

Initiatives in CFSP and Extraordinary Council Meetings – Art. 30 TEU

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Article 30 [initiatives in CFSP; extraordinary Council meetings] (ex-Art. 22 TEU)

- 1. Any Member State,⁵ the High Representative of the Union for Foreign Affairs and Security Policy,^{6, 16} or the High Representative with the Commission's support,^{7,9} may refer any question¹³ relating to the common foreign and security policy to the Council and may submit to it, respectively,¹⁵ initiatives or proposals.¹⁴**
- 2. In cases requiring a rapid decision,²¹ the High Representative, of his own motion, or at the request of a Member State,^{24, 25} shall convene an extraordinary Council meeting within 48 hours²⁰ or, in an emergency, within a shorter period.**

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1. Overview

- 1 Paragraph 1 of Art. 30 TEU provides the rules regarding the right to submit initiatives or proposals. The importance of the right of initiative is found in the fact that it defines the **source of CFSP decisions**. Through this ability, it selects the actors that are allowed to place an issue on the agenda. Paragraph 2 supplements this with the right to convene an extraordinary Council meeting when there is an urgent need to make decisions. Together with Art. 31 TEU, Art. 30 TEU forms the core of the decision-making procedure: the right of initiative and the voting rules. These two elements are generally believed to define the **distinct nature of CFSP** as compared to other Union policies.

2. The right of initiative (paragraph 1)

2.1. Genesis

- 2 Ever since the Treaty of Maastricht, the right of initiative was particularly used by the **Presidency** to initiate new CFSP decisions. Although the Presidency was not explicitly mentioned in the original Treaty, it could base its actions on the fact that it was a MS. The original Art. J.8 TEU-Maastricht listed the same provision in its paragraph 3 by stating that not only the Commission but also any MS “may refer to the Council any question relating to the [CFSP] and may submit proposals to the Council”.
- 3 The **absence of an exclusive right of initiative for the Commission** was one of the characteristics that distinguished CFSP from the Community policies. Although from the outset the Commission had a shared right of initiative under CFSP, it has barely used it.¹ The reason is that the Commission held that the CFSP belonged to the Council. To quote former Commissioner *Chris Patten*: “Some of my staff [...] would have preferred me to have a grab for foreign policy, trying to bring as much of it as possible into the orbit of the Commission. This always seemed to me to be wrong in principle and likely to be counterproductive in practice. Foreign policy should not in my view [...] be treated on a par with the single market. It is inherently different”.²

The modest position of the Commission in the CFSP area has been maintained until this very day, and neither the 1977 Treaty of Amsterdam (Art. 22 TEU-Amsterdam) nor the 2001 Treaty of Nice (Art. 22 TEU-Nice) modified the original text on the right of initiative.

- 4 The first modifications could be found in the 2005 **Treaty establishing a Constitution for Europe**. Art. III-299.1 TCE provided for a right of initiative – in addition to the MS – for the “Union Minister [...] or that Minister with the Commission’s support”, thus deleting the individual ability of the Commission to submit CFSP proposals and replacing it with the possibility of submitting initiatives together with the new Union Minister for Foreign Affairs. The **Treaty of Lisbon** has essentially kept this change, but switched the terminology from “Union Minister” to “High Representative”. It thus introduced three sources for CFSP proposals and initiatives: the MS, the HR and the HR together with the Commission.

2.2. Relevant actors

- 5 Decision-making is the most important activity of an international organisation.³ The process of decision-making has been defined as “what takes place in a given body of an international organization when the will of its members is coordinated and moulded into one which can and shall be considered under the relevant law of the organization as the expression of the will of

¹ See also Regelsberger 2008, p. 276.

² See Spence 2006, p. 360.

³ Schermers & Blokker 2003, p. 491.

the organization.”⁴ All decision-making processes depend on an initiative. In most international organisations, **governments are the most important initiators of decisions**. This situation is relevant to the rights of initiative under CFSP due to the latter’s still mainly intergovernmental character, even though the right of the MS is not exclusive but shared with that of the HR.

