

Recommendations Regarding the Restraint of Corruption

Promoting an effective anti-corruption framework in
Hungary
2015

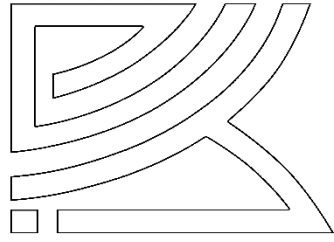
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Introduction

Eötvös Károly Institute has participated in the two-year-long FINEC project since May 2013. The project's overall objective is to enhance institutional anticorruption (AC) frameworks in CEE countries for more effective AC measures enforcement. The project sets a broad approach to so-called soft corruption areas, often regarded as preventive area for hard corruption. This approach consists of researches, comparative analyses, best practice studies and recommendations for the specific situation of post-communist EU countries. The research transfers through country-focused recommendations experience and knowledge among post-communist EU countries.

The project further includes four in-depth researches on enforcement mechanisms of selected AC measures in five CEE countries in areas of political parties financing (effectiveness and pro-activity of oversight), conflict of interest (announcing during public bodies sessions), whistleblowing (whistleblowers protection in ACAs) and access to information (in state-owned enterprises). Comparative analyses will show advantages and deficiencies of different approaches and become a basis for the country focused recommendations. These recommendations on enforcement mechanisms will be inspired by European best practice examples which will be identified and described at the beginning of this project.



FREEDOM OF INFORMATION

I. Current legal and institutional status

A) Protection of rights between 1989 and 2010

The Hungarian democratic transition (the so-called Constitutional Revolution) was characterized by the fact, that informational rights (the freedom of information and data protection) played a crucial role in the democratization of the legal system. The information politics of the totalitarian regime (“non transparent government – transparent citizen”) was transformed following the idea of “transparent government – non transparent citizen”, which was enforced by the Constitutional Court, declaring the division of information power as a constitutional principle and adopting decisions regarding the freedom of information – especially the decision concerning the all-purpose personal identification number (CC Decision No. 15/1991. (IV.13.), see the decision of the Federal Constitutional Court of Germany issued on the 15th of December, 1983 regarding the census law, 15.12.1983 Case No.: 1 BvR 209, 269, 362, 420, 440, 484/83.).

As a consequence, the Act LXIII of 1992 on the Protection of Personal Data and on Access to Data of Public Interest, as a pioneer in Europe and the whole world, regulated the two different fundamental rights in the same act with an integrated approach. The same act established the Office of Parliamentary Commissioner for Data Protection and Freedom of Information for the first time in Europe as an ombudsman-type institution for protecting both related informational rights. The Data Protection Commissioner was a two-faced institution from its assumption of office (1995) considering that the classical power of the ombudsman was strengthened by some administrative powers such as supervising state secrets for enforcing freedom of information and exempting the obligation of secrecy. In the Act LXIII of 1992 and moreover, in the entire legal system the freedom of information enjoyed strong normative protection, supported by the Data Protection Commissioner as a key element of the law enforcement system. Each citizen was entitled to bring actions for accessing data of public interest regardless of his/her personal connection with

the information. Ordinary courts also provided relevant institutional protection exercising their powers and the enforceable legal principles appearing in the decisions of the Constitutional Court brought the courts under a constitutional umbrella.

The guarantee of providing the freedom of information is to reveal all data classified without any legitimate reason to publicity. In case the Data Protection Commissioner concluded in its official capacity that any restricted-access data has been classified without proper justification, could instruct the person by whom the data was classified to lift or revise the restriction. The classifying person could contest the instruction at the court (Section 26 (4) of the Act LXIII of 1992).

B) Protection of rights after 2011

In 2011 the Hungarian Parliament passed a new Fundamental Law and a new act regarding information law. The changes of the constitutional regime concerned both the conditions of enforcing the freedom of information and the entire system of protecting fundamental rights.

1. The establishment of the National Authority for Data Protection and Freedom of Information

The Act CXII of 2011 on Informational Self-determination and Freedom of Information (hereinafter referred to as: New Information Act) introduced a new organizational model: ensuring and controlling the enforcement of the protection of personal data and the right to access to data of public interest became the duty of the National Authority for Data Protection and Freedom of Information, which is defined as an independent agency. The protection of the two different fundamental rights mentioned above remained together.

