup>65</sup> Controls number 144/2009/Po8051/KGP and KGP/41021/08—o wynikach kontroli sprawowania nadzoru właścicielskiego w spółkach z większościami udziałem Skarbu Państwa. Available here: <http://www.nik.gov.pl/plik/id,1682,vp,1900.pdf>

became members of the SOE bodies after the lapse of several months,<sup>66</sup> the third one (P. Tluchoř) chose to appoint L. Antoš as a member of the SOE body instead. The reason for his act was that after the first two deputies were given an office (with the general public noticing a direct link to their resignation), it was socially intolerable for P. Tluchoř to accept the promised office, which was, thus, given to L. Antoš.

**Poland:** Infighting within the ruling Civic Platform (PO) party led to exposure of politicized clientelist networks connected to one of the largest Polish SOE—KGHM Polska Miedź—and its daughter companies. State Treasury owns 32% of the company which together with daughter companies employs nearly 50 thousand people. Allegedly, the company belongs to political spoils system and offers very well-paid positions for clients and members of the ruling political parties as well as their families. In the newest scandal from October 2013, one of the PO backbenchers was offered a lucrative job in KGHM in return for a vote for one of the contenders in PO leadership contest.

The case studies done in the CR and SR confirmed that the most extensive staff fluctuation of SOE members (typically members of the boards of directors and supervisory boards) takes place within one year after the parliamentary elections (that cause personnel changes in national governments), with a correlation between the election date and the number of replaced SOE members.

The analysis “Staff structure of the management and supervisory bodies of state-owned enterprises” shows that during his first 4 months in office V. Tlustý, the Czech Finance Minister, replaced 8 supervisory board members of MERO, a.s. and 7 supervisory board members of ČEPRO, a.s. Significant staff turnover continued to take place after he was succeeded

<sup>66</sup> On 20 Dec 2012 M. Šnajdr was elected the Chairman of the Supervisory Board of ČEPRO, a.s., whose only shareholder is the State; on 11 Jan 2013 I. Fuksa became a member of the Board of Directors and, at the same time, the Chief of Strategy and Development of Český aeroholding, a.s., whose only shareholder is the State.

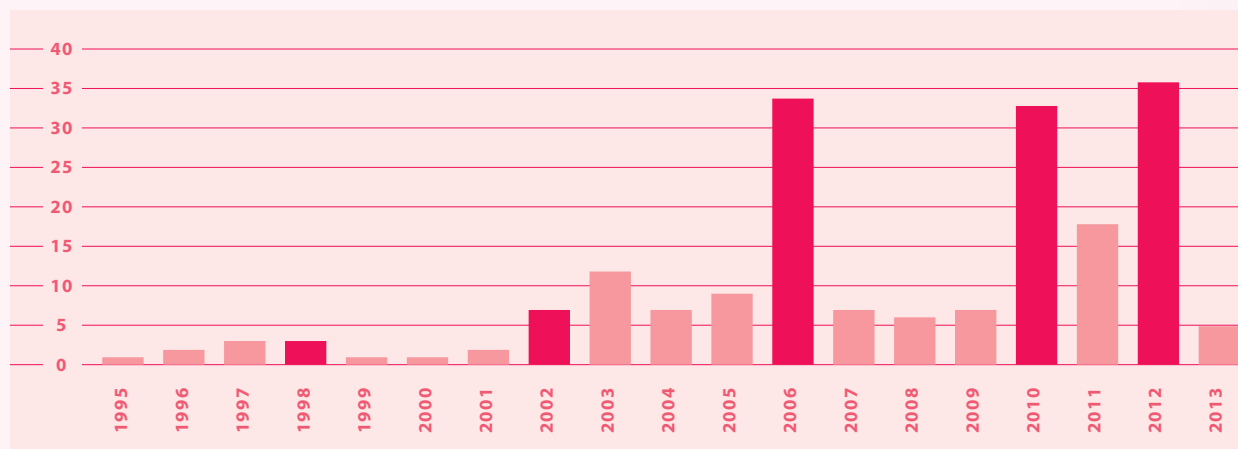
in his office of Finance Minister by M. Kalousek who, during his 15 months in office, replaced 6 supervisory board members of MERO, a.s. and 2 supervisory board members of ČEPRO, a.s. During the following term of office, which lasted 3 years, M. Kalousek replaced other 7 supervisory board members of MERO, a.s. and 9 supervisory board members of ČEPRO, a.s.

The effects of the government and parliament personnel structure on the changes carried out in the SOE bodies are illustrated in the following tables:

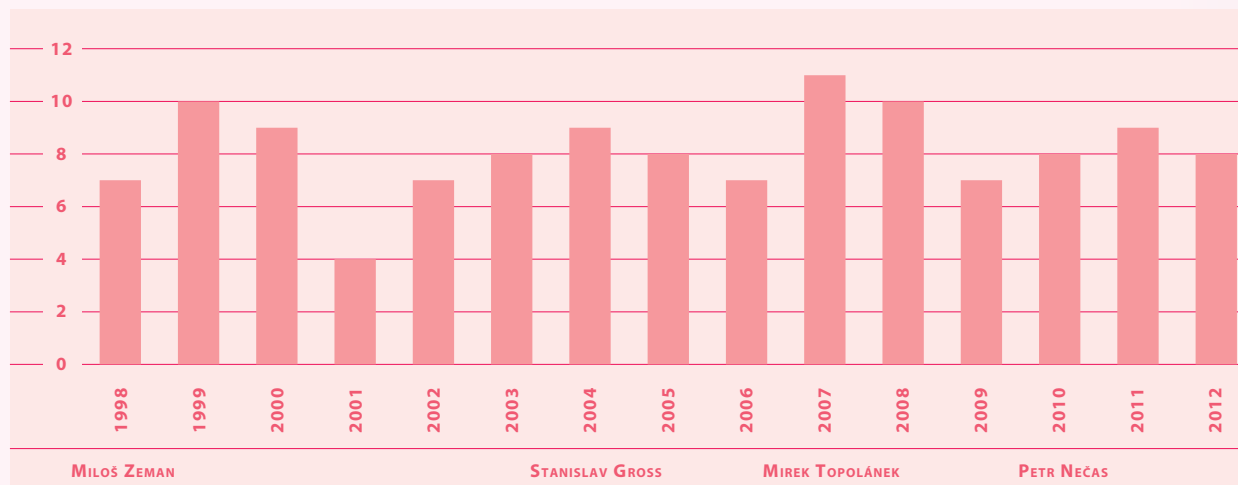
#### **Box C.4** Staff turnover in executive bodies of the Czech and Slovak SOE

The **Slovak case study** “Analysis of senior staff turnover in public enterprises” shows that the total staff turnover rate regarding the senior staff of the Slovak SOE (members of the board of directors, general managers) during the monitored period of 2007–2013 in the election years (i.e. years when elections to the Chamber of Deputies take place—these years are marked in red in the table) was several times higher than the staff turnover rate in the remaining years.

The **Czech data analysis** prepared by Center of Applied Economics, regarding the number of staff changes in the SOE board of directors shows that the largest number of changes usually takes place in the year following the election year, i.e. the year of significant changes in the composition of the Chamber of Deputies and the Government. The elections took place in 2002, 2006, 2010 and 2013 (snap election). The table illustrates the number of personnel changes in the Czech SOE supervisory boards, showing that the changes in the SOE board of directors also depend on other changes in the government structure (2004—resignation of M. Špidla’s government; 2007—significant changes in M. Topolánek’s government).



Source: Slovak Governance Institute



■ The number of chairmen of the boards of directors replaced in 20 monitored companies with a turnover exceeding CZK 100 mil. (2011)

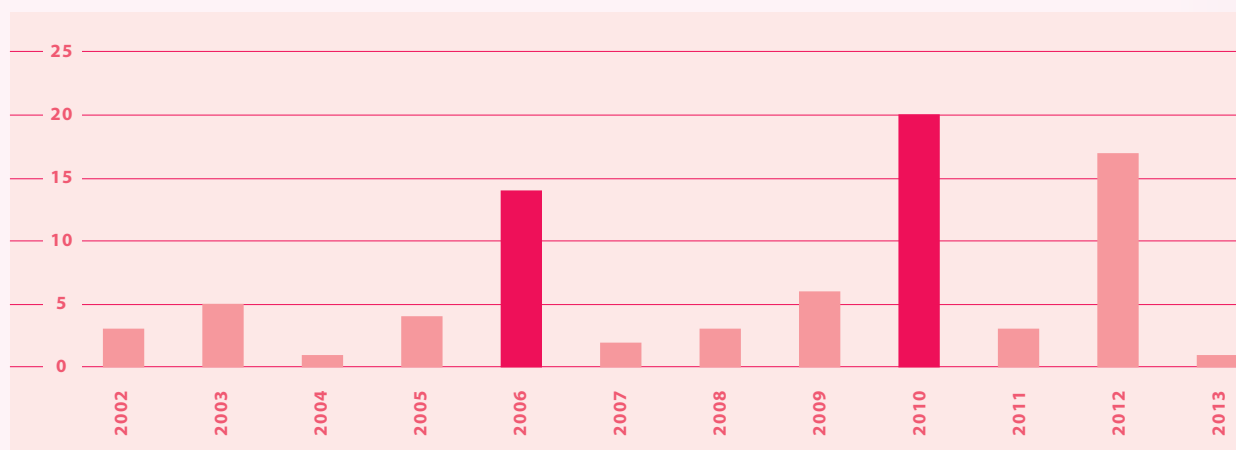
Source: Center of Applied Economics

### Box C.5 Staff turnover in supervisory boards of the Czech and Slovak SOEs

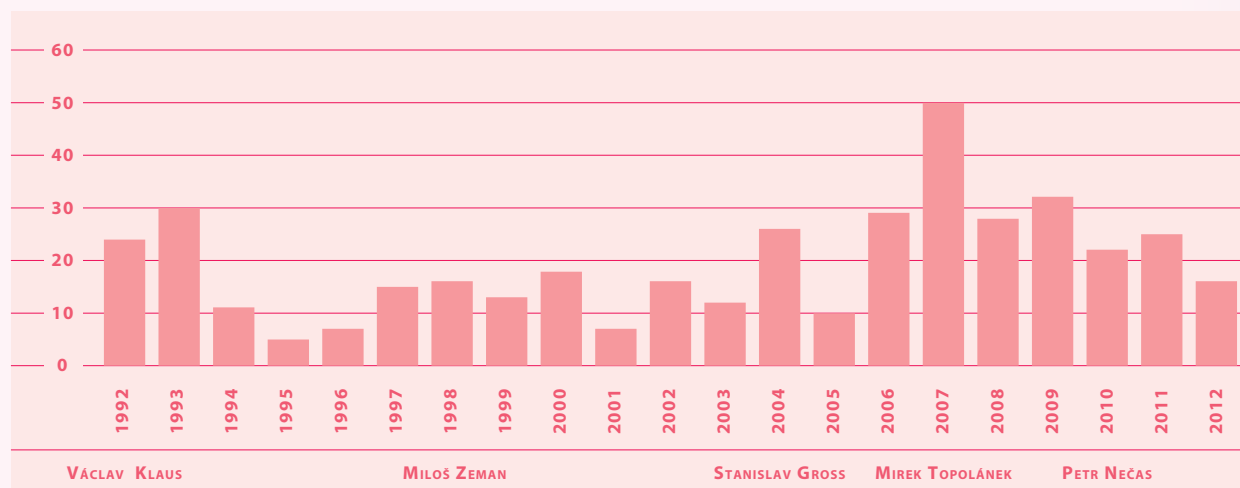
The **Slovak case study** “Analysis of senior staff turnover in public enterprises” shows that the total staff turnover rate regarding the supervisory board members of the Slovak SOE during the monitored period of 2007–2013 in the election years (i.e. years when elections to the Chamber of Deputies take place—these years are marked in red in the table) was several times higher than the staff turnover rate in the remaining years.

