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The President of the European Council – from Rotation to Election

Abstract: This article discusses the principles of election of the President of the European Council, modified by the Treaty of Lisbon. The current procedure for selecting a permanent President of the European Council is presented against the background of the original model of the rotating presidency of both the European Council and the Council. It is worth mentioning that the Council, although in a modified form, has, until now, been using the system of rotating presidency. Key issues discussed in the article relate to two essential points. The first concerns procedural aspects of the election of the European Council president (including qualification requirements, the rules of election and the validity of the principle of incompatibilitatis). The second refers to an analysis of the potential impact of changes in the method of determining the European Council president on the scope of his competences.

Keywords: European Council, President of the European Council, selection procedure

Słowa kluczowe: Rada Europejska, przewodniczący Rady Europejskiej, procedura wyboru

1. Introduction

The European Council is currently one of the key institutions of the European Union, with the authority to determine strategic guidelines for the development of the whole international organisation as well as the stance on important, sensitive issues of European policies. At the same time, the European Council is one of the most interesting elements of the current corporate system of the European Union, as this institution evolved from customary meetings of member states' representatives; only in time was this practice sanctioned through the treaties of the primary law (for the first time in the Single European Act¹).

1 The Single European Treaty, signed on 17 and 28 February 1986, came into force on 1 July 1987 (Dz.U. WE L 169 of 29.06.1987).

The amendments to the foundation treaties of the European Union so far included many aspects of the activities of the European Council. One of the important issues was modifying the corporate system of coordinating the work of this institution. In its first incarnation the European Council was headed by the head of government or a head of state of a member state, based on a half-annual rotation of the presidency of the European Council². Following the latest reform under the Lisbon Treaty³ a permanent head of the European Council was introduced, and elected for a term of two and a half years.

In the context of the changes introduced, the primary aim of this article is an analysis of the current rules for electing the President of the European Council against the background of evolving legislative conditions. The secondary aim is to indicate what potential impact the modified rules have on the method and effectiveness of acting within the corporate system of the European Union.

2. The evolution of the rules for the presidency of the European Council

The permanent function of the president of the European Council was established under the Lisbon Treaty – the latest treaty to amend foundation treaties. The concept in itself was not new; it appeared in the 1970s, with ready proposals for treaty amendments prepared by the European Convention during the works on the European Constitution⁴. New regulations concerning the functioning of the European Council were part of the systemic reform of the European Union, which was intended as to be the answer to the issue of the effectiveness of the Union's corporate structure. An ineffective presidency model was indicated as one of the causes of inefficiency, in terms of the practical functioning of both the Council of the European Union and the European Council. This resulted in insufficient ability of the European Council to dictate the general directions and incentives for the development on the European Union, which contributed to the leadership crisis of the whole of the European Union⁵.

2 Such rule was introduced in the original version of the Treaty on the European Union signed in Maastricht on the 7 February 1992, enacted on 1 November 1993 (Dz.U. WE C 191 of 29.7.1992).

3 The Lisbon Treaty, amending the European Union Treaty and the European Community Treaty, signed 13 December 2007, enacted on 1 December 2009 r. (Dz.U. UE C 306 of 17.12.2007).

4 K. Wojtowicz, Projekt Traktatu ustanawiającego Konstytucję dla Europy – podstawy ustroju i porządku prawnego Unii Europejskiej, "Przegląd Sejmowy" 2004, No. 2, p. 32; Projekt Traktatu ustanawiającego Konstytucję dla Europy (CONV 850/03), 18.07.2003, final version – Traktat ustanawiający Konstytucję dla Europy (Dz.U. C 310 of 16.12.2004).

5 See in particular C. Grant, Restoring leadership to the European Council, "Center for European Reform Bulletin" z 1.04.2002 r., see: text <http://www.cer.org.uk/publications/archive/bulletin-article/2002/restoring-leadership-european-council> (accessed on 26.01.2015), A. Szczerba-Zawada, Pozycja ustrojowa Rady Europejskiej w systemie instytucjonalnym Unii Europejskiej,

Hitherto, the rotational leadership of one of the member states in the European Council, changed every six months did not facilitate the coherent functioning of the European Council. This was especially so because the state leadership was to a large degree burdened with duties associated with the concurrent leadership of the Council of the European Union, and therefore also presiding over the Council's advisory bodies. The practice of joint rotational presidency in two key institutions of the European Union had a negative impact on its effectiveness⁶. The concept of the reform of this model of functioning for the European Council (and the Council) was justified on the basis of new challenges of the prospective broadening of the EU membership to include ten new member states, and the growing need to increase the effectiveness of leadership across the European Union.

