

In Hungary, the Law Changes Every Day but It Doesn't Get Better

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On Wednesday 23 November, the [Frankfurter Allgemeine Zeitung reported](#) that the European Commission will recommend that the Council cut €7.5 billion to Hungary under the [Conditionality Regulation](#). This would cut 65% of the original amount allocated under three different Cohesion Fund programs. According to the FAZ, the Commission decided that the Hungarian government has not yet done enough to keep the [17 promises it had made to fight corruption](#) and therefore the cuts are justified.

At its College meeting on 30 November, the Commission will apparently also approve Hungary's Recovery Plan under the [Recovery and Resilience Fund](#), but Hungary won't see that money any time soon either. The Commission plans to recommend that [€5.8 billion be withheld](#) from the 2022 Recovery Plan allocation until Hungary meets the same conditions that attach to the Cohesion Funds – and probably reaches [additional “milestones”](#) related to judicial independence as well.

In short, the Commission has agreed with us that the laws that we have analyzed in our series of four blogposts, [here](#) and [here](#) and [here](#) and [here](#), did not in fact constitute an effective anti-corruption plan. And the Commission has attached a €13.3 billion price tag to non-compliance. Council agreement is required for both freezes to go into effect.

Now the Hungarian government is scrambling to unlock this cash by introducing two additional laws that attempt to address the Commission's concerns. But these new laws repeat the errors of the prior laws. They create the appearance of an independent corruption-fighting system while digging in political allies at all of the chokepoints and tying up whistleblowers and anti-corruption fighters in red tape. The new laws do not make things better and they may even make things worse.

Given the timing, the two new laws discussed in this blog post – [Act XLIV of 2022](#) (Omnibus Law #1), parts of which already went into effect on 24 November 2022, and [Bill T/2032](#) (Omnibus Law #2), which has not yet passed the Parliament – were probably the result of Commission push-back against Hungary's initially flawed anti-corruption program. The two new laws were put before the Parliament on 15 November on a fast track, so fast that parts of one law were already in effect less than 10 days after the law made its first appearance.

One of the 17 promises made by the Hungarian government ensured that 90% of all laws each year would require “social participation,” including input from affected people and opposition parties, among others. According to New Article 5/A [Act CXXXI of 2010](#) (added only weeks ago), the first report on whether this social participation occurred (or not) should be completed by January 31, 2023,

covering the period between 30 September and 31 December 2022. So the clock is already ticking. This could be why so many of the Commission's desired laws have been so long and complicated. One giant law running to hundreds of pages, under the new counting scheme, counts the same as a one-page law making a minor amendment to an existing law, so the Hungarian government can still meet the 90% target when it passes a great deal of small, perhaps even trivial, laws with lots of social participation while pushing through a set of huge bills that have no input from outside the government at all. All of the anti-corruption laws demanded by the Commission are racing through the Parliament without the legislative safeguards that the Commission insisted that the Hungarian government install to make law more transparent.

Not surprisingly, then, both of the new laws are "salad laws," so named because many legal ingredients are thrown into a single law. So were almost all of the other laws that the Commission demanded. Salad laws are hard to read because they cross-reference many other laws by amending them so that even those skilled in parsing Hungarian legal drafting find them challenging to understand. It is almost surely the case that Members of Parliament do not know what they are voting on when they pass salad laws. And it is hard to imagine that the Commission can properly figure them out either. That's why we are analyzing them in this series of blogposts.

Reinventing the audit agency that audits European funds

The first part of [Omnibus Law #1](#) completely revises the legal basis of EUTAF (*Európai Támogatásokat Auditáló F#igazgatóság*), the Hungarian agency that has audited EU funds ever since 1 July 2010. Until now, EUTAF's only basis in Hungarian law was a 2010 decree by the then-new Prime Minister Viktor Orbán. EUTAF was tucked away in the Hungarian government's organization chart under the authority of the Finance Ministry with the agency's employees – including its director – completely subject to the whims of the ministry leadership without political insulation under the civil service law or any other. The Commission must have insisted that Hungary have a proper independent auditing authority with a statutory basis and a guarantee of institutional independence. That's what this new law appears to provide. Except it doesn't.

The new EUTAF statute created by a part of Omnibus Law #1 proclaims over and over that New EUTAF (which confusingly enough will have the same name as Old EUTAF) is an independent audit agency. Its employees will now be covered by more robust civil service protection and its budget will be self-generated without the legal possibility of the government amending it. The statute is very detailed about what New EUTAF has the power to do, and how it shall be organized. It looks now like a real government agency instead of an invisible office that no one had ever heard of outside the small circle of those who were responsible for the proper spending of EU funds. It starts to operate in this new legal form with the same old legal name on 1 January 2023.