The **Czech case study** “Political control and the potential for corruption in public enterprises” arrives at similar conclusions as the Slovak analysis above. The table shows that the highest number of person-

nel changes in SOE supervisory boards takes place in the election year, or in the year of significant changes in the government (usually caused by the changes in the government coalition that result in personnel changes in the corresponding ministries exercising the rights of ownership in the SOE), while in the remaining years the staff turnover rate in the supervisory board is significantly lower. The elections took place in 1992, 1996, 1998 (snap election), 2002, 2006, 2010 and 2013 (snap election). Apart from the election years, changes in the government also took place in 1993 (dissolution of Czechoslovakia), 2004 (resignation of V. Špidla’s government), 2007 (M. Topolánek’s “second government”), 2009 (resignation of M. Topolánek). Prime ministers’ names during the monitored period are indicated below.



Source: Slovak Governance Institute



■ The number of members replaced in supervisory boards of 12 monitored companies with a turnover exceeding CZK 100 mil. (2011)

Source: Center of Applied Economics, ARES

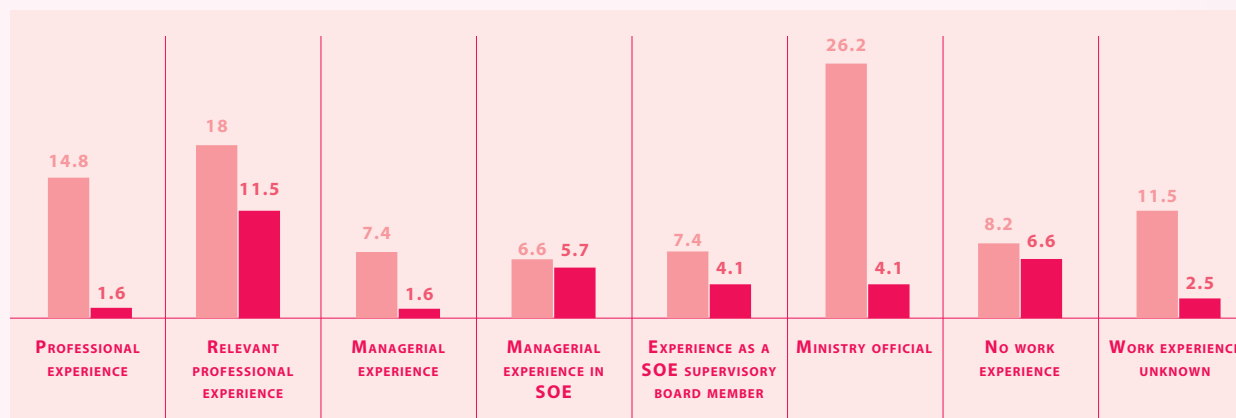
The positions in SOE bodies tend to be filled by public office holders who lack the necessary qualifications. This affects the quality of management of the SOE and increases the risk of abusing the situation by the clientelist network, due to the passive execution of ownership rights. Given that the public office holders lack the knowledge, experience and time needed for a proper discharge of their of-

fice, as they have a lot of other duties, they are not able to control the SOE boards of directors, or other executive bodies, in a consistent manner. The current experience of the particular states clearly shows that the deciding factor for the selection of an SOE body member is not the candidate's qualification, professional experience or integrity, but rather his/her party membership.

**Box C.6** Czech Republic: The numbers of politicians in the selected categories illustrating the practical experience relevant for an office in the supervisory board of a SOE

An analysis of personnel composition of managing and supervisory bodies of five strategic state-owned companies in 2006–2013 prepared by the civic association “Naši politici” shows the low level of qualification and the political key for the selection of officers.<sup>67</sup> Over a third (38%) of all supervisory board members in the monitored sample are active or former politicians.<sup>68</sup> Upon their appointment,

three quarters of them were still active. Compared to other supervisory board members, the politicians typically fall behind in qualification and previous experience needed for the office. The table below shows the number of politicians in the monitored categories that represent education and experience needed for the position in the supervisory board.



■ Politicians in supervisory bodies (in %), ■ All members of supervisory bodies (in %)

Source: Naši politici

<sup>67</sup> The analysis is based on the sample of five selected state-owned enterprises. The evaluation of personnel qualifications for the given positions concerns the members of supervisory boards of the monitored companies, the general managers, the statutory body representative, and the members of the board of directors holding their offices in 2006–2013. The sample consisted of 177 persons, including 122 supervisory board members.

<sup>68</sup> For the purposes of this analysis, a “politician” is a person who had held a public or a political office before or upon his/her appointment to the supervisory board (local politicians are not included; the analysis includes only the representatives of important agglomerations).

The freedom in this area gives space for bribing and influencing contracts of SOE on behalf of the clientelist groups who can award contracts of SOE to anonymous companies or a group of companies secretly controlled by the clientelist network. This leads to the conclusion of clearly disadvantageous contracts (for redundant or overpriced goods or services, undervalued assets, etc.).

**Box C.7** Examples of influence of a clientelist group over contracts concluded with SOE in the monitored states

**Czech Republic:** the above mentioned case of the Prague Public Transport Company describes the clientelist network operating in 2007–2011 in the Prague Public Transport Company (PPTC), whose sole owner is the Capital City of Prague. The analysis shows that in four cases PPTC concluded disadvantageous contracts with anonymous companies: the contract for the provision of electronic tickets, which was overpriced by CZK 137–274 mil., the contract for the provision of PPTC internal transport worth CZK 748 mil., the contract for the operation of sales points—annually, PPTC is paying CZK 130 mil. (compared to the original price of CZK 30 mil.) since 2009. Contracts for the planned revitalization of three Metro stations announced by PPTC were awarded to anonymous companies, all members of Crescon Group, despite the fact that in all three cases the price of land was undervalued by up to 50%.

To sum up, the services provided to PPTC on the basis of these contracts were significantly overpriced, it was difficult for PPTC to terminate the contracts, the contractual penalties were equal to the contract value etc. The award of public procurement contracts and the selection procedures, on the basis of which PPTC concluded these contracts, are not transparent, or are in direct breach of Act No. 137/2006 Coll. on Public Procurement.

**Slovakia:** Slovak Railways is a model case, where for a long time all privately-owned repair companies participating in this case (ŽOS Trnava/ŽOS Zvolen and ŽOS Vrútky/ŽOS Trading) were exerting their influence and, at the same time, ŽSR and its successor companies (ZSSK and CARGO) were becoming

increasingly dependent on external repair companies. As a result, two or three business groups, whose members are linked to particular political parties, managed to control the entire railway repair infrastructure. The analysis of business relations of these repair companies with ZSSK and CARGO established on the basis of tenders announced between 2009 and August 2013 shows that all ŽOS companies acquired 26.2% of the aggregate price of these public contracts that exceeded EUR 1.803 mil. In the tenders announced by ZSSK (approx. EUR 1.535 mil.), ŽOS Vrútky and ŽOS Zvolen were amongst the five biggest suppliers, according to their trade exchange rates.

**Poland:** In 2012, as a result of an investigation conducted by the Central Anti-corruption Bureau, a bill of indictment against five people (for example against the deputy director of the Office of Informatics of PKP PLK SA<sup>69</sup>, head of the Support Department of this Office and the Office of the Vice-President of the Polish branch of an international IT company) accused of taking and giving financial benefits was delivered. According to the investigation some of the staff members took bribes in exchange for selecting a particular contractor in the tender organized by the staff of the Office of Informatics of Polish State Railways Joint-Stock Company – Polish Railway Lines SA. The tender concerns a server room, which control the movement of trains all over the country.

The operations of such networks consisting of business companies and public office holders holding positions in SOE bodies resemble networks of organized crime, which has been confirmed by the bodies responsible for penal proceedings that investigated

<sup>69</sup> Polskie Koleje Państwowe, Polskie Linie Kolejowe S.A (Polish State Railways Joint-Stock Company – Polish Railway Lines SA).



the corruption cases in SOE, as well as by the intelligence services. See Box C.1 above.

The problems arising from the contractual relations between SOE and anonymous companies can be illustrated by indicators similar to the ones listed in chapter B.2 of this analysis. Therefore, we will treat in detail only the problems related to the corruption model of the corporate governance of SOE.

The corruption model is based on the assumption that the due diligence audit of SOE carried out by the public is not efficient, making the general public unable to call for political responsibility of the public office holders involved in the corruption mechanism, in an informed manner. The reason why the control is not efficient is the **lack of information** about the economic activities of SOE provided to the general public, which is thus not able to evaluate the quality of corporate governance of SOE.

### Box C.8 Public access to information about SOE

**Czech Republic:** In 2011 (and again in 2013) we investigated a selected sample of SOE, trying to find out whether they see themselves as ‘obliged entities’ pursuant to Sec. 2 of the Information Act.<sup>70</sup> ČEPRO, a.s., ČEZ, a.s., Letiště Praha, a.s. and ČSA, a.s. (the last two are now part of Český Aeroholding, a.s.), Prague Public Transit Company, MERO, a.s., České dráhy, a.s. or the state-owned enterprises Česká pošta, s. p. and Lesy České republiky, s. p. do not see themselves as ‘obliged entities’ pursuant to Sec. 2 of the Information Act. This is reflected in the attitude of some of them (e.g. ČEZ, a.s. and PPTC) to dealing with the requests for information pursuant to the In-

formation Act, as SOE open legal trials with regard to the disclosure of information and do not publish information on their own. For example, PPTC has not provided information for nearly 11 years, even though it has concluded a number of unilaterally disadvantageous contracts with anonymous companies.

**Slovakia:** In October 2013 we sent a request for information to a selected sample of 14 SOE, asking, among other things, whether they see themselves as ‘obliged entities’ pursuant to Sec. 2 (3) of Act No. 211/2000 Coll., on Free Access to Information. In the time prescribed by law we received an affirmative answer from 11 SOE; the remaining three SOE interpreted the Act No. 211/2000 Coll. in various ways, however, all SOE finally sent the required information. The analysis prepared by the Slovak Transparency International also pointed out the differences in the interpretation of this Act, noting that some companies listed in Sec. 2 (3) of the Information Act refuse to publish information about their activities, typically stating that they do not administer public funds or state assets, nor the assets of a territorial self-governing unit. The scope of the duty to provide information set out in Sec. 3 (2) (a) (b) of Act No. 211/2000 Coll. is the most frequent reason why companies refuse to provide information.<sup>71</sup>

The general public is not able to judge whether the contracts concluded between SOE and private persons present an advantage or a disadvantage, as SOE usually do not make these contracts public. However, we believe that in the cases we monitor a number of contracts—clearly disadvantageous for SOE—would not be concluded if the law stipulated that it was compulsory to make public all contracts that include SOE as a contracting party.

<sup>70</sup> See [http://www.statnifirmy.cz/sites/default/files/soe\\_konference\\_informacni\\_podklad.pdf](http://www.statnifirmy.cz/sites/default/files/soe_konference_informacni_podklad.pdf), p. 5

<sup>71</sup> See <http://firmy.transparency.sk/sk/sets/firms2012/analyses/p:825/preco-aj-na-statne-firmy-plati-infozakon>

**Box C.9** The effects of publishing disadvantageous contracts concluded with SOE in CR and SR

**Czech Republic:** The Prague Public Transit Company may serve as an example. After publishing the terms of some of the contracts concluded by this SOE (clearly disadvantageous for the company), the Prague Public Transit Company reviewed these contracts and amended or terminated them.

