Informal Governance in the European Union

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Published by Cornell University Press

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THE COUNCIL PRESIDENCY AS AN ADJUDICATOR

[Overruling] a minority is just as reprehensible as insisting on accommodation up to the point that it threatens the community interest. . . . Since the normal negotiation process has not allowed [such conflicts] to be prevented, the only alternative to having recourse to force is arbitration. . . . These rules of the game have led to the development of a decisive role of a new communitarian organ: the Presidency. It is the Presidency’s responsibility to maintain “normal” political relations within the Community, to try to construct compromises between extreme positions, and at the same time to avert conflict.

—Jean Louis Dewost, juris consult of the Council of Ministers

Barely mentioned in the original Rome Treaty or the Council’s internal Rules of Procedure (Conseil de la CEE 1958), the Council presidency, rotating every six months among governments, surprisingly assumed important responsibilities in agenda setting and intergovernmental negotiations in the Council.

Some of the Council presidency’s tasks are certainly particular to the European Union, and some of its aspects might be in urgent need of reform. Yet one of its principal functions presents a solution to a more general cooperation problem, which has so far been underappreciated in the literature (Kleine 2013). This chapter argues that the Council presidency serves a crucial information-providing role through its authority to adjudicate demands for informal governance. In other words, it serves to elicit the information that is needed for the governments to discriminate between false and legitimate demands for informal governance. The presidency’s adjudicatory authority is the direct result of an informal norm of discretion and other informal governance practices that surround the EU’s entire legislative process. This implies that it should assume its adjudicatory responsibilities in close parallel to the practices we have previously described.
Other theories disagree. Initial studies regarded the presidency as a stopgap by default, rather than by design, for sundry tasks that popped up and the Commission failed to assume (Kirchner 1992, 71). Power-based institutionalism does not expect dominant states to subject their use of informal governance to the judgment of the government holding the presidency. There is consequently no reason to expect any direct relation between the presidency’s informal authority and other informal governance practices. Studies in the tradition of classical regime theory view the presidency as a functional solution to prominent intergovernmental bargaining problems. It follows that the presidency assumes more and more responsibility in response to the increasing complexity in decision making in the late 1960s and early 1970s, following De Gaulle’s threat to withdraw from the European Union during the “empty-chair crisis,” the Council’s increasing legislative activity, and the Community’s first enlargement in 1973.

These different explanations of the rationale for the presidency’s authority in decision making are now evaluated by tracing the informal evolution of this office. Drawing mainly on new archival material and reports of contemporary practitioners, this chapter demonstrates that the governments in charge of the presidency adopted a number of practices in agenda setting and negotiation as a direct result of the governments’ informal practices in agenda setting and voting. Other factors, such as the Council’s growing workload and the accession of new states to the EU, the variables stressed by classical regime theory, merely accentuate what had already become standard practice.

### The Presidency in the Council

As early as 1961, Jean Megret, a close contemporary commentator on EU decision-making practices, observed:

> There has been a very interesting development in the first three years of practical application of the Treaty. More frequently the Presidency finds itself released from its task of expressing its national position as a member of the Council of Ministers. Instead, it devotes itself to the organization of work and the search for a compromise among governments. (Megret 1961, 636, 646)

Specifically, the presidency’s authority was based on three practices: intense contacts especially with recalcitrant delegations; the preparation of compromise proposals among the member states; and the prerogative to call votes or declare consensus.

The presidency adopted the first practice, the establishment of intense contacts with recalcitrant governments, as a direct result of the norm of consensus
decision making almost immediately after the Treaty of Rome became effective. In an analysis of the German 1964 presidency, for example, the permanent representative emphasizes that these contacts were invaluable for attaining information about the “motives and problems of individual delegations” (Vertretung der BRD bei der EWG 1965b). It was thereby assisted by the Council Secretariat, which gathered intelligence from the member states’ permanent representatives or in direct consultation in the capitals of other governments (Wallace 1985b, 16).  

