CHAPTER 11

Article 7 TEU on the Agenda of the Council's Rotating Presidency: Still a "Nuclear Option" or Rather "a Talking Shop"?

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11.1 Introduction

Over the past decade, many books and articles have examined how the various crises experienced by the European Union (EU) have reshaped its institutions, modes of governance and policies (e.g. Bickerton et al., 2015; Fabbrini, 2015; Ladi & Wolff, 2021; Schmidt, 2020; Wolff & Ladi, 2020). Not only have the balance of power and the traditional roles of the executive, legislative and judicial powers at the supranational level

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been altered (Fabbrini, 2015), but the EU's responses to crises have also been inconsistent. While EU institutional actors managed to find solutions during the Eurozone crisis despite their opposing views on the issues at stake and having to deal with contrasting national preferences, when throughout the 2010s the Fidesz government in Hungary, and the Law and Justice Party (PiS) in Poland have expressed their hostility towards liberal democracy, detaching themselves from the core values enshrined in Article 2 of the Treaty on European Union (TEU), actors at the EU level have been divided about what to do, when and how (Coman, 2022). In December 2017, after two years of dialogue with the PiS government, for the first time in the history of EU integration, the European Commission triggered Article 7 TEU against Poland, while the European Parliament (EP) triggered the same article against Hungary in September 2018 after eight years of parliamentary debates. Their dismantling of the pillars of liberal democracy has received considerable attention. This "existential crisis" (Pech & Scheppele, 2017) is an ongoing one—and is getting worse as, according to Freedom House (2022), Hungary is no longer a democracy (Buzogány, 2017) and Poland is no longer a consolidated one.

Scholars have scrutinised the action taken by the Commission (Closa, 2019; Kochenov & Pech, 2016) and the role of the European Parliament (Coman, 2022; Herman et al., 2021; Meijers & Van Der Veer, 2019). In contrast, little is known about the role of the Council. If in the first half of the 2010s the Council remained rather silent on the developments in Hungary and Poland, the issue became institutionally unavoidable when the Commission and the EP activated Article 7 TEU.

Considering the centrality of the Council throughout Article 7 TEU—which is triggered to respond to (a risk of) a breach by a Member State of the values on which the Union is founded, possibly going as far as the suspension of a country's voting rights in the Council—this chapter explores the role played by its presidencies since 2018 onwards. The interest in this procedure is twofold: beyond its sensitive nature and the strong divisions between Member States, studying how the successive presidencies have dealt with both the institutionalisation of the Article 7 TEU procedure and its inclusion on the agenda allows us to shed light on their room of manoeuvre in the changing political regime of the Union. The question of whether the Council Presidency is still powerful has preoccupied many scholars, as discussed in Chapter 1. If in the 1980s, it was described as a "*responsabilité sans pouvoir*" (Tallberg, 2003: 19),

in recent years scholars have underlined that in the post-Lisbon context the new institutional provisions have even more limited the room of manoeuvre of the Presidency during its six-month mandate (Fernández Pasarín & Mangenot, 2012).

Against this backdrop, this chapter discusses the traditional roles of the Council Presidency as *agenda-setter* and *policy-entrepreneur* with a focus on the very sensitive procedure of Article 7 TEU. These conceptualisations emphasise the individual role of the presidency, which remains central. Yet, as this chapter shows, the Presidency has become increasingly coordinative, cooperating not only with other presidencies belonging to the "trio", but also formally and informally with all EU Member States, the Commission and the European Parliament. The chapter confirms a central finding of the literature regarding the more constrained room of manoeuvre of the Council Presidency when acting as *agenda-setter* (Fernández Pasarín & Mangenot, 2012). But it also shows that in populist times, when the EU's foundations are challenged by parties in office (Coman, 2022; Destradi et al., 2021; Lequesne, 2021; Schmidt, 2020; Zaun & Ripoll Servent, 2022), divisions between Member States weaken its ability to act as a *consensus-builder*. The article shows that both formal (hearings procedures) and informal institutional rules (diplomatic rules and styles) limit not only the room for persuasion and deliberation in the Council but also the ability of the Presidency to reach consensus.

Drawing on interviews[1] with key diplomatic actors and analysing documents issued by the Council and its rotating presidencies since 2018, the chapter discusses these two traditional roles of the Presidency as *agenda-setter* and *consensus-builder*. In so doing it also shows how the Member States themselves have transformed the Article 7 TEU from what was called the "nuclear option"[2] into a "talking shop". The chapter is organised as follows. Section 11.2 discusses the traditional roles of the Council Presidency in the post-Lisbon institutional framework and its ability to act as *agenda-setter* and *consensus-builder*. It argues that the room for manoeuvre of the Presidency in dealing with Article 7 TEU is limited not only by institutional factors but also by formal and informal rules,

[1] 12 interviews were conducted from September to December 2022 in Brussels with diplomats and officials involved in the debates at the EU level, in order to shed light on the nature of deliberations and negotiating styles.

[2] José Manuel Durão Barroso, State of the Union 2012 Address, Plenary session of the European Parliament, Strasbourg, 12 September 2012.

including diplomatic norms and negotiation styles during the hearings. Section 11.3 shows how since 2018 the successive Council presidencies have emphasised or de-emphasised the rule of law in general and the Article 7 TEU in particular; it also illustrates the more coordinative dynamic and the interactions of the Presidency with the Commission and the EP as well as with other Member States. Section 11.4 looks at how formal and informal institutional factors limit the room of manoeuvre of the Presidency to reach consensus through deliberation and persuasion in the Article 7 TEU procedure with Poland and Hungary.

11.2 The Council Presidency: A Coordinative Responsibility with Shared Power

The Council is a complex institution that performs legislative, executive and steering functions, through which governments attempt to develop convergent national positions. Designed as an arena of mediation and consensus-building, the Council is "part-intergovernmental" and "part-supranational" (Lewis, 2014: 321). The Council is the place where Member States represent national interests. Despite natural disagreements, political and diplomatic actors eventually reach consensus (Novak, 2013), either through deliberation (Puetter, 2012), persuasion or coercion. It is not only a forum in which national interests are put forward, but also a place where "a collective legitimation" process takes place, determining "what counts as an acceptable interest in the EU context" (Lewis, 2014: 321).

The Council Presidency plays a central role in this process. As discussed in Chapter 1, various authors have explained the presidency's roles and ability to reach decisions, either with a focus on institutional factors—such as the agenda-setting powers of the rotating presidency (e.g. Häge, 2017; Tallberg, 2003), leadership styles or inter-institutional relations—or with an emphasis on ideational factors—such as Member States' ideas, interests and contextual elements (Princen, 2007: 24–25). Agenda-setting powers of the Council Presidency include both institutional power to "influence the allocation of the Council's political attention over specific policy issues by distributing limited time and space for meetings" and ideational power to influence decision-making outcomes by presenting compromise proposals (Häge, 2017: 696).

11.2.1 Towards a More Coordinated Agenda-Setting Process

Since the establishment of the European Communities, the Council Presidency is set up on a rotating basis, with each Member State holding it for a six-month period. Not only the Treaty of Lisbon but also the Council's Rule of Procedure have put in place a system that invites the Presidency to coordinate its mandate with various actors, including the "trio" and other EU institutions. Traditionally, during each semester, the Council Presidency sets the agenda, putting forward the key priorities of its mandate. Scholars have demonstrated that its role varies depending on factors such as the ambitions of the Member State and its vision for the EU, its administrative capacity, domestic politics and external events, as well as the ability to perform the main functions of the Presidency (Batory & Puetter, 2013). These consist of establishing the agenda, chairing meetings, mediating positions in the Council, managing inter-institutional relations, ensuring continuity and consistency, and building consensus (Quaglia & Moxon-Browne, 2006: 349; Schout & Vanhoonacker, 2006).