**Slovakia:** In May 2013 a contract was published, on the basis of which Slovenská správa ciest (SSC) was planning to award public procurement contracts worth tens of millions euros through a private company from Banská Bystrica. SSC concluded a “Mandate Agreement for Ensuring Public Procurement Processes for the Realization of EU Funded Projects” with a private company, whose task was to find building contractors for 14 above-the-threshold contracts worth approximately EUR 200 mil. SSC failed to inform about the criteria for the selection of the particular private company, and SSC’s spokesperson said that the aim of hiring this company was to speed up the public procurement procedure. After the contract was published, the Minister of Transport said that SSC should not procure via a privately-owned company and ordered to terminate the contract.<sup>72</sup>

The last criterion of a model corruption case is the **non-efficiency of external audits**. The above mentioned cases and the legal analysis show that Czech companies fail to meet Article 3 (3) of “Lima Declaration” that stipulates that all state-owned enterprises should submit to the control of the Supreme Audit Office. In the Czech Republic, the audit is compulsory only for the companies with the legal form of a “state enterprise”. As we said before, the state

fails to implement the audit conclusions regarding the administration of EU funds. In this case, we have unfortunately arrived at the same conclusion: all states that were monitored fail to remove the deficiencies in the corporate governance of SOE.

## C.1. The conflict of interests and the politicization of the corporate governance of SOE

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### C.1.1. The ownership policy

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The first indicator of the politicization of the corporate governance is the absence of a State’s “ownership policy”, which is a basic conceptual document that establishes the basic framework for the execution of the State’s ownership rights, whose content should reflect the OECD’s recommendations. While investigating this indicator, we tried to find answers to two questions: Does the State have an ownership policy that meets OECD’s requirements? And is the observance of the ownership policy by the individual SOE evaluated at all, and if so, in what way?

<sup>72</sup> See <http://ekonomika.etrend.sk/ekonomika-slovensko/pociatek-zrusil-pochybnu-zmluvu.html>

### C.1.1.1. Is there a publicly accessible document regulating general conditions of the exercise of ownership rights of the State according to OECD recommendations?

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#### CZECH REPUBLIC

The legal framework of the exercise of ownership rights of the State in state-owned enterprises is based on Act No. 219/2000 Coll., on the Property of the Czech Republic and the Representation of the Czech Republic in Legal Relations (Act on the Property of the Czech Republic). Nevertheless the law cannot be considered a substitution for ownership policy since it does not apply to state enterprises as defined by Act no. 77/1997 Coll. (see. Sec. 54 (1) of the Act), and has no impact on the management of SOE. Furthermore, the content of the Act on the Property of the Czech Republic is very general and does not correspond to the requirements with respect to the content of state ownership policy according to OECD Guidelines on corporate governance of state-owned enterprises. Therefore the Czech Republic does not have a state ownership policy and the individual state-owned enterprises do not have a similar document either. This conclusion is supported by a survey conducted by the authors in 2011<sup>73</sup> and again in 2013.

#### SLOVAKIA

The legal framework of the exercise of ownership rights of the State is based on Act. 278/1993 Coll. on the Administration of State Property, as amended, which regulates the administration of property owned by the Slovak Republic in public-interest and non-business areas, performed by the administrator of the property of the State. How-

ever, the law does not apply to state enterprises (Sec. 1 (2) or correspond to the requirements regarding the content of the state ownership policy according to OECD rules. In the Slovak legal order in force, there is not any legal regulation regulating in a complex manner basic goals of the State in relation to state-owned enterprises, general conditions for the exercise of rights of ownership, specific requirements regarding individual enterprises, setting basic goals that an enterprise should attain, or addressing a conflict of interest.

#### POLAND

Poland lacks a policy document that would describe in an exhaustive and complex manner the methods and rules of the exercise of ownership rights of the State in all state-owned enterprises, that is, a so-called ownership policy of the State. Bodies carrying out the ownership policy do not publish lists of goals that state-owned enterprises have to meet. We can say that the goals of companies established by the State Treasury depend on the contemporary government policy and personnel composition of the bodies of state-owned enterprises. Some state-owned enterprises have medium-term and long-term goals, often called multi-year strategic plans (e.g. KGHM POLSKA MIEDŹ SA, Grupa Kapitałowa PGE). The adopted documents are prepared by the internal bodies of companies.<sup>74</sup>

The State Treasury is endeavouring to prepare an ownership policy with respect to state-owned enterprises under its supervision. This effort resulted in the creation of the Programme of the professionalization of supervision, where the examples of good practice in state enterprises and guidelines for supervisory boards of state enterprises were published, which needs to be

<sup>73</sup> See [http://www.statnifirmy.cz/sites/default/files/soe\\_konference\\_informacni\\_podklad.pdf](http://www.statnifirmy.cz/sites/default/files/soe_konference_informacni_podklad.pdf), p. 2.

<sup>74</sup> In the last summary report of the Supreme Audit Office, SEOs were reproached for the absence of strategies and goals to be achieved. See the Inspection of the Supreme Audit Office, No. KGP/4,1021/08.

acknowledged to be a good step toward the implementation of OECD recommendations.<sup>75</sup>

### C.1.1.2. Does the State evaluate the fulfilment of the ownership policy by individual SOEs?

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#### CZECH REPUBLIC

Given the non-existence of the ownership policy of the State, no evaluation is carried out. The State evaluates the management of individual state-owned enterprises on an ad hoc basis at the level of individual ministries exercising the rights of ownership in the applicable SOEs. Only Lesy České republiky, s.p. have long-term goals and targets set in the so-called Wooden Book (The policy plan of the Ministry of Agriculture concerning the economic policy of the Lesy České republiky state enterprise from 2012),<sup>76</sup> and the Ministry of Agriculture as the representative of the owner has to disclose by 1 March of each calendar year tenders announced according to this policy plan.<sup>77</sup> However, this is an exception and most SOEs do not have such long-term plans.

#### SLOVAKIA

Given the non-existence of the ownership policy of the State, no evaluation is performed. The State evaluates the management of individual SOEs on an ad hoc basis at the level of individual ministries exercising the rights of ownership in the applicable SOEs.

<sup>75</sup> <http://www.forbes.pl/ministerstwo-skarbu-wzmacnia-nadzor-nad-spolkami-artykuly,160861,1,1.html>

<sup>76</sup> [http://www.silvarium.cz/sklad/Drevena\\_kniha\\_19012011.pdf](http://www.silvarium.cz/sklad/Drevena_kniha_19012011.pdf)

<sup>77</sup> [http://eagri.cz/public/web/file/104336/usneseni\\_vlady\\_110202\\_0084\\_DK.doc](http://eagri.cz/public/web/file/104336/usneseni_vlady_110202_0084_DK.doc)

#### POLAND

The question of implementation of goals, plans and strategies was partly regulated in Regulation No. 3 of the Minister of the State Treasury of 28 January 2013 setting “Rules of the ownership supervision of companies with State Treasury shareholding”, which provides that continuous control and evaluation of work of the company management lies with the supervisory board or the shareholder’s proxies. By this regulation, supervisory boards were obliged to monitor continuously the degree of implementation of multi-year economic parameters, targeted economic and financial results and specific orders received by a company, on the basis of material and financial plans or strategic plans of these companies.

### C.1.2. Rules of procedure for the appointment of SOE supervisory board members

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The second indicator of the politicization of the corporate governance of SOE in the particular states is the absence of a law regulating the appointment of persons to SOE bodies. In order to find out how serious the problems are that the individual states are facing, we need answers to the following three questions that are linked together. The first one is whether the selection of persons who later become appointed or elected members of SOE bodies is regulated by law (C.1.2.1). The second question is whether there is a nomination committee or board that would recommend eligible applicants for the posts in SOE bodies (C.1.2.2). According to OECD’s recommendations, based on good practices in Great Britain, Denmark or Norway, nomination committees or boards should be established in order to assist in the appointment of suitable persons to SOE bodies. The third question is whether the laws

of the particular country set out at least basic qualification criteria to be met by each member of a SOE body (C.1.2.3).

### C.1.2.1. Is the nomination process of selecting members of supervisory boards of SOEs regulated by a law?

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#### CZECH REPUBLIC

The existing Czech legal regulation does not regulate in any way the nomination process for supervisory boards of SOEs (while not preventing its introduction in any way). Membership of politicians in supervisory boards of SOEs is not prohibited by the legal regulation in force (except for members of the Government, as follows from Act No. 159/2006 Coll., on Conflict of Interest). The coming into effect of new Act No. 90/2012 Coll., on Business Corporations, does not change anything in this respect. A generally binding legal regulation of the nomination process for supervisory boards of SOEs in the Czech Republic does not exist.

#### SLOVAKIA

The nomination process of selecting the members of a supervisory board is regulated only in the State Enterprise Act, which stipulates in Sec. 19a the conditions of a selection procedure for the position of a director, chairman and board members. Qualification requirements along with specific criteria and requirements with respect to a candidate, in case of a director or a member of the supervisory board in a state enterprise, are set in the notice of a selection procedure. The procedure is conducted by a selection committee appointed by the founder and in appointing the members of the board the order of candidates is bind-

ing. In case of SOEs with the legal form of a company, the nomination process is not regulated in any way. Only Constitutional Act No. 357/2004 Coll. on the Protection of Public Interest during the Performance of Office by Public Officers excludes public office holders (i.e. officers and politicians) from membership in the bodies of SOEs. A complex legal regulation of the nomination process in accordance with OECD recommendations does not exist.

#### POLAND

The nomination process is regulated by Regulation No. 45 of the Minister of State Treasury of 6 December 2007 concerning the principles and the manner of selecting candidates for supervisory boards of companies with State Treasury shareholding and for supervisory boards of other legal entities supervised by the Minister of State Treasury. The director of the supervision department, immediately after receiving information about the need to make change in the composition of a supervisory board, notifies the Secretary of State or Under-Secretary of State, who calls a three-member committee, composed of a chairman, secretary and member of the committee, and sets the date the committee will conclude its work. The committee, according to Sec. 3 of the Regulation, analyses applications and submits a list of proposed candidates to the relevant Secretary of State or Under-Secretary of State for approval.<sup>78</sup> The Minister of State Treasury selects a candidate who will be invited to join the supervisory board. Information about the course of a selection procedure must be published.

A significant exception to the procedure described above is a situation when none of the candidates meets the requirements and also when a person remaining in an em-

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<sup>78</sup> The list is published on the website of the Ministry and it can be challenged. Objections are reviewed within 7 days.

ployment relationship with State Treasury is appointed to the supervisory board. In such situation the Minister of State Treasury may appoint persons who did not participate in the selection procedure.

### C.1.2.2. Is there a nomination board or a committee recommending suitable persons as members of the bodies of SOEs?

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#### CZECH REPUBLIC

With respect to the absence of a legal regulation of the nomination process for members of supervisory bodies of SOEs, it can be said that such nomination boards or committees do not exist, not even at the level of individual SOEs.

#### SLOVAKIA

The nomination process for members of supervisory bodies of SOEs is not regulated by the legislation in force and therefore nomination boards or committees recommending suitable persons as body members do not exist.

#### POLAND

There is a three-member committee, whose composition and manner of work were described in C.1.2.1. The committee prepares minutes from its meetings.

