

## **COMMENT ON THE EXERCISE AND ORDER OF THE PRESIDENCY OF THE COUNCIL OF THE EU**

According to the current Draft Presidency rotation calendar, Hungary is set to take over the EU Council Presidency in the second part of 2024, while Poland is to succeed Hungary in the first part of 2025. The European Parliament and Commission have been consistently critical of the rule of law record of Hungary and Poland. Both Member States are subject to an Article 7 TEU-procedure pending before the Council, have been subject to several Court of Justice judgements determining serious rule of law violations, and are subject to rule of law related budgetary conditionalities decided by the Council. In this comment, the Meijers Committee discusses whether, and under what conditions, a Member State can exercise the Presidency in line with established legal and policy requirements while being under Article 7(1) TEU-monitoring initiated by the Parliament and the Commission and while facing the rule of law related suspensions of EU funding after the Council decided to put these in place. To this end, the Meijers Committee identifies 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. The central argument of the comment is that various actionable options exist, and that they should be used by the Council and the other EU institutions to protect the integrity of the Council's functioning, and that of the EU more generally

### **Comment on the exercise and order of the Presidency of the Council of the EU**

#### **1. Introduction**

A characteristic of the functioning of the EU is that the presidency of one of its institutions, the Council of Ministers, rotates between Member States every six months according to a previously agreed order. 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<sup>1</sup>, a Council Decision<sup>2</sup>, the Council's Rules of Procedure<sup>3</sup>, a comment on it<sup>4</sup>, as well as a dedicated Handbook<sup>5</sup>.

The Member State holding the Presidency chairs most Council meetings and is responsible for the continuity of the EU's agenda and sound law-making. It needs to do so as an "honest broker"<sup>6</sup>, behave "neutrally"<sup>7</sup>, and rise above its own national interests.<sup>8</sup> As the Council's own website explains, holding the Presidency is like "someone hosting a dinner, making sure their guests all gather in harmony – able to express differences during the meal but leaving on good terms and with a common purpose".<sup>9</sup> Holding the Presidency also entails tasks outside of the Council itself.

<sup>1</sup> European Council Decision 2009/881/EU of 1 December 2009 on the exercise of the Presidency of the Council, OJ 2009 L315/50.

<sup>2</sup> Council Decision of 1 December 2009/908/EU, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ 2009, L 322/28, later amended by Council Decision (EU) 2016/1316 of 26 July 2016 amending Decision 2009/908/EU, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council *OJ L 208, 2.8.2016, 42*

<sup>3</sup> Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ L 325, 11.12.2009, pp. 35–61), adapted many times since. The consolidated version is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009D0937-20230101>. See also summary of Council's Rules of Procedure: <https://eur-lex.europa.eu/EN/legal-content/summary/rules-of-procedure-of-the-council-of-the-european-union.html>.

<sup>4</sup> Council of the European Union, General Secretariat of the Council, *Comments on the Council's Rules of Procedure*, Publications Office of the European Union, 2023, available at <https://www.consilium.europa.eu/en/documents-publications/publications/council-rules-procedure-comments/>.

<sup>5</sup> General Secretariat of the Council, Handbook of the Presidency of the Council of the European Union, October 2022 (on file with the Meijers Committee after receiving it from the Council Secretariat). The latest version that is publicly available online is from 2018, that has however been substantially changed since, can be found here:

[https://www.asktheeu.org/en/request/5942/response/19142/attach/4/PRESIDENCY%20HANDBOOK.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/5942/response/19142/attach/4/PRESIDENCY%20HANDBOOK.pdf?cookie_passthrough=1).

<sup>6</sup> Council of the European Union, 'What does holding the presidency of the Council of the EU mean?' available at <https://www.consilium.europa.eu/en/presidency-council-eu/#group-section-Keys-to-success-rbxWe5qDLK>.

<sup>7</sup> See Handbook of the EU Presidency, *supra* note 5.

<sup>8</sup> See Website Council on EU Presidency, *supra* note 6.

