

Failure to notify Joint Nationally Determined Contribution (NDC)

IMPORTANT: The LRI acts as an intermediary in obtaining legal advice from third parties on the query you have raised. That advice is provided to the LRI but we are able to share it with you. The third-party advisers have accepted certain duties to the LRI but have not and do not accept any duty to you. The LRI itself does not and cannot provide legal advice. As a consequence, the LRI takes no responsibility for the content of any advice that it forwards, nor does it accept any responsibility for any delay either in obtaining or sending copies to you of the advice it receives.

In forwarding the advice to you, the LRI does not intend to create a lawyer-client relationship with you and to the extent permitted by law, any liability of the LRI to you (including in negligence or for any damages of any kind) is excluded. Any dispute between you and the LRI shall be governed by English Law, and the English Courts will have exclusive jurisdiction. In consideration of the LRI sharing the advice with you, you agree to the terms set out above.

This advice is provided in response to Query 58/19.

Query:

What are the legal consequences if parties to the Paris Agreement communicate a joint nationally determined contribution (NDC) but do not notify the secretariat in accordance with Article 4 para.16 of the Agreement?

Advice:

According to Article 4 para.16 of the Paris Agreement parties, including regional economic integration organizations and their member States, that have reached an agreement to prepare, communicate and maintain joint nationally determined contributions “shall notify the secretariat of the terms of that agreement, including the emission level allocated to each Party within the relevant time period, when they communicate their nationally determined contributions”.

A similar process was established under Article 4 of the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC). Parties, which agree to jointly ensure their aggregate anthropogenic carbon dioxide equivalent greenhouse gas (GHG) emissions do not exceed their assigned amounts, have to notify the secretariat of the terms of the agreement (Article 4 para.2). The agreement shall set out the emission level allocated to each party (Article 4 para.1).

Under the Kyoto Protocol the European Union (EU) and its Member States made a joint commitment to reducing GHG emissions by 8% during the first commitment period from 2008 to 2012. This target was shared between the Member States under a burden-sharing agreement contained in Council Decision 2002/358 of 25 April 2002 concerning the approval, on behalf of the EU, of the Kyoto Protocol to the UNFCCC and the joint fulfilment of commitments thereunder. It was notified, on behalf of the EU, to the secretariat of the UNFCCC (upon approval of the Protocol on 31 May 2002).

The burden sharing (or joint fulfilment) agreement sets out individual quantified emission limitation and reduction commitments for each Member State from 2008 to 2012 in Annex II.¹ Article 6 para.1 of the agreement further states that “When depositing their instruments of ratification or approval of the Protocol, Member States shall notify, at the same time and on their own behalf, this Decision to the Secretariat of the United Nations Framework Convention on Climate Change in accordance with Article 4(2) of the Protocol.”

On 8 December 2012 the parties to the Kyoto Protocol agreed on a second commitment period (2013 to 2020) and certain amendments to the Protocol (the so called Doha Amendment).² The European Union (EU) approved the amendments through Council Decision 2015/1339 of 13 July 2015 (on the conclusion, on behalf of the European Union, of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder).

Article 2 of the Council Decision provides that the EU and its Member States will fulfil their commitments under the Kyoto Protocol and the Doha Amendment jointly with one other party (Iceland) in accordance with the notification of the terms of the agreement (“the Notification”), set out in Annex I to the Decision. Section 3 of the Annex (the notification agreement) addresses the respective emission levels allocated to the members to the agreement. They are determined on the basis of the quantified emission limitation and reduction commitments for the members listed in the third column of Annex B to the Kyoto Protocol of 80 %.

The Paris Agreement was adopted on 12 December 2015, entered into force on 4 November 2016 and was ratified by the EU on 5 October 2016. It was approved by Council Decision 2016/1841 of 5 October 2016 on the conclusion of the Paris Agreement on behalf of the European Union. The Preamble to the Decision (in recital 10) states: “The joint action by the Union and its Member States will be agreed in due course and will cover the respective emission level allocated to the Union and its Member States.” In recital 11, the preamble refers to Article 4 para.16 of the Paris Agreement and the need to notify the secretariat “of the joint action, including the emission level allocated to each Party within the relevant time period”.

To date, the EU and its Member States are the only Parties to the Paris Agreement that have a joint nationally determined contribution (which was submitted as intended NDC in March

¹ Subsequent decisions concerning emission levels include: Commission Decision of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC (2006/944/EC); Commission Decision of 15 December 2010 amending Decision 2006/944/EC determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC (2010/778/EU); and Commission Implementing Decision of 8 November 2013 amending Decision 2006/944/EC to include the emission level allocated to the Republic of Croatia under the Kyoto Protocol (2013/644/EU).

² To date, these amendments and the second commitment period have not entered into force.

2015). The EU's NDC envisages a reduction in GHG emissions of at least 40% by 2030 compared to 1990. The commitment reflects the target contained in the climate and energy policy framework for the European Union adopted by the European Council in October 2014 (COM/2014/015 final).

Subsequently, EU legislation was put in place to translate policy commitments into binding annual greenhouse gas emission targets for each Member State for the period 2021–2030: Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (the so called “Effort Sharing Regulation”).