1.1. Exercising administrative powers

In contrast with the status of the Data Protection Commissioner who was responsible only to the Parliament, the Authority, as an administrative body is part of the executive branch. The official explanation of the New Information Act justified the change of the organizational model with claiming that the

powers of the Ombudsman were insufficient for examining and sanctioning violations effectively.

The administrative model is alien from the ethos of protecting fundamental rights. On the one hand the competency is broader than before (e.g. penalties) but on the other hand several measures available before now do not exist. In comparison with the Data Protection Commissioner, the Authority, besides the possibility of imposing penalties and ordering compliance with legal regulations lost important powers. For example the Authority cannot initiate the constitutional review of Acts of Parliament or ask for the interpretation of the Fundamental Law. The Office of the Data Protection Commissioner was originally vested with administrative powers, so the extension of these powers would not entail automatically the end of the parliamentary control and that of the ombudsman-character of the institution.

An ombudsman interprets fundamental rights from a moral aspect, which cannot be the characteristic of an administrative body.

1.2. The problem of independency

Section 38. (5) of the New Information Act declares the independence of the authority. The section referred describes this independence by stating that the authority is subject to Hungarian law only and it may not be instructed in its official capacity. Tasks may only be prescribed for the authority by acts of Parliament.

The independence of domestic institutions enforcing the freedom of information is not determined by the law of the European Union, but taking into consideration that the authority is responsible for protecting both informational rights, the requirements of the Data Protection Directive shall applied to it.

In accordance with the second subparagraph of Article 28 (1) of the EU Data Protection Directive the national public authority responsible for monitoring the compliance with the regulation regarding data protection shall act with complete independence. The Directive does not specify the meaning of this independence unlike the case law of the Court of Justice of the European Union.

The Court interpreting the Directive established that “in relation to a public body, the term ‘independence’ normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure”. “The concept of ‘independence’ is complemented by the adjective ‘complete’, which implies a decision-making power independent of any direct or indirect external influence on the supervisory authority.” (C-518/07, European Commission vs. Federal Republic of Germany, Judgment, sections 18-19.). It follows, that during their official capacity supervisory authorities shall proceed objectively, without fear or favour.

According to the Court of Justice the independence of national authorities shall be similar to the independence of the European Data Protection Supervisor (EDPS) as the EDPS may neither seek nor take instructions from anybody in the performance of its duties. (C-518/07, European Commission vs. Federal Republic of Germany, Judgment, sections 26-28.)

The Court of Justice of the European Union established that Hungary by prematurely bringing to an end the term served by its Data Protection Commissioner has infringed EU law (<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140053en.pdf>). The fair manner of meeting Hungary's engagements would be nominating the previous Data Protection Commissioner to the president of the National Authority for Data Protection and Freedom of Information.

2. The legal status of the Constitutional Court and ordinary courts

The lost independence of the data protection supervisor is aggravated by a new change regarding the regulation of information law. Besides limiting the powers of the Constitutional Court, the number of judges was risen from 10 to 15, and as a result of the completion of mandates of the old judges, the

domination of the political nominees appointed by the incumbent government is increasing. The consequences are menacing.

The independence of the ordinary courts is affected by many organizational changes. The government reorganized the directional system of the courts and removed the considerable part of the court leaders. Though the regulation regarding the forced retirement of the judges was withdrawn, the majority of the removed judges did not return his or her office.

3. Limiting freedom of information

Another aggravating change in the relevant substantive law is that the Fourth Amendment to Hungary's Fundamental Law aims to terminate the availability of case law formed by the Constitutional Court. "Decisions of the Constitutional Court delivered prior to the entering into force of the Fundamental Law become void. This provision does not concern the legal effects achieved by the preceding decisions." Considering the fact that the broad interpretation of the freedom of information was mainly shaped by the binding decisions of the Constitutional Court, it is an additional threat for the enforcement and proper interpretation of the freedom of information.

The practice of the Constitutional Court after the entering into force of the Fourth Amendment to Hungary's Fundamental Law dispelled the above-mentioned worries. The Court declared that its statements regarding the fundamental values, the human rights and freedoms, and the constitutional institutions retain their validity if they had not changed significantly. That demands, however, the comparison of the former Constitution with the Fundamental Law and just when the constitutional law regulation is unchanged or very similar can be taken over.