<sup>9</sup> *Ibid.*

The Presidency meets and negotiates on behalf of all the members of the Council with other EU institutions and external actors. Clearly, this is a task of great prestige and responsibility for the Member State exercising it, as well as of great significance to the proper functioning of the Council as an institution.

At this moment it is urgent to pay close attention to the legal and policy rules underpinning the exercise and order of the Presidency. According to the current Presidency rotation calendar, Hungary is set to take it up in the second part of 2024, while Poland is to then succeed Hungary in the first part of 2025. This means that, without any changes, the essential first full year of the European Parliament's tenth term (2024-2029), and the Commission to be newly elected by it, will see these two Member States chairing meetings of their partner EU institution. **The Parliament and Commission have been consistently critical of the rule of law record of Hungary and Poland, adopting several resolutions<sup>10</sup>, publishing particularly critical assessment of their rule of law record<sup>11</sup> and suing them before the Court of Justice of the European Union<sup>12</sup> that has often ruled in the favour of the actions initiated by the Commission<sup>13</sup>, adding further urgency to the many judgments by the European Court of Human Rights on the same issues.<sup>14</sup> The European Parliament and the Commission have even taken the extraordinary step to separately refer Poland and Hungary to the Council under Article 7, paragraph 1, TEU for reason that developments in each of these countries may constitute a clear risk of a serious breach of Article 2 TEU values.<sup>15</sup> The Council is now forced to periodically debate the rule of law record of one its own constitutive Member States.**

Even more crucially, the Council itself has acted strongly, and in legally binding ways, on the same situation in both Hungary and Poland. Particularly, it has attached rule of law related conditions (so-called milestones) to issuing Recovery and Resilience funding regarding these two Member States.<sup>16</sup> These conditions were based on country-specific recommendations the Council previously agreed in the context of the European semester.<sup>17</sup>

<sup>10</sup> European Parliament resolution of 15 September 2022 on the proposal for a Council Decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)); European Parliament resolution of 15 September 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary (A9-0217/2022); European Parliament resolution of 9 June 2022 on the rule of law and potential approval of the Polish national recovery plan (RRF), P9\_TA(2022)0240; European Parliament resolution of 15 September 2022 on the situation of fundamental rights in the European Union in 2020 and 2021 (2021/2186(INI),

A9-0224/2022.

<sup>1</sup> Rule of Law 2022 Country Report Hungary, 13 July 2022, available at [https://commission.europa.eu/system/files/2022-07/40\\_1\\_193993\\_coun\\_chap\\_hungary\\_en.pdf](https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf); Rule of Law 2022 Country Report Poland, 13 July 2022, available at [https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters\\_en](https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en).

<sup>2</sup> See C-286/12 Commission v Hungary ECLI: 2012:687; CJEU C-66/18 Commission v Hungary, 6 October 2020 ECI: 2020:792; Case C-808/18 *European Commission v Hungary* ECLI:EU:C:2020:1029, C-619/18, Commission v Poland ECLI:2019:575; Case C-821/19 Commission v Hungary ECLI:EU:C:2021:930. 2021. In addition, the Meijers Committee Rule of Law Dashboard provides information about rule of law-related judgements and pending cases at the Court of Justice of the European Union and the European Court of Human Rights and is available at: <https://euruleoflaw.eu/rule-of-law-dashboard-new/>.

<sup>3</sup> See Rule of Law Dashboard of the Meijers Committee, *supra* note 13.

<sup>4</sup> *Ibid.*

<sup>5</sup> See *supra* note 10.

<sup>6</sup> Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, Council document 9728/2 of 14 June 2022 and ADD 1 of 13 June 2022; Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ 2022 L 325/94 (December 2022).