For all of the assertions of independence, however, the dependence of New EUTAF on the Fidesz government will not change. Article 21 of the new law provides that the Director of New EUTAF is appointed by the (Fidesz party) President of the Republic on recommendation of the (Fidesz party) Prime Minister – so functionally Viktor Orbán decides who runs the agency. In fact, Orbán already has done so because the transitional provisions in the law (Article 37) specify that the current head of Old EUTAF will be the new head of New EUTAF. He will now begin a five-year term of office that can be endlessly renewed and, even when his term is over, he stays in office until his successor is named. That would allow the Fidesz-loyal President of the Republic, whose term exceeds that of the present government, to refuse to appoint a different successor if the Hungarian government were to change hands at the next election.

Dig down into the new law a bit and it turns out that the politically appointed director of New EUTAF controls everything. He appoints his own deputy (Article 27). He determines the internal organization of the whole agency (Article 20). He issues all of the “organization and operational regulations” that govern the agency (Article 24(2) (a)). He decides how many employees the agency requires and what resources it needs (Article 31(2)). He has “employer rights” over all the New EUTAF employees to organize their work in detail (Article 24(2)g)). He checks employees’ asset declarations (Article 24(2)h)).

Who will work at New EUTAF? The law formally declares (Article 36(2)) that all current employees (who are now classified as one sort of civil servant, namely as *kormánytisztviselő*) will have their legal relationship transformed into a different kind of civil servant (*közszolgálati jogviszony*) on 1 February 2023. This gives them more political insulation as the *kormánytisztviselő* work directly under political appointees in the government while those holding the status of *közszolgálati jogviszony* work for an established office as different leaders of it come and go. However, according to the next paragraph (Article 36(3)) the employees of the New EUTAF will have to sign new agreements to continue their employment and to do so by 21 January 2023. If the current employees do not sign their new contracts by then, they will lose their jobs (Article 36(4)). Nothing in the law explains whether the Old EUTAF employees will necessarily get the new contracts, however, so anyone not offered one will also be automatically fired. And of course, since the new director has the power to determine how many employees the agency will now need, he can also hire new ones. The law does not specify the selection process for employees of EUTAF, so it could well be that only those who are already trusted by Fidesz are eligible even as they are hired into these new more politically buffered positions.

The director’s powers in New EUTAF become even more interesting once one sees how investigations will be organized. Inspectors working for the agency may now conduct searches that allow them to enter premises of audited organizations and demand access to a wide range of data (including classified tax and business secrets and detailed records of personnel) (Article 13). In general, on-site inspections require five days’ notice before they are carried out unless the delay may affect the “effective conduct” of the inspection (Article 14(1)). But though inspectors working on specific cases make the front-line decisions about whom to

audit, whether to conduct inspections and whether to give notice to the person or organization audited, the director of New EUTAF has the power to “interrupt” specific inspections (Article 15(1)). In addition, the director also has the power to cancel any audit if “the state of the accounting system, the lack of documentation and records, or the illegal behavior of the auditee” prevent the audit from being properly conducted (Article 15(2)). Of course, if one is looking for fraud in the spending of EU money, one might imagine that audits that identified inadequate record-keeping practices or illegal behavior would constitute reasons to continue an audit rather than to suspend it. The law makes clear that inspectors are kept on a very short leash, one that can always be yanked back by the director particularly when it looks like problems will be found.

In short, the politically appointed director of New EUTAF establishes the structure of the new organization, makes all the rules, hires all the people, supervises them all and can intervene in their work down to the level of the individual audit. If an audit is discovering problems (or perhaps even if it is getting too close to someone the government wants to protect), the politically appointed head of New EUTAF can just call it all off. This does not look like an independent agency or one that is likely to be effective at doing its job.

Giving new powers to the Integrity Authority

In the initial flurry of anti-corruption laws passed to win the Commission’s favor, a new Integrity Authority was established as an “independent institution” overseeing the new anti-corruption program. As we noted [in our earlier analysis](#), the Integrity Authority was practically guaranteed to exclude any government critics from its board but given few real powers anyway. Now, after we have learned that some members of the Board [seem closer to the government than the Commission had anticipated](#), the Integrity Authority has been given new powers in the new law.