- 6 Taking a look at the **“agents” relevant to handling CFSP issues**, this provision allows for initiatives or proposals to be submitted by HR, either individually or “with the Commission’s support”. With the Treaty of Lisbon’s establishment of the “new” HR, a new and more supranational element has been introduced into the CFSP by allowing initiatives in this area to be taken by an “agent” of the Union, rather than just by MS. By 2005, the High Representative (the Spanish politician and diplomat *Javier Solana*) had developed into a key player in CFSP, while making sure that he had the support of the MS for his actions. Providing him with a formal role in the decision-making process could certainly be seen as an important breakthrough in the character of the Union’s foreign and security policy. Considering the role of the HR as president of the Foreign Affairs Council (Art. 18.3, 27.1 TEU), the HR’s right of initiative is merely the logical consequence: depriving the chairperson of the right to introduce impulses into the relevant organ would constitute an inconsistent system.
- 7 Under the TFEU the Commission has an exclusive right of initiative in most issue areas. Art. 17.2 sentence 1 TEU in conjunction with Art. 289.1 and 294.2 TFEU confirm this by stating that, as a general rule,⁵ legislative acts may only be adopted on the basis of a **Commission** proposal (→ Art. 17). However, just as legislative acts are to be excluded in the CFSP (Art. 24.1 (2) sentence 3 TEU), acts in this case would only be adopted based on a Commission proposal if the Treaties so provided. As regards Art. 30 TEU in comparison to its predecessors, the Commission has been **deprived of its right to initiative**. At the same time, different from the Commission in most policy areas of the TFEU, the HR does not have a monopoly on CFSP initiative.⁶
- 8 On the other hand, the **competence of the Commission** in this phase of the decision-making process can be regarded as another **“supranational”** element. As we have seen, the Commission decided from the outset not to make use of its formal right of initiative. This is not to say that the Commission was not involved in CFSP. The Commission was, and still is, represented at all levels in the CFSP structures. Within the negotiating process in the Council, the Commission is a full negotiating partner as in any working party or Committee (including the Political and Security Committee). The President of the Commission attends the European Council and other *ad hoc* meetings. The Commission is in fact the “twenty-eighth” MS at the table. Practice thus showed an involvement of the Commission, both in the formulation and the implementation of CFSP Decisions, not in the least because Community measures were in some cases essential for an effective implementation of CFSP policy decisions.
- 9 Following the text of the Constitutional Treaty, the Treaty of Lisbon provides that the HR may use his initiative individually or **“with the Commission’s support”**. Given the position of the HR in the Commission and the clear links between the different aspects of EU external relations, it is difficult to see how he could initiate new CFSP in the absence of support by the Commission. On the other hand, the position of the HR is independent. Within the broad area of EU external relations, different or even conflicting proposals by the Commission and the HR are not excluded.

However, this mention of the Commission is not reminiscent of the fact that it previously had the right to submit proposals by itself. Instead, this wording is an expression of the “specific role” of the Commission (Art. 24.1 (2) sentence 5 TEU) and points towards

⁴ Ustor 1971.

⁵ Cf. Martenczuk, in Grabitz et al. (2010), Art. 17 EUV para 56.

⁶ Wessels & Bopp 2008, p. 21.

those cases of mixed subject matters, i.e. proposals that include elements of both the CFSP (HR) as well as of other Union competences (Commission). Consequently, different procedures would apply (Art. 40 TEU) and may lead to inconsistent results. To ensure consistency as prescribed by (Art. 21.3 (2) TEU), joint proposals by HR and Commission may be submitted (Art. 22.2 TEU).⁷

