How NOT to Be an Independent Agency

The Hungarian Integrity Authority

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The Hungarian government is trying to convince EU institutions that it is taking adequate steps to ensure proper spending of EU funds going forward. Otherwise, if the Council accepts a pending proposal of the European Commission under the Conditionality Regulation, the Hungarian government stands to lose 65% of the money allocated to three Cohesion Fund programs, amounting to some €7.8 billion. The Council faces a deadline of 18 October to decide to accept, reject or modify the Commission's proposal, but that deadline can be extended to 18 December if the Council believes that Hungary could productively use that time to allay concerns by then.

In short, this is crunch time for the rule of law in Hungary. Facing a difficult financial situation at home, Hungary desperately needs the money. The Hungarian government has therefore promised to introduce a set of reforms that will change the way it handles EU funds in order to spring loose the cash. But the proposals put forward by the Hungarian government do not come close to guaranteeing that EU funds will be properly spent and therefore they should not succeed in preventing the recommended cuts.

We have carefully read the laws enacted so far that establish a new anti-corruption framework and can confidently say that neither the Commission nor the Council should accept what the Hungarian government is offering because the proposed changes do not begin to alter business as usual in Hungary. In this blogpost, we will analyze the 'Integrity Authority' which forms the centerpiece of the government's program, showing that it is not independent from the government nor are its powers real.

First, however, it is important to explain why the Commission has cracked down (finally) on Hungary. The present Hungarian government has a long track record of mismanaging EU funds without taking sufficient steps to curb the abuse. At the conclusion of the 2007-2013 Multi-Annual Financial Framework (MFF), the Hungarian government was fined €1.5 billion in financial corrections for mismanagement. Between 2016-2020, OLAF recommended Hungary for the highest rate of financial corrections as a percentage of EU payments in both Structural and Investment Funds and Agricultural and Rural Development Funds. At the conclusion of the 2014-2020 MFF, the Hungarian government was fined €1.4 billion after the Commission found 'systemic irregularities, in particular related to discriminatory or restrictive exclusion, selection or award criteria, and unequal treatment of bidders.'

These 'corrections' for improperly spent EU funds understate the degree of corruption in the Hungarian system because, for years now, the Hungarian government has simply withdrawn from EU funding – and therefore from EU accounting and oversight – problematic contracts that the Commission has identified. Had all those withdrawn programs remained on the EU books, the financial corrections and recorded levels of misspending would have been even larger than the statistics now reveal.

The Conditionality Regulation that went into effect on 1 January 2021 provides a procedure through which the EU can cut funds to Member States whose rule of law violations threaten the sound financial management of EU money. But the prospect of having its funds cut has made little difference in Hungary thus far. In its 2021 Rule of Law Report on Hungary, the Commission emphasized that, '[r]isks of clientelism, favouritism and nepotism in high-level public administration as well as risks arising from the link between businesses and political actors remain unaddressed. Independent control mechanisms remain insufficient

for detecting corruption.' A 2022 study by the Corruption Research Center Budapest showed that a mere 42 politically connected firms had won fully 21% of the net value of EU-funded contracts since the Orbán government came to power.

In its 2022 Rule of Law Report on Hungary, finalized after it launched the Conditionality Regulation against Hungary in late spring, an exasperated Commission noted that its

> *concerns relate to breaches of the principles of the rule of law in relation to the use of public procurement and the functioning of the authorities implementing the budget, financial control, audit, monitoring, accountability process, transparency, prevention of fraud, corruption and other breaches of EU law, and the constant failure to implement the recommendations addressed to the authorities for several years.*

How could the Hungarian government mend its ways to reassure EU institutions that Hungary is a reliable steward of EU funds? Of course, joining the European Public Prosecutors Office would be a step in the right direction, but Hungary is refusing to do it and the Commission evidently believes that it cannot legally condition the distribution of funds from the European budget on joining an Enhanced Cooperation mechanism.

