

An Inconvenient Constraint

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On 1 July 2024, Hungary is set to take over the Presidency of the Council of Ministers. The idea that a state subject to the Article 7 TEU procedure and the rule of law conditionality mechanism procedure will helm Council meetings and represent the Council vis-à-vis other EU institutions – potentially also in files relating to the rule of law – has understandably been a cause for concern and criticism. The European Parliament adopted a [resolution](#) on 1 June questioning how Hungary could fulfil the important tasks of the Council Presidency and asking ‘the Council to find a proper solution’. It also recalls that ‘it could take appropriate measures if such a solution is not found’ (it does not say what measures). One week earlier, the Meijers Committee published a report in which it identified three concrete options that it argues could be pursued to prevent Hungary from exercising the Presidency ([here](#) and [here](#)). The same points were in the last days repeated in op-eds [here](#) and [here](#).

These proposals raise questions of political feasibility, however, especially as one may [doubt](#) if a Hungarian Council Presidency can do much practical damage to the EU. In addition, they also raise questions of legal feasibility. A logical prerequisite for preventing Hungary from holding the Presidency as long as it breaches the rule of law is that doing so is consistent with the EU’s own rule of law. I doubt it is.

Article 16(9) TEU: equal rotation in the Council Presidency

The legal principle at the heart of the matter is that the Presidency of the Council shall be held by Member States ‘on the basis of equal rotation’. We find this principle in Article 16(9) TEU:

“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 of the Treaty on the Functioning of the European Union”.

This provision does not establish the details of these Council configurations or the manner in which these details are to be determined. The latter is governed by Article 236(b) TFEU, which reads as follows:

“The European Council shall adopt by a qualified majority ... a decision on the Presidency of Council configurations, other than that of Foreign Affairs, in accordance with Article 16(9) of the Treaty on European Union”.

Article 236(b) TFEU has served as the legal basis for Council Decisions regulating the exercise of the Council Presidency, but it explicitly provides that any rules

adopted under it *shall* be adopted in accordance with Article 16(9) TEU: i.e., in accordance with the requirement that the Presidency of the Council shall be held ‘on the basis of equal rotation’.

As we will see below, this provision leaves room for some fluctuation in the order of Council Presidencies, and the Council can by a qualified majority decide on the sequencing of the Presidencies, for instance in order to ‘[take account of the diversity of the Member States and geographical balance within the Union](#)’. However, these political decisions must comply with the principle of equal rotation, so member states cannot be easily bypassed, and certainly not to the extent that they do not get their turn to preside over the Council before other states get a second turn.

The legal inevitability of a Hungarian presidency?

How do the proposals for preventing Hungary from exercising the Presidency deal with the legal constraints imposed by Article 16(9) TEU? Perhaps because they are a little inconvenient, they do not.

Neither the provision nor the requirement of equal rotation is mentioned in the Parliament resolution; of course, there is no reason it had to since the resolution makes no concrete suggestions. In contrast, the report of the Meijers Committee repeatedly cites this provision; it even calls it ‘the legal basis’ for Council Presidency configurations. Yet the report does not reflect critically on the legal constraints this provision imposes. The most detailed discussion of Article 16(9) we find on page 7 of the report where the following argument is made:

“Every Member State is entitled to hold the Presidency “on the basis of equal rotation” as laid down in Article 16(9) TEU. The equal rotation is an expression of the principle of equality of Member States enshrined in Article 4(2) TEU and, together with the system of troikas, seeks to guarantee burden sharing while at the same time enabling coherence and co-ordination. At the same time, the Presidency is a demanding task with specific requirements flowing from the various (European) Council Decisions, the Council’s Rules of Procedure and established policy rules adopted by the Council itself.”

The crux lies in the last sentence of this paragraph, where the authors of the report seemingly try to water down the requirement of equal rotation. They admit that it is an important requirement that gives effect to the equality of Member States, but then tell us that the Presidency is ‘a demanding task with specific requirements flowing from’ various Council Decisions. The problem, of course, is that this is not a legal argument that defuses the requirement of equal rotation. Article 16(9) TEU gives member states a right to preside over the Council. It is a sanction to remove this right (obviously not merely a [precaution](#)). Nothing in Article 16(9) TEU suggests that a sanction is due when states are for some reason unable to perform the demanding tasks of the Council Presidency. Moreover, the report glosses over the fact that Council decisions adopted under Article 236(b) TFEU must respect Article 16(9) TEU and thus not compromise the principle of equal rotation.