These rule of law worries of the Council relate specifically to seriously undermining judicial independence and, in the case of Hungary, to not sufficiently safeguarding sound financial management due to insufficient anti-corruption measures. **Over the same worries, the Council has also adopted an unprecedented decision to block EU funds to Hungary under the Regulation laying down a general regime of conditionality.**<sup>18</sup> In other words, the Council (alongside the Commission<sup>19</sup>) has decisively acted to strongly stand up for the enforcement of Article 2 TEU standards. **As long as these rule of law problems are not solved, Hungary and Poland can be expected to remain at loggerheads with the European Parliament, the Commission and other Member States within the Council.**

Against this background this comment discusses whether, and under what conditions, **a Member State can exercise the Presidency in line with established legal and policy requirements while being under Article 7(1) TEU monitoring initiated by the European Parliament and the Commission and while facing rule of law related suspensions of EU funding after the Council decided to put these in place.**

To answer that question, it first provides a short history of the Presidency and sets out the legal and policy framework regulating this task. The comment then identifies three different options to minimise the risk that unresolved Member State-level rule of law problems affect the proper functioning of the Council, its cooperation with other EU institutions, and the functioning of the EU more widely. It also clarifies practical arrangements available if it were decided to postpone the Hungarian Presidency in 2024 and the Polish Presidency in 2025. The central argument of the comment is that **various actionable options exist, and that they should be used by the Council and the other EU institutions to protect the integrity of the Council's functioning, and that of the EU more generally.**

## 2. Short history of the Presidency of the Council

Until 1995, Member States exercised the Presidency in alphabetical order.<sup>20</sup> Thereafter the system was adapted based on criteria such as the size of, and regional balance between Member States.<sup>21</sup> **These criteria and the system of troikas, one 'large' and two 'smaller' Member States exercising the Presidency in close cooperation, were codified in Declaration 9<sup>22</sup> attached to the Lisbon Treaty in 2009.** The European Council Decision of 1 December 2009 on the exercise of the Presidency<sup>23</sup>, adopted on the day that Treaty entered into force, literally copied the text of Declaration 9, but gave its content a basis in secondary law too.

<sup>17</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility OJ L 57 Article 19 (3)-header.

<sup>18</sup> Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I, 22.12.2020; Council implementing decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union against breaches of the principles of the rule of law in Hungary, OJ L 325/94, 20.12.2022.

<sup>19</sup> Press release, 'Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary', December 2022, available at <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>.

<sup>20</sup> Council Decision of 1 January 1995 determining the order in which the office of President of the Council shall be held OJ L 1, 1.1.1995, available at [http://data.europa.eu/eli/dec/1995/2\(1\)/oj](http://data.europa.eu/eli/dec/1995/2(1)/oj).

<sup>21</sup> Ibid. See also: F. A. Pasarin, *The Reform of the Council Presidency: paving the way for a new synergy with the European Commission?* *Politique européenne*, 35 (2011), pp. 30-35.

<sup>22</sup> Declaration on Article 16(9) TEU concerning the European Council Decision on the exercise of the Presidency of the Council Document 12016L/AFI/DCL/09.

<sup>23</sup> See European Council Decision 2009/881/EU, *supra* note 1.

Changes in the previously agreed order of Presidencies have not been uncommon.

They occurred on six occasions, for different reasons: three times after the accession of new Member States, in 1995<sup>24</sup>, in 2005<sup>25</sup> and in 2007<sup>26</sup>; in 2002 at the request of Germany because general elections were scheduled during its upcoming Presidency<sup>27</sup>; in 2009 because of the Treaty of Lisbon<sup>28</sup>; and in 2016 after accession of Croatia and the Brexit Referendum with regard to the UK Presidency, which was scheduled to start in 11 months' time, as of July 2017.<sup>29</sup> Therefore, it is established legal and political practice to reconsider the order of the Presidency in case of relevant circumstances, even if relatively close to the date that the rotation is scheduled to start.

### 3. Presidency: legal and policy framework and tasks

As was pointed at in the introduction, the current legal and policy rules regarding the exercise and order of the Presidency are based on Article 16(9) TEU and Article 236 TFEU, a European Council Decision of 1 December 2009 (copying Declaration 9 of the Lisbon Treaty), a Council Decision of 1 December 2009 (later amended in July 2016), the Council's Rules of Procedure, a Council document commenting on it, as well as a Handbook.<sup>30</sup> These will be discussed and analysed in this section. Together they provide a detailed picture of what the Presidency requires according to the law and the Council's own rules of procedure and policy guidelines.