Having a permanent President of the European Council was seen as a more effective measure to promote and realise the interests of the Union, both inside and outside the organisation. The change of the mechanism for the leadership of the European Council was not treated as a strictly theoretical, doctrinal goal but as a solution to increase its essential ability to function within the framework of the European Union on the eve of the greatest enlargement of this organisation in history.

Despite a broad consensus over the need for the reform of the model for the functioning of the European Council reaching the compromise over the nature and formula for the leadership of this institution turned out to be quite complex. The Convention outlined the difference in opinion between the different member states. One of the concepts, favoured in particular by France and Germany, was the introduction of a permanent President of the European Council. Representatives of smaller member states, supporters of a 'community model' opting for the existing rotational model of leadership, adjusted to improve its effectiveness in practice, strongly opposed such concept. On one hand, they argued, introducing a permanent presidency of the European Council, elected for a term of office and therefore outside the appropriate control of member states may negatively impact on democratic legitimacy of the Union. On the other hand, it was alleged, a departure from a rotational system of leadership of the European Council will aid the concentration of power in the hands of largest member states of the European Union⁷. The opponents of the concept of introducing the new model of a permanent, term based President of the European Council also pointed out that this kind of change to the corporate system of the European Union may disrupt the functioning of the established model

Warszawa 2013, p. 96, K.M. Witkowska-Chrzczonek, *Dynamika rozwoju Rady Europejskiej w systemie instytucjonalnym Unii Europejskiej*, Toruń 2014, pp. 132-135.

6 A. Szczerba-Zawada, *Przewodniczący Rady Europejskiej, czyli o postlizbońskiej formule przewodnictwa w Radzie Europejskiej*, "Przegląd Sejmowy", 2014, No. 4 (123), p. 245.

7 See more in: J. Tallbeg, *Bargaining Power in the European Council*, "Journal of Common Market Studies", 2008, vol. 46, No. 3, pp. 689-690.

of institutional balance and cooperation and coordination as part of the Union decision making procedures⁸.

Finally a compromise was reached over the presidency of the European Council, along the median of the stances of the two main groups of member states. The idea of institutionalising permanent presidency of the European Council was linked with a quantitative definition of the remit of the president. In this way the role of the permanent President of the European Council in the corporate system of the Union was defined in a way that was almost analogous to the rotational leadership of the member states.

The Constitution for Europe Treaty developed a compromise concept of permanent presidency of the European Council; this finally came into force under the provisions of the Lisbon Treaty⁹. The authority of the President of the European Council is defined under Art. 15, Section 6 of the consolidated version of the Treaty on the European Union.

3. The procedure for electing the President of the European Council

The permanent President of the European Council is elected, in accordance with the provisions of Art 15 Para. 5 of the consolidated version of the Treaty on the European Union, by the European Council (through a qualified majority vote) for the term of two and a half years. His mandate may be renewed once. Other institutions, including the European Parliament (unlike with the procedure of electing the President of the European Commission) do not have any rights in the procedures of electing the President of the European Council, who personifies an intergovernmental, not community, dimension of integration within the European Union Framework.

The decision of the European Council on the choice of its President is taken through a qualified majority of votes, under the provisions of Art. 235 section 1 para.2 second sentence of the TFEU. This means that only heads of state or government of the European Union member states take part in voting. Other members of the European Council (the president of the European Commission and possibly the incumbent President of the European Council) do not participate in the vote. The decision of the European Council is made according to guidelines specified under Article 16 Section 4 TEU and under Article 238 section 2 TFEU. Previously, decisions

8 See more e.g.: I. Pernice, *Democratic Leadership in Europe: The European Council and the President of the Union*, (in:) J.M. Beneyto Pérez, I. Pernice (eds.), *The Government of Europe: Which Institution Design for the European Union*, Baden-Baden 2004, pp. 36-44.

