TAKING THE GAMBLE? A LEGAL AND POLITICAL ANALYSIS OF THE POSSIBLE SUSPENSION OF THE HUNGARIAN COUNCIL PRESIDENCY

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ABSTRACT

Despite its increasingly autocratic style of governance, Hungary is set to take over the Presidency of the Council of Ministers in the second half of 2024. Since doubts exist about the country's capacity to exercise the responsibilities that come with this office, different proposals have been put forward to suspend a Hungarian Presidency. This paper offers a legal and political analysis of these proposals. First, I argue that the proposals in their current form are inconsistent with the requirement in Article 16(9) TEU that the Presidency of the Council shall be held by the Member States on the basis of equal rotation. It is in line with this provision to delay a Hungarian Presidency for some time, but not to sanction the country for as long as it continues to violate the rule of law. Secondly, being mindful of these legal constraints, I will question whether delaying a Hungarian Presidency is a smart choice politically. The choice of delaying a Hungarian Council Presidency is something of a gamble. My analysis suggests it might be better to allow Hungary to chair the Council in the second half of 2024 rather than in several years.

KEYWORDS

Rule of Law, Council Presidency, Hungary, Equality of Member States
INTRODUCTION

Since Victor Orbán came to power in 2010, Hungary has gradually slid down the scale of democratic countries and experienced a sharp decline in the value of the rule of law. His government has chipped away at the core values of the democratic constitutional state, including by manipulating the democratic process and undermining the independence of its judicial system.¹ According to the 2023 Freedom House report, ‘the government’s uninterrupted authoritarian streak cements Hungary’s place among hybrid regimes, in the “grey zone” between democracies and autocracies’.² As a result, it is no longer certain that it is a representative democracy as EU Member States should be in accordance with Article 10 TEU, and it is certainly not acting anymore in accordance with the values on which the EU is founded. Indeed, it is legitimate to say that Hungary no longer meets the basic conditions for EU membership.³ In response to these developments, the European Parliament initiated the Article 7 TEU procedure to establish that there is a clear risk of a serious breach by Hungary of these values.

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in 2018, and last year the Council decided to withhold EU funds from Hungary to protect the EU budget against its breaches of the rule of law.

Despite the increasingly autocratic style of governance in Hungary, the country is set to take over the Presidency of the Council of Ministers in the second half of 2024. While the influence of the Presidency has shrunk since the office was separated from the Presidency of the European Council and the head of the Foreign Affairs Council, it remains a powerful position to hold. The Presidency is responsible for planning and chairing the meetings in the Council and for representing the Council in relations with other EU institutions. It also acts as an honest and neutral broker between different Member States. Unsurprisingly, doubts exist about Hungary’s capacity to exercise the responsibilities that come with this office. Will it act responsibly on the Council’s behalf in relations with other institutions and can it be trusted to act as an honest broker, especially on political issues that directly concern EU values? This debate has taken off in recent weeks, especially after the Meijers Committee published a report ‘on the exercise and order of the Presidency of the Council of the EU’, in which three concrete options are identified that can be pursued to prevent Hungary from exercising the

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5 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).


This report has not fallen on deaf ears. On June 1, the European Parliament adopted a resolution asking ‘the Council to find a proper solution’ on the matter, and members of the academic community have repeated the call for action by the Meijers Committee in op-eds and interviews.

This paper offers a legal and political analysis of the possible suspension of Hungary from the Council Presidency. Although the Meijers Committee report submits that its proposals are legally sound, this analysis questions the legality of two of its proposals. I will argue, more specifically, that the proposals in their current form are inconsistent with the requirement in Article 16(9) TEU that ‘the Presidency of Council configurations ... shall be held by Member State representatives in the Council on the basis of equal rotation’. In my view, it is in line with this provision to delay a Hungarian Presidency for some time, but not to sanction the country for as long as it continues to violate the rule of law and other EU values. The latter can only be done using the procedure laid down in Article 7 TEU, and it would be a violation of the EU’s very own rule of law to circumvent this.

11 Parts of the analysis rely on an earlier blog post of mine: <https://verfassungsblog.de/an-inconvenient-constraint/> (last visited: 14 June 2023).
procedure.\textsuperscript{12} Moreover, being mindful of these legal constraints, I will question whether delaying a Hungarian Presidency is a smart choice politically. Tempting as it may be to make use of the legal opportunities available, it may, all things considered, be better to allow Hungary to chair the Council in the second half of 2024 rather than in several years. The choice of delaying a Hungarian Council Presidency is something of a gamble. The analysis below suggests that it might be better not to take it.