Article 16(9) TEU provides:

*"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 further 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, in accordance with Article 16(9) of the Treaty on European Union."*

On this basis, the European Council adopted the abovementioned Decision of 1 December 2009 on the exercise of the Presidency of the Council the text of which had already been agreed between the Member States in Declaration 9 attached to the Treaty of Lisbon. It provides in Article 1(1):

*"The Presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of three Member States for a period of 18 months. The Presidency groups are made up on a basis of equal rotation among the EU Member States, taking into account their diversity and geographical balance within the EU."*

According to Article 1(2) of this Decision, each of the three members of the Presidency group (the so-called troika) in turn chairs for a semester all configurations of the Council, with the exception of the Foreign Affairs configuration (the latter is chaired by the High Representative of the Union for Foreign Affairs and Security Policy<sup>31</sup>).

<sup>24</sup> See Council Decision of 1 January 1995, *supra* note 20.

<sup>25</sup> Council Decision of 12 December 2005, (2005/902/EC, Euratom), L 328/60, determining the order in which the office of President of the Council shall be held.

<sup>26</sup> Council Decision of 1 January 2007, L 1/11 determining the order in which the office of President of the Council shall be held.

<sup>27</sup> Council Decision of 28 January 2002, OJ 2002, L 39/17 on the order in which the office of President of the Council shall be held.

<sup>28</sup> See Council Decision of 1 December 2009/908/EU, *supra* note 2.

<sup>29</sup> See Council Decision (EU) 2016/1316 of 26 July 2016, *supra* note 2.

<sup>30</sup> See *supra* notes 1-6.

The same applies to most of the Council's preparatory bodies. Article 1(2) also provides: *"The other members of the group shall assist the Chair in all its responsibilities on the basis of a common programme. Members of the team may decide alternative arrangements among themselves."*

Article 3 of the European Council Decision provides that the Member States holding the Presidency shall take all necessary measures for the organisation and smooth operation of the Council's work, with the assistance of the General Secretariat of the Council. Article 4 stipulates that the Council shall adopt a decision establishing the measures for the implementation of the decision of the European Council.

Based on this mandate in Article 4 of the European Council Decision, **the Council of Ministers (a different EU institution) adopted the implementing decision also on 1 December 2009.**<sup>32</sup> In Article 1 of that Council Decision the order of Presidencies of the Council adopted in 2007 was confirmed, and the division in groups of three Member States (troika) is set out in an annex.<sup>33</sup> Additional rules on the functioning of the troikas are provided in Article 2:

*"1. Each member of a group as referred to in Article 1, second subparagraph, shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of the Council's 18-month programme.*

*The members of a group as referred to in Article 1 may decide upon alternative arrangements among themselves.*

*2. In either of the situations provided for in paragraphs 1 and 2, the Member States within each group shall by common accord determine the practical arrangements for their collaboration."*

It is notable that in the 2009 and 2016 versions of the Council Decisions the Annex with the listing of the Presidencies is entitled "Draft Table of Presidencies of the Council". That choice of wording underlines that changes in the order are considered possible within the context of the Council Decision as it stands in case of relevant developments. Moreover, arguably, in accordance with Article 236, under b, TFEU, **the European Council can, by qualified majority, also decide to alter the European Council Decision in case it sees fit to regulate the way in which, and the conditions in accordance with which, the Presidency of the Council need be exercised. In that scenario, the Council would then subsequently need to change the Council Decision accordingly, perhaps adding more detail.**

It is important to get a more detailed sense of what holding the Presidency entails, and what significance this has for the functioning of the Council as an EU institution.