### C.1.2.3. Are basic qualification criteria clearly set according to OECD recommendations?

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#### CZECH REPUBLIC

As regards qualification criteria, besides absolutely elementary criteria (legal personality and legal capacity),<sup>79</sup> the law requires only members of the supervisory board of a state enterprise—as defined by Act no. 77/1997 Coll.—to have certain expertise. Pursuant to Sec. 13 (3) of the State Enterprise Act, members of the supervisory board are appointed and elected from among independent experts, economists, scientific and technical employees, employees in the banking sector and the representatives of state enterprise employees. Members of joint-stock company bodies are required to have clean criminal records.<sup>80</sup>

#### SLOVAKIA

Qualification requirements along with specific criteria and requirements with respect to a candidate for the position of a director or a member of the supervisory board in a state enterprise—as defined by Act no. 111/1990 Coll.—are set in the announcement of a selection procedure. Additional provisions pertaining to qualification requirements according to OECD recommendations do not exist.

#### POLAND

Polish regulations set the criterion of professionalism, which is the condition for representing the State Treas-

<sup>79</sup> See Sec. 194 (7) of the Commercial Code and Sec. 13 (3) of the State Enterprise Act.

<sup>80</sup> As follows from the provision of Sec. 194 (7) of the Commercial Code, or Sec. 200 (3) of the Commercial Code in combination with Sec. 6 (2) to (4) of Act No. 455/1991 Coll., on Trade Licences.

ury in SOE. Candidates have the right to sit in supervisory boards if they pass examinations for membership in supervisory boards or have a qualification relieving them from the requirement to pass the examination, i.e. have an academic degree of the doctor of economic science or the doctor of law or are entered in the register of legal advisors, attorneys of auditors or of investment advisors. The above-mentioned Regulation No. 3 of the Ministry of the State Treasury of 28 January 2013 also contains a recommendation that professionals should be invited to the bodies of SOEs. The recommendation of OECD seems to have been, with respect to the base of the given specialists and the formal procedure, fulfilled.

### C.1.3. Conclusions regarding the ownership policy and the appointment procedures

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The above mentioned comparison shows that none of the states has implemented a state ownership policy that would meet the OECD's requirements, establish basic principles of corporate governance of SOE, set short-, middle- and long-term goals that the particular SOE should achieve, and allow for regular controls of their performance. The absence of the ownership policy is closely connected with an inadequate evaluation of the economic activities of SOE, with the exception of the Polish legal regulation that, at least partially, deals with the issue of fulfilling middle- and long-term goals of SOE. As regards the appointment of concrete persons to the supervisory bodies of SOE, it is only the Polish law that regulates the rules of procedure for the appointment of persons to SOE bodies in a transparent manner, using the ad hoc established nomination committee that helps to select the suitable candidates, with a minister having a certain decision-making authority. The Slovak law regulates the nomination process only for the purposes of appointing members to the bodies of state

enterprises; however, a law that would regulate the nomination procedure for the appointment of persons to those SOE bodies that have the legal form of business companies is missing. As regards the possible risk of the politicization of the corporate governance of SOE, the Czech Republic is the state where the situation is by far the worst. The procedure for the appointment of officers to SOE bodies is not regulated at all, and it is thus at the sole discretion of the owner, or his representatives, whom they will appoint for the particular office. As a result, SOE bodies are filled on the basis of political agreements, while the particular offices might be even assigned on the basis of a bribe. We conclude that Poland, out of the three compared states, has the best legal framework for the appointment of persons to the offices in SOE bodies, and this legal framework helps to reduce the possible risks of politicization of the corporate governance of SOE.

” As regards the possible risk of the politicization of the corporate governance of state-owned enterprises, the situation is by far the worst in the Czech Republic.

### C.1.4. Comparative table concerning the ownership policy and nomination processes

QUESTION / STATE	CR	SR	PR
IS THERE A PUBLICLY ACCESSIBLE DOCUMENT REGULATING GENERAL CONDITIONS OF THE EXERCISE OF OWNERSHIP RIGHTS OF THE STATE ACCORDING TO OECD RECOMMENDATIONS?	No	No	No
DOES THE STATE EVALUATE THE FULFILMENT OF THE OWNERSHIP POLICY BY INDIVIDUAL SOES?	No	No	Yes
IS THE NOMINATION PROCESS OF SELECTING MEMBERS OF SUPERVISORY BOARDS OF SOES REGULATED BY A LAW?	No	No	Yes
IS THERE A NOMINATION BOARD OR A COMMITTEE RECOMMENDING SUITABLE PERSONS AS MEMBERS OF THE BODIES OF SOES?	No	No	Yes
ARE BASIC QUALIFICATION CRITERIA CLEARLY SET ACCORDING TO OECD RECOMMENDATIONS?	No	No	Yes

## C.2. Anonymous ownership and state-owned enterprises

The problems connected with the contractual relations between SOE and anonymous companies might be illustrated by indicators similar to the ones presented in chapter B.2 of this analysis. Therefore, we only present in detail the problems related to the corruption model of the corporate governance of SOE. The remaining indicators will be included in a comparative table. The first indicator is the answer to the question whether the legal framework of the given state allows anonymous companies to establish contractual relations with SOE. The second indicator is the answer to the question whether the business companies are obliged to document their complete ownership structure if they wish to enter into contracts with SOE.

### Box C.10 Czech Republic: list of ten most profitable SOE suppliers

This table contains data on profitability of ten suppliers of public procurements submitted by Czech SOEs. As for the Return of investment (ROI), if the value of this indicator is persistently above 25% it indicates double profitability of a given supplier compared to the industry average. The ratio Procurement / turnover higher than 0.3 shows that a significant share of income of the company comes from public procurement. Due to several methodological issues, this is only a very rough indicator. However, it is evident that the first two most profitable suppliers are the anonymous companies.



	PROCUREMENT RECEIVED IN 2007–2012 (MIL. EUR)	TURNOVER OF THE SUP- PLIER 2009–2011 (MIL. EUR)	PROCUREMENT / TURNOVER	ROI 2009	ROI 2010	ROI 2011	NOTE
GEODÉZIE-TOPOS A.S.	1.4	3.2	0.43	97.91	108.35	112.09	AC
CROSS POINT, S.R.O.	11.6	37.8	0.31	94.4	66.97	107.04	OFFSHORE
C D V SLUŽBY, S.R.O.	46.5	49.4	0.94	84.62	98.44	91.26	
MONIT PLUS, S.R.O.	1.4	2.2	0.64	84.36	67.9	86.59	
ASE, S.R.O.	97.2	41.1	2.36	41.27	64.41	84.28	AC
JANOZA CZ, S.R.O.	7.6	9.8	0.78	29.89	35.01	73.74	
ŠKODA ELECTRIC A.S.	133.5	331.9	0.40	40.09	33.58	46.65	OFFSHORE
METROPROJEKT PRAHA A.S.	17.0	50.8	0.33	28.38	41.7	44.12	OFFSHORE
DAIN S.R.O.	3.2	3.1	1.02	38.94	110.52	40.08	
HA-SOFT, S.R.O.	1.9	3.5	0.55	60.99	26.85	38.93	

Source: Center of Applied Economics, Datlab, s.r.o., Czech Credit Bureau, a.s.

### C.2.1. Is there a legal regulation prohibiting SOEs from making contracts with anonymous companies?

#### CZECH REPUBLIC

The existing legal regulation does not prohibit SOE from making contracts with anonymous companies and the adoption of new Act No. 90/2012 Coll., on Business Corporations, does not change anything in this respect. At the same time, however, the legal regulation does not prevent SOE from incorporating such prohibition for example in its statutes.

#### SLOVAKIA

The legal regulation in force does not prohibit SOE from making contracts with companies that have an anonymous ownership structure.

#### POLAND

A legal regulation prohibiting SOE from making contracts with companies that can be defined as anonymous does not exist.

### C.2.2. Do companies have to document their complete ownership structure if they want to enter into contractual relations with SOEs?

#### CZECH REPUBLIC

In case SOE is the contracting entity in public procurement making a contract with a supplier, Act No. 137/2006 Coll., on Public Procurement requires suppliers or sub-contractors, if they are in the form of a joint-stock company, to provide the list of shareholders (i.e. they have to show evidence of the first level of the ownership structure). As stated above in chapter B.2 of this analysis, the problem

of anonymous companies is not solved by this since anonymous companies only hide behind subsidiaries with a different legal form—e.g. behind limited liability companies. No other legal regulations that would address e.g. the awarding of public contracts by SOEs to anonymous companies or the tightening of the Conflict of Interest Act or the consideration of a reputation risk were adopted as at the day of preparation of this analysis. The Commercial Code or Act No. 77/1997 Coll., on State Enterprise, do not contain the requirement to document the complete ownership structure as a condition necessary for making contracts with SOEs.

#### SLOVAKIA

In case SOE is a contracting entity in public procurement, the Public Procurement Act stipulates, in case of a tender exceeding EUR 10 million, a duty of bidders to present the list of shareholders or partners that own at least 30% of shares. In other cases, this duty is facultative and it is up to the contracting entity whether it will apply this provision or not. No other regulations regarding the documentation of a complete ownership structure as a condition for making contracts with SOEs exist.

#### POLAND

Such duty is not directly set; however, pursuant to Act of 16 November 2000 on Counteracting Money Laundering and Terrorism Financing (homogenous text Coll. 2000 No. 46, item 276), an attorney is obliged to determine the beneficiary recipient of a transaction (i.e. a person that will have property benefit from the transaction). It follows that the ownership structure will have to be documented in case of transactions concluded by SOE with its contracting partner before an attorney. However, the regulation is not intended to be directed specifically at checking the contracting partners of SOE and, apart from that, it

will concern particularly property turnaround pursuant to the Polish legal regulation.

### C.2.3. Conclusions regarding anonymous ownership of SOE

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None of the legal frameworks of the states compared prohibits SOE from concluding contracts with anonymous companies. Despite the fact that Czech and Slovak laws try to minimize the risk of possible corrupt practices or the conflict of interests by requiring the parties to produce documents proving the ownership structure of the contracting partners of SOE, in either case the laws seem to be efficient. Czech and Slovak laws requiring the presentation of documents proving the ownership structure apply only to public procurement contracts, which means that, in reality, they do not apply to all contracts that SOE conclude. Neither the Czech, nor the Slovak law requires the contractual parties of SOE to produce documents proving a complete ownership structure to the level of individual natural persons. The Polish law does not require any documents proving the ownership structure of the legal persons entering into contracts with SOE at all, with the exception of the disposal of real property or other transactions concluded between SOE and their contractual partners before the notary public. As regards the effect of the provisions that would prevent or eliminate the possible conflict of interests in case of public office holders who are, at the same time, members of SOE bodies, we would like to refer to the conclusions made in subchapter B.2.5 of this analysis. Therefore, we can say that the legal regulations of the states compared do not prevent possible corrupt practices connected with the conclusion of contracts between SOE and anonymous companies and leave it at the sole discretion of the SOE, whether they will require their contractual partners to document a complete ownership structure. Therefore, similar cases to the one concerning the Prague Public Transit Company, which managed to conclude a number of disadvantageous contracts with anonymous companies, might happen again any time.

### C.2.4. Comparative table: anonymous ownership and SOE

Simplified results of the comparison of legal regulations in the Czech Republic, Slovakia and Poland.