The Information Act in force opposes the principle of accessing data of public interest regardless any personal or official concerns. In this context it is extremely hazardous to link the right of dissemination to the condition of purpose limitation. "Personal data of public interest may be disseminated in

compliance with the principle of purpose limitation (Section 26. (2), New Information Act)".

Section 30. (7) of the New Information Act restraints the scope of requesting data of public interest in comparison with the previous legal situation: "The requests for data with the purpose of a comprehensive, account level as well as an itemized control of the financial management of the body with public service functions are regulated in specific relevant laws."

4. Protecting rights in practice

As presented before the System of National Cooperation (as the new social and political system of Hungary is called) coming into power in 2010 corroded the protection of fundamental rights. This influenced the substantial law and the institutional checks as well, but probably the second one even more. The attitude of the National Authority for Data Protection and Freedom of Information is passive when it comes to the protection of the freedom of information, especially controlling the central administration, and the Authority completely abandons its supervisory powers concerning classified data.

At the same time practical legal changes usually follow political changes later. Despite the emerging difficulties of the legal environment, as a result of the activity of a few civil organizations, ordinary courts (besides some controversial rulings) still make some great, human rights friendly decisions regarding important issues.

II. To ensure the enforcement of freedom of information the following proposals shall be taken into consideration

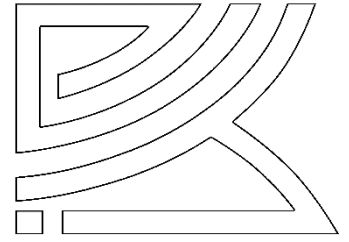
A) General conditions:

- The binding force of decisions made by the Constitutional Court before the Fundamental Law came into force shall be restored.

- The personal and organizational independence of the Constitutional Court shall be reinforced on the legal basis of the constitutional traditions of 1989.
- The enforcement of the freedom of information cannot occur without restoring the independence of branches of power, especially the independence of supervisory authorities and ordinary courts.

B) Direct proposals regarding the freedom of information:

- The governmental control of the institution protecting the freedom of information shall be terminated and the character of an ombudsman-type institution responsible to the Parliament shall be ensured.
- The role of an independent controller monitoring the secrets of the state would be substantial.
- The substantive judicial control of classified data shall be guaranteed.
- Legal regulation limiting the freedom of information shall be repealed, while personal data of public interest shall be disseminated unlimited.
- Education in the field of freedom of information shall be organized for civil servants and judges.



POLITICAL PARTY FINANCE

I. Basic Principles

Political parties are essential actors of democratic politics, and the regulation of their activities must satisfy several, sometime conflicting, requirements at the same time. Parties need substantial resources to perform their essential role of representation and democratic will-formation effectively. At the same time, their access to and spending of resources must be transparent so that they do not get captured by special interest groups that are not accountable to the public. Furthermore, it is desirable that disproportionate distribution of resources among parties do not undermine the fairness of the political competition. Keeping these desiderata in mind, we first present fundamental principles for the design of party finance regimes, and then describe the main weakness of the existing Hungarian regime. Finally, we develop specific recommendations in light of the particularities of the Hungarian context.

1. Effectiveness

Given that parties are essential, indispensable actors of democratic politics and that their effective operation is costly, the first aim of an acceptable regime of PPF is to ensure that parties can have access legally to sufficient resources. This can happen through the dominance of either public or private funding, or a balanced combination of the two.

2. Transparency

Since parties serve as a vital link between citizens and public authority, and have a crucial constitutional function, their operation is under more stringent standards than those of purely private actors. Their activities, and especially

their financial conduct ought to be transparent to the public as a general rule.

3. Fairness

The democratic competition of political parties is the main vehicle of democratic accountability. Accountability can be realized only if there is robust competition, which in turn depends on the major parties competing on a more or less level playing field, including availability of resources. An equitable distribution of resources is therefore a necessary condition of the fairness of political competition. This may require public funding of parties, as well as limits on private donations.

II. Hungary: the main areas of weakness

In the area of political party finance, the current Hungarian regime has a number of important weaknesses, both with respect to the regulatory framework, and in terms of the enforcement of the existing rules, that causes it to fall far short of satisfying the principles listed above. We start with weakness in the rules and proceed to overview problems with enforcement.