- 10 After all, both the exclusive right of the Commission's initiative and the turn to (ever more) qualified majority voting (QMV) belong to the "Community method", which over fifty years characterised European cooperation.⁸ There are good reasons to argue that the new Lisbon rules on the right of initiative and the voting rules show a move towards a less intergovernmental CFSP, or perhaps even a toward a "**progressive supranationalism**".⁹
- 11 Now that the **EEAS** is fully operational (→ Art. 27), it is assumed that preparation of CFSP decisions takes place by that body rather than by the Commission's DG Relex. In practice the difference between an autonomous HR initiative and one supported by the Commission will primarily have consequences for the way in which the proposal is prepared. Also, assumedly, it will have consequences for the subsequent decision-making procedure as the Commission's involvement may point to a legal basis in the TFEU.
- 12 The **EP** has no right of initiative. According to Art. 36 (2) TEU it may only address questions or make recommendations to the Council or the HR. The latter shall, pursuant to the first subparagraph of Art. 36 TEU ensure that the EP's views "are duly taken into account". The reason is the still intergovernmental character of CFSP.¹⁰

2.3. Forms of initiative

- 13 Art. 30.1 TEU list three forms of "impulses". First of all, Art. 30.1 TEU states that the respective parties may refer to the Council "**any question**" relating to the CFSP. These "questions" are equivalent to "matters" mentioned in Art. 24.1 TEU and thus include "all areas of foreign policy and all questions relating to the Union's security", as long as they are "questions of general interest" according to Art. 24.2 TEU. This is similarly repeated in Art. 32.1 TEU (→ Art. 32). It is also in line with the position of the Council as an institution of the *Union*. Hence, the "referring of a question" can be understood as merely presenting an issue (of general interest), i.e. having it placed on the agenda, for further (detailed) discussion within a Union context.
- 14 Furthermore, paragraph 1 states that "**proposals**" may be submitted to the Council. This means an elaborated submission that could be voted on right away. In other words, this could form the basis for a Council vote that would result in the adoption of a CFSP instrument (Art. 25 TEU).
- 15 Art. 30.1 TEU mentions that "**initiatives**" may now also be submitted to the Council. The Treaty itself does not clarify the difference between "initiative" and "proposal". In other areas of the Union only "proposals", and not "initiatives", may be submitted (by the Commission; Art. 293 and 294 TFEU). The reason may be that not all CFSP actions take the form of formal decisions. On the basis of Art. 25 TEU the Union shall conduct its CFSP not only by adopting decisions, but also by defining the general guidelines and by strengthening systematic cooperation between the MS in the conduct of policy. In the triad of ways of giving impulses to the Council, the term "initiative" may be placed between the "referring of a question" and a

⁷ Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 30 EUV para 4.

⁸ This is not to deny that other elements may be of equal importance, in particular the role of the ECJ and the involvement of the EP in the decision-making process.

⁹ See Gosalbo Bono 2006, p. 349. See also Wessel 2009. With the opposing view Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 30 EUV para 2.

¹⁰ Frenz 2011, para 5323.

“proposal”.¹¹ In the end, however, there may be no essential difference between a proposal and an initiative when one compares this wording with the Commission’s function (for other policy areas) in Art. 17 TEU. It provides that the Commission shall take appropriate initiatives to promote the general interest of the Union; in general, these “initiatives” are proposals for legislative acts (→ Art. 17).¹²

The use of the term “initiative” in Art. 30 TEU is striking as one could argue that an “initiative” by, for instance, the HR, in most cases is not a prerequisite for the Council to adopt a decision. It may adopt decisions in the absence of a formal initiative being taken by the HR, and it may also deviate from a proposal submitted by a MS. Only in a limited number of cases does the Treaty seem to have foreseen a true procedural function of initiatives by the HR, in the sense that an initiative is needed for the Council to be able to act. By derogation from the default rule of unanimity in CFSP (Art. 31.1 TEU; → Art. 31 para 7 et seqq), on the basis of Art. 31.2 TEU (→ Art. 31 para 21 et seqq.), the Council may act by **qualified majority** “on a proposal which the [HR] has presented following a specific request from the European Council”. Further, Art. 33 TEU provides that “the Council may, on a proposal from the [HR], appoint a special representative with a mandate in relation to particular policy issues.”