It has been argued that presidencies can exert influence via their *agenda-structuring powers*, i.e. by "emphasising or de-emphasising issues already on the agenda" or through *agenda-exclusion* which refers to "the active barring of issues from the policy agenda" (Tallberg, 2003: 5). In other words, "political actors seek actively to bring issues on to the agenda if they are looking for a change of policy, or to keep them off the agenda if they want to defend the status quo" (Princen, 2007: 21). Concerning the case under consideration, this chapter shows that the rule of law agenda is mainly driven by the Member States who historically designed and contributed to the foundations of the EU polity, including its values, as enshrined in Article 2 TEU. Through playing an *agenda-structuring* role, it appears that Western European governments holding the rotating presidency are more inclined than Eastern European governments to feature the rule of law in general, and Article 7 TEU in particular, in their programmes. Yet, it is important to underline that even Western Member States approach rule of law concerns from different angles, where the inclination is to prioritise other rule of law tools over the use of Article 7 TEU. Given the sensitivity of the procedure, we hypothesise that

H.1.1 The Council Presidency tends to emphasise the rule of law in general in the programme, while downplaying Article 7 TEU.

In practice, the Presidency's power to put Article 7 TEU on the Council meeting agenda is institutionally constrained and depends on the degree of support received from other Member States or EU institutions. In a more coordinative institutional framework, the passive role of the Presidency can be compensated by an active role of the other Member States representatives. Thus,

H.1.2 When the Presidency is passive, groups of active Member States keep the issue on the agenda.

Alternatively,

H.1.3 When both the Presidency and the Member States are passive, the Commission and the EP can pressure the Council Presidency to act as agenda-setter.

11.2.2 Formal and Informal Institutional Rules Undermining Deliberation and Persuasion

Reaching decisions is at the core of the Council's *raison d'être*. The Council's capacity to find consensus is determined by its ability to compromise in political, technical and diplomatic negotiations. This chapter shows that by setting the rules of conduct of the Article 7 TEU procedure in general and the modalities to organise hearings in particular, Member States have limited themselves the space for both deliberation and persuasion. As a result, the chapter hypothesises that

H.2.1 The ability of the Presidency to act as consensus-builder through deliberation and persuasion is limited by the institutional setting.

Although key sensitive decisions are still adopted by unanimity and qualified majority voting has been extended, in practice, most of the decisions are adopted by consensus unless a Member State requires the vote. As Lewis puts it, the logic behind the culture of consensus in the Council, where "consensus is a reflexive habit", is to "bring everyone on board"

(2005: 949). Member States implicitly and explicitly defend their position, their visions for the EU and specific policy preferences. For some authors, national representatives tend to join the majority and refrain from abstention or opposition as a "strategy of blame avoidance" (Novak, 2013). In this sense, consensus is understood as the absence of explicit opposition rather than a general agreement and negotiations are pursued "until there is no more apparent blocking minority" (Novak, 2013: 1094, 1097). According to Puetter, "intensive policy dialogue, commitment to continuous consensus-seeking and policy deliberation at the highest political level even at times of serious disagreement over policy options" are key features of the Council (2014: 24).

But the way in which Member States express consensus (Novak, 2013), contestation (Lewis, 2014) or dissensus (Coman, 2022) in the Council matters. The analysis of the Article 7 TEU procedure shows that the internalised norms of diplomacy count as much as formal institutional factors. In other words,

H.2.2 The ability of the Presidency to reach an outcome is limited by the diplomatic norms of intergovernmentalism which prevail in the Council.

Deliberation and persuasion play a vital role at every stage, as the policy process is essentially a "rhetorical and interpretative exercise in which protagonists engage in discourses intended to both define and further their ideas and interests" (Howlet et al., 2020: 28). Persuasion also implies an exchange of views whereby the power of the best argument tends to prevail. The power of persuasion or the power of good argument can be as compelling as a blocking minority. Yet, over the past decade, populist governments have challenged the functioning of the Council in different ways and through diverse strategies. As examined by Zaun and Ripoll Servent (2022), they reject the formal and informal rules of Council decision-making if "they are not conducive to their preferred outcome", they "reject traditional means of ensuring compromises", "they reject the final solution and exploit the ensuing deadlock to prove that the EU is weak and dysfunctional"; and ultimately they contest the legality (not only the legitimacy) of EU procedures (Coman, 2022). Against this backdrop, we derive the following hypothesis:

H.2.3 The ability of the Presidency to reach an outcome is limited by national delegations' deliberation styles.

11.3 Rule of Law: On the Council Presidency's Agenda Since 2018

The European Parliament has been launching debates on the situation in Hungary since 2010 and on the situation in Poland since 2015. The Commission has also used some of the hard and soft tools at its disposal, including infringement proceedings, the Rule of Law Framework, the European Semester, the EU Justice Scoreboard, and more recently the Annual Rule of Law Report and Rule of Law Conditionality Regulation 2020/2092. In contrast, in the first half of the 2010s, Member States were reluctant "to confront Poland and Hungary in a robust way" (De Búrca, 2022: 10). Since Article 7(1) TEU was first triggered, the rule of law has occupied an inconsistent place on the agenda of rotating presidencies of the Council, as illustrated by the analysis of all trio and individual programmes since 2018.

11.3.1 Setting the Agenda: Emphasising and De-emphasising Strategies

The way in which the rule of law is put forward by the Council Presidency varies. Despite the problems that all EU Member States face when it comes to respect for the rule of law, its importance for the EU polity has been underlined by all the presidencies since 2018. Some presidencies mentioned it in relation to democratic backsliding, or in connection with other issues such as Germany, Portugal and Slovenia's assessment of the EU's response to the Covid-19 pandemic "fully respecting our values, rights and the rule of law" (Council of the EU, 2020: 3). Others emphasised the rule of law's necessity for the functioning of the EU. Finland (2019: 5) and Slovenia (2021: 12) underlined importance of the rule of law for the European economy and internal market. The Austrian Presidency (2018: 30), the Croatian Presidency (2019: 23) and the French Presidency (2021: 9) depicted it as a strong cluster of judicial systems which allow for mutual trust. Like Portugal (2020: 7), Germany underlined that it is "the fundamental prerequisite for the protection of other values" (2020: 18). Bulgaria was the only country that did not refer to the

importance of the rule of law during its Presidency as an internal policy question, but instead in relation to the EU's enlargement to the Western Balkans. In contrast, Finland prioritised the protection of the rule of law and dedicated the first part of its programme to "Common values and the rule of law, cornerstones of EU action" (2019: 2). If most programmes included the rule of law in rather general terms, Germany (2020: 18) and France highlighted "deficits as regards the rule of law" within the EU. Slovenia was the only Member State to hint at the tensions within the Council concerning the non-respect of the rule of law and the "need to depoliticise the debate (2021: 13) to "contribute to a convergence of views to improve mutual understanding and trust between Member States and institutions" (2021: 19). Furthermore, Slovenia warned that "many are unwilling or unable to see cases where the standards and guarantees of the rule of law do not really protect the European values" (2021: 13). With the rule of law being tackled at the EU level through many different policy instruments, some Council presidencies put more emphasis on some tools than others, depending on the context and the place of said instruments on the agendas of other institutions. There is a tendency, as presented in Table 11.1, to emphasise the rule of law in general while downplaying Article 7 TEU in particular.