QUESTION / STATE	CR	SR	PR
IS THERE A LEGAL REGULATION PROHIBITING SOEs FROM MAKING CONTRACTS WITH ANONYMOUS COMPANIES?	No	No	No
DO COMPANIES HAVE TO DOCUMENT THEIR COMPLETE OWNERSHIP STRUCTURE IF THEY WANT TO ENTER INTO CONTRACTUAL RELATIONS WITH SOEs?	No	No	Yes
IS THERE A LEGAL REGULATION REQUIRING PUBLIC TENDER BIDDERS OR SUPPLIERS TO DOCUMENT THEIR OWNERSHIP STRUCTURE?	Yes	Yes	No
DOES THE LEGAL REGULATION REQUIRE PUBLIC TENDER SUPPLIERS TO DOCUMENT THE COMPLETE OWNERSHIP STRUCTURE TO THE LEVEL OF INDIVIDUALS?	No	No	No
IS THERE AN EFFECTIVE LEGAL REGULATION PREVENTING THE RISK OF A CONFLICT OF INTEREST IN CASE OF PUBLIC OFFICE HOLDERS IN THE BODIES OF SOEs, DECIDING ON MAKING CONTRACTS OR DECIDING ON PUBLIC PROCUREMENT?	No	PARTIALLY	No

## C.3. Access to information about SOE

In this part of our analysis we deal with issues connected with the public access to information on economic activities of SOE and with the efficiency of this kind of control. The first indicator of the efficiency of the due diligence audits of SOE carried out by the general public is the answer to the question whether the public is obliged to rely only on information that the particular SOE publish themselves pursuant to the law (e.g. Annual Reports), or whether the citizens can actively ask SOE for certain information (see C.3.1). The next indicator is the answer to the question whether the SOE publish their public procurement contracts concluded with the State or with private entities.

### C.3.1. Can the public require SOE to provide information on the basis of a legal regulation?

#### CZECH REPUBLIC

Pursuant to Sec. 2 (1) of Act No. 106/1999 Coll., on Freedom of Information (hereinafter only “the Freedom of Information Act”), obliged entities also include so-called public institutions, which can include—among others—SOEs if they meet most characteristics of a public institution, as follows from the judgment of the Constitutional Court of 24 January 2007, ref. No. I. ÚS 260/06 and the relating judicial decisions of the Supreme Administrative Court. If state-owned enterprises are obliged entities according to the Freedom of Information Act, they have to provide information to everybody who requests so according to the conditions stated in Sec. 13 et seq. of the Freedom of Information Act, including information about contracts where state-owned enterprises are a contracting party.

Therefore the public may request that SOEs that are public institutions provide information.

#### SLOVAKIA

In Sec. 2 of Act No. 211/2000 Coll. on Freedom of Information, obliged entities also include legal entities established by a law, a body of the State, a higher self-governing unit or a municipality and legal entities established by the obliged entities mentioned above. SOEs can be placed in the above-mentioned categories and therefore they are obliged entities within the sense of the Freedom of Information Act. The public may request, on the basis of the legal regulation, the provision of information.

#### POLAND

Information about the activities of SOEs can be demanded on the basis of Act of 6 September 2001 on Access to Public Information (Coll. 2001, No. 112, item 1198 with amendments). It contains a set of entities that are required to provide public information. Entities obliged to make information accessible include legal entities in which State Treasury, units of local authority or economic or professional local authority hold dominant position within the sense of the provisions of competition and consumer protection (Art. 4 (1) (5)).

### C.3.2. Do SOEs in fact provide information to the public upon request?

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#### CZECH REPUBLIC

Some SOEs in the Czech Republic refuse to provide information about contracts in violation of the Freedom of Information Act for various reasons and prefer to get involved in a lawsuit with persons requesting information. The legal regulation does not make it possible to demand the provision of information immediately and therefore the possibility of a person to get the requested information through court is protracted and ineffective and the length of a court proceeding regularly exceeds one year.<sup>81</sup>

#### SLOVAKIA

SOEs in the Slovak Republic refuse to provide information, saying that they do not manage public funds or dispose of the property of the State, property of a higher territorial unit or municipal property.<sup>82</sup> The second reason usually given for not making information accessible is the participation of the obliged entity in economic competition and reference to competition disadvantage compared to private companies.<sup>83</sup>

#### POLAND

Interpretations of regulations show a frequent use of the premise of a business secret as a reason for refusing

<sup>81</sup> See for example judgments in disputes regarding the provision of information, published on the website of Otevřete.cz: <http://www.otevrete.cz/soudni-spory-a-kauzy/soudni-spory/nejvyssi-spravni-soud/>

<sup>82</sup> Obligated persons are, according to the Freedom of Information Act, obliged to make accessible information solely within the scope of Sec. 3 (2) of the Act, in particular information about the management of public funds, disposal of property of the State, property of a higher territorial unit or property of a municipality and others.

<sup>83</sup> For more detail see <http://firmy.transparency.sk/sk/sets/firms2012/analyses>

access to public information although SOEs are in essence obliged to provide information. If SOE refuses to provide public information, a complaint may be filed with the Administrative Court, which, however, is connected with waiting for several months for a judgment (Polish legal regulation contains a three-month period within which a case must be considered).

### C.3.3. Are contracts with SOEs as contracting parties disclosed?

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#### CZECH REPUBLIC

On the basis of the Freedom of Information Act, the public may request SOE to disclose contracts concluded by the SOE. The Czech legal regulation, however—with the exception of a limited range of public procurement contracts—does not require SOEs themselves to disclose contracts, for example on their website or in some central register, which impedes the exercise of control of SOE management by the public. It needs to be added that the Czech legal regulation does not prevent SOE from publishing contracts on their own accord<sup>84</sup> and that the central register of contracts is already in trial operation.

#### SLOVAKIA

The latest amendment to the Freedom of Information Act of 2010<sup>85</sup> enabled the creation of the Central Register of Contracts. SOEs are obliged, if they are a contract-

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<sup>84</sup> For example Lesy České republiky state enterprise has been publishing all public procurement contracts exceeding CZK 300,000 since 1 June 2013. See <https://www.lesy.cz/profil-zadavatele/Stranky/default.aspx> a <http://www.lesy.cz/media/tiskove-zpravy/Stranky/tiskovy-briefing-lesu-cr-po-jednani-dozorci-rady.aspx>

<sup>85</sup> Act No. 546/2010 Coll., amending the Civil Code and the Freedom of Information Act

ing party, to disclose their contracts. The Central Register of Contracts is a public list of contracts subject to mandatory disclosure, maintained in electronic form by the Government Office of the Slovak Republic. The government of the Slovak Republic issued Government regulation No. 498/ 2011 Coll. on 14 December 2011 laying down the details of publishing contracts in the Central Register of Contracts and the elements of information about the conclusion of a contract.

#### POLAND

Contracts made by SOEs are not usually disclosed. In case of contracts made within public procurement, the results of public tenders and competitions can be found on the website of the Public Procurement Office.<sup>86</sup> Besides that, Art. 92 of the Public Procurement Act imposes a duty on a contracting entity to publish information about the result of the procedure performed on the website of the contracting entity.

### C.3.4. If contracts with SOE as a contracting party are disclosed, are they published “on one place”, e.g. in the register of contracts?

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#### CZECH REPUBLIC

Contracts are not published on one place but some SOEs disclose some contracts in which they are a contracting party. Although the central register of contracts exists, its use is not prescribed by a law (it is only voluntary) and the register itself is in trial operation. Contracts are not even published in one central register in case of public pro-

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<sup>86</sup> The search engine of the Public Procurement Office: <http://bzpi.portal.uzp.gov.pl/index.php?ogloszenie=brower>

curement contracts with SOE as a contracting entity; they are published on the profiles of individual contracting entities involved in public procurement.

## SLOVAKIA

Although a central register of contracts exists, the duty to enter contracts in the Central Register of Contracts (hereinafter only “CRC”)<sup>87</sup> lies only with the State, or ministries, central bodies of state administration, public institutions and organizations subordinate to such institutions (i.e. obliged entities pursuant to Sec. 2 of Act No. 211/2000 Coll.). The provision of Sec. 5a (6) of Act No. 211/2000 Coll., however, makes an exception for other entities (Slovak National Bank, institutions receiving contributions from the State budget or institutions fully funded from the State budget). The exception also concerns obliged entities with an over 50% property interest of territorial self-governing units (i.e. also SOEs owned by territorial self-governing units). Such obliged entities do not have to enter contracts in the Central Register of Contracts; it is sufficient that they publish them on their websites. If an obliged entity does not have its own website, it publishes contracts in Business Bulletin pursuant to Sec. 5a (9) of Act No. 211/2000 Coll. To make the situation even more chaotic, some SOEs have published some of their contracts in the CRC and the rest on their own websites.

## POLAND

Contracts are not published in one central register; SOEs publish contracts at their own discretion since the Polish legal regulation does not impose such duty on them.

### C.3.5. Conclusions regarding access to information about SOE

Pursuant to the law, the citizens of all three states are allowed to actively seek certain information from SOE. However, practical experience shows that not all SOE are willing to disclose information about their activities to the public, usually disputing the mere fact that they have a duty to disclose information, or arguing that publishing information would threaten their business secret or place them at a competitive disadvantage. The efficiency of the law is also reduced by the length of the possible legal proceedings related to the disclosure of information pursuant to the law.

As regards the legal regulation stipulating the public announcement of contracts concluded with SOE, there are great differences among the states compared. An example of a good practice is the Slovak legal regulation that sets out the requirement that, in principle, the Slovak SOE must publish all contracts that they have concluded, otherwise the contracts are invalid. The Czech legal regulation stipulates that only some public procurement contracts must be published; the Polish legal regulation does not require that the contracts are published; it only requires SOE to make them public upon request.

” Practical experience shows that not all state-owned enterprises are willing to disclose information about their activities to the public.

To sum up, despite the fact that the legal regulations provide the general public with the possibility to control the economic activities of SOE by requesting information, the public control is not really efficient.

<sup>87</sup> www.crz.gov.sk

### C.3.6. Comparative table: access to information about SOE

QUESTION / STATE	CR	SR	RP
<b>CAN THE PUBLIC REQUIRE SOE TO PROVIDE INFORMATION ON THE BASIS OF A LEGAL REGULATION?</b>	Yes	Yes	Yes
<b>DO SOEs IN FACT PROVIDE INFORMATION TO THE PUBLIC UPON REQUEST?</b>	FROM CASE TO CASE	FROM CASE TO CASE	FROM CASE TO CASE
<b>ARE CONTRACTS WITH SOEs AS CONTRACTING PARTIES DISCLOSED?</b>	TO A LIMITED EXTENT	Yes	No
<b>IF CONTRACTS WITH SOE AS A CONTRACTING PARTY ARE DISCLOSED, ARE THEY PUBLISHED "ON ONE PLACE", E.G. IN THE REGISTER OF CONTRACTS?</b>	No	No	No

## C.4. Controls and audits of SOE by supreme audit institutions

The aim of this part of our comparative analysis is to determine why the audit conclusions of the SAI are actually ignored, whether it is due to a bad practice or a system failure of a legal regulation, and suggest solutions. The particular indicators illustrating the efficiency of the audits of SAI have been described in chapter B.4 of this analysis; therefore, we will now focus only on the indicators that have not been discussed so far. The responses to the remaining questions regarding the efficiency of the audits of SAI are listed in a summarizing table only. The first indicator of the due diligence audit in SOE performed by the SAI is the answer to the question whether the SAI can control the SOE at all (C.4.1), and possibly what kind of SOE they can control (C.4.2). The second indicator is the answer to the question to what extent the SAI can perform the due diligence audit in SOE.

**C.4.1.** Is Article 23 of the Lima Declaration observed? Can the supreme audit institution audit SOEs in the form of private companies with a property interest of the State? If so, can the supreme audit institution audit the management of SOEs with respect to lawfulness, factual correctness, economy and effectiveness?

### CZECH REPUBLIC

The Czech Supreme Audit Office may audit the management of state enterprises, as follows from the definition of the material scope in Art. 97 (1) of the Constitution in combination with Sec. 2 (2) of Act No. 77/1997 Coll., on State Enterprise. However, the Czech Supreme Audit Office cannot audit a joint-stock company since such company manages its own, private property, as follows from the Commercial Code. Therefore, the Czech regulation does not fulfil the requirement of Art. 23 of the Lima Declaration.