An 18-month programme of Council activities is prepared by the pre-established group of three presidencies (the so-called troika) due to hold office over that period. These presidencies draw up a draft programme with the President of the Foreign Affairs Council, in order to take account of that configuration's activities during that period, and in close cooperation with the Commission and the President of the European Council, after appropriate consultations. On the basis of the 18-month programme, after consulting the Commission, the Presidency, which is to hold office in the relevant period, draws up draft agendas for the Council meetings scheduled for the next six-month period, at the latest one week before the beginning of the relevant six-month period.<sup>34</sup>

<sup>31</sup> It is however possible for the High Representative to be replaced by the member in the Foreign Affairs Council representing the Member State holding the Council Presidency (Article 2(5) second subparagraph CRP – which states that when the Foreign Affairs Council is convened to discuss common commercial policy issues, its President will ask to be replaced by the six-monthly Presidency). This will normally be the case when the Council is convened to discuss common commercial policy issues.

<sup>32</sup> See Council Decision of 1 December 2009/908/EU, *supra* note 2.

<sup>33</sup> This most recent version of this annex, laid down in the 2016 Council Decision, is reproduced at the end of this comment.

According to Article 237 TFEU the Council meets when convened by its President on his own initiative or at the request of one of its members or of the Commission.<sup>35</sup>

A Minister of the Member State holding the Presidency organises and chairs the Council's meetings and draws up the provisional agenda for each session. The Presidency will usually organise the agenda by grouping together items that belong to the same area.<sup>36</sup>

At the meetings, the Presidency ensures compliance with the Council's Rules of Procedure and ensures the smooth running of discussions. An important part of its task is to assist in finding compromises and achieve consensus within the EU Council of Ministers.<sup>37</sup> Most bodies responsible for preparing the work of the Council (i.e. COREPER, the committees and the working parties) are chaired by the representative or delegate of the Member State holding the Council Presidency.

The tasks of the Presidency throughout the decision-making process in the Council and its preparatory bodies are further defined in the Council's Rules of Procedure and in the Handbook of the Council Presidency. The key tasks of the Presidency are the following:

- I. planning, coordinating and chairing meetings of the Council and most of the Council's preparatory bodies, i.e. working parties and committees;
- II. suggesting compromise solutions with a view to reaching an agreement in the Council (i.e. 'honest broker');
- III representing the Council in its relations with the European Parliament (EP), the Commission and other EU institutions;
- IV negotiating on behalf of the Council to reach agreements on legislative files with other EU institutions;
- V. participating in the external communication effort on the activities of the Council.<sup>38</sup>

Furthermore, the Presidency may restrict the number of persons per delegation present in the meeting room for discussion of a particular item; it may decide the order in which items are to be taken; it may determine the duration of discussions on each item and the order in which the participants may take the floor. The Presidency can ask delegations to present in writing their proposals for amendments of a text under discussion before a given date.<sup>39</sup> The combination of the above-mentioned tasks gives the Member State holding the Presidency both formal and informal influence and power on the actual functioning of the Council in most of its configurations.

In short, the EU Presidency is responsible for driving forward the Council's work on EU legislation, 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.

<sup>34</sup> See Comments on the Council's Rules of Procedure, *supra* note 4, at 40.

<sup>35</sup> Article 1(1) Council Decision of 1 December 2009, *supra* note 3.

<sup>36</sup> See latest version of the Handbook of the Presidency of the Council 2022, at 14, *supra* note 5.

<sup>37</sup> See latest version of the Handbook of the Presidency of the Council 2022, at 10, *supra* note 5.

<sup>38</sup> See latest version of the Presidency Handbook of 2022, at 2-4, *supra* note 5; see also Comments on the Council's Rules of Procedure, *supra* note 4; and Council website on EU Presidency, *supra* note 6.

<sup>39</sup> Article 20 of the Council's Rules of Procedure, *supra* note 3.

#### **4. Options to safeguard the Council's functioning if Member States with rule of law problems are scheduled to take up the Presidency**

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.<sup>40</sup> 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.

According to the Draft Table of Presidencies of the Council in the Annex to the 2016 Council Decision, the current Presidency troika (2023-first part of 2024) consists of the French, Czech and Swedish Presidencies. The next troika is formed by **Spain, Belgium and Hungary** and is scheduled for July 2023 until December 2024. According to this schedule Hungary will take over the Presidency in the second half of 2024.

