

## ***Why an EU Country under the surveillance procedure (Article 7.1 TEU) should not chair the Council Presidency***

*By Pier Virgilio Dastoli and Emilio De Capitani\**

In accordance with the Council Decision on the exercise of the Presidency of the Council of the European Union,<sup>1</sup> from July 1 of this year the office is to be held by Hungary. This occasion will mark the first time that the Presidency will have been held by a Member State that has been subject to the “surveillance” procedure in Article 7(1) of the Treaty on European Union, having been launched by the European Parliament in September 2018.

As the Court of justice has recognised,<sup>2</sup> by adopting its resolution the EP has already triggered the legal consequences foreseen by Protocol 24, and that *“as long as the Council or the European Council has not taken a decision in respect of the Member State concerned, a Member State may, by way of derogation from the general rule laid down in that single article, take into consideration or declare admissible to be examined any asylum application lodged by a national of the Member State that is the subject of that procedure.”* Simply put, it means that Hungary is no longer to be considered a “safe country” and, if it should occur, a Hungarian may request asylum in another EU Country. In other words, the general presumption that fundamental rights and values are respected in that Member State is no longer absolute and precaution should be taken when fundamental rights of individuals are concerned (as it is the case in relation to the European Arrest Warrant). In a more general sense, and in the relations with other Member States or EU Institutions, the principle of mutual trust that is the bedrock of intra-EU cooperation is not “blind trust” and cannot be taken for granted.

Within this perspective, it would be sensible to assume that a Member State that does not enjoy the full confidence of the other Member States should not be responsible for a key coordinating role, as is the case when holding the Council Presidency. As a matter of fact, holding the Council Presidency is anything but a protocolar task. It plans, coordinates and chairs meetings of the Council and most of the Council’s preparatory bodies, i.e. working parties and committees. It suggests compromise solutions with a view to reaching an agreement between the Members of the Council (‘honest broker’). The Presidency should be, by definition, neutral and impartial. It is the moderator for discussions and cannot therefore favour either its own preferences or those of a particular Member State.

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\* Pier Virgilio Dastoli, *Professor of international Law in the University for Foreign Students Dante Alighieri in Reggio Calabria*, Jean Monnet professor in various Italian universities (Macerata, Perugia, Roma and Bari) Emilio De Capitani, *affiliated to Scuola Superiore S. Anna (Pisa)*

<sup>1</sup> Council Decision (EU) 2016/1316 of 26 July 2016 amending Decision 2009/908/EU (OJ L 208, 2.8.2016, p. 42) : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D1316>.

<sup>2</sup> See paras. 39 and 40 of Case C-650/18, *Ungary v. European Parliament*, June 3 2021, EU:C:2021:426:

“39 In the present case, it should be noted that the adoption of the contested resolution initiates the procedure laid down in Article 7(1) TEU. Under point (b) of the sole article of Protocol (No 24), once that procedure is initiated and as long as the Council or the European Council has not taken a decision in respect of the Member State concerned, a Member State may, by way of derogation from the general rule laid down in that single article, take into consideration or declare admissible to be examined any asylum application lodged by a national of the Member State that is the subject of that procedure.

40 It follows that the adoption of the contested resolution has the immediate effect of lifting the prohibition, which is in principle imposed on the Member States, on taking into consideration or declaring admissible to be examined an asylum application made by a Hungarian national. That resolution thus changes, in relations between Member States, the position of Hungary in the field of asylum.”.

But holding the Council Presidency also has an essential interinstitutional dimension, because it is the Presidency that represents the Council in its relations with the European Parliament (EP) and negotiates on behalf of the Council to reach agreements on legislative files by protecting and promoting together the EU values that Hungary is openly challenging.

It is not surprising that the European Parliament (which originally triggered the Article 7(1) TEU procedure against Hungary) already one year ago<sup>3</sup> sent a Resolution to the Council and the Commission underlining “*..the important role of the presidency of the Council in driving forward the Council’s work on EU legislation, ensuring the continuity of the EU agenda and representing the Council in relations with the other EU institutions*” but also questioning “*...how Hungary will be able to credibly fulfil this task in 2024, in view of its non-compliance with EU law and the values enshrined in Article 2 TEU, as well as the principle of sincere cooperation...*”.

Surprisingly, neither the Commission nor the Council have to date furnished any response. Perhaps the reason was that these two institutions were expecting a positive development prior to the end of the legislative term, such as apparently occurred with Poland, (the only other European Country subjected to the Article 7(1) TEU procedure). Yet, unfortunately, in the case of Hungary, the situation has in the meantime rather worsened, to the extent that the European Parliament adopted two new Resolutions, the first on January 18 of this year<sup>4</sup> and the second on April 24.<sup>5</sup>

These highly detailed texts summarise and update the already formidable list of all Hungarian infringements of the rule of law and of the Budgetary Conditionality Mechanism. The most recent text declares in even stronger words the same concerns as to the suitability of Hungary as President of the Council and declares the EP ‘readiness to take measures to defend the credibility of the Union with respect to the values enshrined in Article 2 TEU as regards cooperation with the Council’.