As illustrated in Table 11.1, all presidencies—except Bulgaria, Romania, and Croatia—devoted particular attention to the Rule of Law Dialogue (RLD), which was established in 2014 on the initiatives of Belgium and Germany as an intergovernmental instrument of the

Table 11.1 The rule of law in the Council presidencies' individual and Trio programmes (2018–2023)

Year	*2018*		*2019*		*2020*		*2021*		*2022*		*2023*
Rotating presidency	*BG*	*AT*	*RO*	*FI*	*HR*	*DE*	*PT*	*SI*	*FR*	*CZ*	*SE*
Rule of law dialogue		X		X		X	X	X	X	X	X
Multiannual Financial Framework (MFF)				X							
Regulation 2020/2092				X		X			X	T	X
Article 7 TEU						X			X	X	X
Infringements						X					

Legend: X = Individual program; T = Trio program only

Council. Designed to be conducted on a regular basis and following a neutral, non-partisan and evidence-based approach (Council of the EU, 2014), the RLD aims at promoting and safeguarding the rule of law between Member States. Its first iteration was under the Luxembourg Presidency in November 2015, the second under the Dutch Presidency in May 2016, the third under the Estonian Presidency in the second half of 2017 and the fourth under the Austrian Presidency in November 2018. The first evaluation of this tool in 2016 was followed by a second one during the Finnish Presidency in 2019. Although very much appreciated by diplomats and political actors because of its informal and "constructive" nature (Interview 1; Interview 3; Interview 6; Interview 9) as a favourable forum in which to exchange "best practices" in a non-confrontational atmosphere (Interview 5; Interview 6), the Council's Rule of Law Dialogue is neither a forum for deliberation nor persuasion, but rather sheds light on the challenges faced by different Member States.

Depending on the institutional agenda at the EU level, which has been disrupted by the Covid-19 pandemic and Russia's war of agression in Ukraine, some Council presidencies have devoted particular attention to the Multiannual Financial Framework (MFF), which the Commission proposed to adopt together with Regulation 2020/2092 on the protection of the Union budget. The Regulation's purpose is to make EU funds conditional upon the termination of breaches of the rule of law which (could) put the Union's budget at risk. Interviewees argued that the MFF was a priority for the so-called "frugal four", in particular Austria (Coman, 2022). Finland was the only country to mention the MFF as a potential instrument for safeguarding the rule of law in its Presidency programme (Finland, 2019: 16) although work on the file had been conducted at a technical level during the Romanian Presidency (Coman, 2022). Regulation 2020/2092 was supported in the Germany's individual programme and the trio programme of France, Czechia and Sweden (2020: 18; Council of the EU, 2021: 4), while Germany was the only presidency to invoke proceedings before the Court in its programme (2020: 18). Ultimately, only four countries mentioned the Article 7 TEU procedure: after Germany in 2020, the trio of France, Czechia and Sweden expressed their support for the procedure.

11.3.2 Setting the Working Agenda of the Council: Passive Vs. Active Presidencies

Yet, beyond the programme, putting the rule of law on the Council meeting agenda has proved to be challenging. From an institutional point of view, the presidency can make a proposal to add Article 7 TEU to the agenda. Some have been active in this regard, while others have refused to deal with such concerns (Hernández, 2022: 10–11). According to Article 2 of the Council Rules of Procedure, provisional agendas for all meetings are sent at least one week before the beginning of a term (General Secretariat of the Council, 2015), but the final version must be adopted by a simple majority in the Committee of Permanent Representatives (COREPER). From an institutional point of view, the Presidency's willingness is therefore not sufficient to transfer an item from its programme to the meeting agenda. Alternatively, if the presidency is not willing to include an item on the agenda, Article 3 states that the Commission or a Member State delegation can send a request at least 16 days in advance if the necessary documents are available (General Secretariat of the Council, 2015: 41). Institutional rules can thus represent an obstacle for an active presidency, or an additional opportunity in case of a passive presidency, to add Article 7 TEU to the Council meeting agenda. The institutional framework therefore limits the presidency's room for manoeuvre to some extent.

As illustrated in Table 11.2, since 2018, six hearings have been organised with Poland during the Bulgarian, Austrian, Portuguese, French and Swedish presidencies, while six hearings with Hungary have been organised during the Finnish, Portuguese, French, Czech and Swedish presidencies. Their organisation and conduct came as a result of commitment from various actors: presidencies, Member States and supranational institutions, as a reflection of a more interactive and coordinative functioning of the Council Presidency.

At the outset, the mere inclusion of a hearing on the agenda of the Council was challenging (Interview 4; Interview 8). After Article 7(1) TEU was triggered against Poland, the subsequent presidencies—Bulgaria and Austria—sought to avoid the topic in order to, as diplomats argued, remain neutral towards the members concerned (Interview 6) or because of their own domestic problems in relation to the rule of law (Interview 4). Nevertheless, the pressure exerted by the Commission and other Member States representatives in the Council led to the first hearings

Table 11.2 Timeline of conduct of Art. 7 TEU hearings under the rotating Council presidencies (2018–2023)

Year	*2018*		*2019*		*2020*		*2021*		*2022*		*2023*
Rotating presidency	*BG*	*AT*	*RO*	*FI*	*HR*	*DE*	*PT*	*SI*	*FR*	*CZ*	*SE*
Poland	H1: 26 June 2018	H2: 18 September 2018 H3: 11 December 2018					H4: 22 June 2021		H5: 22 February 2022		H6: 30 May 2023
Hungary				H1: 16 September 2019 H2: 10 December 2019			H3: 22 June 2021		H4: 23 May 2022	H5: 18 November 2022	H6: 30 May 2023

Legend: H = Hearing

with Poland during the Bulgarian Presidency, while Austria organised the second and the third ones. On the contrary, Finland was the first presidency to be proactive on this matter and held the first and second hearings with Hungary. Yet, according to diplomatic sources, this decision even created tensions in the Council (Tuominen, 2022: 9; Interview 4; Interview 6). The necessary agreement in COREPER would have come down to only a few votes leading to diplomatic strains. For instance, one interviewee noted that Poland was "frustrated" when Latvia supported the organisation of one of the first hearings (Interview 8). But then, once the initial contestation passed, the procedure became a routine (Interview 2; Interview 8). Compared with the first hearings, the issue at stake in recent years has been less whether the subject will be included on the agenda and more its format (Interview 5).

Indeed, according to Article 7(1) TEU, the Council "shall hear the Member State in question". Two configurations emerged from the interpretation of this provision: a hearing or a "state of play". The former is enshrined in the treaties, the latter results from the day-to-day practice. A hearing is a formalised exercise involving rules of procedure and a specific agenda adopted in COREPER. A state of play is shorter and more informal, covers the situation in the country concerned by the procedure and must also be adopted as an item on the Council agenda. Interviewees highlighted that the format chosen to appear on the agenda elicited different objectives and meanings. On the one hand, a hearing has higher political significance, sending the message to the Member State in question (and EU institutions) that there is no intention to end the procedure. On the other hand, a state of play can be a means to put pressure on the Commission to monitor the situation and to provide current information (Interview 5). It also allows the Council Presidency to remain neutral and avoid confrontation with Poland or Hungary without stalling the process, according to interviews. It is an opportunity for the Commission or the Member State concerned to show to the Council members there is progress around the procedure (Interview 5; Interview 10). It also allows the Council to put pressure on Poland or Hungary given persistent problems (Interview 5).

Contextual or political events can impact the *agenda-structuring* powers of the Presidency and the conduct of hearings (Interview 8; Hernández, 2022: 15–16). Several presidencies have had to change their initial plans. For example, after the outbreak of the Covid-19 pandemic, no physical Council meeting could take place. As a result, Germany

could not organise any hearings and replaced them with state of play updates. Since then, state of play updates have become usual practice. The Portuguese Presidency had to wait until June 2021 to conduct the fourth hearing with Poland and the third hearing with Hungary during the same General Affairs Council (GAC) meeting. The political agenda is also important: during the French Presidency, the hearing with Hungary was postponed after the Hungarian presidential elections to avoid any interference with the procedure (Interview 8). France eventually managed to conduct the fifth hearing with Poland and the fourth hearing with Hungary. However, as noted by an interviewee, there is "no point" in organising a hearing if there is "nothing new" (Interview 10) given the higher costs and amount of preparation required. Although there is no obligation for a presidency to schedule either of the two configurations, because of the normalisation of the procedure and the pressure from public opinion and EU institutions, it is not conceivable "in diplomatic and practical terms" that a presidency would completely avoid the topic, as "even if some Member States are less enthusiastic than other presidencies, they end up dragged along" (Interview 10). Nowadays it has become common practice to organise at least one state of play update per rotating presidency. Ultimately, the level of prioritisation impacts the perception of the presidency's commitment, the perception of the targeted state, and the perception of the procedure by the other institutions (Interview 8).