Omnibus Law #2, awaiting parliamentary passage as [Bill T/2032](#), amends many laws to require that various heads of agencies and independent authorities submit asset declarations. While asset declarations were required of a long list of government officials in the earlier wave of anti-corruption laws, Omnibus Law #2 requires asset declarations from the primary officials in the Competition Authority, Media Council, State Audit Office, President of the Republic, Commission of Fundamental Rights, Data Protection Officer, the Budget Council, National Election Office, National Remembrance Committee, Public Procurement Office and the new integrity office within the EU Funds Ministry (about which, more below). It also requires asset declarations from judges of the Constitutional Court, all prosecutors, Members of Parliament and high officials at the National Bank. All of these asset declarations will now be sent to the Integrity Authority which checks them (Article 17). Plus, the Integrity Authority is given some other new responsibilities under new amendments to the Criminal Procedure Code.

Changing (again) the Criminal Procedure Code

Omnibus Law #1 amended the new provisions in the Criminal Procedure Code that were inserted by Act XLI of 2022 and just entered into force nine days earlier. The [Constitutional Court](#) had just found the law constitutional and now that law has been amended. The law passed a few weeks ago gave private actors (both individuals and corporations/NGOs) the ability to file a motion for the prosecutor to reopen corruption cases that had been dropped without indictment, and the amendment now permits the Integrity Authority to do the same under the newly added Article 817/C) (7) of [Act XC of 2017](#) on the Criminal Procedure Code (CPC)). Previously, all public bodies were prevented from filing such motions.

But even though the Integrity Authority now has the power to file motions for reconsideration, it has only been given some, not all, the powers that ordinary citizens have in this new procedure. The Authority may file the initial motion (using Article 817/C and Article 817/D(1) CPC), which can be either accepted by the prosecutor or the investigatory authority and result in an order to continue the proceedings or the motion can be sent up the chain to the prosecutor's superior (Article 817/D)(2) CPC). This latter entity then either orders the investigation to be continued or sends the motion to the court (Article 817/D(3) CPC). Should the court order the continuation of the proceedings (as permitted by Article 817/G CPC) and should the prosecutor or the investigation authority terminate the proceedings a second time, the Integrity Authority – or anyone else who could file an initial motion – may file a repeated motion according to the new provisions introduced by Omnibus Law #1 (Article 817/H CPC). A repeated motion may only be filed by the person who had filed the initial motion (Article 817/H(3) CPC). Of course, recall that the party making all of these motions must do so with aid of counsel and must bear all of the costs of the proceeding, so adding yet more procedural stages – now a second round of court proceedings – may not be altogether welcome by those attempting to get the prosecutor to finally indict someone for corruption.

If, however, in this newly introduced second round, the Integrity Authority is rejected at the court and the prosecutor is not ordered to reopen the case based on the evidence and arguments presented in this new procedure, then the Authority – unlike anyone else who has gotten this far in the process – has no legal standing to bring a private prosecution (Article 817/J/2). Instead, private parties, if they so choose, can pick up the case started by the Integrity Authority and bear all of the labor (and cost) from here on out to bring a private prosecution (Article 817/J/3).

Excluding the Integrity Authority's possibility of bringing a private prosecution may seem consistent with the once-firm principle that no other state entity than the prosecutor's office may prosecute a case (see Constitutional Court Decision [42/2005. \(XI. 14.\)](#), reaffirmed by Constitutional Court decision [3030/2020. \(II. 24.\)](#)). The Hungarian government has the power to amend the constitution from one day to the next, however, so it clearly does not want the Integrity Authority to have this power, even though it might be in the best position to bring a private prosecution given the resources and information that will be channeled to it. So now the Integrity Authority can ask that prosecutions be reopened but it is barred from doing anything

if the prosecutor still fails to indict. If the public prosecutor continues to refuse to indict in a corruption case that has a reasonable chance of success, only private actors may substitute themselves for the public prosecutor and they have to pay the full cost of doing so, while they will not receive the information the Integrity Authority had about the case. And private actors will still have to bear the costs of both parties if they bring a private prosecution and lose. [Our earlier analysis](#) of this procedure showed how cumbersome and expensive this new procedure is to use, and the changes to the law do not change that.

Finally, it is worth noting another change to the recently changed Criminal Procedure Code. According to the changes made by Omnibus Law #1, if a private person or entity makes it all the way through the procedure to bring a private prosecution and then a negative judgment is passed on the merits, those who represented the case in lieu of the prosecutor (but with fewer resources), will not be able to appeal this judgment (Article 817/T(1) CPC), or to file any other extraordinary appeals, unlike a prosecutor would under Hungarian law (Article 817/V CPC). So, if a private prosecution goes forward and loses at first instance, the private prosecutor will not only have to pay the costs of both sides, but will not be able to appeal. The person convicted of corruption charges, however, will be able to appeal and will therefore have a second chance to throw all of the costs onto the party who launched the private prosecution if he is found not guilty at that stage. The person bringing the private prosecution, however, will not have the opportunity to be vindicated on appeal, unlike a Hungarian public prosecutor.