- 16** In addition, the Treaty refers to a number of other specific institutional issues in which a **proposal by the HR** seems to have had a more formal role. Thus, Art. 27.3 TEU states that “[t]he Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission” when deciding on the organisation and functioning of the EEAS. Art. 42.3 TEU states that “[t]he Council shall adopt by a qualified majority, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy” decisions related to the start-up fund for expenditure arising from operations having military or defence implications; Art. 218.3 TFEU states that “the Commission, or the High Representative of the Union for Foreign Affairs and Security Policy [...] shall submit recommendations to the Council” in relation to the negotiation of international agreements. Art. 329.2 TFEU states that the HR “shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union’s common foreign and security policy.” These provisions underline the new and important role of the HR in initiating new foreign policy.

3. Extraordinary Council meetings (paragraph 2)

3.1. Genesis

- 17** The possibility to convene an extraordinary Council meeting when it is not possible or not preferred to await the next regular Council meeting is closely linked to the right of initiative and has been part of the CFSP institutional machinery from the outset. The original Art. J.8.4 **TEU-Maastricht** listed the possibility as follows: “In cases requiring a rapid decision, the Presidency, of its own motion, or at the request of the Commission or a Member State, shall convene an extraordinary Council meeting within forty-eight hours or, in an emergency, within a shorter period.” The initiative was thus laid in the hands of the Presidency, despite the fact that the Commission and MS were allowed to request the President to convene an extra meeting.
- 18** The provision returned in the TEU-Amsterdam, with the same wording (Art. 22.2), as well as in the TEU-Nice (Art. 22.2), with one minor modification (“48 hours” instead of “forty-eight hours”).

¹¹ Cremer, in Calliess & Ruffert (2011), Art. 30 EUV para 2.

¹² On this topic, cf. Martenczuk, in Grabitz et al. (2010), Art. 17 EUV para 13 et seq.

- 19 The **Constitutional Treaty** moved the competence to convene an extraordinary meeting from the Presidency to the “Union Minister for Foreign Affairs” (Art. III-299 TCE), in line with the foreseen role of the Union Minister as president of the Foreign Affairs Council. The **Treaty of Lisbon** kept this change with the respective adaption of terminology.

3.2. Concept

- 20 Art. 30.2 TEU is *lex specialis* to Art. 237 TFEU. The latter, however does not set a deadline for the convening of a Council meeting. As can be inferred from Art. 3 of the Council’s Rules of Procedure, the default deadline for convening a Council meeting is at least 14 days, since that article provides that the provisional agenda for the respective meeting shall be distributed among the MS at least 14 days before the actual meeting.¹³
- 21 The origin of CFSP is to be found in the fact that the EU needed instruments to respond quickly in case of regional or global crises (→ Art. 21). While there may be doubt as to whether the Union succeeded in reaching this objective,¹⁴ the procedures as such have been crafted to allow for rapid decision-making. It is left to the discretion of the actors (the HR and the MS) to decide *which* cases require a rapid decision, or *when* there is an emergency. One could argue that in these decisions the HR will be led by the **objectives of CFSP**: once those objectives can only (or better) be achieved by convening an **extraordinary Council meeting**, the HR may decide to do so. Obviously, for all twenty-seven members of the Council to clear their busy calendars, there would have to be a serious crisis. Examples are scarce, but include the extraordinary Council meeting on Haiti of 18 January 2010.¹⁵ Only eleven MS were represented by their Minister – the others by vice or deputy Ministers or by their Permanent Representatives.
- 22 In practice, the system of **COREU** (*CORrespondance Européenne*) is often used in urgent cases. This is the EU communication network between the MS, the Council and the Commission for cooperation in the fields of foreign policy.¹⁶ It is an e-mail (formerly: fax) based system to enable the exchange of (confidential) information within a short period of time, and thus allows for decision-making between the relevant actors without any physical meeting. The so-called “COREU silence procedure” may be used at the initiative of the president of the Council, i.e. the HR.¹⁷ This makes it easier for decisions to be made swiftly in emergencies.
- 23 Apart from the Council, also the **European Council** (→ Art. 15.3 sentence 3 and Art. 26.1 (2) TEU...) may convene in extraordinary meetings, as we have seen in relation to the situation after 9/11 (extraordinary meeting of the European Council, held on 21 September 2001) and Iraq (extraordinary meeting held in Brussels on 17 February 2003).
- 24 Following the text of the Constitutional Treaty, Art. 30.2 TEU moved the competence to convene an extraordinary Council meeting from the (rotating) Presidency to the **HR**, either by own motion or at the request of a MS. This follows from the HR’s post as President of the Foreign Affairs Council (Art. 18.3, 27.1 TEU) and his responsibility to conduct the Union’s CFSP (Art. 18.2 TEU). Although there are good reasons to argue that the HR as Presidency operates as a “Union actor” rather than as a MS, the importance of this shift should not be underestimated. For the first time the Foreign Affairs Council can be convened on the initiative of the EU itself.