1. Lack of effective resources

One of the main weaknesses of the current Hungarian regime is that the parliamentary parties do not have access to sufficient legal sources of funding for a variety of reasons, and therefore are dependent on illegal funding that fuels corruption. First, membership fees generate minimal revenues due to the low number of active members. Second, there is no tradition of political donations and the middle class, everywhere the main source of political contribution, is weak and unwilling to donate. Third, state funding is not sufficient to close the resource gap, and is actually being

reduced in recent years. The public funding formula is at the discretion of the actual governing majority.

2. No definition of campaign costs

Even though the law on electoral procedure sets a legal limit on the amount of money parties and candidates may spend during an election campaign period, there is significant confusion as to what kinds of expenditures should count towards that limit. It is agreed that paid advertising counts as campaign expenditure, but there is no clarity concerning live campaign events, staff-related costs, the costs of polling, production costs, etc. For this reason, the limit is practically not enforceable.

3. Lack of a mechanism to track campaign spending

The current system of campaign regulations does not make it possible to effectively track the amount of outlays made by the parties. There is no obligation that ads made on behalf of a party or candidate should actually be paid for by that party or candidate, or any kind of obligation regulating the costs related to live events, etc. for this reason, parties and candidates can always claim that an ad that appeared publicly or an event was not paid by them and therefore should not count towards the legal expenditure limit. Again, this glaring loophole makes the spending limit practically unenforceable.

4. 3rd party campaigning

Another problem related to the enforceability of spending regulations is that there are no rules applicable to so-called 3rd party organizations that for all intents and purposes campaign on behalf of specific parties (or against their rivals), but apparently independently of them. Such 3rd parties were major players during the past couple of election cycles, spending on the same order of magnitude as the major parties. Yet the rules don't apply to them,

and their expenditures don't count towards the spending limits. Once again, this loophole makes enforcement of the spending limit illusory.

5. Use of state resources

Currently, there is no ban on the use of state or municipal resources by parties for campaign purposes during the campaign period. Therefore, during the last several election cycles the government, various ministries and larger local governments have been using public funds, ostensibly to inform the public about their activities, but in reality to push political propaganda. Such spending (always to the benefit of the party in power), often approached or even exceeded the amounts spent by the major parties. Needless to say, such practices undermine the fairness of the competition of the parties.

6. Ban on paid ads in commercial television and radio channels

Beginning with the election cycle that just ended in April, 2014, a ban was introduced on paid political advertising in the commercial television and radio channels. Traditionally, these media had the largest to second largest share of political ads in past cycles. The ban has the effect of muting the campaign, especially of the opposition parties, since the ruling party can always use state resources (see previous point). Overall, the ban has the effect of undermining government accountability.

7. Arbitrary distinctions in open pricing

“Open pricing” is the requirement that the various media where parties or candidates may purchase ads must announce their rates publicly, in advance of the start of the campaign period, and they must apply the same rates for all parties. This ensures that there is no favoritism in pricing. However, the requirement applies only to the print and online media and does not apply to outdoor billboards, currently by far the most important channel, given the ban on television and radio ads.

8. Unwillingness of the State Audit Office to investigate actual campaign activities

Formally, it is the State Audit Office that is responsible for overseeing the campaign spending of the political parties. The language of the statute that establishes its authority is quite vague, but it is certainly compatible with the understanding that the SAO has the power not just to examine the accounting books and receipts that each party submits to it each year and after each election cycle, but also to actually investigate the parties' activities. For instance, when there is a huge gap between the reported spending of the parties and the amount of ads observed during the campaign period, then it is within the SAO's power to actually probe into the parties' spending. However, in practice the SAO has never been willing to actually use its authority, and it restricted itself to examining the financial reports that have been submitted to it. As a result, no major party has ever been found in violation of the spending limits, even though independent analyses confirmed it that the major parties spend several times more than the legal limit.

9. Lack of a wide spectrum of sanctions

The current Hungarian regime recognizes only a couple of different types of sanctions, such as fines for minor transgressions and criminal charges for major violations. Clearly, these sanctions have no deterring effect, partly because the threat of prison is not credible, as it is widely understood that such sentences would not be imposed on influential party figures.