1 Emile Noël, the Commission’s executive secretary, also underscores the importance of contacts between the Council presidency and individual delegations: “The chairman has a feeling for unformulated desiderata and requests. He knows where positions are reserved. He knows how to take account of and interpret remarks made in confidence” (Noël 1967b, 238; 1966, 32).  

The Council presidency’s central role in intergovernmental negotiations was accentuated even more in recent years by the gradual promotion of the European Parliament to the status of a co-legislator. Instead of face-to-face negotiations among members of the European Parliament and the Council in full session, the governments relied on the presidency to establish contacts with the Parliament in informal trilogue meetings and to conduct negotiations on the Council’s behalf (Hayes-Renshaw and Wallace 2006, 151, 212; Council of the EU 2000, 15).  

The Council’s norm of consensus decision making directly led to a second practice by the Council presidency: the preparation of compromise proposals, which soon became known as “presidency compromises.” The term appears in Council documents as early as the first years of the 1960s. For example, in preparation for the third German presidency in 1964, the permanent representative advised the chairmen of the various Council working groups to prepare possible presidency compromises prior to group meetings (Vertretung der BRD bei der EWG 1964a). By the late 1960s, the presidency compromise had become a fact of Community life (van Rijn 1972, 652; Sasse 1975, 143–47; Dewost 1987, 174).  

The Commission played an important, yet a secondary, role in this process. Although the Council presidency understood the scope for changes, the Commission felt more obliged to defend its original legislative proposal. As Emile Noël and Henri Etienne explain:

[The Commission] is more obliged to uphold, even practically on its own, the Simon-pure position, which the Commission has decided is most in accordance with the Community interest….So it is the chair [the Council presidency] that has the most scope for quietly taking soundings, putting out feelers, and coming forward at the right moment with compromise suggestions—particularly suggestions some distance away from the Commission’s original proposal. (Noël and Etienne 1971, 438)
The member states gradually had more frequent recourse to majority voting from the mid-1970s on. In the absence of a norm of discretion, we would expect the presidency’s role in the search for a consensus to fade away with this development. However, just the reverse is true. In line with Liberal Regime Theory, the more frequent use of majority voting in the Council only increased the demand for an adjudicator to determine whether the formal voting rules applied or informal governance was demanded.

The gradual shift to more frequent majority voting consequently served to accentuate even more the third informal practice: the presidency’s prerogative to call votes. As Noël and Etienne explained at the end of the 1960s:

> When there has been a vote, this is because the Council Presidency, after consultation of the Commission, judged that the negotiations had been sufficiently stretched to the effect that the law of majority voting can be rightfully used to provoke hesitant partners to rally round an agreement. (Noël and Etienne 1969, 47)

The Three Wise Men in 1979 approved of this unwritten law that the authority to determine whether and when to invoke formal voting rules rests with the Council presidency:

> Each state must remain the judge of where its important interests lie. Otherwise it could be overruled on an issue which it sincerely considered a major one. It is only when all states feel sure that this will not happen that they will all be willing to follow normal voting procedures…. The application of these solutions lies in the hands of the Presidency. The Chairman of the Council is best placed to judge whether and when a vote should be called. (Council of the EC 1980)

The fact that in mid-1980s, when the number of majority votes peaked, the Commission found it necessary to complain about the presidency’s dominant role further testifies to the fact that the presidency’s authority increased with a growing need to adjudicate whether formal voting or informal consensus decision making was needed:

> The practices once begun tend to go on: multiplication of the compromises made by the Presidency on all sorts of subjects, thus supplanting Commission proposals, undue resort to bilateral talks, national glorification of the “Presidency of the Community,” although this is a new office with no legal basis. (Noël 1985, 150)

The chapter-opening quote by Jean-Louis Dewost directly pinpoints, in line with Liberal Regime Theory, why the presidency assumed its adjudicatory
function. For him, the presidency serves to prevent disruptive conflicts by determining whether a minority ought to be overruled or accommodated. The presidency’s three practices of intense contacts with recalcitrant delegations, the preparation of compromises, and the prerogative to call votes have hardly altered over time. Neither the empowerment of the European Parliament nor the establishment of a permanent president of the European Council alongside the rotating presidency of the Council of Ministers changed the fact that the authority to adjudicate on ambiguous demands for added discretion rests with the government that holds the Council presidency.