This paper first sets out the three concrete options identified in the Meijers Committee report. Then, in section 3, I will zoom in on the principle of equal rotation in Article 16(9) TEU and discuss the constraints that this provision places on what is legally possible. I will argue that this principle requires that all Member States get their turn before others get their second turn, which in the present situation means that all states should be able to hold the Presidency before the current cycle ends in 2030. Finally, taking into consideration these legal constraints, the final section discusses whether the EU should take the gamble and block Hungary for as long as possible. I provide two reasons that warrant caution.

**THREE PROPOSALS FOR SUSPENDING A HUNGARIAN COUNCIL PRESIDENCY**

The Meijers Committee report makes three proposals to prevent states that systematically undermine the rule of law from holding the Council Presidency. These three proposals, in apparent order of feasibility, are (1) finding alternative

arrangements among the three members of the Presidency group to prevent rule of law violating states from presiding over dossiers that involve rule of law issues; (2) changing the order of the presidencies within the confines of the current legal framework; (3) amending this framework to explicitly stipulate that countries that are subject to rule of law related procedures cannot chair the Council.\textsuperscript{13} Let’s zoom in on these proposals in more detail.

The first proposal is probably the least controversial, legally speaking. The 2009 Council Decision on the exercise of the Council Presidency provides that the three members of the Presidency group (the Trio) may “decide upon alternative arrangements among themselves” and “by common accord determine the practical arrangements for their collaboration”.\textsuperscript{14} Article 20(2) of the Rules of Procedure of the Council further stipulates that it may be decided ‘at the Presidency’s request and acting on its instructions, [that] 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’.\textsuperscript{15} This suggests indeed that the Trio members could decide that Hungary will not chair Council meetings where rule of law issues are discussed. One may wonder if these provisions were meant to allow other members of the

\textsuperscript{13} Meijers Committee Report (n 8), p 7-10.
Presidency group to assume full responsibility for certain dossiers during the Presidency of the third, but if Hungary would agree to Spain or Belgium (the other two members) presiding over dossiers that concern the rule of law, this would seem permissible under the existing legal framework. But the problem, of course, is that this can only happen at the request of the Presidency, i.e. Hungary, and in accordance with its instructions. It seems very unlikely, to say the least, that Hungary would be interested in waiving its prerogative to preside over dossiers that most directly affect its interests, or in giving instructions to the other Trio members that would do so. In other words, the first proposal is legally sound but does not seem like a solution at all.

The other two proposals seem more promising in this respect. According to the second proposal, one or more Member States could express their concern that the responsibilities of the Presidency will not be fulfilled if a country that is at loggerheads with the EU’s core values will hold this position and thus propose to change the order of rotation of the EU Presidency. The Council could then decide to change the order of rotation by a qualified majority. The third proposal goes a step further and is more difficult to realize since it requires an amendment of the existing framework regulating the exercise of the Council Presidency. The idea is that the European Council could use its power under Article 236(b) TFEU to amend its 2009 Decision by introducing more specific conditions under which the Presidency may be exercised. In particular, the Meijers Committee proposes to establish a general rule that in case a rule of law procedure is pending against a

17 Meijers Committee Report (n 8), p 8.
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’.\(^{18}\)

These proposals could provide a solution provided they are lawful. The question, however, is whether they are. While the Meijers Committee offers a sound legal analysis of the secondary law acts regulating the exercise of the Council Presidency, it does not adequately address the legal elephant in the room, the most important legal constraint on the configuration of the Council Presidency, Article 16(9) TEU, which provides that the Presidency shall be held on the basis of equal rotation.

**ARTICLE 16(9) TEU: EQUAL ROTATION IN THE COUNCIL PRESIDENCY**

The first proposal put forward by the Meijers Committee to prevent states that systematically violate the rule of law from holding the Council Presidency is, as we saw above, lawful under EU law but too dependent on Hungary’s cooperation. The other two proposals avoid this shortcoming but are, on the contrary, more difficult to reconcile with EU law. This is due to the constraints set out in Article 16(9) TEU, which reads as follows:

“\(\text{The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions}\)"

\(^{18}\) Ibid, p 9.
established in accordance with Article 236 of the Treaty on the Functioning of the European Union”.

