

The Czech Presidency and the Rule of Law: Not Hungary's Satellite Anymore

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ABSTRACT

This article assesses the achievements and failures of the 2022 Czech presidency in one of its priority areas, namely democratic resilience and the rule of law. By analysing the two inherited Article 7 (1) procedures against Poland and Hungary as well as the rule of law conditionality mechanism against Hungary, I argue that the Czech presidency's major achievement was the successful completion of the conditionality procedure despite Hungary's hostage policy. Besides, the Czech presidency's handling of the rule of law procedures had crucial symbolic implications. The government managed to distance itself from the notion that Czechia is a member of the 'illiberal' Visegrád bloc and instead demonstrated its pro-democratic and pro-European orientation.

KEYWORDS

Czech presidency, rule of law, resilience, Article 7 (1), rule of law conditionality

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INTRODUCTION: THE CZECH PRESIDENCY AS AN 'HONEST BROKER'?

From July to December 2022, the Czech Republic held the rotating Presidency of the Council of the EU for the second time since its accession to the European Union.¹ Just like the French presidency in the first half of 2022, the Czech presidency was overshadowed by the Russian war against Ukraine, which forced the Czech government to partially rewrite its original EU priorities (LAZAROVÁ 2022). In addition, two domestic political conditions were potential obstacles to a successful presidency. First, by the time Czechia took over, the five-party government led by Prime Minister Petr Fiala (*Občanská demokratická strana*, ODS) had been in office for only six months. Hence, it was not clear how stable this oversized government would be in case of internal debates. A second challenge was that a fair share of the preparations for the presidency had taken place under the previous government of Andrej Babiš (*ANO 2011*), which had not considered the presidency as a top priority. As a result, the government had allocated a comparatively small budget for the preparations (ZACHOVÁ 2021).² Nourished by the memories of the first Czech presidency, when the government was ousted by the opposition's vote of no confidence in the middle of the presidency (SEE LINEK – LACINA 2010), these domestic challenges raised some doubts about the government's ability to manage the presidency successfully.

This contribution assesses the presidency's achievements, failures and leftovers in one of its presidency priorities, namely the resilience of democratic institutions. While this policy field also includes questions of how to strengthen the democratic resilience of the EU polity as a whole (for example, by ensuring free and fair elections or protecting media freedom in the EU), the question of how to respond to threats to the rule of law and democracy at the national level are at the core of this debate. Thus, the article focuses on the rule of law conflicts with the Hungarian and Polish governments. In particular, it assesses how the Czech presidency managed the ongoing Article 7 (1) procedures against both Poland and Hungary as well as the first-ever application of Regulation 2020/2092 on the general regime of conditionality for the protection of the Union budget, which was initiated against Hungary by the European Commission in April 2022.

I argue that the Czech presidency was successful in this area because it fulfilled its commitment to act as an ‘honest broker’ (LAZAROVÁ 2022) in the rule of law-related negotiations with Hungary and Poland. Although it did not substantially bring forward the Article 7 (1) procedures against Hungary and Poland in the Council, it brought the first application of the conditionality mechanism to a successful end. In particular, the presidency succeeded in getting Hungary to not block an 18 billion Euro assistance package for war-torn Ukraine in exchange for lifting the procedure and managed to secure a necessary qualified majority in the Council in favour of suspending EU funds. In addition, the Czech government effectively countered the image of a coherent Visegrád Group whose members are united in their opposition to liberal democracy, ‘western’ values and further integration.

The article starts by reviewing the presidency of the Council from a theoretical angle, highlighting its agenda-shaping powers in the Council. After a brief overview of Article 7 (1) and the rule of law conditionality procedures, I assess the Czech presidency’s handling of these procedures. I conclude with an overall assessment of the presidency’s performance and its implications for the Czech government’s position in the EU.