The Presidency and the Agenda

At the same time that the Council presidency adopted a number of new prerogatives in intergovernmental negotiations, it also assumed new responsibilities in the micromanagement of the legislative agenda. As before, this authority was a direct result of informal governance practices in the decision-making stage.

The Treaty of Rome endowed the Commission with the exclusive right of initiative. This monopoly allowed the supranational bureaucracy to submit proposals for legal acts when it considered the circumstances for their adoption to be favorable. However, instead of discussing them at the level of the Council of Ministers, the governments began from the early 1960s onward to pass Commission proposals on a regular basis to the ever-growing Council substructure of government representatives in working groups and committees.

This practice broke the link between the Commission’s agenda-setting activity and the composition of the Council’s legislative activity. In other words, the Council agenda ceased to be determined by the Commission’s timing of legislative proposals, and this in turn afforded the governments the opportunity to structure the Council agenda according to new priorities.

As soon as the Council agenda opened up for new priorities in the early 1960s, the presidency began to play an increasingly important role in determining the specific composition of the Council agenda. Reflecting on its working methods, the Council’s Committee of Permanent Representatives (COREPER) recommended in 1960 that the “choice of important subjects, which merit discussion in the Council, ought to be conferred to the Presidency” (Conseil de la CEE 1960). The Council presidency subsequently outgrew its modest official role as a mere organizer of meetings to become the informal driving force behind intergovernmental negotiations in the Council. For example, recapitulating the role of the presidency, the Belgian permanent representative, Joseph van der Meulen, explained in 1966 that the “presidency is…anything but mere decoration”: 
Not only does it maintain the good order of negotiations. It prepares...the work program for the Working Groups with a view to keeping up a progressive examination of all questions. All these Working Groups in fact constitute a considerable machinery that risks becoming paralyzed were it not for the vigilant attention of the President. (van der Meulen 1966, 12; see also Wallace and Edwards 1976, 540)

In short, the governments’ practice of passing the Commission’s legislative proposals to the Council substructure deprived the Commission of its influence on the Council’s legislative activity and allowed the member states to structure the Council agenda according to new priorities. The Council presidency immediately assumed this responsibility and consequently gained the opportunity to prioritize agenda items and, ceteris paribus, let others slide. The Commission official and close observer Thomas van Rijn noted:

This task [of organizing meetings] gives the Presidency great influence, and it is here that different national characteristics become apparent. It permits putting strong emphasis on certain problems while waiting for others to become “ripe.” The very fact that one country occupies the presidency for six months at all levels allows initiatives to be taken and other issues to be concluded as soon as possible. (van Rijn 1972, 653; see also Noël 1967b, 237)

In recognition of this development, the Council obligated incoming presidencies from 1973 onward to publish their work program and timetables for meetings (de Bassompierre 1988, 24; Amphoux et al. 1979, 110). This work program became the basis for the semiannual State of the Community address, in which each incoming Council presidency announced a list of its objectives and priorities to the European Parliament (Wallace and Edwards 1976, 543; Westlake 1995, 342). In their report on the European institutions, the Three Wise Men recommend strengthening the presidency’s agenda-setting function even further (Council of the EC 1980). Jean-Louis Dewost concurs in 1984:

[The] Presidency has assumed [a] delicate role: the generation of political impetus through the revitalization of forgotten dossiers and the provision of new topics that hopefully mobilize political energy....The Presidencies announce programs and present themselves as real motors for the Community, hoping to impose their national interests at the Community level. (Dewost 1984, 32; see also Wallace 1985b, 5)

How did the presidency use its influence over the agenda? According to close observers, the government holding the Council presidency usually neglects leg-
islative proposals that are controversial and that it would like to see changed substantially in Council negotiations (interview in Brussels, January 2007). But it does not do this on its own initiative. Rather, corroborating Liberal Regime Theory, the government in charge neglects legislative proposals that it wishes to change because other governments in the Council would cold-shoulder self-serving demands from the presidency. In 1964, the German permanent representative reflected on his experiences during the German presidency, noting that in general the “chairman has to contain himself in his demands for consideration of specific national interests” (Vertretung der BRD bei der EWG 1965b). Violations of this custom were considered inappropriate and strongly discouraged. “Attempts like this,” emphasized another internal report on the conduct of the presidency, “would meet with strong refusal” (Vertretung der BRD bei der EG 1971; Elgström 2003, 47).