The subsequent troika consists of the **Polish, Danish and Cypriot** Presidency. Poland would be holding the EU Presidency immediately after Hungary, in the first half of 2025.<sup>41</sup> In other words, without changes, for a full year Council meetings would be internally chaired, and the Council would be represented externally, by Member States which have been referred for Article 7(1) TEU monitoring by the Parliament and Commission, and for which the Council itself and the Commission have decided to suspend various EU funds for rule of law related reasons.

This raises the question of whether, and under what conditions, such Member States can exercise the Presidency as long as these rule of law issues are not fully solved. More specifically: what options are available to minimise the risk that unresolved Member State-level rule of law problems affect the proper functioning of the Council of Ministers, its cooperation with other EU institutions, and the functioning of the EU more widely?

This section identifies three such options:

- 1) finding a solution within the respective Presidency troikas;
- 2) finding an alternative solution within the current legal and policy framework; and
- 3) changing the current legal and policy framework. These options will be discussed in turn.

#### **4.1 Partial transfer of responsibilities of the Presidency among troika Member States**

Article 1(2) of the 2009 European Council Decision and Article 2(2) of the 2009 Council Decision provide that **the three members of a troika “may decide upon alternative arrangements for the responsibilities of the Presidency] among themselves”**. Article 2(3) of the 2009 Council Decision states that they can **“by common accord determine the practical arrangements for their collaboration”**. Moreover, the Presidency Handbook stipulates that in accordance with Article 20(2)<sup>42</sup> of the Council's Rules of Procedure the Presidency can request that another delegation chairs a configuration of a Working Party during the period of the Presidency on behalf of the Presidency. The Council is then asked to agree to these arrangements in accordance with Article 19(4) of the Council's Rules of Procedure. This is without prejudice to alternative Chairing Arrangements for EU coordination meetings on the spot.<sup>43</sup>

<sup>40</sup> See Annex of Council Decision 2016, *supra* note 2.

<sup>41</sup> See p. 29 of Comments on the Council's Rules of Procedure, *supra* note 4.

<sup>42</sup> Article 20(2) Council's Rules of Procedure, *supra* note 3, which stipulates that “[...] the six-monthly Presidency shall be assisted in all its responsibilities by the other members of the pre-established group of three Member States referred to in Article 1(4) on the basis of the 18-month programme or pursuant to other arrangements agreed between them. It shall also be assisted, where appropriate, by the representative of the Member State next holding the Presidency. 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.”

<sup>43</sup> See Presidency Handbook, at 11 *supra* note 5.

Clearly, this allows for the possibility that the three Member States within each of the two troikas concerned (i.e. Spain-Belgium-Hungary: July 2023-December 2024; and Poland-Denmark-Cyprus: January 2025-June 2026) could agree that one of the two other Member States chairs all meetings of the Council configurations and preparatory meetings where rule of law issues are, directly or indirectly, discussed.

Such meetings include, in any event, the Article 7 procedures, discussion about the

Commission rule of law report, the implementation and evaluation of the Conditionality Regulation and the Reconstruction and Resilience Facility, or any other rule of law matter (such as the formulation of country-specific recommendations under the European semester), in either Poland or Hungary are on the agenda or to be discussed.

This option speaks particularly to the **legal responsibilities of the two other Member States in the upcoming troikas (i.e. Spain and Belgium in the case of Hungary and Cyprus and Denmark in the case of Poland)** to make sure that EU values are respected and protected during the latter Presidency trios for which they are co-responsible.

Spain, Belgium, Denmark, and Cyprus have a direct interest and responsibility as a member of these troikas. **The option also requires the sincere cooperation of the two Member States against which an Article 7 TEU procedure is pending and that currently face rule of law based suspensions of several different EU funds: Hungary and Poland.** Although this option at first sight appears unattractive for these two Member States, the very existence of the following two options, and the plausibility for these to be acted upon in the absence of their direct agreement, may be important for their calculus.