It remains to be seen if the two most recent EP texts will once again fall again on deaf ears on the Council side. However, from a constitutional point of view, the assessment of the EP appears well founded and should have received much greater attention from the Council, notably because by maintaining the Hungarian Presidency the Council is threatening the smooth functioning of the EU in its essential legislative and budgetary functions as envisaged in the post-Lisbon Treaty framework: these functions now fall within the joint responsibility of the European Parliament and of the Council (Article 14(1) and 16(1) TEU), and this co-responsibility requires a great deal more than loyal cooperation between the two institutions (Article 13 TEU).

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<sup>4</sup> See point 8 of the Resolution “Situation in Hungary and frozen EU funds” questioning again “*..if the Hungarian Government will be able to credibly fulfil this task in 2024, in view of its non-compliance with EU law and the values enshrined in Article 2 TEU, as well as the principle of sincere cooperation;*” and “*asking the Council to find proper solutions to mitigate these risks as soon as possible*”, [https://www.europarl.europa.eu/doceo/document/TA-9-2024-0053\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2024-0053_EN.html).

<sup>5</sup> See Resolution “Ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen Rule of Law and its budgetary implications” where it regretted “*...that the Council has not yet found a solution to this problem, and that representatives of the Hungarian Government would chair the Council’s meetings concerning democracy, the rule of law and fundamental rights, including meetings related to protecting the EU’s financial interests and budget; underscores that this challenge comes at the crucial moment of the European elections and the formation of the Commission; deplores the failure to find a solution and reiterates its readiness to take measures to defend the credibility of the Union with respect to the values enshrined in Article 2 TEU as regards cooperation with the Council;*” [https://www.europarl.europa.eu/doceo/document/TA-9-2024-0367\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2024-0367_EN.html).

It would now be both prudent and sensible for the Council to modify its 2016 Decision, by qualified majority, as already provided for in legal doctrine,<sup>6</sup> and delay the Hungarian Presidency to such a time when the Article 7(1) TEU surveillance procedure will have been successfully concluded. Such a postponement should not be considered as a sanction against Hungary, but rather a simple precautionary measure to preserve the smooth functioning of the European Union and to avoid a period of interinstitutional bickering between the EU co-legislators, particularly at such a decisive moment for the EU legislature both from an internal and international point of view. Moreover, it wouldn't be the first time that the Council Presidency has been postponed, and then for much less serious reasons. As rightly noted by the Meijers Committee,

'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, in 2005 and in 2007; in 2002 at the request of Germany because general elections were scheduled during its upcoming Presidency; in 2009 because of the Treaty of Lisbon; 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. 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'.

It is finally also worth noting that an urgent appeal to postpone the Hungarian Presidency has very recently been submitted to the EU Institutions by the European Movement (IT, ES, FR branches).<sup>7</sup> The European Commission President, Ursula Von Der Leyen, has shared it with the competent Members of the College, notably with Vice-President Maroš Šefčovič, who is responsible for interinstitutional relations. The time period until July 1 is rapidly shrinking, and on June 18 the General Affairs Council will decide on a reasoned proposal from the Commission on closing the Article 7(1) TEU procedure against Poland.<sup>8</sup> Will it also be the occasion to discuss the issue of the incoming Hungarian Presidency? If so the point could also be submitted for final decision at the European Council Meeting on June 27/28 under the chapter on institutional issues (as the general responsibility on the issue of Council Presidencies falls under the COEUR competence – Article 236 TFEU).

We, the undersigned scholars, experts and citizens, support the call for the postponement of the Hungarian Presidency.

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<sup>6</sup> See the Meijers Committee "Comment on the exercise and order of the Presidency of the Council of the EU", published on 19 May 2023, <https://www.commissie-meijers.nl/comment/comment-on-the-exercise-and-order-of-the-presidency-of-the-council-of-the-eu/>.

<sup>7</sup> Available at: [https://www.movimentoeuropeo.it/images/documenti/VIKTOR\\_ORB%C3%81N\\_MUST\\_NOT\\_CHAIR\\_THE\\_COUNCIL\\_OF\\_THE\\_EUROPEAN\\_UNION\\_MEIT-FR-ES.pdf](https://www.movimentoeuropeo.it/images/documenti/VIKTOR_ORB%C3%81N_MUST_NOT_CHAIR_THE_COUNCIL_OF_THE_EUROPEAN_UNION_MEIT-FR-ES.pdf).

<sup>8</sup> Available at: <https://data.consilium.europa.eu/doc/document/ST-10716-2024-INIT/en/pdf>.