The Council Presidency has an important but not exclusive role in setting the agenda. Member States can exert pressure on the presidency. Active members such as Belgium have sought to maintain the conduct of hearings as they have a higher symbolic value (Interview 7). For instance, the second hearing with Poland during the Austrian Presidency resulted from a request of a majority of Member States (with no one opposing the vote in COREPER). In the case of Hungary, Council members were also active, as one year had passed between the procedure being triggered and the conduct of the first hearing. During the Romanian Presidency, several countries supported the organisation of a proper hearing, including Sweden, France, Germany, Luxemburg and the Netherlands (Agence Europe 1 February 2019; 9 April 2019). Yet, no hearing was organised with Hungary during the Austrian and Romanian presidencies, and they put two reasons forward to justify the delay (Pech, 2020: 164): one was the breadth of the EP's Reasoned Proposal questioning the selection of items to discuss during hearings, and the other was Hungary's lawsuit against the EP before the Court of Justice. On the contrary, the

members concerned by Article 7(1) TEU have succeeded in turning a hearing into a state of play update, notably Hungary during the Slovenian Presidency (Interview 8). The Czech Republic was also hesitant to organise hearings due to diplomatic reasons. In the end, the presidency organised a fifth hearing with Hungary but held a state of play update with Poland, since it was its turn that semester to be examined through the Rule of Law Dialogue. According to interviews, presidencies dedicate a considerable amount of time to bilateral meetings with Council members (Interview 1; Interview 12), as well as Poland and Hungary, to "get the Member State concerned on board" (Interview 10). As one diplomat declared, a hearing or state of play update in a GAC meeting is "only the tip of the iceberg" (Interview 10).

11.3.3 The Proactive Role of Supranational Institutions

Since 2018 the European Commission and the European Parliament have put pressure on the Council to advance the procedure. In the case of Poland, beyond triggering Article 7(1) TEU in December 2017, the Commission has played a key role in making sure organising hearings is on the Council's agenda (Closa, 2021: 510; Hernández, 2022: 15). The first and third hearings, in particular, were adopted by COREPER at the Commission's request. According to our interviewees, the pressure culminated with the Juncker Commission, during which Commissioner Timmermans was "very active", even seen as "politicising the issue" (Interview 6). Tensions have decreased since the von der Leyen Commission. In the case of Hungary, as the procedure was triggered by the European Parliament through its Reasoned Proposal, the Commission refused to play the role of a proxy, stating that the EP "should be given the possibility to present its case in procedures it has initiated" (European Commission, 2019: 14). During the first hearings, presidencies assumed a steering role since there was no formal setting and many questions had to be addressed (Interview 3), but they were variably sensitive to the participation of the EP (Interview 8). The contestation of the Reasoned Proposal by the Hungarian government in front of the Court of Justice led to the formalisation of the procedure by the Council Legal Service (CLS) in 2019. The year before, the CLS provided a verbal opinion regarding the modalities of hearings during the Austrian Presidency, refusing the participation of the EP on the grounds that it "would violate the institutional balance" (Pech et al., 2019). Some Member

States also challenged its exclusion, including Greece, the Netherlands, Germany, Spain, Belgium and Denmark, while the United Kingdom, Latvia and Hungary fully supported the view of the CLS (Ibid). During a meeting with representatives of the Trio Council presidency in September 2019, representatives of the LIBE committee expressed the EP's view that side meetings could not replace a formal presentation of the Reasoned Proposal by the rapporteur before the Council, and that it should be put on an equal footing with the Commission (Council of the EU, 2019b). A few days before the first hearing with Hungary on 16 September, the former EP President David Sassoli sent a letter to the Council presidency asking for an invitation to the GAC meeting. In its response in October 2019, the Finnish Presidency stated that the Council Rules of Procedure and Article 7(1) TEU do not prescribe such a role to the EP (Council of the EU, 2019c). Even if the first draft of the procedural modalities included the possibility of inviting a representative of the EP to present the Reasoned Proposal (Council of the EU, 2019a), the final version excludes the institution from hearings. According to an interviewee, this exclusion is justified to maintain the proper functioning of the Council, where the EP does not have "a special seat" (Interview 8). Nevertheless, the EP continues to pressure the Council "to show genuine commitment to make meaningful progress" through various resolutions (European Parliament, 2022). Regular meetings are held between the Council presidency and the EP, such as Croatia's organisation of a broader exchange with Member States, which led to tensions between parliamentarians and Polish representatives. Meetings usually take place with the same members of the European Parliament who are particularly proactive, vocal and in favour of the procedure (Interview 1). Ultimately, the opinion of the CLS provided a basis before the adoption of the hearing procedural rules by the GAC on 18 July 2019 (Council of the EU, 2019a). However, the section below demonstrates that the chosen institutional framework limits the potential for discussion, transforming the "nuclear option" into a "talking shop".

11.4 From a "Nuclear Option" to a "Talking Shop"?

Once Article 7 TEU was triggered by the Commission and the EP, the Council had to determine its own rules. Some Member States felt the need to formalise the hearing procedure, including the countries

concerned for which "procedural aspects are important" (Council of the EU, 2018). As this section shows, Member States themselves have limited the Council's room for manoeuvre by establishing a constraining institutional framework that does not allow for deliberation or persuasion. Hearings have been institutionalised as passive exercises, whereby actors feel "uncomfortable" for both political and diplomatic reasons illustrated in this section.

11.4.1 The Role of Presidencies in the Institutionalisation of the Hearing Procedure and Its Constraints

The institutionalisation of the hearing procedure has given rise to many questions concerning its scope, the role of EU institutions and the rights of the country facing the procedure, in other words the hearings' "choreography". Given the political sensitivity of the debates, the objective was to depoliticise them (Interview 1) to establish a setting that would ensure an equal and fair treatment of Member States, without impacting the effectiveness of this stage of the procedure (Interview 4). For the first iterations, the Council Presidency played an important role. Each hearing had to be entirely prepared and adopted in COREPER (Interview 4). Thus, for the first hearing with Poland in June 2018, the modalities were defined by the Bulgarian Presidency with the support of the Secretariat General. Austrian diplomats recalled that the modalities were on the agenda of "every GAC meeting" because there was so much to discuss, and as it was "a new process, everything had to be invented" (Interview 3). The role of the Presidency was therefore central in steering the process in quite a flexible way. As a result, the General Secretariat of the Council defined the standard modalities, specifying the scope of the procedure and the focus on the issues raised in the Reasoned Proposal that led to the activation of Article 7 TEU. They were adopted without discussion during the GAC on 18 July 2019. The procedure slightly differs depending on which actor initiated the Reasoned Proposal (Member States, the EP or the Commission) as illustrated in Table 11.3.