#### 4.2 Options using the current legal and policy framework

The current legal and policy framework provides for different settings where this issue can be discussed.

A first obvious way is for one or more of the troika partners of Hungary or Poland, i.e. Spain and/or Belgium and Denmark and/or Cyprus, to request a discussion. **They can signal, based on Article 1(2) of the 2009 European Council Decision and/or Article 2(2) and/or Article 2(3) of the 2009 Council Decision and/or the relevant rule 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 Decisions, therefore putting the fulfilment of their own role and responsibility in jeopardy.** After all, as trio-partners they will, as a matter of current law and policy, be co-responsible for what could happen under Hungarian and Polish Presidency, and the impact that this could have on the proper functioning of the Council.

Alternatively, other Member States could put this on the agenda, expressing their concerns that tasks are not going to be fulfilled in line with the relevant European Council Decision, Council Decisions, Rules of Procedures and policy measures. Or, at the very least, they could ask the incoming two troikas to clarify how they intend to arrange for avoiding conflict of interests and smooth operations of Council proceedings, and interactions with other EU institutions.

The current Swedish Presidency could also use its role to put this 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.** In doing so, it could refer to the precedent that in the past relevant developments have led to changes in the order of the Presidencies. Moreover, the fact that the order of rotation of the EU Presidency has been amended previously based on important political events, such as the EU accession of Croatia in 2013 and the Brexit referendum in 2016<sup>44</sup>, shows that **the 2009 Council Decision has been applied under the understanding that the Council can amend the order of rotation of the EU Presidency.**

#### 4.3 Options requiring changing the current legal and policy framework

Article 236, under b), TFEU, lays down the authority for the European Council to regulate how to exercise the Presidency. This competence was used only once so far, simply placing the literal wording of Declaration 9 to the Lisbon Treaty, evidently agreed to by unanimity of Member States, into the format of the secondary law of a European Council Declaration.

The European Council could use the same competence again, notably with only a qualified majority, to amend the 2009 European Council Decision, and to clarify in more detail under which conditions the Presidency could be exercised.

In accordance with Article 4 of the 2009 European Council Decision, the Council could then, subsequently, adopt a decision establishing the measures for the implementation of that new



European Council Decision.

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. **It could do so by inserting a general rule in Article 1 of European Council Decision 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 the Council, by way of amending the relevant Council Decision, will determine the new order of presidencies. The three additional years will allow all Member States concerned sufficient time to start with the preparation of their Presidency.

In practice, this could mean **postponing the Presidencies of Hungary and Poland so as to allow those Member States to focus first on effectively and fully redressing the current rule of law issues, and to only assign them a new Presidency slot once these issues are fully redressed.** The European Council, by making a general rule, avoids the focus on two Member States and provides clarity into the future. The rule would also apply to other Member States subject to any future Article 7 procedure, or rule of law related budgetary conditionalities.

The text of the relevant amendment of the European Council Decision could be:

**“In case the procedure is put in motion for the Council, in accordance with Article 7(1) of the Treaty on European Union, to determine whether there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 of that Treaty, in case the procedure is put in motion for the European Council, in accordance with Article 7(2) of the Treaty on European Union, to determine whether there exists a serious and persistent breach by a Member State of the values referred to in Article 2 of that Treaty, or in case rule of law related concerns have led to a decision of the Council to suspend a EU budgetary flow to a Member State, the Member State concerned cannot hold the Presidency of the Council in order to avoid a conflict of interest. Within three months after a decision to discontinue the Article 7 procedure against a Member State, or the decision to lift suspension of any budgetary flow, the Council adjusts the order of the exercise of the Presidencies. That Member State cannot hold the Presidency of the Council until three years after this Council Decision.”**

See recital 2 and 3 of Council Decision 2016/1316, *supra* note 2.

If, under this proposed text, there is disagreement about whether the Council itself could regulate the new order of Presidencies, the European Council could instead further use its own powers under Article 236, under b), TFEU, to instruct the Council to adapt the rotational schedule laid down in the 2016 Council Decision in a specific way, to the effect of postponing Presidencies that are in the process of solving their rule of law issues.