In case of audit of state enterprises performed by the Czech Supreme Audit Office, pursuant to Sec. 4 (1) of the Supreme Audit Office Act, the Office examines whether the audited operations conform to legal regulations, further, it examines whether they are substantively and formally correct and also economical and effective.<sup>88</sup>

#### SLOVAKIA

The Supreme Audit Office of the Slovak Republic may audit the management of companies with a property interest of the State, as follows from the definition of personal and material scope stipulated in the Constitution. This definition is also adopted by the Act on the Supreme Audit Office of the Slovak Republic (see Sec. 2 (1) and Sec. 4 of the Act). The subject of audit is defined in great detail because the Slovak legal regulation does not contain a general definition of property.<sup>89</sup> The Slovak regulation thus fulfils the requirement of Art. 23 (1) of the Lima Declaration and subjects to the audit of the Supreme Audit Office of SR also entities established on the basis of private law with a property interest of the State. The scope of competence of the Supreme Audit Office of SR was extended upon amendments to the Constitution by means of Constitutional Acts No. 90/2001 Coll. and No. 463/2005 Coll., and it is clear from their explanatory notes that one of the motives was an effort to comply with the Lima Declaration.<sup>90</sup>

Pursuant to Sec. 3 of the Act on the Supreme Audit Office of SR, the Slovak Supreme Audit Office carries out audits with regard to the compliance with generally binding legal regulations (lawfulness), economy, effectiveness and ef-

iciency. The legal definitions of these terms are provided in Sec. 2 of the Act on Financial Control and Internal Audit.

#### POLAND

The Polish Supreme Audit Office may, pursuant to Art. 203 (3) of the Polish Constitution and pursuant to Sec. 2 (3) (4) of the Supreme Audit Office Act, audit the activities of organizational units and enterprises (companies) to the extent in which they use state or public property or sources or to the extent in which they meet financial obligations toward the State, specifically, if they act with the participation of the State or a local self-government, use the property of the State or of a local self-government, including sources allocated according to international standards. This provision is interpreted by Polish legal science in a way that it enables the Polish Supreme Audit Office to audit any company in which the State or a local self-government has at least a minimum property interest, regardless of the size of the property interest (theoretically, it is sufficient for the State to own a single share). The Polish legal regulation thus fully complies with Art. 23 of the Lima Declaration.

The Polish Supreme Audit Office may, pursuant to Sec. 5 (1) of the Supreme Audit Office Act, generally perform audits with regard to legality, sound management (e.g. economy), expediency and integrity;<sup>91</sup> however, in case of a company with a property interest of the State, the Polish Supreme Audit Office may perform audits, pursuant to Sec. 5 (3) of the Supreme Audit Office Act, only with regard to legality and sound management.

<sup>88</sup> For more detailed interpretation of specific definitions, please see Sec. 2 (l), (m), (n) and (o) of the Financial Control Act No. 320/2001 Coll.

<sup>89</sup> BRÖSTL, Alexander a kol. Ústavné právo Slovenskej republiky. Plzeň: Aleš Čeněk, 2010, p. 335–336.

<sup>90</sup> See parliamentary print No. 643 of 2000, available at: <http://www.nrsr.sk/nrdk/Download.aspx?MasterID=162485> and parliamentary print No. 1207 of 2005, available at: <http://www.nrsr.sk/Dynamic/Download.aspx?DocID=190276>.

<sup>91</sup> The English translation of the Supreme Audit Office Act uses the term “integrity” so that there can be no doubt as to the content of the notion with respect to the context. Other authors translate the term as “diligence” and define it as “acting according to general expert knowledge and in good faith”. See FOLTÝNOVÁ, R. Nejvyšší kontrolní úřad – komparace. Diploma theses. Faculty of Law of Palacký University, Olomouc: 2011, p. 45.



### C.4.2. How high does the property interest of the State have to be for SOE to be subject to audit of the supreme audit institution?

#### CZECH REPUBLIC

The Czech Supreme Audit Office has no possibility to audit the management of joint-stock companies with a property interest of the State (no matter how high). The size of the property interest is not a condition for conducting an audit by the Supreme Audit Office.

#### SLOVAKIA

The Slovak legal regulation mentions only a property interest of the State without determining how high the property interest has to be.<sup>92</sup> The explanatory notes on the proposed amendment to the Constitution of the Slovak Republic of 2007 state that determining the minimum size of a property interest of the State in a legal entity for the Supreme Audit Office to exercise the auditing competence is very problematic, saying that the determination of the specific size will be up to the Act on the Supreme Audit Office of SR.<sup>93</sup> However, the law is silent in this respect and does not set any minimum size of the participation of the State. The Slovak Supreme Audit Office de facto checks only private persons with a majority property interest of the State since in case of a lower property interest of the State the conclusions and recommendations from audit activities would not have to be carried out.

<sup>92</sup> With the exception of legal entities with a property interest of the National Property Fund of SR (NPF). Such legal entities may be audited by SAO SR only if the property interest of NPF is at least 50% or if such legal persons have the character of a natural monopoly and the property interest of NPF exceeds 34% (see Sec. 4 (e) of the Act on the Supreme Audit Office of SR).

<sup>93</sup> See parliamentary print No. 643 of 2010, available at: <<http://www.nrsr.sk/nrdk/Download.aspx?MasterID=162485>>.

#### POLAND

The Polish Supreme Audit Office may, pursuant to Art. 203 (3) of the Polish Constitution and also pursuant to Sec. 2 (3) (4) of the Supreme Audit Office Act, audit enterprises with a property interest of the State or a local self-government of any size.

### C.4.3. Conclusions regarding controls and audits of SOE by supreme audit institutions

In all the states compared, with the exception of the Czech Republic, the requirements of Art. 23 of “Lima Declaration” are met at least partially, i.e. the supreme control institution of the particular state can control the state-owned enterprises. The Czech Republic is the last Central European country that has not included the requirement of Art. 23 of “Lima Declaration” in its legal regulations. In all states compared, with the exception of Poland, the SAI can examine all four criteria (compliance, purpose, cost-efficiency, effectiveness) of the economic activities of SOE during their due diligence audit in a particular company. In principle, the audit of SAI is not limited merely to the verification of the accounting documents or the company’s compliance; it also checks the purpose and effectiveness of its economic activities.

” The Czech Republic is the last Central European country that has not included the requirement of Art. 23 of “Lima Declaration” in its legal regulations.

Problems related to the inefficiency of the audits are illustrated by the audits related to the drawing of the EU funds carried out by the SAI in the particular states, as well as by the due diligence audits carried out in the SOE. These problems are described in more detail in chapter B.4 of this

analysis. Therefore, we will only limit ourselves to a brief statement that the Czech and Slovak supreme audit institutions do not carry out repeated audits as regards the SOE

(and their owners—the ministries), in case their previous audits had revealed certain malpractices.

#### C.4.4. Comparative table: the control and audit of SOE by the supreme audit institutions

QUESTION / STATE	CR	SR	PR
ARE THE PROVISIONS OF ART. 23 OF LIME DECLARATION SATISFIED, I.E. CAN THE SUPREME AUDIT INSTITUTION (SAI) CONTROL ALSO THE "PRIVATELY-OWNED" BUSINESS COMPANIES WITH AN OWNERSHIP INTEREST OF THE STATE?	No	Yes	Yes
WHAT PERCENTAGE OF OWNERSHIP SHARES OF THE STATE WOULD ENABLE THE SAI TO CONTROL THE SOE?	No	1%	1 SHARE
CAN THE SUPREME AUDIT INSTITUTION CONTROL THE ECONOMIC ACTIVITIES OF THE SOE AS REGARDS THEIR COMPLIANCE WITH LAWS, OBJECTIVE ACCURACY, COST-EFFICIENCY AND EFFECTIVENESS?	No	Yes	ONLY COST-EFFICIENCY AND COMPLIANCE
DO THE ENTITIES CONTROLLED BY THE SAI HAVE A LEGAL DUTY TO ADOPT REMEDIAL MEASURES SET OUT IN THE SAI'S AUDIT CONCLUSIONS?	No	Yes	No
DO THE ENTITIES CONTROLLED BY THE SAI HAVE A LEGAL DUTY TO REPORT TO THE SAI ON THE IMPLEMENTATION OF THE REMEDIAL MEASURES?	No	Ne	Yes
CAN THE SAI ITSELF ENFORCE THE REMEDY OF THE DEFICIENCIES DISCOVERED?	No	No	No
DOES THE GENERAL PUBLIC HAVE ACCESS TO THE FULL OR LIMITED VERSION OF THE SAI'S AUDIT CONCLUSIONS?	LIMITED	FULL	LIMITED

As it was mentioned hereinbefore, this analysis is targeted at two main groups: the officers and decision-makers at the EU level, and the officers and decision-makers at a national level. Based on the comparative parts of this analysis and its partial conclusions, we propose several recommendations to solve or at least substantially mitigate the misuse of public money from EU funds through operational programmes and the misuse of public money in state-owned enterprises. We were especially focused on closing the gaps that exist in legal regulation of subsidies, in law on public procurement, in law on civil service, and in statutes related to the state-owned enterprises, anonymous companies, and supreme audit institutions. Recommendations are arranged according to the structure of the analysis and then divided with respect to the two target groups.

On the **European Union's level** (EU level), there are several institutions that may use our recommendations or indicators of a risk of system political corruption. As the body primarily responsible for setting up the Specific Country Recommendations for the next 12 to 18 months, based on the detailed analysis of EU member states' programmes<sup>94</sup> of economic and structural reforms,<sup>95</sup>

the **European Commission** ("Commission" hereinafter) may suggest some of our proposals during the European Semester by setting up Specific Country Recommendations for its member states in May 2014 and in subsequent years. Where it is appropriate, the Commission may—according to the Art. 293 and next of the Treaty on the Functioning of the European Union ("TFEU" hereinafter)—initiate changes in the already existing EU legal regulations, namely the EU Directives and EU Regulations, or propose new ones to the European Parliament and the Council.

EU control institutions—namely the EU Court of Audit and the European Anti-fraud Office ("OLAF" hereinafter)—may use the indicators of a risk of system political corruption in public bodies managing the operational programmes during their audits and controls on spending the EU money to prevent frauds and corruption according to the Art. 325 Sec. 1 of the TFEU. OLAF can investigate all of the EU expenditures, including the EU funds, on all of the economic operators, including state-owned enterprises, public administrative bodies, etc. As a set of special criteria for the year 2014 and subsequent years, OLAF may use some of our indicators of a risk of system political corruption.

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<sup>94</sup> See [http://ec.europa.eu/europe2020/making-it-happen/key-areas/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm)

<sup>95</sup> [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm)

On the **national level**, our recommendations and indicators may be used by the governments and parliaments (which are in most cases the only institutions empowered to pass new legislation or amend the previous one) and also by the relevant control institutions.

## D.1. Recommendations for public administration in the usage of EU funds

### EU LEVEL

Despite the fact that the EU has very limited competence in the area of public administrative law of its member states,<sup>96</sup> it may actually influence the public administration in its member states during the European Semester by setting up Specific Country Recommendations for its member states in May 2014 and in subsequent years. Those recommendations may be similar to those mentioned at the national level (see below).

” Despite the fact that the EU has very limited competence in the area of public administrative law of its member states, it may influence the public administration in its member states by setting up Specific Country Recommendations.

#### 1. Use of indicators of the risk of system political corruption for control by the EU institutions

In their controls and audits, the EU Court of Audit and OLAF should aim at:

- » the fluctuation of executive staff in the management and control bodies responsible for implementing the EU funds in each particular member state;

- » the separation of political and apolitical positions in the public administration bodies responsible for the implementation of the EU funds;
- » the existence of legal regulations that provide adequate protection of civil servants against illegal orders;
- » the protection for whistle-blowers.