These changes are technical, but they all pull in the same direction. Even though it is admirable in general for the public to have a way to challenge the prosecutor when he drops major anti-corruption cases, the procedure designed by the Hungarian government ties the public up in so many knots of expense and delay that the effort to improve accountability accomplishes very nearly the reverse. The new effort to give the Integrity Authority a role in the process doesn't really improve matters as the Authority is not given enough power to make a difference, which would require the Authority to be permitted to assume the cost of substituting for the public prosecutor. In our view, these changes made by Omnibus Bill #1 do little to strengthen the fight against corruption.

Establishing a parallel audit and integrity authority, this time within a ministry

The new anti-corruption program has resulted in a number of new institutions created to intercept corruption on the Hungarian political landscape. In October, [Act XXVIII of 2022](#) added a new Article 29/B to [Act CXXV of 2018](#) on Government Administration, right after the section on the Office of the Political Director of the Prime Minister. Article 29/B established a new "Internal Audit and Integrity Directorate" (IAID) without providing any detail about how this new office would work. All anyone could see then was that this new office has a name which might well be confused with either EUTAF (in charge of audits) or with the Integrity Authority (overseeing the whole anti-corruption program). But the new office is

something else – a new unit operating within the Ministry for the Use of Union Funds, presently headed by Tibor Navracsics who has been negotiating the Recovery Fund “milestones” with the Commission. This section of Omnibus Act #1 already entered into force on 24 November 2022 so it is getting up and running now.

IAID is governed by a Board of Directors who shall be selected on the basis of a public tender with the criteria for holding the office and the selection process controlled by the Integrity Authority (Article 29/B(6)). Newly added through Omnibus Law #1 is a power of the Integrity Authority to initiate a new process for selection of this Board if there are “irregularities” the first time around. The Integrity Authority controls the operation of the Board of Directors of IAID. However, all staff working at IAID can be hired and fired by the politically appointed secretary of state who is the deputy to the Minister (Article 29/B(7)).

The amendments added by Omnibus Law #1 give this agency the primary task of carrying out checks of the newly required conflict of interest declarations (Article 29/B/3/a), which a long list of government officials now have to submit. This agency is also charged with following up on whistleblower reports of undeclared conflicts of interests on the part of government officials (Article 29/B(3a)a) and Article 29/B(9e)). If a conflict is discovered, it must be reported to the Integrity Authority which then acts to notify the employer of the person with the conflict as well as those who are responsible for the implementation of any affected EU grants (Article 29/B(9d) and (9f)). So this new office seems to be the primary way that the new law on conflicts of interest will be enforced.

The problem is, of course, that while those who actually do the work of finding the conflicts of interest in the official declarations and through the whistleblower reports may be supervised by an independent Board, their careers are controlled by the Minister. In short, this is not a system well-insulated from political influence and yet it is charged with carrying out one of the most sensitive tasks in the new anti-corruption system. This doesn't look like the way one would set up an agency if one wanted it to operate independently.

Rules that come and go

These two new omnibus laws make changes in other omnibus laws that were only passed a few weeks ago. Some of the new laws hadn't yet taken effect and yet were already amended. Unfortunately, this is not a unique situation in Hungary. With his [two-thirds parliamentary majority](#) and [unlimited decree power](#), Prime Minister Viktor Orbán can change the law from one day to the next and make exceptions to any laws in force by decree. This extreme flexibility of Hungarian law is something that European institutions might keep in mind as they assess whether any program promised by the Hungarian government will have the effects that they demand.

Given that the laws in Hungary can be changed (or have exceptions made to them) at any moment, it might therefore be a safer strategy for protection of the EU budget, if and when EU money is released down the road when European institutions are persuaded that the changes are both effective and real, to distribute it bit by bit, with

continuous scrutiny of the laws and practices of state entities to make sure that they haven't been changed since the last handover of cash. Just as the Commission has been able to demand changes in the law and generate those changes overnight, so too the Hungarian government – when the Commission isn't looking – can reverse those changes just as quickly. Withholding funds now may protect the EU budget, but releasing funds eventually into a legal shredder down the road will not guarantee that any reforms achieved will be permanent.

In Hungary, the law changes every day but it doesn't get better. Until that problem is fixed, and as long as the anti-corruption program is as shot through with political influence as this one is, any anti-corruption program that the EU institutions agree with the current government of Hungary will be built on sand.

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