III. Recommendations

In order to address all of the weaknesses mentioned above, we recommend the following measures to be adopted.

1. Resources

In order to deal with the problem of resource shortage and to prevent dependence on illegal sources of funding, we recommend a dual approach. First, public funding for the parties should be increased, but second, this should be done in such a manner so as to create incentives for private contributions. Such a measure would be to create a system of matching funds, so that parties could receive further state funds after each contribution they receive from individual donors. This would make parties more interested in creating a network of (legal) private donors. In order to avoid dependence on a few large donors, the system could prioritize small donations, matching them to a larger proportion than larger contributions. Another recommended method is to provide public funds not up front, but after the campaigns, in some fixed proportion of actual spending as demonstrated by financial records. This way, while the parties could have more resources than what they currently control, there would be an incentive to channel their spending through legal routes, because they could get access to state funds only if they keep proper account of their expenditures. Such a system could contribute both to the effective working of the parties and to their legality.

2. Defining campaign costs

This difficulty might be dealt with in a relatively straightforward manner. The appendix of the law should create either an exhaustive list of admissible campaign-related costs, in light of an extensive analysis of current campaign practices, or it should adopt a functional definition of campaign costs and empower a specialist body to determine whether particular categories of spending fall within the purview of the definition.

3. Tracking mechanism

As noted above, there is currently no mechanism tracking the spending of parties during a campaign period. In fact, it cannot even be established

whether a particular ad has been paid for by the party or candidate that it is advertising or not. For this reason, we recommend the following mechanism. There should be one single central campaign account for each party and each candidate that runs in an election, and every instance of spending that is made by the party or the candidate must be made from this account. Furthermore, each campaign-related material, whether it is a billboard, a TV-ad, a flyer, or anything else, must have a unique identifier such as a barcode or some similar device so that it can be identified as belonging to the party or candidate and as being paid for using the official campaign account. In this way, every single campaign material that appears in the public could be notionally traced to a party's or candidate's official account. If some material or ad appears without the identifier, it can be removed instantly. In this way, it could be possible even after the fact to track the amount of funds spent by each part and to match them with the publicly observable campaign events and materials.

4. 3rd party campaigning

The regulation of campaign activities by organizations that do not run in the elections has no altogether satisfactory solution. One way of dealing with the problem would be to simply ban all political advertising by any organizations other than parties and candidates for the duration of the campaign period. This, however, is not viable because campaigning is a form of political speech, and such a ban would violate the constitutional protection of free speech. Furthermore, campaign periods are especially important from the point of view of free speech, since we know from empirical studies that citizens are much more attuned to public affairs during campaigns than otherwise, and therefore banning political ads during these periods would deprive 3rd parties of especially valuable opportunities to reach their targeted audience. On the other hand, leaving 3rd parties unregulated is not an option, either. Therefore, we recommend the following mechanism: each organization or private person who intends to pay for political advertisements during the campaign period, suitably

defined, should register at the electoral commission by a deadline well in advance of the start of the campaign. Furthermore, each such organization should publish the names of its leaders and office-holders and its bye-laws and internal regulations. Most importantly, it should disclose all of its financial records going back to five years (or to its founding, in case it have not existed five years earlier), including all sources from which it received funding. In this way, the public could be well-informed regarding the nature and background of these organizations.

5. State resources in the campaign

The use of state or municipal resources for partisan purposes is a simple abomination of the political process that has no valid justification whatsoever. This advantage, currently enjoyed by the ruling parties, undermines the fairness of the democratic competition for no good reason at all, and therefore it should not exist. A blanket ban on government advertising with political content during the election period would be the recommended general rule. Of course, it might happen exceptionally that the government or a municipality must communicate announcements of public interest to the citizens during campaigns (such as announcing bids, applications, information about natural disasters, epidemics or other public health concerns, etc.), and the rules should make exceptions for such cases. The best way to deal with such exceptions is to introduce a requirement that all such ads must be submitted, in advance of being aired, to the local or national electoral commission for approval of nonpartisan content. The ads could be aired only if approved by the commissions.

6. Ban on paid ads in commercial channels

This ban has an especially distorting effect in light of the broad use of state resources by the ruling parties, but it also weakens government accountability independently. The ban has no good justification and should

be lifted. Certain limits on paid ads could be preserved, but they should keep in line with the requirement of accountability.