### NATIONAL LEVEL

#### 2. Separation of political and apolitical positions in public administration

The law on civil service must separate the political positions in public administrative bodies and apolitical positions (professional civil servants). Only the political positions should be staffed on the basis of political key, and such people should be responsible for planning and for creating policies. They should not have the power to intervene in personnel affairs or give orders directly to medium- and low-level civil servants. All civil servants shall be selected through transparent procedures.

#### 3. Clear description of rights and duties of civil servants

The law on civil service should precisely enumerate the basic rights and duties of civil servants and other public officials. There shall be no gaps in competences that may be utilised for politicization of public administration. The requirements of the fight against corruption must be taken into account by laws regulating rights and duties of civil servants.

These two recommendations related to the civil service should prevent the basic risks of its politicization. However, other amendments of the law are necessary to prevent the possible circumventions of the law.

#### 4. Improvements in the nomination process of civil servants

The nomination process (recruitment) of civil servants shall guarantee:

<sup>96</sup> So called the European administrative space. See Art. 3 to 6 of the Treaty on the Functioning of the European Union.

- » that the appointment of every civil servant is based on the result of the selection procedure. Direct appointment from the minister shall be limited to the political positions only;
- » that the selection procedure itself is open, which means that anyone may accept a call;
- » that the evaluation of the candidates is based on the list of basic requirements and competences required from the candidates: qualification (level of education required for particular position) and previous experience, incorruptness (clean screen of criminal records). All the disqualifying conditions and the situations of conflict of interest should be carefully evaluated by the selection board.

#### 5. Clearly defined grounds for dismissal of civil servants or their removal from the office

The grounds for dismissal of civil servants or their removal from the office must be clearly described in legal regulations. To prevent civil servants from being dismissed for political reasons only, the law on civil service must:

- » provide an enumeration of grounds for dismissal or removal from the office;
- » guarantee that reasonable explanation must be provided for removal from the office.

#### 6. Stable organisational structure of public administrative bodies

The law on civil service should also prevent frequent changes in the organisational structure of public administrative bodies, which seems to be abused as a method of circumvention the legal regulations on dismissal of civil servants.

#### 7. Adequate protection to whistle-blowers in public administration

For the prevention of corruption in public administration, it is important to provide adequate protection

to the civil servants who may (in good faith) report of cases of corruption or unlawful or unethical practice (whistle-blowers). The civil servants may also refuse to comply with unlawful orders and must be protected from the retribution of their superiors in such cases. The law on civil service:

- » must provide protection to the civil servants and other state employees against unlawful instructions of their superiors;
- » must protect the civil servants (and other state employees) from retribution or unjustified sanctions, if such civil servants reported their suspicions in good faith or in the public interest;<sup>97</sup>
- » must provide a clear and precise description (or guideline) on how the whistle-blower should proceed.<sup>98</sup>

” For the prevention of corruption in public administration, it is important to provide adequate protection to the civil servants who may report of cases of corruption or unlawful or unethical practice (whistle-blowers).

## D.2. Recommendations to tackle the issue of anonymous companies and the EU funds

### EU LEVEL

The problem with the anonymous companies that are beneficiaries of the EU funds is related to two major legal areas

<sup>97</sup> The lawfulness of the reporting is not violated if the whistle-blower acts in a bad faith but his or her information is correct.

<sup>98</sup> The reporting on corruption or unlawful practice should not be in a conflict (contradiction) with the civil servant's duty of confidentiality.

of the EU law: the legislation on public procurement and the legislation on EU funds. These recommendations are in accordance with the G8 initiative in Lough Enre in 2013 (see part A of our analysis).

” The Commission may redefine the rules regarding the possible EU funds’ beneficiaries, in such a way that the member states will have the possibility to adopt a legal regulation according to which the beneficiaries will have to provide a list of all their shareholders up to the level of individual natural persons.

#### 8. Redefinition of the rules regarding the EU funds’ beneficiaries and their ownership structure

The Commission may propose amendments of the EU Regulation 1083/2006/EC<sup>99</sup> on EU funds under the Art. 106 of this regulation until 31 December 2013 in accordance with the procedure laid down in Art. 177 TFEU. The Commission may redefine the general rules applicable to the EU funds, including the rules regarding the possible beneficiaries,<sup>100</sup> in such a way that the member states will have the possibility to adopt a legal regulation according to which the beneficiaries<sup>101</sup> will have to provide to the managing authorities and intermediate bodies<sup>102</sup> from the member state responsible for implementing the EU funds a list of all the beneficiaries’ shareholders up to the level of individual natural persons so the ultimate beneficiaries will be known to the managing authorities. Otherwise, the finance (aid, grants) from EU funds will not be provided to the beneficiary by the member state’s authorities responsible for implementing the EU funds. It will be up to each member

state whether it will require such list or not with regards to the national law and concrete situation.

#### 9. Possibility to ask successful candidates of the public procurement to disclose their ownership structure

As for the EU law concerning public procurement, the Commission should amend the EU law on public procurement (namely the Directive 2004/18/EC) to clear away all doubts as to whether the member states may exact the disclosure of the ownership structure from the successful candidates of the public procurement. The member states should have the possibility to adopt a legal regulation under which the successful candidate beneficiaries will have to provide a list of all the successful candidate’s shareholders up to the level of individual natural persons so the ultimate beneficiaries will be known to the contracting authorities before the public contract<sup>103</sup> will be granted to the candidate.

#### 10. Use of indicators of the risk of system political corruption in the usage of EU funds for control by the EU institutions

As for the control of the EU funds, the Commission may control the member states on the transparency of the usage of EU funds, on the quality of their managing systems, etc.<sup>104</sup> The Commission should give attention to the anonymous companies that are beneficiaries of the EU funds, namely to the indicators of the risk of system political corruption, which are:

- » the amount of money granted to the anonymous companies by the member state’s public administrative bodies responsible for the implementation of the EU funds;
- » the turnovers of the anonymous companies that are contractors (or subcontractors) of public subsidies that are co-financed from the EU funds;

<sup>99</sup> And of the related articles of the EU Regulation 1828/2006/EC.

<sup>100</sup> Defined in Art. 2 Par. 4 of the regulation (applicants or recipients of subsidies from EU funds).

<sup>101</sup> Beneficiaries who are the artificial legal persons that have a legal form of a private company.

<sup>102</sup> Defined in Art. 2 Par. 5 of the regulation.

<sup>103</sup> The public works contract, public supply contract or public service contract.

<sup>104</sup> See Art. 71, 72, 73, Art. 82 Par. 2, Art. 91, 92, 93 to 97, 100 and 101 of the EU Directive 1083/2006/EC.

- » the possible connections between the anonymous companies and the public officials of the managing authorities and intermediate bodies, including assessing the risk of conflict of interest;
- » the overall efficiency of the legislation that shall prevent public officials responsible for implementing the EU funds from a possible conflict of interest.

Also the other control institutions—EU Court of Audit and the OLAF—may use the same indicators of the risk of system political corruption in their examinations and audits.

#### NATIONAL LEVEL

The member states may regulate at least the public procurement so the anonymous companies will have to disclose their ownership structure in a non-discriminatory manner. The control institutions of the member states should give attention to the same indicators as the EU control institutions (see above).

#### 11. Introduction of a register of contracts and grants accessible to the general public

The member states may also reduce the risk of system political corruption in the usage of EU funds by adopting a law (or amending the law on access to information) that requires that all the contracts (in which the state is a contracting party) shall be disclosed to the general public. By allowing anyone to see what projects and under which conditions the EU funds have been used for, the register of contracts may help to improve the efficiency of public procurement and provision of grants and financial aid under the particular operational programmes. For more details see national recommendation D.6 below.

### D.3. Recommendations on the control and audit of the usage of EU funds conducted by supreme audit institutions

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#### EU LEVEL

The problems related to the deficiencies of enforcement of audit findings on the usage of EU funds should have been tackled on the national level by the particular member states. However, the Commission may—despite the fact that the legal regulation of member states' supreme audit institutions does not fall within the ambit of competence of the EU in general—at least recommend the provisions mentioned below (see national level) in its drafts of the Specific Country Recommendations.

#### 12. Putting more emphasis on the SAI's audits of the usage of EU funds

The Commission may also require and control the efficiency of the SAI's audits of the usage of EU funds under the EU Directive 1083/2006/EC because the SAIs may be incorporated into the structure of the member state's institutions responsible for implementation of the EU funds.<sup>105</sup> The other control institutions (EU Court of Audit, OLAF) may control and evaluate the SAI's performance in relation to the control of the usage of EU funds, too.

#### NATIONAL LEVEL

The problem has been identified in the effectiveness of enforcement of recommendations in audit findings and the rectification of deficiencies that were found by SAI. The member states should consider our suggestions and

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<sup>105</sup> For example the Slovakian Supreme Audit Office plays the role of the certifying authority.

may adopt appropriate legal regulations that will improve the impacts of the SAI's controls.

### 13. Enhancing the enforcement of the SAI's findings

The law on supreme audit institution should be amended in a way that ensures that the audit findings of the SAI should be legally binding for the subjects of the audit and that the SAI or other public administrative body will be empowered to enforce such findings by imposing fines. This recommendation is based on good practice in Italy, Belgium, Portugal, and France.<sup>106</sup>

” The law on supreme audit institution should be amended in a way that ensures that the audit findings are legally binding and may be enforced by imposing fines.

### 14. Implementing follow-up procedures

Our analysis also shows deficiencies in the follow-up procedures despite the recommendation in the Mexico declaration.<sup>107</sup> It is required that the supreme audit institutions not only must perform an ad hoc audit of a certain SOE, but also must perform a follow-up procedure at least in a way that is described in the Polish Supreme Audit Office Act. The follow-up procedure must be performed regularly a certain period of time (several months) after the original audit if severe deficiencies were found, in order to ensure that the SAI's recommendations and findings have been properly addressed by the audited subjects.

If the adequate follow-up procedures are to be implemented, it seems desirable that the state should provide its SAI with enough staff and financial resources so the SAI may perform more audits per year, including the follow-up audits of the previously audited SOEs and other persons.

<sup>106</sup> Supreme audit institutions in Italy, Belgium and Portugal may impose fines upon audited subjects. In France, the Court of financial and budgetary discipline may actually impose the fines instead of SAI.

<sup>107</sup> Principle no. 7 of the Mexico declaration. See [http://www.intosai.org/fileadmin/downloads/downloads/4\\_documents/publications\\_stand\\_xxi\\_INCOSAI/E\\_Lima\\_Mexico\\_2013.pdf](http://www.intosai.org/fileadmin/downloads/downloads/4_documents/publications_stand_xxi_INCOSAI/E_Lima_Mexico_2013.pdf)

## D.4. Recommendations for the corporate governance of the state-owned enterprises

### EU LEVEL

The member states' SOEs are considerable recipients of the grants and subsidies financed from the EU funds. However, the EU has no special competence in the area of corporate governance of the state-owned enterprises.<sup>108</sup> Only the control institutions such as Commission's audits, EU Court of Audit, or OLAF may use our indicators of a risk of system political corruption in state-owned enterprises during their audits and controls of spending the EU money.

### 15. Use of indicators of the risk of system political corruption in corporate governance of the SOEs for control by the EU institutions

In their control of SOEs, the aforementioned EU institutions should aim at the indicators listed below, namely at:

- » the level of implementation of the OECD Guidelines on Corporate Governance of State-owned Enterprises in each member state's law. This means that the existence of the ownership policy and the nomination process should be taken into account;
- » the figures on staff turnover in executive bodies and supervisory boards of the SOEs, namely in the years in which changes of government or political representation of the state occur;
- » the existence of basic qualification criteria required from the members of executive bodies and supervisory boards of the SOEs.