As a rule, the hearing starts with a presentation made by the institution that triggered Article 7 TEU; this is limited to 20 minutes (Council of the EU, 2019a). The presidency is responsible for presenting the view of the EP as it is not represented in the hearings. In response, the Member State concerned presents its view for up to an hour. According to the procedure, each Member State can address two questions and the concerned country has up to ten minutes to respond. At the end of the

Table 11.3 Comparison of procedural modalities of hearings depending on the type of activation of Article 7(1) TEU

Hearing process		*European Commission*	*European Parliament*	*One third of EU Member States*
First hearing	Opening	Presentation of the Reasoned Proposal by the **Commission** for up to **20 minutes**	Report by the **Presidency** following contact made with the European Parliament	Presentation of the Reasoned Proposal by **a representative of the Member States** that submitted it up to **20 minutes**
		Opportunity for the **Member State concerned** to present its views on the issues covered by the hearing; initial presentation of **one hour** maximum; possibility to elaborate further in writing		
			Option for the **Commission** to provide comments or information relevant for the issues covered for **10 minutes** maximum	
	Q&A session	Each Member State can ask up to **2 questions per issue;** follow-up questions allowed; **2 minutes** maximum per question. Response to each question by the Member State concerned in **10 minutes** maximum, possibility to elaborate in writing		
	Closing	Observations and remarks by the **Member State concerned**, **no time limit;** procedural conclusions by the Presidency		
Subsequent hearings	Opening	Possible update by the **Commission** for **up to 15 minutes**		Possible update by a representative of the Member States that submitted the Reasoned Proposal for **up to 15 minutes**
		Opportunity for the **Member State concerned** to present its views on the issues covered by the hearing for **up to 20 minutes**		
			Option for the **Commission** to provide comments or information relevant for the issues covered for **10 minutes** maximum	

Hearing process		*European Commission*	*European Parliament*	*One third of EU Member States*
	Q&A session	Each Member State can ask up to **2 questions per issue;** follow-up questions allowed; **2 minutes** maximum per question. Response to each question by the Member State concerned in **10 minutes** maximum, possibility to elaborate in writing		
	Closing	Opportunity for the **Commission** to make observations for **up to 15 minutes;** Observations and remarks by the **Member State concerned**, **no time limit;** procedural conclusions by the Presidency	Observations and remarks by the **Member State concerned**, **no time limit;** procedural conclusions by the Presidency	Opportunity for the **Member States that submitted the Reasoned Proposal** to make observations for **up to 15 minutes;** Observations and remarks by the **Member State concerned**, **no time limit;** procedural conclusions by the Presidency

hearing, the Member State concerned is given the opportunity to present its own observations and remarks, for which no time limit is foreseen. In practice, hearings have not exceeded two or three hours and their duration has decreased over time. Diplomatic sources have argued that this tendency was due to a lack of progress and the conflicting nature of irreconcilable positions (which are both discussed in the next sections). The standard modalities therefore favour the argumentation of the Member State concerned, to the detriment of other Council members. Several diplomats argued that the hearing "is not a good format" because one "cannot react" (Interview 1). Only follow-up questions are allowed.

The scope of each hearing is adopted in COREPER. In the case of Poland, the issues to be discussed were put forward by the Commission whose Reasoned Proposal focused on very specific institutional issues concerning the judicial organisation in Poland including the Supreme Court, the Constitutional Tribunal, the National Council for the Judiciary and standard courts, as well as specific regimes and procedures (see Table 11.4). When it comes to Hungary, the scope has been based on the much broader Reasoned Proposal of the EP adopted in September 2018. As illustrated in Table 11.4, the first hearing covered 12 topics including several issues such as minority rights and academic freedom, as well as institutional matters such as corruption or the independence of the judiciary. For the second hearing with Hungary, the list of topics was reduced to three: the independence of the judiciary and other institutions and the rights of judges; freedom of expression; and academic freedom. For the remaining hearings, all the issues raised in the Reasoned Proposal of the European Parliament were addressed again, so that the Council received an up-to-date picture of the situation in the Member State in question. According to a legal expert working on this matter in the Council, it is a mistake to proceed with such a wide scope because "one that tries to gather a lot gets very little" and it would be better to focus on a few sound elements rather than "hundreds including some that are questionable" (Interview 5). The scope is thus another limitation of the debate during hearings, even if new developments can impact their content, such as the law against the LGBTIQ community adopted by Hungary which provoked heated discussions in June 2021 (Interview 7; Interview 12).

In contrast, a state of play is less formal and does not involve strict steps. Despite there being no time limit, it is shorter than a hearing. It begins with an update by the Commission on the rule of law situation

Table 11.4 Scope of the hearings organised with Poland and Hungary in the Council as part of Article 7(1) TEU

Hearing	*Date*	*Scope of the hearing*
Poland	26 June 2018 18 September 2018 11 December 2018 22 June 2021 22 February 2022 30 May 2023	All the issues raised in the Reasoned Proposal of the Commission: (1) Supreme Court (2) National Council for the Judiciary (3) Ordinary Court Judges (4) Disciplinary Regime (5) Court Presidents (6) Extraordinary Appeal Procedure (7) Constitutional Tribunal
Hungary	16 September 2019	All the issues raised in the Reasoned Proposal of the European Parliament: (1) functioning of the constitutional and electoral system (2) independence of the judiciary and of other institutions and the rights of judges (3) corruption and conflicts of interest (4) privacy and data protection (5) freedom of expression (6) academic freedom (7) freedom of religion (8) freedom of association (9) right to equal treatment (10) rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities (11) the fundamental rights of migrants, asylum seekers and refugees; and (12) economic and social rights
	10 December 2019	(1) independence of the judiciary and of other institutions and the rights of judges (2) freedom of expression (3) academic freedom
	22 June 2021 23 May 2022 18 November 2022 30 May 2023	All the issues raised in the Reasoned Proposal of the European Parliament

within the country which is concerned by the Article 7 TEU procedure. Member States are then allowed to intervene, but contrary to the hearing process, they are not invited to ask questions; they rather express

comments, criticisms or requests (Interview 7) even if, in legal terms, there is no rule that prevents them from asking questions (Interview 5).

The constraining institutional framework adopted by the Council does not lead to a real exchange of views, which is limited further by diplomatic norms in the Council and national strategies, as discussed in the next section. Even in the absence of strict modalities, state of play updates do not allow for a fruitful discussion. Both formats have little impact on the progression of the process since there is no limit on the number of state of play updates or hearings conducted during an Article 7(1) TEU procedure (Interview 8).

11.4.2 The Limits of Intergovernmentalism and Informal Diplomatic Norms

Conceived as a peer review exercise, in institutional terms, the aim of a hearing is to enable the members of the Council to have a more in-depth exchange with the country concerned on key issues (Council of the EU, 2018). In diplomatic terms, what the Council is seeking to obtain in the hearings is to make sure that the risk identified no longer exists (Interview 1). Their preparation is crucial for both the Member State concerned with the procedure and the other members of the Council. It goes beyond the report made by the Commission. "Each country has to prepare itself", whether that is through embassies sending information about the situation in the country, permanent representations drafting questions and their notes serving as "background information for the minister" sitting in the GAC (Interview 3). "Diplomats are doing the groundwork" (Interview 6). Although some countries try to maintain pressure there is unequal involvement among Member States.

In practice, during the hearing, up to eight seats are attributed to the country concerned. Member States are usually represented by their Ministers of European Affairs, as hearings are part of the GAC. During the Finnish Presidency, technical experts could accompany the ministers and even speak for the Member States concerned. However, the Portuguese Presidency put an end to this practice, considering that a political dialogue should take place between politicians who share a common language (Interview 12). Technical experts are available for short clarifications only. Other Member States can be represented by up to five people, and the head of the delegation can be assisted by another member of the delegation at the front table. Once GAC meetings started taking place again

after the Covid-19 pandemic, the number of attendees had to remain limited (as for the two hearings in June 2021). While the Member States concerned are almost always represented by their ministers,[3] other Member States can be represented by their ambassadors in Brussels: they have the credentials to act as if they were ministers (Interview 10). Representation is an element of the institutional framework that can impact the language of hearings, and thus their substance.

The hearings are also based on questions presented by Member States. As illustrated in Fig. 11.1, the number of questions has slightly fluctuated over time. Initially, hearings with Hungary involved a dozen Member States, then reached a peak with 17 Member States intervening during the fourth hearing in the context of the Fidesz government's announcement of its intention to ban public displays of homosexuality (see Coman, 2022). On the contrary, hearings with Poland started with the commitment of 15 Member States during the first one and stabilised around a dozen members during the following iterations.