Instead, the Hungarian government has proposed a rearrangement of its domestic institutional architecture to better fight corruption. At the center of this effort is a new 'Integrity Authority' (in Hungarian: *Integritás Hatóság*). The law establishing this authority, Bill T/1260, just passed the Hungarian Parliament on 3 October 2022.

Apparently without irony, the Hungarian government published this draft bill as usual – after the close of business on a Friday evening so that it would not attract public attention or immediate scrutiny. In addition, the government raced this complex bill through the Parliament on an expedited schedule, minimizing social consultation. In one of its other offerings to the Commission as part of its proposed rule of law reforms, the Hungarian government promised that it will ensure proper time for interested parties and the political opposition to have input into 90% of the laws proposed from here on out. But apparently, after more than a decade of speed-passing major legislation, the reform has not yet begun. This law, like most of the others passed in Orbán's dozen years in power, emerged from a closed drafting process and was put before the Parliament only slightly more than a week before it passed. Unusually for proposals from the governing party, however, this bill had the support of two opposition parties Momentum (on the left) and Jobbik (on the right). That support may have been generated by the fact that how the law appears on the surface and what the law does when you work through the details are different. Two opposition parties voted for the surface.

The law says all the right things at the start. Chapter 1, section 1 of the law announces that this Integrity Authority is 'autonomous,' that the Authority and its officials and staff are 'completely independent' and that:

> *It is subject only to law including directly applicable European Union Law; it cannot be overruled in its tasks by any other person or body; it performs its tasks separately from other bodies and free from influence.*

In short, the law screams that the Authority is independent. But what the opening chapter of the statute giveth, the later chapters taketh away.

The Political Dependence of the Integrity Authority

The Authority is controlled by three people: the president and two vice-presidents who constitute the Authority's board of directors. This group decides by majority, so only two out of three are required to make a decision on behalf of the Authority.

But a political sleight of hand converts what might have been an independent agency into a dependent one. Dependency is hard-wired into the way that the Authority's officials are appointed. Here, a confusing multi-stage process appears to buffer the Authority's officials from political influence. But the confusion disguises the way that the process that selects the

leaders of the Integrity Authority is political all the way down.

First, an 'Eligibility Committee' announces an open and public tender for the positions of president and vice presidents of the Authority. The eligible applicants must meet a variety of laudable requirements. They must have a university degree in a relevant field, be 'undoubtedly independent' and have extensive professional experience in public procurement and anti-corruption work. The Authority's officials must make extensive asset and conflict of interest declarations. The Eligibility Committee assesses these applicants to make a short list of the top candidates. So far so good.

But how is the Eligibility Committee constituted? While the Eligibility Committee's role in making the short list is outlined in Article 37 of the law, the Eligibility Committee's membership is only explained much later, in Articles 64 through 66, so it is easy to miss it. Like the Authority itself, the Eligibility Committee consists of three 'independent' members who make their decisions by majority vote. And they are selected, as the law says, 'by the head of the body that audits European grants.'

So, then, what is the body that audits European grants? The law might have actually spelled out the name of that body or the law that creates it, but it doesn't, so there is no way to cross-reference it through the usual forms of legal research. Instead, one has to know independently of this law who audits European grants in order to start the legal research trail all over again. From our prior work, we know that body is EUTAF (in Hungarian, *Európai Támogatásokat Auditáló Főigazgatóság*), otherwise known in English as the Directorate General for Audit of European Funds. This is a body that few Hungarians have heard of. It doesn't appear in the press and from its website, one cannot tell who runs it or who works there. Its English-language website explains that EUTAF 'was established on 1 July 2010 as an autonomously operating central budgetary organisation within the chapter of the ministry responsible for public finances.'