THE POWERS OF THE PRESIDENCY OF THE COUNCIL OF THE EU FROM A THEORETICAL PERSPECTIVE

The role of the rotating presidency, which is carried out by a member state government for six months, has been reduced with the Treaty of Lisbon (BATORY – PUETTER 2013). First, the functions of the presidency of the Council were separated from those of the European Council by establishing the post of a permanent President of the European Council serving for a two-and-a-half-year term. This reduced the rotating presidency’s formal responsibilities and duties and, as a result, also its informal powers in shaping EU policies. Second, since after Lisbon the rotating presidency is no longer at the helm of the Foreign Affairs Council (BATORY – PUETTER 2013: 98), its influence on the Union’s Common Foreign and Security Policy is diminished.

Despite this, the state holding the presidency still enjoys enormous agenda-shaping powers in the Council (HÄGE 2017; TALLBERG 2003). It can set the agenda by putting certain proposals and issues on the agenda

(*agenda-setting*), it can structure the agenda by emphasizing or de-emphasizing certain issues (*agenda-structuring*), and it can prevent certain issues from being placed on the agenda (*agenda-exclusion*). While blocking certain issues is not an option in some cases (e.g. in crises, when decisions are urgent or in rule of law-related matters; see below), the presidency can use its scheduling power to set the pace and to determine which issues it will prioritize and devote special attention to (HÄGE 2017). Hence, the presidency still has the power to steer the course of EU policies into its preferred direction and to determine issues of particular importance.

At the same time, the presidency is expected to act as a mediator and an 'honest broker' by "*suggest[ing] compromise solutions with a view to reaching an agreement in the Council*" (COUNCIL OF THE EUROPEAN UNION 2018: 9; QUAGLIA – MOXON-BROWNE 2006: 351). Moreover, it is also expected to be neutral concerning the fulfilment of its duties (COUNCIL OF THE EUROPEAN UNION 2018: 10). In sum, while the presidency is allowed to delineate political priorities and use its agenda-shaping powers, it is not allowed to exploit these powers for its political objectives.

The question of how to assess whether a presidency was successful or not, or how to determine its achievements and failures, is the subject of much scholarly discussion (SEE MANNERS 2013; QUAGLIA – MOXON-BROWNE 2006) and there is no commonly accepted set of criteria to measure success. As a consequence, such assessments are always subjective to a certain degree (MANNERS 2013: 70), depending on the criteria used. In the following, I differentiate between a *substantial* and a *symbolic* dimension of success or failure in rule of law matters. The substantial dimension denotes the achievement of a formal goal, e.g. the completion of a procedure. The symbolic dimension refers to the symbolic message a particular action carries. Rule of law protection through the EU at the national level is highly contested: While some member state governments support stronger EU oversight mechanisms, others are cautious or reject EU interference in domestic matters. Whether and how presidencies handle rule of law issues thus carries strong symbolic weight. Through these decisions, they implicitly position themselves either in the camp of governments favouring a more sovereigntist position or in the camp of those supporting EU interference.

THE RESILIENCE OF DEMOCRATIC INSTITUTIONS AND THE PROTECTION OF THE RULE OF LAW UNDER THE CZECH PRESIDENCY

Starting in 2010 and 2015 respectively, Hungary and Poland have taken the path of democratic backsliding (SEE E.G. BAKKE – SITTER 2022), resulting in continuous conflicts over the national rule of law and democracy with the EU. Given these internal challenges to the rule of law and democracy - both of which are fundamental values of the EU – it is not surprising that the Czech Presidency made democratic resilience one of its five core priorities. In addition, the government’s choice might have arguably been influenced by its wish to be perceived as the anti-populist, pro-democratic and pro-European alternative to the previous government (HAVLÍK – KLUKNAVSKÁ 2022). Hence, it pledged to “*focus on strengthening the resilience of institutions that have a major influence on maintaining and developing values of democracy and the rule of law in the EU*” (CZECH PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION 2022: 9). Besides its commitment to support EU legislative acts designed to strengthen the EU’s overall resilience as a political system, the presidency announced that it would moderate a discussion on the implementation of the rule of law on the basis of the Commission’s Annual Rule of Law Report. Moreover, it promised a “constructive approach” (IBID.: 14) in the ongoing Article 7 (1) procedures against Hungary and Poland.