The Council Presidency chairs the hearings and does not ask questions, but prepares the deliberations in collaboration with the delegations. Looking at the Member States that have actively engaged in addressing questions during the hearings, the agenda seems driven by the EU15. Figure 11.2 illustrates the distribution of questions asked during hearings among Council members. Presidencies that are active on the rule of law issue are also active Member States around hearings (Interview 8). A dozen countries have almost always intervened during hearings, aiming to attract additional Member States to their informal group of "like-minded" countries or "Rule of Law Friends" consisting of Belgium, the Netherlands, Luxemburg, France, Germany, Portugal, Spain, Ireland, Sweden, Finland, Denmark. Italy and Austria have also become supportive (Interview 7), and Slovenia and Slovakia recently joined the group (Interview 8). The so-called "Rule of Law Friends" alliance is an informal exchange forum (Interview 3). Questions are prepared in advance by Member State representatives, who seek to coordinate themselves in order to ensure all topics are covered and repetition is avoided (Interview 6; Interview 8). Some ask questions together, like the Benelux countries, France or Germany, "to send a stronger sign" (Interview 9). According to a French diplomat, the system of Franco-German coordination is a

[3] The 6th hearings were organised during the General Affairs Council on 30 May 2023. While Hungary was represented at ministerial level, Poland was not for the first time.

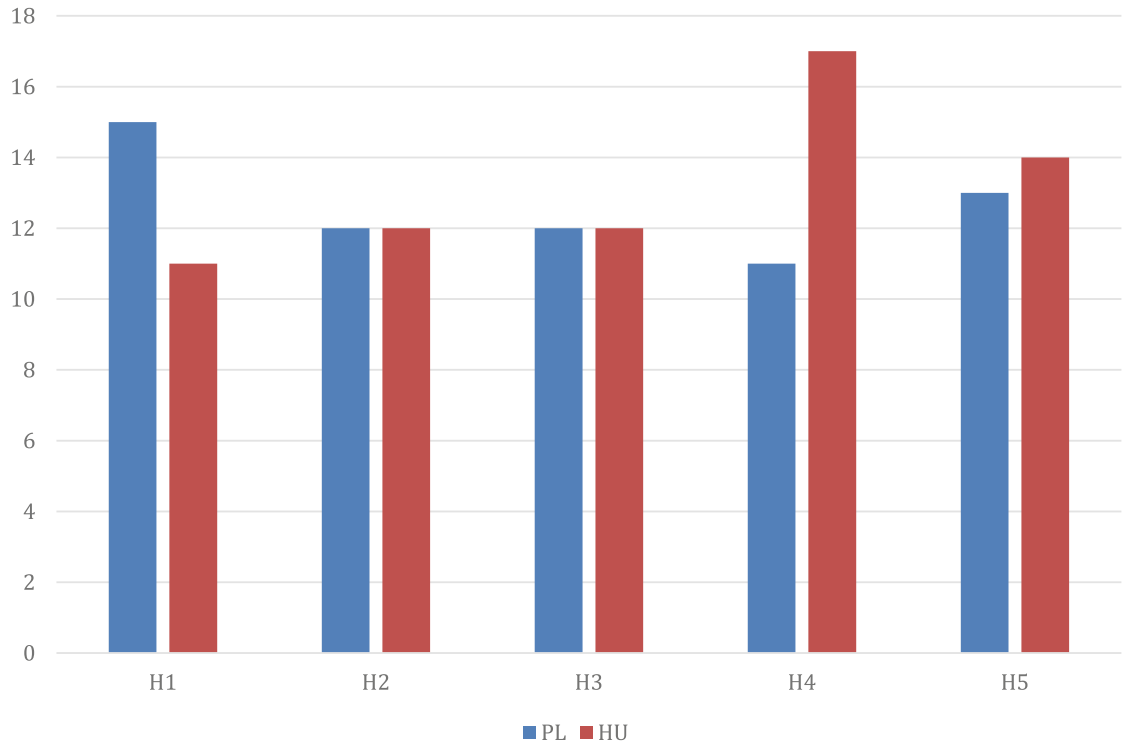

Fig. 11.1 Number of questions addressed by EU Member States per hearing with Poland and Hungary (*this Figure does not include the 5th hearing with Hungary and the 6th hearings with both countries*)

tradition. The two countries can be in agreement without negotiation and often—although not systematically—give the same view on an issue. This creates a basis which is difficult for other members to circumvent (Interview 8).

Some members are more passive during hearings (see Figs. 11.2 and 11.3). As one diplomat argued, "there is a group sitting there not doing much" not wanting "to antagonise" Poland and Hungary (Interview 10). A few countries wish to remain "neutral", such as Austria, Bulgaria or Romania (Interview 3) to "calm things down" (Interview 6). Others, such as Slovakia or the Czech Republic, used to support Poland and Hungary (Interview 6). Yet these Member States are not against the protection of the rule of law per se, but for some of them, it seems to be a matter of solidarity (Interview 8). Moreover, not asking questions does not amount to opposition to hearings (Interview 8). Each Member State has its own reasons to intervene or not during the debates. When invited to discuss the variations in the involvement of Member States during the hearings, our interviewees refused to speculate, but what looks

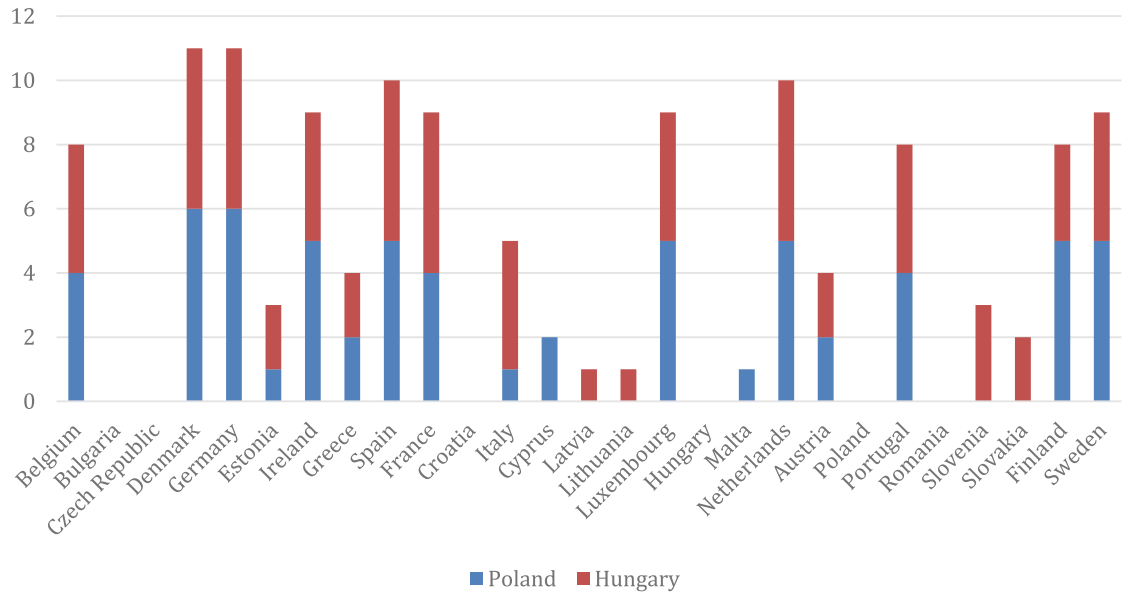

Fig. 11.2 Questions per Member State in the hearings with Poland and Hungary (*this Figure does not include the 5th hearing with Hungary and the 6th hearings with both countries*)

like an East–West divide can be explained by diplomatic, administrative or (geo)political reasons (see Figs. 11.2 and 11.3).

