An Honest Broker?

Three Avenues for Postponing Hungary's and Poland's Presidency of the Council of Ministers

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01.06.2023 doi: 10.17176/20230601-231129-0

A characteristic of the functioning of the EU is that the Presidency of the Council of Ministers rotates between Member States every six months according to a previously agreed order. The EU Presidency is responsible for driving forward the Council's work on EU legislation. In the second half of 2024, Hungary will take over the Presidency, followed by Poland in the first half of 2025. Given their rule of law record, it is highly questionable whether they will act in the Council's general interest. In order to avoid damage, there are three avenues available to the Council and the Member States.

Urgent action required

The legal basis for this arrangement is Article 16(9) TEU. This provision lays down that

> *"The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 [TFEU]".*

Article 236, sub b, TFEU stipulates that the European Council shall adopt, by a qualified majority,*"a decision on the Presidency of Council configurations, other than that of Foreign Affairs* [...]". On that basis, further details about how the different components of holding the Presidency, and how to exercise it in the interest of the Council of Ministers as an institution, have been laid down in various sources, including a European Council Decision, a Council Decision, the Council's Rules of Procedure, a comment on it, as well as a dedicated Handbook.

The EU Presidency is ensuring the continuity of the EU agenda, orderly legislative processes, and the cooperation among Member States and with EU institutions. To this end, the EU Presidency must, by definition, act in the Council's general interest. It serves as the moderator for discussions and cannot therefore favour either its own preferences or those of a particular Member State. The Presidency is expected to act as an honest broker in reaching compromises within the Council and with other EU institutions.

The European Parliament and Commission have been consistently critical of the rule of law record of Hungary and Poland, adopting several resolutions, publishing particularly critical assessments of their rule of law record and suing them before the Court of Justice of the European Union (hereafter: CJEU) that has often ruled in the favour of the actions initiated by the Commission, adding further urgency to the many judgments by the European Court of Human Rights (hereafter: ECtHR) on the same issues.

Without any changes, for a full year Council meetings would be internally chaired – and externally represented – by Member States which are subject to an Article 7 TEU-procedure pending before the Council; Member States that have been subject to several CJEU and ECtHR judgments determining serious rule of law violations, and that are subject to rule of law related budgetary conditionalities decided by the Council.

On 24 May 2023, the European Parliament underlined the important role of the Presidency of the Council in a motion for a resolution supported by all major political groups. It particularly questioned how Hungary will be able to credibly fulfil this task in view of its non-compliance with EU law and the values

enshrined in Article 2 TEU and asked the Council to find a proper solution as soon as possible. The Parliament clearly recognised the urgency of this issue adding that it "could take appropriate measures if such a solution is not found".

Options to safeguard the Council's functioning

There are three possible avenues to minimise the risk that unresolved rule of law problems and other violations of fundamental values of Article 2 TEU in a Member State scheduled to exercise the Presidency will affect the proper functioning of the Council of Ministers, its cooperation with other EU institutions, and the functioning of the EU more widely.

1. Partial transfer of responsibilities of the Presidency among troika Member States

The first avenue provides for troika partners, during the assigned time-period for Hungary and Poland, to take over the chairing of meetings on every file with a direct or indirect bearing on Article 2 TEU conflict of interests within the Council, as well as negotiations on behalf of the Council with other EU institutions. In practice, this action requires the cooperation of the Member States concerned. The Meijers Committee argues that this option may nonetheless be attractive for them, because of the existence of two more far-reaching options listed below.

2. Postpone Hungary and/or Poland's Presidencies by using existing legal and policy options

The second avenue argues for using existing legal and policy rules to prevent Member States that are subject to Article 7(1) TEU monitoring and various rule of law related budgetary conditionalities from holding the EU Council Presidency. A first way to do this is for one or more of the troika partners of Hungary and/or Poland, i.e. Spain and/or Belgium, or Denmark and/or Cyprus, to request a discussion in the Council. They can for example signal, based on Article 1(2) of the 2009 European Council Decision Article 2(2) and 2(3) of the 2009 Council Decision or the relevant rules in the Council's Rules of Procedure, that they have been unable to agree on alternative arrangements, and that they will not, in that way, be able to "fulfil responsibilities" in the sense of Article 1(2) of the European Council Decision, therefore putting the fulfilment of their own role and responsibility in jeopardy. Moreover, the current Presidency (Sweden) could use its role to put this issue on the agenda, signalling that the combination of Article 7 TEU and budgetary suspension will jeopardise the capacity of Hungary and Poland in fulfilling their role as Council President, and could therefore put the effective functioning of the Council at risk.

3. Changes in the current legal and policy framework: bar from EU Presidency by the European Council

The Meijers Committee argues that a third avenue to address this issue is to change the current legal and policy framework. In particular, the European Council could formulate conditions for when a Member States currently, or previously under Article 7 TEU monitoring, or subject to rule of law related budgetary conditionalities, could again hold the Presidency of the Council once these issues have been solved. This could be done by the European Council, based on its powers in Article 236, under b), TFEU, inserting a general rule in Article 1 of European Council Decision 2009/881/EU of 1 December 2009 that in case a procedure on the basis of Article 7 TEU is pending against a Member State, or rule of law based budgetary conditionalities are triggered against a Member State, that Member State shall be delayed in holding the Presidency pending that procedure *until three years* after the end of the Article 7 TEU procedure. In such case, based on the adapted European Council Decision, the Council, by way of amending Council Decision 2016/1316, will determine the new order of Presidencies.

Practical arrangements regarding incoming EU Presidencies

In practical terms, if eventually it is decided to postpone the Presidency of Hungary and Poland, either using current possibilities or by amending law and policy measures, there are two solutions given in the short time before the second part of 2024:

1. divide the relevant other Member States of the upcoming troikas into pairs (i.e. link Spain only to Belgium, and Denmark only to Cyprus) and let them each do nine rather than six months.

Hungary and Poland will then be rescheduled in the order of presidencies once their rule of law problems have been solved;

2. rearrange the troikas altogether, moving Denmark one year forward to link up with Spain and Belgium and move all other Member States up from there. The latter was the option chosen when the United Kingdom, 11 months before it was to take up the Presidency in July 2017, arranged for it to withdraw from the rotational schedule. Also here, Hungary and Poland will then be rescheduled once their rule of law problems have been solved.

The time frame demands urgent action. Perhaps, starting discussions and negotiations on changing the order of the EU Presidency could serve as an additional incentive for Hungary and Poland to redress their main Article 2 TEU violations. The best option for all parties is to solve the outstanding rule of law issues *immediately*, so that no change in the exercise and order of the EU Presidency will be necessary.

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SUGGESTED CITATION

Safradin, Barbara; Groenendijk, Kees; Morijn, John: An Honest Broker?: Three Avenues for Postponing Hungary's and Poland's Presidency of the Council of Ministers, Verfassungsblog, 01.06.2023, doi: 10.17176/20230601-231129-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20230601-231129-0.