9 See. P. Craig, *The President of the European Council*, (in:) J.M. Beneyto, I. Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts. Lisbon and Beyond*, Baden-Baden 2011, pp. 208-212.

on the choice of the President of the European Council were made according to the Nice System (in force until 31st October 2014).

In terms of a qualified majority vote, the European Council deploys appropriate guidelines adopted by the Council of the European Union. The principles of a qualified majority vote deployed until 31st October 2014 were based on weighted votes; in essence, this boiled down to countries having a different number of votes¹⁰. The distribution of votes happened through negotiations at international conferences and was relatively proportionate, with consideration given to such factor as the economic potential of member states, their population and territorial extent with favourable treatment of smaller countries. For all the decisions to be made so far by the European Council on electing its President (both Herman von Rumpoy during the first term on 1st December 2009 and during his re-election on 1st March 2012, and Donald Tusk – 30th August 2014) the qualified majority required at least 255 votes 'for', given by at least two thirds of member states in the European Council (guidelines for decisions that were not the result of an application by the European Commission).

The Treaty of Lisbon materially altered the process through which the Council of the European Union makes its decisions through a qualified majority (which was in place since 1st November 2014), applicable also to decision-making by the European Council through a qualified majority (as is the case with electing its president). It was replaced by the requirement of double majority in terms of the number of states and the population size, without defining the number of votes. Under the provisions of Art. 238 Section 2 TFEU, which cover decision-making by the European Council through a qualified majority of votes, passing a decision requires the support of at least 72% of the European Council members representing those member states whose joint population equals at least 65% of the total population of the European Union. This requirement will be applicable to future decisions on electing the President of the European Council¹¹.

The Treaty Regulation regarding the choice of the President of the European Council is very laconic; in order to define the procedure more precisely, Declaration No.6 was endorsed and attached to the final Act at the intergovernmental conference which adopted the Lisbon Treaty signed on 13th December 2007¹². Member states' representatives working on the reform treaty decided that the choice of the person for

10 More on valid votes in international organisations in: Z.M. Doliwa-Klepacki, *Encyklopedia organizacji międzynarodowych*, Warszawa 1999, pp. 217-222; H.G. Schermers, *International Institutional Law*, vol. 2, *Functioning and Legal Order*, Leiden 1972, pp. 331-335.

11 More on the rules for making decisions through a qualified majority of votes see: A Doliwa-Klepacka, *Stanowienie aktów ustawodawczych w Unii Europejskiej*, Warszawa-Białystok 2014, pp. 48-51 and its references.

12 Declaration concerning Article 15 sections 5 and 6, Article 17 Sections 6 & 7 and Article 18 of the Treaty on the European Union, see the full text: http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14434&Itemid=4316 (accessed on 26.01.2015).

the office of the President of the European Council needs to consider the need to give regard to the geographical and demographic diversity of the Union and its member states (in order to ensure appropriate balance of political forces and influences)¹³.

The Treaty on the European Union does not specify any conditions for a presidential candidate to the leadership of the European Council. The only Treaty restriction concerns the prohibition to hold a national public function after being elected President of the European Council (Art. 15 Section 6 TEU)¹⁴. This requirement – *incompatibilitas* – seems justified in practice. It also underlines the departure from the previous model of the rotating presidency of the European Council by a head of state or government of whichever member state's turn it was to hold the office for a semester.

That the function of the President of the European Council cannot be held jointly with a national function will aid the concentration of efforts on meeting the full remit of the European Council as well as lend authority to the office which can be held without having to compromise the interests of a national office.

New treaty measures (entrusting the autonomous right to choose the President to the members of the European Council) will undoubtedly increase the responsibility of the European Council members for personnel decisions. Although there are no specific procedural guidelines in this area, it would seem that experience in the practical functioning of the European Council would be crucial to the role. The introduction of the criterion of the candidate's rank, appropriate to the membership of the European Council (that is the function of a President or a Prime Minister) was supported by the Benelux countries, while work was still in progress on the text of the reforming treaty¹⁵. This was not formally adopted under the Treaty provisions, but it would seem justified pragmatically in order to ensure the efficient running of the European Council, effectively influencing the effectiveness of the whole European Union corporate framework. The requirement for efficient functioning of the European Council also determines the factors that need to be considered when deciding who to elect as the President of the European Council. Substantive

13 Analogous requirements apply for electing the President of the Commission and the High Representative for Foreign Affairs and Security Policy. On this, see interesting discussion by A. Gostyńska, Learning from Herman: A handbook for the European Council President, "Center for European Reform Bulletin" of 21.08.2014. full text <http://www.cer.org.uk/insights/learning-herman-handbook-european-council-presidentsthash.1Kuy3MVQ.dpuf> (accessed on 30.01.2015).