The example of the End of Life Vehicles (ELV) Directive is instructive. The Commission proposal, submitted in 1997, stipulated take-back and recycling duties for the automobile industry. Initially, only Spain and the United Kingdom under pressure from their automobile industries voiced opposition while the majority of governments, including Germany, Sweden, Denmark, and Austria, supported the Commission proposal (Agence Europe 1999a). The negotiations did not make much progress during the first half of 1998 under the British presidency, which opposed the directive in its current form. The Austrian presidency consequently inherited responsibility for finding an agreement among the member states and announced its determination to adopt a common standpoint by December 1998 (European Voice 1998). Under its chairmanship, the permanent representatives swiftly prepared a compromise text that all delegations were willing to accept (Council of the EU 1998). The incoming German presidency, led by the newly elected “red-green” coalition of the Social Democratic and Green parties, announced that the adoption of this directive would be a key policy goal for Germany’s term in charge of the Council business (European Voice 1999d).

Suddenly, and to everyone’s surprise, the German chancellor, Gerhard Schröder of the Social Democratic Party (SPD), decided to revoke the German delegation’s support for the compromise. The reason was a direct intervention by the chief executive of Volkswagen, Ferdinand Piëch, who had complained about the extensive adjustment costs the German automobile industry was going to face. Schröder invoked his prerogative as chancellor to define the German policy guidelines and instructed his minister for the environment, Jürgen Trittin of the Green Party (Bündnis 90/Die Grünen [Alliance 90/The Greens]), who chaired the Council of Environmental Ministers, to use his prerogatives as Council president in order to postpone the scheduled decision in order to reopen negotiations and then garner a blocking minority to reject the proposal (Wurzel 2000).
Other delegations reacted strongly to this rumor, which they regarded as an abuse of the presidency’s power, and reminded the German presidency that its prerogative to call a vote was not a codified right. If the German presidency called a vote to block the proposal, they threatened they would for the first time in the history of European integration overturn the presidency’s procedural decision, which according to the Council’s rules of procedure was possible with a simple majority (Agence Europe 1999a).

Trittin then decided to discuss the dossier in a Council session strictly closed to the public (Frankfurter Allgemeine Zeitung 1999; Die Welt 1999a). In this session, he once again demanded concessions for the German car industry. Because one television camera was still recording sound, the European Voice was able to report the highlights of exchanges among the Ministers:

Fascinated journalists gathered round the screen as Trittin harangued ministers for refusing to accept his new “compromise” proposal. . . . “What are you doing trying to talk us into a compromise when you are the problem?” asked the Austrian Environment Minister, Martin Bartens-tein. Denmark’s Sven Auken was almost screaming with anger and France’s Dominique Voynet boomed: “We cannot leave this room to tell the press and the public that we have dropped our trousers for the car industry!” . . . The only support for Trittin’s trousers came from the UK’s Michael Meacher, who announced he was not performing a U-turn but had been told to reverse his stance by Premier Tony Blair under pressure from Schröder. (European Voice 1999a)

The Council then noted the impossibility of adopting the text and decided to pass on the issue for further discussion to the subsequent Finnish presidency (Agence Europe 1999b). Since it was obvious from its U-turn that the domestic pressure on the German government was far from unmanageable and that it could very well afford having its automobile industry adjust to the EU directive, it took only three more weeks of deliberations under the Finnish presidency to form a qualified majority in favor of the proposal and against a recalcitrant German delegation in the minority (Die Welt 1999b).