Besides providing that the Presidency shall be held on the basis of equal rotation, this provision allows more precise conditions for the exercise of the Presidency to be established in accordance with Article 236 TFEU. The manner in which Council configurations are to be determined is governed by Article 236(b) TFEU:

“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, including those cited earlier, 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’. So any exercise of the power under Article 236(b) TFEU that violates this requirement is impermissible under Article 16(9) TEU.

To identify what constraints this requirement imposes on the regulation of the Council Presidency, it helps to place the provision in a somewhat wider context. Article 16(9) TEU does not require ‘strictly equal rotation’ as Article 17(5) TEU does in respect of the appointment of Commission members. The latter states that:

“The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States”.
That Article 16(9) TEU does not call for strict equality in the rotation of the Council Presidency means that some room is left for fluctuation in the order of Council presidencies and that the Council can decide on the sequencing of the presidencies by a qualified majority. Political decisions affecting this sequencing must, however, abide by the principle of equal rotation.

What might this mean in practice? That the Council has discretion to determine how the Presidency rotates between Member States can be seen, for example, in Article 1(1) of the European Council Decision on the exercise of the Council Presidency. It says: ‘the groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union’. Another example is that the order of Presidencies has been changed in the past at the request of individual Member States or in response to relevant political developments. The rotation was changed four times upon the accession of new Member States, once in 2002 following a request from Germany in relation to its upcoming elections, and once in 2009 to adjust to changes introduced by the Lisbon Treaty.\(^\text{19}\)

Of course, the case of Hungary is different, and previous changes in the order of the Presidencies can hardly be regarded as a relevant precedent for the current situation. While the four changes to the Council Presidency configurations following accession happened to include new Member States on the basis of equal rotation, and the delay in the German Presidency happened at the behest of

\(^{19}\text{These examples are discussed in the Meijers Committee Report (n 8), p 4.}\)
Germany itself, the proposals discussed here seek to deny Hungary the right to hold the Presidency against its will. But this does not settle the question of whether, or rather at what point, preventing or postponing a Hungarian Presidency violates the principle of equal rotation in Article 16(9) TEU.

A plausible interpretation of this principle is that Member States cannot be bypassed easily, and in any case not to the extent that they do not get their turn to preside over the Council before other states get a second turn. It would violate the requirement of equality if one or more Member States were allowed to preside over Council meetings for a second time before others have been allowed to do so a first time.\(^{20}\) So how do the proposals fare against this requirement? Because of their lack of specificity, it is hard to answer this question with certainty, but they seem to violate this requirement.

If the principle of equal rotation requires that all states get their turn before others get their second turn, then all Member States should be able to hold the Presidency once in the current 13.5 year period. The current period started in the second half of 2017 with Estonia taking up the role and ends in the second half of 2030 with Malta scheduled to hold the position.\(^{21}\) Changes in the order are still possible, but Hungary has a right to hold the Presidency before the queue ends in 2030. In other words, changes in the order of rotation can, as the Meijers Committee advocates, be proposed, but Hungary must at some point in the next seven years be allowed to take over. This certainly casts doubt on the suggestion

\(^{20}\) An exception could be made if state at the end of the queue asks for its Presidency to be delayed due to relevant political developments. But that would be at the state’s own request, so it would be entirely different from the issue discussed here.

of the Meijers Committee that states should not hold the Presidency pending any rule of law procedures against them until three years after these proceedings. Unless we believe that the serious and persistent rule of law deficiencies in Hungary will be remedied in the next three years (I wish I could share this belief), this proposal cannot be applied to Hungary without abridging the principle of equal rotation.

Another reason to think that the constraints of Article 16(9) TEU have not been taken sufficiently seriously by those who favor a suspension of the Hungarian Presidency is that this provision is either watered down or completely ignored when the legality of the proposals for suspension is discussed. While acknowledging that this provision is ‘the legal basis’\textsuperscript{22} for Council Presidency configurations, the Meijers Committee report also says the following about the provision:

“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.”\textsuperscript{23}

\textsuperscript{22} Meijers Committee Report (n 8), page 1.
\textsuperscript{23} Ibid, page 7.
The crux lies in the last sentence of this paragraph. The authors of the report recognize the importance of the requirement of equal rotation: it gives effect to the equality of Member States, which the EU is, in accordance with Article 4(2) TEU, under an obligation to respect. But then they tell us that the Presidency is ‘a demanding task with specific requirements flowing from’ various Council Decisions. The problem 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, and nothing in this provision suggests that this right can be suspended or removed when states are for some reason unable to perform the demanding tasks of the Council Presidency.