¹³ Cf. Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 30 EUV para 9.

¹⁴ Blockmans & Wessel 2009.

¹⁵ Press release 5471/10(Presse7), 18 January 2010.

¹⁶ Cf. Karalus 2009, p. 170 et seq.; Kaufmann-Bühler & Meyer-Landrut, in Grabitz, et al. (2010), Art. 31 EUV para 20.

¹⁷ Cf. Art. 12.2 lit. d of the Council’s Rules of procedure, O.J. L 325/35 (2009).

- 25 It is interesting to note that the possibility for the **Commission** to request an extraordinary meeting was deleted. Taken together with the removal of the Commission's individual right of initiative under CFSP (→ para 7) this underlines the upgraded position of the HR, but at the cost of the Commission. Since the HR is Vice-president of the Commission, there is still a link to the Commission; thus, the Commission can still "request" an extraordinary Council meeting, but only indirectly.¹⁸ MS retain their privilege of requesting that the HR to convene an extraordinary emergency meeting.

4. Assessment

- 26 It is difficult to determine to what extent Art. 30 TEU changed the nature of CFSP. Do we see a less intergovernmental CFSP that is more in line with other external Union policies?

In historical perspective a development is indeed undeniable, but the finally emerging picture is, at best, mixed. Indeed, the inclusion of CFSP together with all other Union policies in one "Constitutional Treaty" in 2005 seemed to bring an end to the specific nature of CFSP. In addition, the Constitutional Treaty introduced the "Union Minister for Foreign Affairs" – modified by the Treaty of Lisbon to "High Representative of the Union" – as the successor to the "High Representative for Common Foreign and Security Policy". Thus a new, more **supranational**, element was introduced into the CFSP by allowing initiatives in this area to be taken by an "agent" of the Union, rather than simply by MS. Similarly, the privilege of convening an extraordinary meeting was moved from the Presidency to the HR, which implied that for the first time the Council could be convened on the initiative of the EU itself.

- 27 At the same time, the role of the **Commission** in initiating new policies remains clearly different. First of all, the Commission lost its formal right to request an extraordinary meeting of the Council. While it could be argued that this competence has never been exercised, the current situation further underlines the distance between the Commission and CFSP. Yet, more importantly, the individual competence of the Commission to submit proposals (one of the crown jewels of the "Community method") has been removed and replaced by the possibility of submitting initiatives together with the new HR. Even a proposal by the Presidium of the Convention to allow for joint proposals by the Commission and the HR was not accepted, because this would mean that the HR would need approval from the Commission for his proposal. Also, many found the proposals to limit the right of initiative of individual MS to be unacceptable.

¹⁸ Cf. Cremer, in Calliess & Ruffert (2011), Art. 30 EUV para 4; Frenz 2011, para 5322.

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