7. Open pricing

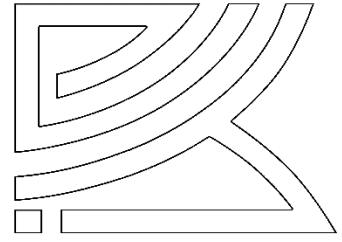
The practice of open pricing should be extended to all forms of advertising. There is no good justification for exempting certain channels or media from this requirement, and such exemptions only create the suspicion of favoritism.

8. The SAO's investigative authority

In light of the SAO's traditional unwillingness to investigate political parties in depth, despite the permissive language of the statute establishing its powers, and despite its willingness to use investigative powers against other entities, new rules should be adopted that explicitly mandate the SAO to conduct probes of the relevant type. It should be given the resources and staff to carry out such probes.

9. Sanctions

In light of the lack of deterrence of the current system of sanctions, we recommend additional forms that create new incentives for the parties. Sanctions could include withholding of public funds, losing the entitlement of matching funds, and losing the right to run for office for especially severe violations of the regulations. As these sanctions might be more realistically applied than criminal ones, they might also have larger deterring power.



CONFLICT OF INTEREST

I. Recommendations regarding the codification

Recommendation #1: the provisions relating to conflict of interest should be drafted more carefully, after impact assessment and paying attention to the necessity of ensuring the coherence between the legal provisions. Application of ambiguous, badly prepared legal provisions may have decisive impact on professional careers, sometimes resulting in their termination.

Before dealing with the recommendations it is worth mentioning that at the time of the inauguration session of the newly elected National Assembly (on 6 May 2014) and shortly after that considerable changes happened to the incompatibility rules. Since then, concerning the official incompatibility, a general ban of any engagement in any other (state, social, political or economic) occupation, whether gainful or not, applies to the members of the National Assembly (with the exception of occupations relating to scientific, artistic, educational, editorial activities or activities falling under copyright laws) instead of the previous detailed list of incompatible offices.

In line with this the provisions of the economic incompatibility have been simplified, while the provision prohibiting the member of National Assembly from acting as legal representative of the State, central public administration body, central budgetary body, fully or partially state-owned business organization has been deleted as well (this can be considered as part of the general ban).

These changes, although welcome, highlight a typical characteristic of the legislative procedure. Some incompatibility rules were introduced without providing sufficient time for the persons concerned to accommodate to the new rules. As a result, these persons suffered disadvantages. Further, some provisions should have been amended on short notice due to their ambiguity.

Recommendation #2: where applicable, the legal provisions must be harmonized with EU legislation. During the codification this should be an important aspect.

In its opinion of 31 January 2014¹ the European Central Bank expressed that – if sanctions apply for non-compliance with provisions aiming at excluding conflict of interest – such sanctions must be established by taking fully into account the supremacy of the European law(s), if such laws apply.

Recommendation #3: Targeted legislation exempting certain persons should be avoided.

The scope of incompatible positions must be established on a general theoretical basis, with attention to its aim to ensure the implementation of the separation of powers, the independent and free-from-influence work of a state organ, as well as the transparency of the income and property status of state officials. Currently there are a number of loopholes targeted at specific persons.

II. Recommendations with regard to official incompatibility

Recommendation #4: whenever it is possible, the legislator should choose the general ban of any engagement in any other occupation instead of the system of the exhaustive list of incompatible posts. The general ban system serves better the aim of the incompatibility. The latter system is to be upheld for such cases where the position is not gainful. Where the given position holder receives remuneration for his/her full time occupation, the legislation should be stricter with regard to the incompatible positions.

1 Cf. https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2014_08_f_sign.pdf

The system of exhaustive list of incompatible posts has been used for members of the National Assembly, members of the European Parliament, mayors and presidents of the national minority of local self-governments, and, on the other hand, for example the attorney-at-laws. According to Act XIV. of 2014 members of the National Assembly have been moved out of the scope of the system of exhaustive list of incompatible posts and now they are falling under the scope of general ban system. In parallel with this, the system of remuneration was also changed with considerably higher base salary than previously, however, additional salary elements have been removed. In sum, the stricter regime cannot be justified only by the fact of re-tailored remuneration system: the general ban would have been justified in the previous years as well.