To illustrate *diplomatic reasons*, some interviewees stated that Article 7 TEU does not align with the way the Council works because the procedure implies "attacking a Member State in a diplomatic setting" (Interview 2; Interview 9). Others underlined that, for Poland and Hungary, being in this situation "is already a lot" (Interview 3) and that "complete exclusion is impossible in the Council" (Interview 4). German diplomats fear that "any further action would disrupt all the work of the Council" (Interview 9), and a Spanish counterpart underlined that "the decision of the Council can have a consequence for the EU as a whole" and "splitting the EU is not a solution to the rule of law problem" (Interview 5). Croatian diplomats shared the same view, arguing in favour of "solidarity" and underlining that they do not want to break the decision-making system (Interview 1). Furthermore, as support from other Member States is crucial for any Member State that wishes to advance a certain file in the Council, "antagonising" a country in relation to the Article 7 TEU procedure can be detrimental to the conduct of negotiations on other files (Interview 10). In COREPER, ambassadors know each other and "files do not come alone", instead "ultimately

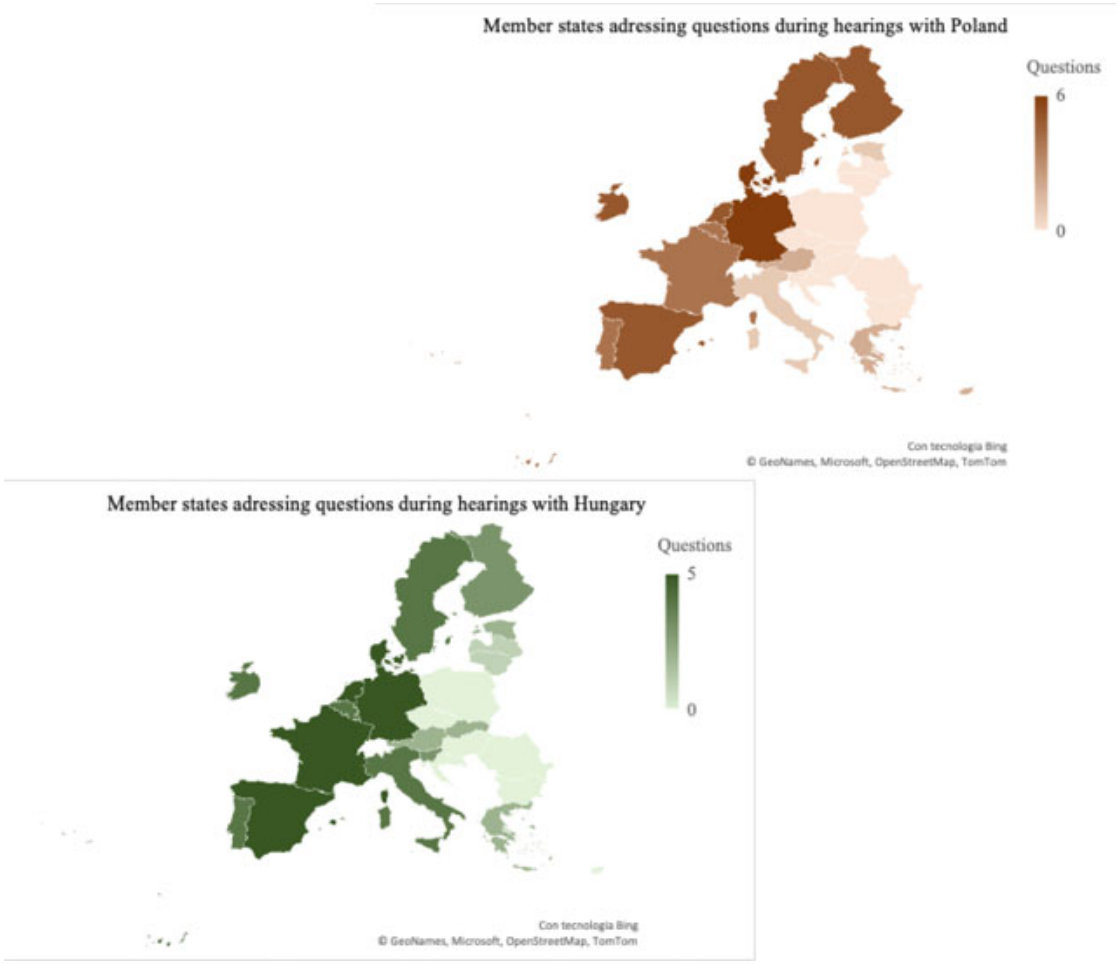

Fig. 11.3 Maps of the Member States which addressed questions during the five hearings with Poland and the four hearings with Hungary

together as a package" (Interview 4). Council's culture of consensus and the above-mentioned structural limitations prevent the outbreak of conflict, in particular on highly sensitive issues.

To illustrate *administrative reasons*, some Eastern European representatives justified their silence by arguing that their country does not have the capacity to follow the situation in Poland and Hungary and that they do not have the same level of expertise at their disposal to assess their domestic situation. The existence of internal threats over the rule of law can also prevent Member States from confronting other Member States, but this explanatory factor seemed more influential during the first hearings rather than the more recent ones (Interview 4; Interview 6).

From a more *political perspective*, during interviews with Member States reluctant to address questions as part of the hearings, diplomats underlined that both Poland and Hungary are their "close partners in the EU" (Interview 6). In fact, Baltic countries for instance are more active towards Hungary than Poland for this reason (Interview 7). According to a French diplomat, Lithuania does not ask questions to Poland because it would lead to unnecessary diplomatic costs, despite the fact that it continues to vote in favour of the organisation of hearings in COREPER (Interview 8). When it comes to the Article 7 TEU procedure the political affiliation of the government can impact the attitude of some Member States (Interview 3). For instance, Slovenia turned from a "practically Orbánist" stance to the "like-minded group" (Interview 8). This tendency is also reinforced by the ineffectual use of questions, as argued by a Croatian diplomat; the country intervened "two years ago, and nothing happened. Why bother?" (Interview 1). "Could such a process affect my country?" is a question that each member takes into account as it decides the position it will take during the process (Interview 3).

The standard modalities therefore favour the argumentation of the Member State concerned by the procedure, to the detriment of the "Q&A" session with other Member States. Paradoxically, after adopting this procedure several diplomats argued that the hearing "is not a good format" because one "cannot react" (Interview 1). Only follow-up questions are allowed. The lack of time constraint only concerns Poland and Hungary, while other actors are limited in this regard. Even though the Portuguese Presidency tried to push it further, the presidency did not impact the conduct of a hearing only providing procedural conclusions at the end (Interview 12).

Over time, it seems that the initial fortuitous East/West divide has been less apparent since the end of the Juncker Presidency (Interview 8, Interview 12). The number of Member States presenting questions to Poland and Hungary has increased over time, partly because of the routinisation of the procedure. There was no hearing where only "older" Member States asked questions (Interview 9). According to a Belgian diplomat, the GAC in June 2021 was a turning point: some ministers did not intend to intervene, but the adoption of an anti-LGBTIQ law in Hungary led to heated debates and more questions than expected (see also Coman, 2022). The most active countries in the hearing thus try to make sure that all the Member States participate (Interview 7). The objective of the "Rule of law Friends" is to display a sense of unity and maintain

a certain dynamism in the procedure, even if the lack of deliberation and outcome challenge its future, as argued in the next section.

11.4.3 No Deliberation, No Persuasion, at Best Confrontation or Apathy

Beyond the involvement of the Member States, the tone of the debate also matters. It is determined by the temperament and diplomatic style of the representatives of the country concerned. Antagonist views have been expressed from the very beginning as neither Poland nor Hungary agree with the Commission and the EP Reasoned Proposals. As the Polish Foreign Affairs Minister said, echoing arguments often exposed by Prime Minister Morawiecki and President Duda, "each country has the sovereign right to proceed with the internal reforms it judges appropriate" (Agence Europe 14 September 2018). Both countries also denounced an "overlap" of the application of the various mechanisms of the "rule of law toolbox": Article 7 TEU, the Rule of Law Dialogue, the MFF and now Regulation 2020/2092 (Interview 5). As argued by a German diplomat, "Article 7 TEU implies that one Member State is against all others, hence why it is nuclear" (Interview 9). Confrontation is inevitable, but deliberation remains impossible given the institutional framework established and opposing views.