Given this strong reaction to self-serving demands to make changes to the Commission proposals, presidencies that are more experienced than the German presidency back in 1998 typically stall these dossiers until the next government takes over and it can speak more freely. Two close observers of this office, Helen Wallace and Geoffrey Edwards, also note that the “only strategy left to the chair is to block such issues by keeping them off the agenda or by delaying their discussion in a committee” (Wallace and Edwards 1976, 544; see also Wallace 1985b, 16–17; Elgström 2003, 50).
As a result, Council agendas developed a bias in favor of legislative proposals that the government holding the presidency does not wish to change substantially. Other governments fully accepted the presidency’s influence on the Council agenda. Asked about the importance of an adequate balance of interests on the agenda, a former permanent representative explained succinctly:

Nobody cares if the Council agenda adequately balances the governments’ various interests. It’s simply like that: Governments decide what needs to be decided and what the Presidency thinks is important. (interview in Brussels, February 2008)

The presidency managed to retain its influence on the micromanagement of the agenda despite the emergence onstage of rival agenda setters such as the European Council. For example, upcoming presidencies established contacts with the Commission well before their term in order to ensure a timely preparation of the legislative proposals it wished to discuss during its term (Edwards and Wallace 1978, 82; Wallace 1985a, 463). The presidency also invented more subtle strategies. In 1986, a confidential document (cited in Maass 1987, 10) entitled “Guidance on the Exercise of the Presidency” instructed British officials: “[The] simplest device will be for the chairman to let the delegation ramble on.” The document added that the chairman can delay matters by setting a meeting for a month later, then canceling it “because another group needs the meeting room allocated for the next session, and so on.” Asked about this document, a British official shrugged it off, arguing that “everyone in the community uses the kind of maneuvers or procedures that were mentioned in the paper…. The only surprising thing is that the British put them on paper” (see also Thalmann 1987, 72; and Dewost 1976, 3; 1984, 32).

In addition, the establishment of a permanent president for the European Council (currently Hermann van Rompuy from 2009 to 2014) as well as for the Foreign Affairs Council (currently Catherine Ashton) did not change the fact that the rotating presidency micromanages the legislative agenda for the Council of Ministers. New rules of procedure for the European Council envisage that its president will coordinate with the member state holding the six-month Council presidency on dates for summits by the chiefs of governments (Council of the EU 2009, Article 2).

Despite this phenomenal rise in importance, it is noteworthy that the Council presidency’s role in the setting of the Council agenda has hardly ever been formalized in the treaties. In 1988, the Council of Ministers decided that each presidency should present a more comprehensive work program for its six-month period. In 1993, this procedure was integrated into the Council’s internal Rules of Procedure (Tallberg 2006, 50). Despite long debates about the inefficiency of
the rotating presidency’s influence on the Council’s legislative agenda in today’s twenty-seven member European Union, the practices described above have hardly changed since.

Mentioned only in passing in treaties, the office of the Council presidency underwent a surprising development over time. The government in office serves as the “hub” in intergovernmental negotiations, suggests compromises among its cooperating partners, decides whether to call a vote or declare a consensus, and micromanages the Council’s legislative agenda.

In line with the predictions of Liberal Regime Theory, the Council presidency assumed all these responsibilities as a direct consequence of other practices of informal governance in agenda setting and decision making. Thus, the norm among governments to search for a consensus in the event that a government faces unmanageable domestic recalcitrance created a demand for a government to assess the legitimacy of this claim. In addition, the member governments’ practice of passing legislative proposals to the Council substructure of working groups and committees deprived the Commission of its direct influence on the legislative agenda and opened up the opportunity for the presidency to structure it according to new priorities.

The chapter has asked the question of why the member states defer to another government. The deference to a cooperating partner is not self-evident, since the government holding the presidency might use its procedural prerogatives for national gain and at the expense of other member nations. This is why, as we have seen in this chapter, the government usually faces much headwind when it personally stands to gain from changes to the legislative proposal under negotiation. The following chapter seeks to demonstrate that the presidency wields authority only when it is biased against governments that demand accommodation and, therefore, that other member states can trust its judgment about the actual need for informal governance.