Article 7 (1) and the conditionality procedure

The EU has several rule of law instruments at its disposal. Some of these are only preventive in nature, designed to prevent rule of law deficits from happening in the first place or meant to highlight existing deficiencies (e.g. the Annual Rule of Law Report). Others are designed to react to and sanction member states in case of actual breaches of the rule of law, such as the Article 7 (2) procedure or the recently established rule of law conditionality mechanism. When Czechia took over the presidency, it ‘inherited’ three distinct procedures: the Article 7 (1) procedure against Poland launched by the Commission in December 2017, the Article 7 (1) procedure against Hungary initiated by the European Parliament in September 2018, and the conditionality procedure triggered against Hungary in April 2022.

The Article 7 (1) procedure, also called the preventive mechanism, can be initiated when “*there is a clear risk of a serious breach by a Member State of the values referred to in Article 2*”. Often confounded with the sanctioning mechanism in Article 7 (2), Article 7 (1) cannot result in the member state losing some of its rights (such as voting rights in the Council). It can only lead to recommendations issued by the Council after it has decided with a four-fifth majority that a member state risks breaching the Union values. Before such a decision is made, the Council has to hear the member state in question. These hearings, structured by the so-called standard modalities laid down by the Council in 2019, hence form the major part of the procedure. After the opening statement by the member state itself, delegations may pose questions related to the topics covered by the hearing, followed by answers and the asking of follow-up questions (PRIEBUS 2022).

Regulation 2020/2092 on the general regime of conditionality for the protection of the Union budget, the so-called rule of law conditionality, was adopted in December 2020 (BARAGGIA – BONELLI 2022; HILLION 2021). It can be activated when “*breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way*” (Article 4). The procedure has several stages involving the Commission and the Council. If the European Commission finds evidence of such breaches, it can send a written notification to the member state and request further information. The government in question must respond – and may already propose remedial measures – within one to three months, depending on the exact amount of time granted by the Commission. The Commission then must assess these answers within one month. Should the member state response not suffice, the Commission can submit a proposal for an implementing decision on the appropriate measures to the Council; i.e., the Commission can suggest suspending or reducing a certain amount of EU funds. The Council subsequently must decide on the Commission’s implementing decision within one month, although it may extend this period by a maximum of two months if necessary. It can adopt and/or amend the Commission proposal with a qualified majority.³

When assessing the presidency’s achievements or failures concerning the rule of law procedures, it is important to differentiate between the Article 7 (1) procedure as an instrument *without* fixed deadlines, and the

conditionality mechanism as a tool *with* fixed deadlines. While Article 7 (1) outlines the conditions for its triggering and its procedural stages, neither the treaty nor the standard modalities specify deadlines as to when the procedure has to be concluded, the number of hearings to be held before tabling a vote or the intervals between the hearings (PRIEBUS 2022). As a result, the presidency has complete discretion in deciding whether or not to proceed with the procedure in the Council by scheduling hearings during its six months in office. Concerning the Article 7 (1) procedure, the presidency thus enjoys enormous agenda-shaping powers. In contrast, the conditionality regulation contains clear deadlines, setting time limits as to when the procedure has to be finished. Hence, after this procedure is launched, the presidency's agenda-shaping powers are limited because it has to decide on the Commission's proposal within one to three months.

The Article 7 procedures: More symbolic than substantial achievements

The Czech presidency put both Article 7 procedures on its agenda, although not to the same extent. In the case of Poland, the presidency held an 'exchange' on the situation of the Polish rule of law in October 2022, meaning that Council members were only updated by the Commission on developments concerning national rule of law issues in this case (COUNCIL OF THE EUROPEAN UNION 2022B).