Indeed, EUTAF was established by Governmental Decree 201/2010 (VI.30.), signed by Prime Minister Viktor Orbán only six weeks after he was sworn in for his first term in office with a supermajority parliament. It must have been one of his highest priorities to constitute this office so quickly. Creating the office by decree allows Orbán to change anything about this agency with the stroke of a pen. EUTAF is not established by a statute, nor is it a free-standing agency. Instead, it is lodged institutionally within the Finance Ministry, which is itself one of Hungary's key managing authorities run by one of the Prime Minister's oldest and closest friends.

A 'normative instruction' of the Finance Ministry governs EUTAF's internal operations and requires the Director General of EUTAF to report directly to the Deputy State Secretary of the Finance Ministry, a political appointee who is not a career civil servant. ('Normative instructions,' according to the Act on Law-Making, may regulate the organizations, operation, and activities of bodies under a minister's control, direction, or supervision.) The Finance Minister himself has the power to dismiss the Director General of EUTAF, since according to the normative instruction, the Director General is responsible directly to the minister himself. But nowhere in this legal framework, such as it is, are there any standards, procedures or even general guidance for determining when the Director General of EUTAF may be fired.

In short, EUTAF is created by a governmental decree signed by Viktor Orbán and regulated by a normative instruction of the finance minister. The independence of the office is guaranteed neither by law nor by its institutional position, nor is the tenure of its head protected by law in any way. EUTAF sits institutionally within one of the major managing authorities that is responsible for spending EU funds, whose minister can fire the chief auditor at will. It is hard to conclude that this is truly an independent office.

And yet, it is the Director General of EUTAF who is the prime mover in the system that sets up the Integrity Authority. He alone appoints all three members of the Eligibility Committee and this Eligibility Committee in turn shortlists potential members of the Integrity Authority.

Maybe this is not so bad. The body selecting the Integrity Authority is at least twice removed from a direct political appointee so perhaps the political influence would fade by the time that the members of the Integrity Authority are finally appointed. But that would be wrong. The Eligibility Committee only compiles the short list. The three board members of the Integrity Authority are actually selected from that short list by the head of the State Audit Office (in Hungarian *Állami Számvevőszék* or ÁSZ).

The new head of the ÁSZ – elected on a party-line vote in June 2022 for a 12-year term – is a long-time political appointee in successive Orbán governments, first named vice-president of the Hungarian National Bank in 2013, just when the Bank fell under more centralized party control and was warned by the European Central Bank that its independence was under threat. Just as this official was moving into his new office as ÁSZ director this summer, ÁSZ began its extensive audits of NGOs in what the NGOs believe is a politically motivated harassment of the civil sector. The European Commission expressed concern about these new intrusive audits in its 2022 Rule of Law Report on Hungary.

Not surprisingly, the State Audit Office is not widely viewed in Hungary as independent of the government but instead as a tool that the government uses to harass opponents. But the head of that agency is the one who picks the three members of the Integrity Authority from the short list created by the Eligibility Committee. And he presents his choices to Katalin Novák, the President of the Republic, who is a former minister in the last cabinet of Prime Minister Viktor Orbán and who was elected as President on a party-line vote earlier this year. If all looks satisfactory to her, she makes final appointment. Any politically inconvenient candidates who wind up on the short list can be weeded out with these two final political filters.

With political appointees at the beginning and end of the procedure for choosing who sits on the Integrity Authority, the Authority can have no integrity. Instead, the elaborate scheme for selecting members of this Authority ensures that no one will be named to this Authority who is inclined to make trouble for the government.

Illusory Powers

Even if the Integrity Authority were more independent than it is, its powers are largely illusory. While the opening chapter of the law (in particular Section 5) explains the impressive tasks of the Authority, those powers are less than meet the eye.

For example, the Authority must conduct an annual 'risk assessment' to protect EU funds and prepare a report outlining what it finds. But it has no authority to make anyone do anything based on that report. All it can do is to make recommendations to those who might be causing the risks (Section 14) without any means of enforcing its recommendations.