One solution is available, at least hypothetically. The Meijer Committee rightly notes that on the basis of the [2009 Council Decision](#) on the exercise of the Council Presidency, the three members of the Presidency group (the Troika) may “decide upon alternative arrangements among themselves” and “by common accord determine the practical arrangements for their collaboration”. According to article 20(2) of the [Rules of Procedure of the Council](#), it may be decided ‘at the Presidency’s request and acting on its instructions, that representative or a member of that group shall replace it as and when required, shall relieve it, where necessary, of certain tasks and shall ensure the continuity of the Council’s proceedings’. Therefore, the Troika members could decide that Hungary will not chair Council meetings where rule of law issues are discussed. But since this would need to happen at the request of the Presidency, i.e. Hungary, and in accordance with its instructions, one may question whether this is much of a solution at all.

Yet unfortunately for everyone concerned about a Hungarian presidency, other solutions that have been proposed seem legally impermissible. The Meijer Committee also suggests that member states, either within the framework of Decisions regulating the exercise of the Council Presidency or by amending this framework, can delay states subject to the Article 7 TEU procedure or the rule of law conditionality mechanism procedure in holding the Presidency. In support of this proposal, they cite the fact that also in the past ‘relevant developments have led to changes in the order of the Presidencies’.

However, previous changes in the order of the Presidencies can hardly be regarded as relevant precedent for the current situation. Four of these happened upon the accession of new member states, one in 2002 at the request of Germany due to its upcoming elections, and one in 2009 to accommodate the changes introduced by the Lisbon Treaty. The case of Hungary is very different. While the four changes to the Council Presidency configurations following the accessions happened to include new member states on the basis of equal rotation, and the delay in the German presidency happened at the behest of Germany itself, the proposals discussed here seek to deny Hungary the right to hold the Presidency against its will.

But more importantly, while these examples show that the order of the Presidencies can be changed, such changes should respect the principle of equal rotation. So delays in when states can take up the presidency should not become quasi-permanent. Or rather, any delay should be temporary and short-term in order to observe the requirement that the Council Presidency is held on the basis of equal rotation. And therefore, since the realistic scenario is that the rule of law deficiencies in Hungary will not be resolved any time soon, Hungary would be blocked from the Presidency for the foreseeable future if the suggested solutions of the Meijer Committee are implemented. This seems incompatible with the principle of equal rotation.

Is there then nothing that can be done? The proper course of action would be to follow the Article 7 TEU procedure. If a serious and persistent breach by a member state of the rule of law is found, it would be possible to suspend ‘certain of the rights deriving from the application of the Treaties’. A possible sanction would be to deprive them of the right to hold the Council Presidency. Of course, it is unlikely that

this procedure will be used – the shortcomings of the Article 7 TEU procedure are well known and need not be restated here – but it is the procedure the EU has for depriving states of their rights for violations of the rule of law. One may be convinced this procedure should be amended to make it more effective (as I am), but I sincerely doubt the EU should ignore or manipulate its constitutional procedures when these fail to give it the results it likes (for similar concerns see [here](#)).

Being committed to the EU’s rule of law?

Just as there are [perils to passivity](#) in the EU rule of law crisis, there are perils to proposed EU action that violates the EU’s very own rule of law. It might be interesting to contemplate such measures at academic conferences, but we should be careful to present them as lawful measures that can be implemented in the short run. This merely distracts us from the debates we should be having and from finding the solutions that can and should be found. For example, Parliament has no right to prevent Hungary from holding the Presidency of the Council, so it does not help to suggest it [can or should](#) do so. Yet more importantly, such proposals sit uneasily with a commitment to the rule of law and therefore risk being self-defeating. Perhaps a broader debate is needed about when the EU might have to bend its own rules to protect the values on which it is founded. But in principle, a commitment to the rule of law should mean a commitment not only to the national rule of law but also to the at times inconvenient constraints of the EU’s own rule of law.