<sup>108</sup> Thus the EU institutions (Commission) may only recommend the same measures that are mentioned in the national level part.



## NATIONAL LEVEL

The states should eliminate the gap in their legal regulation of SOE's corporate governance by adopting a state ownership policy. The states should follow those recommendations, described in more detail in OECD Guidelines on Corporate Governance of the State-owned Enterprises.

” The states should eliminate the gap in their legal regulation of SOE's corporate governance by adopting a state ownership policy.

**16. Establishing a state ownership policy**

States should establish an ownership policy in which they declare the overall targets and set the particular mid-term and long-term objectives for each state-owned enterprise. All the objectives must be measurable,<sup>109</sup> and the fulfilment of the ownership policy must be verified periodically (annually at least). The ownership policy must also define the role of the state as the owner, namely, the relationship between the state and the SOE's executive and supervisory boards. The state should also describe the process of evaluating the ownership policy (at least the economic results of the SOEs).

**17. Periodical evaluation of SOE's performance by the state**

SOE performance must be evaluated regularly (not ad hoc) so the ownership entity will have a true picture of SOE's fulfilment of objectives. The state should develop a systematic benchmarking of SOE performance with comparable domestic or foreign enterprises (including foreign SOEs). The results of an SOE's evaluation should be published in one aggregate report.<sup>110</sup>

<sup>109</sup> To achieve this, the state ownership policy must set a series of economic and other indicators (turnover ratio, rate of return, dividends, amount of employees, maintaining control of the strategic infrastructure, researching and development statistics, safety and working environment evaluations).

<sup>110</sup> For more details, see OECD Guidelines, Guideline V. A Transparency and disclosure, p. 41.

**18. Adoption of a transparent nomination procedure for positions on SOE's boards**

To prevent members of clientelist groups from gaining influence in the boards of the SOEs, the states should adopt a law on SOEs or private enterprises in which the nomination procedure should be transparent and clearly described. It is necessary that:

- » the process of selecting and nominating (or voting for) certain board members should be prescribed by laws for all the state-owned enterprises regardless of their legal form (state enterprise, private company, etc.). The nomination committees should be established, consisting of public officials, independent experts, and members of trade unions, appointed by ministers;
- » the law must set a list of basic requirements and competences required from the apolitical candidates: qualification (level of education) and previous experience, incorruptness, capacity to perform a function properly (which means enough time and also conflict-of-interest prevention).

” To prevent members of clientelist groups from gaining influence in the boards of the SOEs, the states should adopt a law on SOEs or private enterprises with transparent and clearly described nomination procedure.

## D.5. Recommendations to tackle the issue of anonymous companies and the SOEs

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### NATIONAL LEVEL

#### 19. Disclosure of the ownership structure as a prerequisite for making a contract with SOE

The ownership entity should amend the law on state-owned enterprises or at least their articles of associations (decision-making procedures of SOE boards) so the SOEs should mitigate the risks related to making contracts with anonymous companies. SOEs should ask their contracting parties to submit a list of all their shareholders (owners, beneficiaries) as a *conditio sine qua non* for making the contract. In exceptional cases, the SOEs may enter into a contract even with an anonymous company, but their boards must give reasons for this to its owner. Members of SOE boards must know with whom they are entering into contracts. Otherwise they could not prevent conflict of interest.

## D.6. Recommendations on the access to information related to the SOEs

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### EU LEVEL

#### 20. SOEs shall disclose information under the EU Directive 2003/98/EC

According to the Art. 13 Sec. 1 of the EU Directive 2003/98/EC on the re-use of public sector information, the Commission shall carry out a review of the application of this directive before 18 July 2018 and shall propose amendments of that directive so:

- » the directive will apply to state-owned enterprises, too;
- » the directive will contain provisions under which the public sector bodies and state-owned enterprises should have to disclose at least some types of contracts<sup>111</sup> with them as contracting parties. Commercial secrets shall not be disclosed in such contracts. Also, other limitations on providing information shall be respected. For more information, see National level recommendations below.

### NATIONAL LEVEL

#### 21. SOEs shall have a clear legal duty to provide information upon request

For strengthening the efficiency of public control of the SOEs, it seems desirable that under the law on access to information the SOEs will have to provide information to everybody who requests it. The commercial secrets shall not be breached this way. In case the SOEs are not the “obliged entities” according to law on access to information, then the ownership entities (ministries, government, etc.) must provide all the information instead of SOEs upon request.

#### 22. Introduction of a register of contracts accessible to the general public

Another way to reduce the risks of system political corruption in corporate governance of the SOEs is to adopt a law (or amend the law on access to information) that requires that all the contracts (in which the state or SOE is a contracting party) shall be disclosed to the general public. The Slovakian Freedom of Information Act can serve as an example of good practice. All the disclosed contracts shall be accessible online in one register, undisclosed contracts shall be considered null and void, and

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<sup>111</sup> For example contracts which exceed certain value.

the commercial secrets or other classified information shall not be breached.

” One way to reduce the risks of system political corruption in corporate governance of the state-owned enterprises is to adopt a law that requires that all the contracts (in which the state or a state-owned enterprise is a contracting party) shall be disclosed to the general public.

## D.7. Recommendations on the control and audit of the state-owned enterprises conducted by supreme audit institutions

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### EU LEVEL

Basically the same as was already mentioned in part D.4 of this analysis.

### NATIONAL LEVEL

#### 23. SOEs should be audited by SAI regardless of their legal form

The law on supreme audit institution shall grant to the supreme audit institution a right to audit not only the public administrative bodies but also the state-owned enterprises regardless of their legal form (SAI may audit both the state enterprises and private corporations owned by the state). To achieve this, it is necessary to amend the law on supreme audit institutions in such a way that it adds the state-owned enterprises into the list of persons that may be audited by the SAI.

The law shall secure that—in a case that not all the SOEs may be audited by the SAI—at least all the state-owned enterprises in which the state has a majority (holds at least 50% share) may be audited by the SAI.

#### 24. SOEs should be audited by SAI “in full extent”

The supreme audit institution shall audit the management and performance of the SOE in full extent, which means that the SAI can control management of the SOE with respect to lawfulness, factual correctness, economy, and efficiency. It should be reasonable that the ownership entities shall be audited together with the SOEs so the SAI may provide cross-audit findings.

” The law on supreme audit institution shall grant to the supreme audit institution a right to audit the state-owned enterprises regardless of their legal form.

Below is a list of case studies and data analyses prepared and published (or soon to be published) by the authors of this analysis as well as a list of other studies used for the purposes of this document.

### E.1. Case studies

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#### Case study no. 1: The Řebíček system

“K otázkám profesionalizace státní správy: Příklad praxe resortu dopravy 2007–2009“, Naši politici, o.s., 2013. Available at: <http://www.nasipolitici.cz/cs/kauzy/detail/101-cesko-11-let-bez-zakona-o-urednicich-priklady-z-praxe-ministerstva-dopravy/download/28-problematika-profesionalizace-statni-spravy-na-pozadi-praxe-ministerstva-dopravy-2007-2009-mm-pdf>

#### Case study no. 2: Regional Operational Programme North-West

“Analýza problematických dotací ROP Severozápad – případ Kadaň“, Naši politici, o.s., 2013. Not yet published. Information available at: <http://www.nasipolitici.cz/cs/kauzy/detail/94-analyza-problematickych-dotaci-rop-severozapad-pripad-kadan>

#### Case study no. 3: The Rath case

“Kauza Rath“, Naši politici, 2013. Not yet published. Information available at: <http://www.nasipolitici.cz/cs/tag/42-kauxa-rath>

#### Case study no. 4: The Notice Board Tender case

“Nástenkový tender – případová štúdia politickej korupcie“, Pavol Hardoš, Inštitút pre dobre spravovanú spoločnosť, 2013. Available at: [http://www.governance.sk/assets/files/publikacie/nastenkovy\\_tender.pdf](http://www.governance.sk/assets/files/publikacie/nastenkovy_tender.pdf)

#### Case study no. 5: Prague Public Transit Company

“Analýza fungování klientelistické skupiny napojené na politické strany v Dopravním podniku hlavního města Prahy – Dopravní podnik jako model systémové korupce ve veřejně vlastněných firmách v ČR“, Naši politici, o.s. and Transparency International Česká republika, 2013. Not published. Information available at: <http://www.nasipolitici.cz/cs/kauzy/detail/95-prvni-z-kauz-dpp-pred-soud-exreditel-dvorak-obvinen-policii>

#### Case study no. 6: Electronic Tickets

“Déja vu z pražského dopravního podniku? Zakázky na SMS jízdenky v regionech ČR“, Naši politici, o.s., 2012. Available at: <http://www.nasipolitici.cz/cs/kauzy/>

detail/99-kaucha-sms-jizdenek-pokracuje/download/22-nasi-politici-o-s-analyza-zakazek-na-sluzbu-sms-jizdenky-v-regionech-cr-pdf

#### Case study no. 7: Slovak Railways

“Cesta ke zprůhlednění správy a řízení státem vlastněných společností v železničním sektoru“, Daniel Šitera, Inštitút pre dobre spravovanú spoločnosť, 2013. Available at: [http://www.governance.sk/assets/files/publikacie/sprava\\_a\\_riadenie\\_spolocnosti\\_v\\_zeleznicnom\\_sektore.pdf](http://www.governance.sk/assets/files/publikacie/sprava_a_riadenie_spolocnosti_v_zeleznicnom_sektore.pdf)

#### Case study no. 8: Tipos case

“Kauza Tipos“, Erik Szedély, Inštitút pre dobre spravovanú spoločnosť, 2013. Available at: [http://www.governance.sk/assets/files/publikacie/kaucha\\_tipos.pdf](http://www.governance.sk/assets/files/publikacie/kaucha_tipos.pdf)

#### Case study no. 9:

“Ziskovost firem s listinnými akciemi na majitele ve veřejných zakázkách“, Centrum aplikované ekonomie (zIndex), 2011. Available at: [http://zindex.cz/data/2011-08-30-studie\\_listinne-akcie-na-majitele-ve-verejnych-zakazkach.pdf](http://zindex.cz/data/2011-08-30-studie_listinne-akcie-na-majitele-ve-verejnych-zakazkach.pdf)

#### Case study no. 10:

“Veřejná kontrola obchodních společností s majetkovou účastí státu a samospráv“, Ekologický právní servis, o.p.s., 2011. Available at: [http://www.eps.cz/sites/default/files/publikace/nku\\_eps\\_brozura\\_nahled.pdf](http://www.eps.cz/sites/default/files/publikace/nku_eps_brozura_nahled.pdf)

## E.2. Data analyses

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#### Data analysis no. 1:

“Personální politika státu ve společnostech strategického významu: Analýza personálního složení managementu a dozorčích orgánů na vzorku 5 strategických státních společností v letech 2006–2013“, Naši politici, o.s., 2013. Available at: <http://www.nasipolitici.cz/cs/kauchy/>

detail/103-stat-chce-vylepsovat-sve-dozorci-rady-jaka-je-soucasna-praxe

#### Data analysis no. 2:

“Analýza výměn vedení ve firmách vlastněných veřejným sektorem“, Ctibor Košťál, Inštitút pre dobre spravovanú spoločnosť, 2013. Available at: [http://www.governance.sk/assets/files/publikacie/analyza\\_vymen\\_vedeni.pdf](http://www.governance.sk/assets/files/publikacie/analyza_vymen_vedeni.pdf)

#### Data analysis no. 3:

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