The Authority is also given the power to conduct 'investigative procedures,' but the Authority is given no investigatory capacity. Instead, it can receive complaints and issue recommendations to various parties to do better. The only powers given in the law to investigate include (in Section 15) the ability to either 'request data from any person or organization involved in the given case' or to 'request an organization with tasks and powers in the field of monitoring the use of European Union funds to carry out evidence collection on its behalf' (Section 18). In case these limitations are not clear enough, the law states explicitly that 'the Authority may not perform any other evidence collection on its own authority, except for the invitation to provide data and the evaluation of public information' (Section 18[10]). In short, the Authority's ability to investigate complaints is severely limited because it has no powers to do anything other than 'invite' others to give it information or delegate the investigation to 'the organization with the tasks and powers in the field of monitoring the use of European Union funds.'

And what is this mysterious organization? Like 'he who must not be named' in the Harry Potter series, this unnamed organization is none other than the office of the Prosecutor General. Of course, the Prosecutor General – a former MP with the governing party who is a long-time friend of the Prime Minister – has

been repeatedly criticized by the European Commission and by GRECO (the Council of Europe's Group of States against Corruption) for failing to initiate corruption investigations in the decade plus that he has been in that office. Nonetheless, he was re-elected last year on a party-line vote to another nine-year term.

If the Integrity Authority asks the Prosecutor General to conduct a corruption investigation, will he? If history is any guide, the answer will be that he will never find enough evidence to prosecute anyone close to the government's inner circles.

Suppose that the Integrity Authority's own limited 'investigations' based on polite invitations and public information turns up something, then what? The Authority can issue 'recommendations' that the parties involved don't have to follow as long as they issue reasons for not doing so (Section 15[3]). At that point, the Authority can refer the offending parties to the Public Procurement Decision Committee, an existing committee within the much-criticized existing procurement process that has not to date been notably successful at preventing corruption. In short, the Integrity Authority's investigations are funneled into the same old process that has not worked before.

If the Authority detects fraud or corruption or other serious violations in the procurement process, it may also issue an 'order' that can suspend an ongoing tender (Section 21). If the tender is not thereby suspended, the Investigatory Authority can issue a fine against the Procurement Authority (Section 22), which – if successful – would result in money going from one government pocket to another, with none of the private entities that benefit from the corruption ever at risk of sanction. The Integrity Authority has a similar process to follow (and a similar toothless remedy) if it discovers problems with the Competition Authority (Section 24). Note in both cases that a suspension order only suspends, but does not cancel, a problematic tender or approval process already started. Wait long enough, and the process can start again after some money has been shifted from one government agency to another.

If the Authority suspects that something criminal is going on in its 'investigations,' the Authority may 'call upon an organization with tasks and powers to initiate proceedings in the context of monitoring the use of European Union funds' (Section 25) – in short, calling upon the Public Prosecutor who shall not be named. If the past is prologue, high-level corruption cases sent to the Public Prosecutor's office will die.

The Authority has a variety of other tasks – keeping records of procurement procedures and beneficiaries, for example – but it has no serious investigatory or enforcement authority to ensure the sound management of EU funds. It is ornamental more than functional, and not even guaranteed to be independent of political influence.

There's more to the Hungarian government's proposed reforms, but the Integrity Authority was designed to be the centerpiece of the new anti-corruption initiative so it is by far the most visible innovation. Far from being a fierce watchdog, the Integrity Authority is nothing but smoke and mirrors.

And Now It's Up to the Council

The decision facing the Council now is either to cut Hungary's funds as the Commission recommends or to certify that these reforms are actually capable of controlling corruption in Hungary so that funds may be released. But as we have shown, if the Council's faith in these reforms rests on the independence or efficacy of the Integrity Authority, that faith is misplaced.

The Council has a third option – amending the proposal of the Commission. Given Hungary's track record of misspending EU funds in all programs and given the lack of sincere cooperation that the Hungarian government has demonstrated by its putting forward patently misleading proposals for reform, the Council would be well within its legal authority to vote to cut *all* of Hungary's EU funds until the Hungarian government gets serious about the rule of law.

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