In contrast, it conducted a fifth non-public hearing of Hungary in November, which, however, led neither to pathbreaking results nor to a conclusion of the procedure. The discussions focused on a wide variety of issues, ranging from academic freedom, media pluralism and LGBTQ rights to issues related to the independence of the judiciary and government-funded campaigns targeting EU sanctions against Russia (COUNCIL OF THE EUROPEAN UNION 2022A). Despite the lack of substantial results, the relevance of the hearing should not be underrated. To begin with, the hearing kept the deteriorating situation in Hungary on the agenda and allowed Council members to interrogate the Hungarian delegation about recent political developments. More importantly, however, it carries a symbolic weight: The decision to hear Hungary can be read as an implicit statement on the Czech government's position on Hungary and its rule of law conflicts with the EU. Arguably, by tabling a hearing the presidency sided with those

governments supporting the protection of the rule of law and democracy at the national level through the EU. Moreover, it is a sign that the Czech government does not support the path taken by Poland and Hungary, and a sign of its effort to distance itself from the image of a coherent Visegrád Group united in its members' opposition to the rule of law and the EU.

What merits discussion is that the Czech presidency decided to hear Hungary but not Poland, although Hungary had previously been heard in May, while Poland's last hearing had taken place in February 2022. Three possible explanations might account for this. First, the situation in Hungary is more dynamic compared to that in Poland, especially after the April 2022 parliamentary elections, which secured Viktor Orbán's government another two-thirds majority in parliament and led to a further tightening of his grip on power (e.g., by extending the possibilities to rule by decree) (PRIEBUS – VÉGH 2022). Second, the differing positions of the governments on the war against Ukraine seem crucial (SEE JARACZEWSKI 2022). While Poland is an active supporter of Ukraine and the EU sanctions against Russia, the Hungarian government keeps supporting President Vladimir Putin's regime and repeatedly vetoes or at least threatens to veto EU sanctions against Russia. Therefore, it can be assumed that due to Poland's crucial role in the EU's response to the war, the Czech presidency decided not to upset the Polish government with an official Article 7 hearing. While this trade-off between protecting the rule of law and the war in Ukraine is debatable (BAYER 2022), it is consistent with the logic of EU decision-making in certain policy fields (such as foreign and security policy) where the support of all member state governments is needed to reach a binding decision. Lastly, partisanship might have also been at work. Prime Minister Fiala's ODS is a member of the party group of European Conservatives and Reformists in the European Parliament, just like the ruling Polish Law and Justice Party (Prawo i Sprawiedliwość, PiS). Thus, the Presidency might have been anxious not to strain the inter-party relations by holding another hearing.⁴

The conditionality procedure against Hungary: Managing Hungary's hostage policy

After the Commission launched the procedure against Hungary in April 2022, it put forward its proposal for an implementing decision to the

Council in September, recommending the suspension of 65 per cent of the commitments in three programmes financed from the European Regional Development Fund (ERDF), the Cohesion Fund (CF), the Just Transition Fund (JTF) and the European Social Fund Plus (ESF+) (European Commission 2022a). It left, however, room for compromise by announcing that upon the fulfilment of the 17 remedial measures by 19 November, which the government had proposed in August, the conditionality procedure could be suspended (EUROPEAN COMMISSION 2022B). On 30 November, however, the Commission concluded that the Hungarian lawmakers' reforms were insufficient to remedy the problems and maintained its original proposal from September (EUROPEAN COMMISSION 2022C). Subsequently, the Economic and Financial Affairs Council (ECOFIN) had to decide on the proposal by 19 December at the latest. The decision-making process was, however, complicated by the Hungarian government's hostage policy. The Hungarian delegation vetoed two unrelated EU proposals requiring a unanimous vote, namely the decision on the introduction of a global minimum tax on multinationals and an aid package of 18 billion Euro for Ukraine, to blackmail the EU (TAMMA – BAYER 2022).

To make Hungary lift its vetoes, the Czech presidency used its agenda-structuring power: It linked the two proposals blocked by Hungary with the conditionality procedure and another Hungary-related file – the approval of Hungary's national plan, which is needed to unlock the money from the Recovery and Resilience Facility⁵ – by putting all four issues on the Council's agenda on 6 December. Moreover, it sequenced the issues in a particular order by putting the decision on the two issues blocked by Hungary first and the decision on the Hungary dossiers second, hoping to pressurize Hungary into giving in (VELA – SHEPTALOVICH 2022). This strategy backfired, however, when the Hungarian government blocked the aid package, forcing the presidency to postpone the voting on the other issues (ALLENBACH – AMMANN 2022).