III. Recommendations regarding the abuse of position to get unlawful advantages

Recommendation #5: The legislation should provide for the exclusion of a position holder from decision making if he/she or his/her relatives are personally interested in a given issue.

The legal provision² prohibiting the member of the National Assembly to act as legal representative of the State, of central public administration body, of state owned company or of company with majority state share was repealed [while the general ban of any engagement in any other (state, social, political or economic) occupation was introduced as from May 2014].

² Article 86 of the Law XXXVI of 2012 on the National Assembly. Similar provision applies to the Hungarian member of the European Parliament (cf. Article 8 of the Law on the legal status of the Hungarian members of the European Parliament).

However, it is still not prohibited for a member of the National Assembly to take part in decision making if he/she or his/her relatives are personally concerned in a case. This should be introduced even in the case of the members of the National Assembly irrespective of the fact that the National Assembly primarily does not decide on individual cases.

IV. Recommendations regarding the obligation to declare assets

Recommendation #6: The whole system of declaration of assets should be revised.

Experiences show that declarations of assets cannot fill its purpose: even MPs ignore filling out the declaration of assets properly and there is no real sanction for non-compliance. The declaration itself is not accompanied with supporting documents and even if that would be the case, there are many ways to hide the assets out of the declaration. The easiest way is to declare items in the declaration of the spouse/children.

Recommendation #7: Alternatively, the scope of state officials who are obliged to declare their assets should be reduced.

In line with several opinions of the former data protection ombudsman, obliging a wide scope of state officials to declare their assets does not seem to be a suitable tool for the fight against corruption and it restricts the rights of the people concerned to protection of their personal data in an unnecessary and excessive ways.

Experiences show that the number of examinations launched based on these declarations are extremely low compared to the hundreds of thousands of

declarations stored.

Recommendation #8: Control mechanism should be introduced to ensure the completeness of the declaration of assets and to verify their trueness.

As mentioned under recommendation #7, even MPs ignore filling out the declaration of assets properly and there is no real sanction for non-compliance. Although submission of false declaration could constitute criminal offence, the recent cases (during the electoral campaign in 2014) show that it does not have any preventive force. The declaration can be amended at any time, without any legal consequence (cf. *Rogán-case*, named after the MP who declared incorrect data regarding his real estate and amended his declaration several times).

The content of the declaration of assets is not checked upon submission. And there are no systematic checks at all. The public (e.g. newspapers) have limited possibility to verify the content of the declarations: their possibilities are limited to verifying the validity of data of real estates and of some other data available in open databases.

A very basic control mechanism would be to oblige the position holders to submit (and make public) all supporting documents that underpin the statements in the declaration. Now this can happen only if investigation is launched upon a well-established complaint, but the data submitted will not be made available to the public.

However, such provision would not prevent the position holders from hiding any asset as the scandal of the *Simon-case* (named after the MP who hid considerable amount of money in foreign bank accounts) showed.

A proposal³ of the party called Politics Can Be Different ("LMP") aims at overhauling the provisions of declaration of assets in order to ensure effective

3 <http://www.parlament.hu/irom40/00133/00133.pdf>

control over them. The proposal would prescribe *ex officio* check of the declaration of assets of the MPs and other high level state official by the State Audit Office. The check would comprise the completeness, correctness of the declarations, and the State Audit Office should check (against such declarations submitted within ten years) the source any increase of wealth. The State Audit Office should conduct an extraordinary investigation in such “unexpected” case where any emerging information would raise doubts regarding the correctness of the declared assets (e.g. costly lifestyle or one-time expenditure that cannot be justified by the declared wealth – both reflect current scandals).

Recommendation #9: The declaration of assets of the mayors and members of local self-government assemblies should be published on the official website of the local government.

The said declarations are considered as data of public interest but the local self-governments are reluctant to publish them or even to make them available to the public. The proposal⁴ of the Politics Can Be Different (“LMP”) would therefore regulate at the level of the law this obligation.

V. Recommendations regarding the demerit

Recommendation #10: The legislation should be unified regarding the cases where the incompatibility lies in the position holder being convicted as a result of criminal offences.