According to diplomats, Poland and Hungary are both well-prepared but use different styles during the hearings. While the Polish delegation has often drawn on emotions and a spirit of "victimisation", Hungarian representatives have been more offensive and often put forward questions such as the legality of the procedure (Coman, 2022: 190). Diplomats "have experienced situations where it was difficult to be in the room" (Interview 7). Throughout the process, the Hungarian Minister contested the Reasoned Proposal as a political move made by a political institution (Interview 10). With Hungary discussions seemed "long and uncomfortable", which no one "liked" because it was sometimes an "aggressive exchange" (Interview 1). Interviewees depicted Judit Varga, the Hungarian Minister of Justice, as a well-prepared and "extremely combative" person, with a hard-line attitude and a discourse that sometimes played against her (Interview 7). Several interviewees recalled the Hungarian Minister readily attacking not only the Commission and the EP (Interview 5), but also other Member States, pointing out concerns, asking questions and claiming that the rule of law debate is a "socialist

conspiracy" or a "left-wing attack" (Interview 10). One hearing in particular gave the impression that "it was the 26 other Member States that were heard" instead of Hungary. However, these attacks quickly became counter-productive (Interview 8). A regular line of defence on the Hungarian side consisted of finding comparable examples in other countries to defend the domestic measures which were being contested. The Polish style has remained the same despite the change of ministers. As one diplomat recalled, the Polish Minister used language which is "elevated" or of a "eurocrat", explaining the Polish vision of the system and the issues at stake from a technical point of view (Interview 7; Interview 12). Interventions include "detailed points" and references to the case law of the court (Interview 10).[4] As a French source stated, the tone is sometimes aggressive, but hearings do not impact the usual Council diplomacy; it remains a European framework and the Council cannot be a tribune like the Parliament (Interview 8). Tension has also decreased due to changes of Commissioner: Didier Reynders remains "determined" but Article 7 TEU was Frans Timmermans' "*cheval de bataille*" (Interview 6; Interview 8). One question remains unanswered: is there appeasement because the procedure is now less contested or because the procedure is facing erosion and weariness? (Interview 8).

Moreover, Member States representatives contend that the debate has become too legal and technical. Some argued that the GAC is not the place in which legal issues should be discussed, and that Ministers of General or European Affairs are not always in the best position to discuss such technical questions (Interview 2; Interview 6). On the contrary, Polish and Hungarian ministers deliver in-depth replies as they are very good legal experts (Interview 8). Some diplomats maintained that hearings are inappropriate for legal dialogue as these should take place in a specialised arena. For instance, it happened "that a minister read out a very technical question and then three representatives of the country concerned read notes for a couple of minutes with very detailed provisions from their legislation" (Interview 10). In addition, interventions are not accompanied by fact-checking (Interview 1). The Commission's expertise has been reported more extensively with regard to the Polish

[4] The last hearings on 30 May 2023 seem to challenge this tendency: while the Hungarian minister appeared more compromising than usual, an internal source reported that the Polish representative—not a minister—adopted a "tougher" attitude, according to a diplomatic source (15 June 2023).

case it initiated than Hungary's (Interview 8). Hungary's hearings therefore required more work from Member States, who themselves have had to develop expertise on various judicial topics even if they cannot master them all. Diplomats of the group of like-minded states even created a shared set of documents to overcome this difficulty (Interview 8). Despite criticism, representatives of some Member States have underlined the valid legal character of some considerations raised by Poland and Hungary during hearings (Interview 5).

Over time hearings have gradually transformed into long monologues (Interview 9). "The procedure has a dynamism issue" in the sense that it is not interactive; it has even been described as mechanical by some. Years later, it is "still based on the initial claims" (Interview 10). Some even contended that Article 7 TEU reached its limits (Interview 2). Five years since the organisation of the first hearing, it is not clear whether Member States in the Council know how to conclude this procedure. Most of our interviewees argue that subsequent hearings are thus meant to keep the procedure alive. In trying to understand what Member States wish to achieve, some interviewees insisted that Article 7 TEU is not aimed at delivering outcomes, it is embedded in "a broader process" (Interview 9) which is not meant to solve all the problems identified (Interview 8; Interview 2; Interview 10) but instead flag them (Interview 9).

The method for closing the procedure seems to be a matter of interpretation. It is up to the Council Presidency to put a vote on the table to confirm a clear risk of a serious breach of the rule of law, which requires a majority in the EP and a four-fifths majority in the Council which is lacking (Interview 3), hence why it has never been attempted (Interview 4). But for some diplomats, this would not solve the issues at stake (Interview 5; Interview 9) nor would it put an end to the procedure (Interview 4). In contrast, many have contended that even if the procedure is discussed in the Council, the Commission plays an important role and is responsible for making a proposal (Interview 10) because, as diplomats declared, "the Council cannot do more" (Interview 9; Interview 12). In other words, the lack of outcome is not explained as the inability of the Presidency or of the Council to perform its function, but by putting forward the role of the Commission. The paradox is that diplomats see the Commission as being too cautious because the Commission makes a further move only if there is support in the Council, otherwise "the credibility of the Commission would be lost" (again, not the credibility of the Council) (Interview 10). Others, such as the group of like-minded states,

put forward the possibility to vote on recommendations in the Council—which are politically easier to adopt—with similar majorities in the EP and the Council (Interview 7). The initial uncertainty concerning the way in which to proceed with it in the Council was replaced by hesitations on how to bring it to a conclusion.

11.5 Conclusions

Article 7 TEU has now been developing for more than five years. Council presidencies have played an active role in the institutionalisation of the hearings. Initially, they had significant leverage to develop a tool that had never been used before. Since the procedure was formalised, each rotating Presidency has been able to emphasise or play down the rule of law on the agenda of the Council. The analysis shows that all of them expressed a preference for the Rule of Law Dialogue (as illustrated by the various programmes since 2018), while national priorities and alliances led to discontinuity in the advancement of the two Article 7 TEU proceedings. But several elements compel the Presidency to address the issue. First, the pressure of other Member States and EU institutions have an influence on the presidency's agenda. Second, a routinisation or "ratchet effect" has established the procedure and ensures that hearings or state of play updates are organised regularly even by reluctant presidencies. Over time, even Poland and Hungary have come to accept the procedure, with less contestation than at the beginning of the process. In the end, COREPER remains the forum where decisions are taken and where diplomats have the final say due to the fact that a majority of members must agree on the organisation of hearings and the definition of modalities. The Council Presidency thus plays an important but limited and non-exclusive role.

Article 7 TEU is now entrenched in Council meetings. However, hearings are not conducive to persuasion or deliberation among Council members; they are rather a "talking shop" or consist of long successive monologues. First, the institutional framework has been designed in a way that restricts the capacity for discussion and makes hearings unproductive in the absence of a decision. Second, our interviewees declared that the attitude adopted by the concerned members—Poland and Hungary—transforms the debate into a legal and technical discussion that not all ministers in the GAC are capable of following. Third, diplomatic rules

and thematic or geographical alliances may vary and affect the involvement of Member States, while the existence of opposing views does not allow for a final decision. Incompatible views in the Council have weakened the procedure. Alliances between active members—in particular the group of Rule of Law Friends—aim to circumvent these limitations by maintaining the pressure when it comes to the organisation of hearings, the development of a legal corpus, the distribution of questions and the inclusion of new countries in the group. All our interviewees emphasised that Article 7 TEU is not a tool designed to solve the alleged rule of law issues directly and that it must be seen in conjunction with other rule of law instruments. Interviews revealed that there is no expectation to see an outcome emerging from Article 7 TEU but confirmed their hope that other rule of law instruments will show their effects. Member States representatives declare themselves powerless and encourage the Commission to move the procedure forward, absolving the Council of any responsibility and risking neutralising the deterrence effect that the procedure initially seemed to offer.

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List of Interviews

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