Subsequently, the Czech presidency had to find a solution to this impasse. Instead of simply giving in to Hungary, Minister of European Affairs Mikuláš Bek made clear that the outcome of the conditionality procedure was dependent on Hungary's position towards Ukraine: If the Hungarian government lifted its veto, the Council members would be willing to make concessions concerning the conditionality procedure and the recovery

plan ^(HALMAI 2022). Against this background, the presidency under the Czech ambassador to the EU, Edita Hrdá, brokered an agreement a week before the deadline. This deal saw Hungary lift its veto in exchange for a reduction of the originally proposed 65 per cent of the three EFDR funds to 55 per cent ^(COUNCIL OF THE EUROPEAN UNION 2022C). Moreover, the Council also approved Hungary's recovery plan, albeit with further conditions that need to be fulfilled before the money is released ^(COUNCIL OF THE EUROPEAN UNION 2023).

In conclusion, the Czech presidency managed to end Hungary's hostage policy and reach a decision to suspend the money. While the Czech compromise included a reduction of the originally proposed amount of money, the presidency's strategy was nevertheless successful because it secured an agreement on all four issues. Apart from this, the Czech presidency's successful management of the first-ever application of the regulation is crucial as it will serve as a blueprint for its future applications.

CONCLUSION: CZECHIA BACK AT THE CENTRE OF THE EU

Commission Vice-President Frans Timmermans hailed the Czech presidency as *“one of the most successful presidencies in the last few decades”* ^(ZACHOVÁ 2023). Concerning democratic resilience and the rule of law – which traditionally are very sensitive matters affecting state core powers – the Czech presidency's major achievement was to bring the conditionality procedure against Hungary to a successful end. It averted Hungary's hostage policy, i.e. its attempt to block the aid package for Ukraine in exchange for lifting the procedure. Instead, the presidency secured Hungary's agreement on the Ukraine package the Commission's implementation proposal altogether. Also, while it did not conclude the pending Article 7 (1) procedures, leaving those as leftovers to future presidencies, it nevertheless signalled its support for these by putting them on the agenda.

What seems even more crucial is that the Czech presidency's position on rule of law matters was a commitment to the EU and its values. When asked about what the major achievement of the Czech presidency was, Prime Minister Fiala named the improvement of Czechia's image and its position within the EU ^(PANCÍŘ 2022). The Czech government indeed used the presidency as an opportunity to give a strong pro-European signal and demonstrate that it is not part of the 'illiberal' bloc often associated with all members of

the Visegrád Group. This is important because the Czech Republic's relations with the EU were strained under the Babiš government, not only because of the corruption allegations against Babiš himself, which involved EU funds (BAYER 2021). Babiš and his party ANO have also been sympathetic to the sovereigntist, starkly Eurosceptic policies pursued by Hungary and Poland, evoking concerns that his government could become the driver of an 'illiberal turn' (HANLEY – VACHUDOVA 2018) or at least an 'illiberal swerve' (BUŠTÍKOVÁ – GUASTI 2017). With its handling of the inherited rule of law procedures, the presidency restored the image and demonstrated that Czechia is not "Hungary's satellite" (ZACHOVÁ 2023).

ENDNOTES

- 1 For an evaluation of the 2009 presidency see Beneš – Karlas 2010.
- 2 By establishing a separate Ministry for European Affairs, the new Prime Minister Fiala did not only underline the importance of European affairs under his government but arguably also sought to strengthen the political coordination of Czechia's EU policy.
- 3 At least 55 per cent of member states, which must represent at least 65 per cent of the EU population.
- 4 In comparison, Fidesz was a member of the European People's Party until it left in March 2021. Its members sit as non-attached deputies in the EP since then.
- 5 Apart from the conditionality procedure, the Commission also put pressure on Hungary through other financial means, especially the withholding of money from the Recovery Fund. As a result, the negotiations on these two separate mechanisms proceeded in parallel. See Scheppele – Morijn 2022.

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