14 See remarks by J. Barcz, Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej, Warszawa 2010, p. 188.

15 See J.W. Sap, The European President, "European Competition Law Review", 2005, No. 1, p. 49, C. Closa, Institutional Innovation in the EU: The 'Permanent' Presidency of the European Council, (in:) F. Laursen (ed.), The EU's Lisbon Treaty. Institutional Choices and Implementation, Farnham 2012, pp. 123-124.

considerations (such as experience in working as part of the European Council) and the administrative abilities of the candidate ought to be essential requirements.

So far, this approach seems to be justified in practice. The first President of the European Council chosen by heads of state and heads of government was Herman von Rompuy (at the time of the elections – the prime minister of Belgium)¹⁶. His term began on 1st December 2009 (until 31st May 2012). After re-election to office¹⁷ he continued in this role from 1 June 2012 till 30 November 2014. The second elected President in history is Donald Tusk (at the time of election – Prime Minister of the Republic of Poland), whose term began on 1st December 2014, (until 31st May 2017)¹⁸. According to the press, four serious presidential candidates were considered: Donald Tusk, the Danish Prime Minister – Helle Thorning-Schmidt, the president of the European Commission Jose Manuela Barroso, and the Prime Minister of Latvia – Valdis Dombrovskis¹⁹. Evidently, each candidate had the practical experience of the functioning of the European Commission required.

A very significant modification to the pre-Lisbon system of presidency of the European Council was the extension of the term of office from six months (when this function was being held jointly with presidency of the Council) to two and a half years for permanent presidency nowadays. As mentioned before, the presidential mandate may be renewed once. This change should also have a positive effect on taking effective action within the European Council framework, as it creates an opportunity to implement not just quick wins but medium to longer term goals. It should also improve cooperation with other institutions of the European Union through better coordination, and consequently strengthen the position of the European Council within the Union corporate framework.

Discretionary authority of the European Council with regards to making a decision on the choice of a candidate for President of the European Council extends to the right to decide to withdraw the mandate from the President in case of an impediment or serious misconduct (Art. 15 Section 5 TEU). A President may be recalled following the same procedure as with presidential elections. The Treaty provisions clearly indicate that the European Council is not obliged to act to recall the President even

16 Decision of the European Union (2009/879/UE) of 1 December 2009 on selecting the President of the European Council (Dz.U. UE L 315 of 2.12.2009).

17 Decision of the European Union (2012/151/UE) of 1 March 2012 selecting the President of the European Council (Dz.U. UE L 77 of 16.03.2012).

18 Decision of the European Union (2014/638/UE) of 30 August 2014 selecting the President of the European Council (Dz.U. UE L 262 of 2.9.2014).

19 "Kto pokieruje sprawami Unii? Przedstawiamy sylwetki kandydatów", 31.08.2014 r., zob. <http://www.tvn24.pl/wiadomosci-ze-swiata,2/kto-pokieruje-sprawami-unii-przedstawiamy-sylwetki-kandydatow,463315.html> (accessed on: 29.01.2015), Ch. Bremner, "Zdecydowała wolta Camerona. Kulisy wyboru Tuska na przewodniczącego Rady Europejskiej" of 1.09.2014, <http://www.polskatimes.pl/arttykul/3558577,zdecydowala-wolta-camerona-kulisy-wyboru-tuska-na-przewodniczacego-rady-europejskiej,id,t.html?cookie=1> (accessed on: 29.01.2015).

if the above guidelines are met. The treaty clearly envisages a possibility of passing a decision to recall the President, but does not regard this as an obligation, giving the European Council discretion to make its own assessment of the situation. However, it is prudent to regard the change of rules applicable to the President of the European Council as an important measure for political control²⁰. The most punitive measure would be, of course, to withdraw the mandate from the President; not being re-elected could also be perceived as a lesser, less drastic, but nevertheless serious consequence of a negative assessment of the president's term in office.