An obvious counterargument against this line of argumentation is that using Article 236, under b), TFEU to have the European Council clarify the requirements and implications of Article 2 TEU issues would violate the treaties in that Article 7 TEU is the only way to regulate Article 2 TEU related issues. Indeed, this is what Hungary and Poland argued before the CJEU in their challenge of the rule of law Conditionality Regulation 2020/2092. **However, this argument was firmly rebuffed by the CJEU in its judgment on the validity of the Conditionality Regulation.**

In particular, the Court held that “in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State” and that “it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2

TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU.”<sup>45</sup>

The aim of the legislative actions discussed in this paragraph would be to **ensure the proper functioning of the Presidency of the Council in accordance with the values contained in Article 2 TEU**. As was explained, the subject matter of the action discussed would be to put in place clearer conditions to exercise the Presidency of the Council.

This is different from the measures covered by Article 7(3) TEU. Hence both the aim and the subject matter of the measures discussed above are different from those of the Article 7 TEU procedure. Therefore, it is fully possible for the EU legislator, in this case **the European Council and the Council, to put in place additional measures to protect the proper functioning of the Council and the avoidance or conflicts of interest just as it did by virtue of the Conditionality Regulation**.

## 5. Practical arrangements to act on rule of law concerns 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.

One is to 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.

<sup>45</sup> CJEU 16 February 2022, C-156/21, Hungary v Parliament and Council, ECLI:EU:C:2022:97, paras. 159 and 168.

Another option could be to 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.

## 6. Conclusions

In this Comment, the Meijers Committee assessed the content and legal basis of Council Presidencies, questioning whether **a Member State referred by the Commission and Parliament for Article 7(1) TEU monitoring, and after the Council itself (or the Commission) has triggered various rule of law related budgetary conditionalities can exercise the Presidency**. Finding that this would create major problems in the light of existing legal and policy standards laying down the way in which a Presidency should be exercised, this comment identified three possible avenues to minimise the risk that unresolved Member State-level rule of law problems affect the proper functioning of the Council of Ministers, its cooperation with other EU institutions, and the functioning of the EU more widely.

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.

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.

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.

The Meijers Committee calls on the current Presidency (Sweden), future trio-partners of Hungary and Poland (i.e. Spain, Belgium, Denmark and Cyprus), any other Member State, the Council and European Council to put this matter up for discussion as soon as possible.

The Meijers Committee also calls on the European Parliament to adopt, as soon as possible, a resolution on this issue, specifically focusing on the criteria for holding the Presidency of the Council of the EU in a manner consistent with the common values of the EU as laid down in Article 2 TEU and avoiding conflicts of interest that may jeopardise the proper functioning of the Council.

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. Because the best option available for them and for the EU 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.

Annex I (source: Council Decision (EU) 2016/1316 of 26 July 2016)

## Draft Table of Presidencies of the Council (\*)

Netherlands (**)	January-June	2016
Slovakia (**)	July-December	2016
Malta (**)	January-June	2017
Estonia	July-December	2017
Bulgaria	January-June	2018
Austria	July-December	2018
Romania	January-June	2019
Finland	July-December	2019
Croatia	January-June	2020
Germany	July-December	2020
Portugal	January-June	2021
Slovenia	July-December	2021
France	January-June	2022
Czech Republic	July-December	2022
Sweden	January-June	2023
Spain	July-December	2023
Belgium	January-June	2024
Hungary	July-December	2024
Poland	January-June	2025
Denmark	July-December	2025
Cyprus	January-June	2026
Ireland	July-December	2026
Lithuania	January-June	2027
Greece	July-December	2027
Italy	January-June	2028
Latvia	July-December	2028
Luxembourg	January-June	2029
Netherlands	July-December	2029
Slovakia	January-June	2030
Malta	July-December	2030

(\*) Without prejudice to the United Kingdom's rights and obligations as a Member State.

(\*\*) The current trio is inserted in this Annex for information purposes.'