Moreover, to dispel any doubt immediately, this right also cannot be suspended by relying on Article 10 TEU. The second paragraph of this provision provides that ‘Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens’. It has been cited as a legal basis for banning autocracies from participation in the Council. Whether such a move would be consistent with Article 16(2) TEU, according to which ‘the Council shall consist of a representative of each Member State at ministerial level’, remains to be seen. But more importantly, we are dealing with the question of whether autocracies can preside over the Council, not whether they can participate in it at all. The latter question

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cannot be regulated through Articles 16(9) TEU and 236 TFEU or the secondary legislation adopted thereunder. It would require a (controversial) judgment by the CJEU, not a decision by the Council. In contrast, the decision of when Hungary can preside over the Council until 2030 is for the Council and not the CJEU to make, as a decision of the latter on this issue would infringe upon the Council’s discretion under the Treaties to determine the order. Of course, the CJEU can review relevant Council decisions; it should just not intervene in these decisions unless the Council exercises its discretion unlawfully, for example, by violating the principle of equal rotation.

Of course, the Treaties lay down one possibility for suspending the right to preside over the Council for Member States that systematically breach the rule of law. 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 here26 – but it is the procedure that the EU has for depriving states of their rights for violations of the rule of law. One may be convinced that this

26 For criticism, Dimitry Kochenov, ‘Article 7: A Commentary on a Much Talked-About “Dead” Provision’ in Armin von Bogdandy and others (eds), Defending Checks and Balances in EU Member States (Springer 2021); Leonard Besselink, ‘The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives’ in András Jakab and Dimitry Kochenov (eds), The Enforcement of EU Law and Values: Ensuring Member States’ Compliance (OUP 2017); Bojan Bugarič, ‘Protecting Democracy in the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism’ in Carlos Closa and Dimitry Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (CUP 2016).
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. So unless this procedure is followed, only limited measures can be taken to keep Hungary and other Member States that violate the rule of law away from the Council Presidency. This conclusion confirms that the EU can be (too) powerless against Member States that decide to violate democratic constitutional values, and that EU membership may even help to sustain authoritarian regimes. The right to hold the Presidency can be suspended, but not to a date after 2030.

TAKING THE GAMBLE? TWO REASONS FOR CAUTION

So why not suspend Hungary’s access to the Presidency for as long as possible? It may not be the cure for all ills, and may not even cure anything, but it would at least send a strong signal from a large majority of Member States regarding their displeasure with internal political developments in Hungary. Doing so is better than doing nothing, one might think. However, as I will explain, this decision would not be without risks, especially if the internal political situation in Hungary does not improve in the coming years (as seems likely). The question, therefore, is whether it is worth taking the gamble. I will offer two reasons that warrant caution and that may tip the balance in favor of a Hungarian Presidency in 2024 rather than at a later date.

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27 For proposals, Kochenov (n 23).
The first reason is that the second half of 2024 is a period during which Hungary can most likely not do too much damage as president. This conclusion may seem counter-intuitive, given that Hungary will take over one month after the European Parliament elections and thus in the middle of a very intense political time when the appointment of the members of the European Commission is being decided. However, relatively little legislative work will be done during this period, which is crucial given that ensuring the continuity of the EU legislative agenda is where the most significant portion of the Council Presidency’s work lies. One reason given for not allowing Hungary to hold the Presidency as scheduled is that ‘the Commission is absolutely crucial as the main engine for any sort of legislative proposal which will be very much happening during the Hungarian Presidency’.  

But history tells us otherwise, namely that ‘little legislative work will happen during that time’. As Thu Nguyen has shown, observing the period immediately following the 2019 elections,

“The legislative files moving forward under the Finnish Presidency in the second half of the year were significantly fewer than normal: agreements were reached on 18 texts during its term. For comparison, the Estonian Presidency brokered 76 agreements in the second half of 2017, the Austrian one reached agreements on 128 documents in the second half of 2018, and the French Presidency even managed to foster agreement on 130 texts last year.”