Since the integrity of a position holder, as well as that of the institution of which

4 <http://www.parlament.hu/irom40/00133/00133.pdf>

he/she is a member, is (should be) of the utmost importance, a person whose criminal responsibility (especially for intentional crime) has been established should not serve any longer.

In this regards, the legislation is not uniform: in the case of the member of the National Assembly, committing such crime may serve as basis for deprivation of the mandate if the minimum legal punishment is at least 3 years of imprisonment, while it is irrelevant if the member of the National Assembly has, in fact, started his sentence or not (normally not, because for that the authorisation of the National Assembly is required). In the case of a mayor, however, the verdict must be imprisonment. In the case of the member of local self-government assembly (as well as in the case of the president and member of local minority self-government), however, any intentionally committed crime may serve as basis of establishment of demerit provided that the sentence is imprisonment. In the case of the President of the Hungarian Competition Authority only selected crimes may serve as basis of establishment of demerit.

Recommendation #11: Criminal conviction should entail loss of mandate without any further step on the side of the National Assembly.

In the case of MPs, in case of criminal conviction the mandate is lost by the decision of the National Assembly. The authority given to the National Assembly, as well as the 2/3 majority requirement for declaring the incompatibility may give the majority/minority of the National Assembly room for manoeuvre. This violates the principle of equality before the law.

Recommendation #12: Lack of the criteria for appointment should not be considered as case of demerit but simply an administrative issue.

In the case of the President of the Budgetary Council, the case of demerit simply means the lack of the criteria for appointment. Other laws⁵ – while

⁵ In the case of the President of the National Authority for Data Protection and Freedom of Information, of ministers, of state secretaries, and of the President of the Equal Treatment

obviously knows such cases – regulate this issue as not demerit but, simply, without any moral content. This latter approach should be followed in any case (see for example the case of prosecutors who are obliged, upon being called for doing so, to submit evidences proving that they still meet the criteria for appointment. Failing to do so results in termination of appointment. Similar provision applies to the President of the Hungarian Antitrust Authority.

VI. Recommendations regarding the procedures of establishing incompatibility

Recommendation #13: Legal remedy must be provided against decisions establishing the facts leading/resulting in proposal for establishing the incompatibility.

In the case of the President of the National Authority for Data Protection and Freedom of Information and of the President of the National Election Office, where the Prime Minister makes a proposal for the President of the Republic to deprive the respective position holder of his/her position, the laws stipulate the position holder's right to challenge the Prime Minister's decision by launching an appeal with the labour court. The President of the Republic may decide after the court's judgement against the appellant. *Mutatis mutandis* similar procedure should apply in the case of other position holders whose incompatibility can be established by the President of the Republic.

Recommendation #14: In cases where the facts resulting in incompatibility have already been established by other authorities, the requirement of a qualified majority (two-thirds) vote in the National Assembly present at a given session should be abolished.

Although the requirement of 2/3 votes might be an important safeguard, in cases of demerit of members of the National Assembly such requirement might lead to violation of the principle of equality before the law (cf. Recommendation #12).

Recommendation #15: Conditions for initiation of investigation regarding declaration of assets should be eased.

Under the current rules⁶ investigation regarding the declaration of assets of an MP can be initiated by stating such exact facts that specifically identify the contested statement of assets and content. This may be almost impossible for the general public to initiate any investigation since access to such specific information is difficult or impossible for them to obtain. As suggested in the proposal⁷ of the Politics Can Be Different (“LMP”) there might be cases where only the investigators could have access to the information underpinning the suspect of abuse (e.g. costly lifestyle or one-time expenditure that cannot be justified by the declared wealth).

Recommendation #16: The sanctions to be used in the case of submission of false declaration of assets should have sufficient deterrent effect.

Under the current rules, there is not any effective sanction if false or incomplete declaration of assets is submitted: the MP concerned can any time amend or complete his/her declaration or can add comments to that. As per the proposal⁸ of the Politics Can Be Different (“LMP”) in case of intentional omission of submission of declaration of assets or if intentionally false data are communicated the Chair of the respective standing committee of the National Assembly should initiate the declaration of the incompatibility by the National Assembly.

6 Article 94 (4) of Act XXXVI of 2012 on the National Assembly

7 <http://www.parlament.hu/irom40/00133/00133.pdf>

8 <http://www.parlament.hu/irom40/00133/00133.pdf>

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