4. Modifying the rules for appointing the President of the European Council and practical application of their authority

Established by the Lisbon Treaty, the President of the European Council as a political concept was to be a symbolic leader of the European Union and was presented as such to the public. His appointment could be regarded as a metaphorical answer to the question once posed by the American Secretary of State, Henry Kissinger "Does Europe have a telephone number?". It was noted from the very start that the actual position of the President of the European Council as the leader of the Union will depend on two main factors. On one hand – on the charisma, authority and diplomatic skills of the politician chosen to the office. On the other – on the will of the member states and on their decision on how much that authority will depend on implementing treaty framework agreements.

Currently the remit of the President of the European Council includes first and foremost leading the work of the European Council on defining strategic directions and political priorities of the European Union. This authority is exercised in cooperation with the European Commission, in particular with its President. Ensuring readiness and continuity of the works of the European Council is based on the work of the General Affairs Council. This restriction clearly indicates that, although in theory the permanent President of the European Council is better established, the actual centre of power lies still in the capitals of the member states²¹. Consequently the main task of the President is really coordinating and facilitating a compromise between member states, improving the compatibility and the effectiveness of the European Council's actions. In this area he presides over the European Council and leads on its work, ensures the readiness and the continuity of the works of this institution and facilitates consensus reaching in the European Council. It is possible to assume that

20 See more in K. M. Witkowska-Chrzczonec, *Dynamika rozwoju Rady Europejskiej w systemie instytucjonalnym Unii Europejskiej*, Toruń 2014, pp. 173-177.

21 It is worth stressing here that in the Council – the fundamental legislative body of the European Union – the system of rotational presidency is still in place, the only amendment made following the Treaty of Lisbon was the formal adoption of the joint presidency of a member states triad.

President's mediation skills are of key importance, as is maintaining regular contact with heads of state or heads of government of member states, also outside of the seat of the European Council in Brussels.

The President of the European Council briefs the European Parliament after each session. This, however, does not equate to being answerable politically to this institution.

The President of the European Council represents the European Union outside on foreign policy and security matters (without impacting on the authority of the High Representative for Foreign Affairs and Security Policy). As part of his diplomatic remit, the President of the European Council is to strengthen the European Union presence on the international scene. It would seem, however, that treaty restrictions to the framework of how the President of the European Council carries out these tasks (“without impacting on the authority of the High Representative for Foreign Affairs and Security Policy”) indicates that the High Representative's function in the area of foreign policy and security of the European Union is more important. The President of the European Council has more of a representative role. In practice he represents the European Union at international summits (usually together with the President of the European Commission), such as annual G8 and G20 summits, as well as EU-China, EU-USA, EU-Japan, or EU-Russia summits. As part of his diplomatic role the President of the European Council also hosts heads of state from outside of the EU.

5. Conclusions

The reform of the guidelines for the functioning of the European Council under the provisions of the Treaty of Lisbon is an example of a structural change to the European Union corporate system. Apart from extending the scope of the particular remit of the European Council, the most significant modification concerned the establishment of its permanent President, elected by the heads of state and heads of government for a two and a half years term. The departure from rotational leadership of a head of state or head of government of the state currently presiding over the Council of the European Union is, without a doubt, a sign of a greater autonomy of both institutions and bolstering the political significance and independence of the European Council.

The legal position of the President of the European Council is relatively strong, but practical ability to exercise the authority outlined in the Treaties depends on their individual work style and personality. Institutionalising the permanent presidency of the European Council and extending the term of presidency should have a positive impact on the effectiveness of President's actions. It needs to be remembered that the European Council has been given the authority to check that the actions taken by

its President are appropriate. This is a significant change in relation to the previous formula of rotational national leadership.

So far, observing the office of a permanent President of the European Council, chosen by heads of state and heads of government, in practice may lead to a generalised assessment of the significance of this function and how much it is able to influence strategic decisions in real terms. The analysis of the structure and tasks of the European Council would lead to the conclusion that the President is first and foremost its representative. Any influence that the President may have over members of the European Council is down to his personal authority and political skills, but it is doubtful that his position and decision making powers exceed those of the heads of state or heads of government. It is important to remember that political decisions in strategic areas of coordinating European Union actions (e.g. common foreign and security policy) are made according to an intergovernmental formula. The voices that count most are those of the largest and economically strongest states: Germany, France and the UK.

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