30 Review of Democracy (n 10).
31 Nguyen (n 6).
32 Ibid.

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Those seeking to prevent rule of law backsliding member states from taking up the Council Presidency have objected to referring to such facts. They consider it ‘a strange argument to make ... that Hungary’s Presidency is not that problematic because of its timing during a politically dull moment’. However, especially given the existing legal constraints that limit to what extent the Presidency can be suspended, such empirical and political considerations must be considered if the EU is to take the best-informed decision in this matter. It would be unfortunate if we turned a blind eye to the political realities on the ground. One reality, if history is something to go by, is that the second half of 2024 is likely to be not the worst possible time to have a Hungarian Presidency.

The second reason is that Hungary is not the only Member State that has been steadily chipping away at rule of law values in recent years. Poland has done the same, including by actively undermining the independence of its judiciary, and is also subject to the Article 7 TEU procedure for clear risks to the rule of law, as well as infringement proceedings for violating the principle of judicial independence. Poland is scheduled to take over the Council Presidency in the first half of 2025 – indeed, immediately following Hungary. This has added to the perceived urgency to act and suspend the Presidency of both countries. As the Meijers Committee report says: ‘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

33 Review of Democracy (n 10).
34 Wojciech Sadurski, Poland’s Constitutional Breakdown (OUP 2019).
35 European Commission proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (2017/0360(NLE)).
While far from ideal, the important caveat to make here is that Hungary and Poland are part of different Trios. The Trio scheduled from the second half of 2023 until the end of 2024 consists of Spain, Belgium, and Hungary, while the Trio in the next 18 months consists of Poland, Denmark, and Cyprus. It is the Trio of member states holding the Presidency that sets the agenda and determines the priorities during their 18-month Presidency, so the fact that Poland and Hungary are coming right after each other will probably not be as damaging as one might think at first glance.

In any case, the risks of political damage would be considerably greater if Poland and Hungary were to be part of the same Presidency group of three states. It is not excluded that this will happen if the Presidency of both countries is suspended for being subject to rule of law infringement procedures. Recall that, in accordance with the principle of equal rotation, all Member States have a right to exercise their right to chair the Council by the end of 2030. This means that both states can be suspended until the end of 2029 at the latest and that both countries will be part of the last Presidency group of this cycle if their rule of law deficiencies are not resolved in the coming years. Moreover, if the rotation order otherwise remains the same, they will then do so together with Malta, a small state that may not be able to act as an effective counterweight to these countries. In other words, while a consecutive Hungarian-Polish presidency in 2024-2025 might be an unattractive scenario, placing both countries in the same Trio with Malta would be a nightmarish one. Admittedly, this is somewhat speculative, and there will be

37 Meijers Committee Report (n 8), p 7.
38 See footnote 20 for the rotation order.
ways to change the rotation order in a way that Hungary and Poland do not end up in the same Presidency group, but the possibilities to delay their presidencies are limited due to the legal constraints that Article 16(9) TEU imposes. So these limitations should be considered properly before any action is taken against both countries.

CONCLUSION

The authoritarian turn in Hungary and Poland must be combated and therefore there is a great need for solutions that can help reverse this turn. However, it is crucial that these solutions are consistent with the EU’s very own rule of law, especially if they are meant to remedy rule of law breaches at the national level. First, the fight against rule of law backsliding otherwise will lose credibility and may even become self-defeating. A commitment to the rule of law should also mean a commitment to the EU’s rule of law. Secondly, effective solutions can only be found on the basis of a sound understanding of the legal constraints limiting EU action. As this paper has shown, Article 16(9) TEU precludes certain proposals put forward to suspend a Hungarian and Polish Council Presidency. Contrary to what the Meijers Committee report suggests, their presidencies cannot be delayed for as long as their internal institutional reforms violate the value of the rule of law. Instead, both countries have a right to hold the Presidency before the current period of rotations ends in 2030. With these constraints in mind, and seeing what sort of action can lawfully be taken, this paper questioned whether it would be wise to delay the Council Presidency of Hungary and Poland. It may be tempting to do so, if only to send a strong signal to both countries, but it is likely to be better to have a Hungarian Council Presidency in the second half of 2024 rather than at a later date, especially since postponing the Presidencies of both
Hungary and Poland may mean they end up in the same Presidency group in several years’ time.
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