The Effort Sharing Regulation determines minimum percentages by which each Member State shall by 2030 limit its GHG emissions compared to 2005 levels (Annex I to the Regulation). It further sets out a comprehensive and complex system of determining, checking and adjusting Member States' individual annual emission allocations (AEA) for the years 2021-2030, following a linear reduction trajectory. It aims to reflect the different capacities of Member States and provides a degree of flexibilities within the system (e.g. to bank, borrow, buy and sell emission allocations).

The European Commission is tasked with adopting implementing acts to define AEA for the years from 2021 to 2030 in terms of tonnes of CO₂ equivalent (Article 4 para.3 of the Regulation) based on a comprehensive review of the most recent national inventory data for the years 2005 and 2016 to 2018. It is expected to do so during the course of 2020. On 12 December 2019, the European Council also invited the Commission, after a thorough impact assessment, to put forward its proposal for an update of the EU's nationally determined contribution (NDC) for 2030 in good time before COP26.

To date, the EU and its Member States have not notified the UNFCCC secretariat, in accordance with Article 4 para.16 of the Paris Agreement, of the terms of an underlying agreement to their joint NDC, including the emission levels allocated.

Consequences of failure to notify the secretariat

Article 4.16 is among the few prescriptive provisions in the Paris Agreement (“shall”) that contains a clear obligation of conduct - i.e. to notify the secretariat of the terms an agreement to act jointly when they communicate their nationally determined contributions. One view may, therefore, be to consider failure to do so as a breach of a provision of the treaty. Under the 1969 Vienna Convention on the Law of Treaties, this in turn could trigger the rights of other parties (to invoke the breach) if the alleged breach was “material”. Material in this context is defined – under Article 60 paragraph 3 (b) of the Vienna Convention - as the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

The Paris Agreement aims to strengthen the global response to the threat of climate change as outlined in Article 2 of the Agreement. It appears difficult to argue that a purely procedural requirement (notification) can be considered essential to pursue and achieve an

overarching substantive outcome such as, for example, the stabilization of greenhouse gas emissions in the atmosphere at a level that would limit global warming to between 1.5 and well below 2°C above pre-industrial levels.

The Paris Agreement, however, is largely built around procedural reporting obligations and non-compliance with certain formalities may weaken its overall structure and ability to function effectively. The requirement to notify the terms of an agreement under Article 4.16 ensures a degree of transparency and accountability. The similarity in wording of the provision with Article 4 of the Kyoto Protocol also suggests that there may be a continuous expectation to do so at an early stage.

Parties that communicate a joint NDC remain responsible for their individual emission level as set out in the agreement to act jointly and notified to the secretariat (Article 4 paras.17 and 18). Unlike the Kyoto Protocol (in Annex B), however, the Paris Agreement does not list parties' individual targets. In case an agreement to act jointly, for example, fails or is prematurely terminated the notification of emission level allocated to each party would provide a degree of certainty for other parties and future carbon markets.

But while the procedural requirement to notify has its distinct role in the operational design of the Paris Agreement it is ultimately for the parties to define whether a breach is to be considered material. This can be based either on the subsequent interpretation of the Paris Agreement by its parties (Article 31.3 Vienna Convention) or Article 15 of the Paris Agreement - as a special provision applicable in the event of a breach (Article 60.4 Vienna Convention).

Article 15.1 of the Paris Agreement establishes a mechanism to facilitate implementation of and promote compliance with the provisions of the Agreement. Pursuant to Article 15.3, the parties to the Paris Agreement further adopted the modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, contained in Decision 20/CMA/1, in Katowice in 2018.

According to the modalities and procedures, the Committee can initiate consideration of a party's compliance if the party has failed to meet its procedural obligations under the Agreement in the following four cases (Decision 20/CMA.1, Annex sub-paragraph 22 (a) i-iv): to communicate or maintain an NDC under Article 4; submit a mandatory report or communication of information under Articles 13.7, 13.9 and 9.7; participate in the facilitative, multilateral consideration of progress under Article 13; or submit a mandatory communication of information under Article 9.5 on ex-ante finance.

Although framed as another "shall" requirement, the need to notify the secretariat under Article 4.16 has not been included here. Nor has it been mentioned elsewhere in the modalities and procedures. This strongly indicates that Parties do not consider it to be of particular importance to achieve the Paris Agreement's purpose.

With regard to the joint NDC of the EU, it is also important to note that it was initially submitted as an intended NDC (INDC). At this point in time, before the entry into force of the Paris Agreement, there was no obligation to notify the terms of the underlying

agreement. Whether there was an obligation, to notify the secretariat subsequently, for example, when the EU ratified the Paris Agreement (and became fully bound by the Agreement) is an open question. The fact that, following the early entry into force of the Agreement, Parties did not further address the issue may indicate that on this particular occasion they considered the EU to have satisfied its obligations under Article 4.

Conclusions

As a result, failure to notify the secretariat of the terms of agreement for a joint NDC may be considered a breach of Article 4.16 of the Paris Agreement. But it is not material and does not have any specific consequences. Two or more parties that communicate a joint NDC but not the terms of the underlying agreement may self refer to the Committee under Article 15. Failure to notify does not affect the validity of the joint NDC. This appears to reflect the general consensus among academics that failure to abide by the procedural obligation (e.g. to report correctly) does not render another act unlawful.³ The procedural shortcoming can be cured subsequently by submitting the missing notification.

Historically, the EU has argued for flexibility with regards to the timing and notification of agreements reached to meet GHG emission reduction commitments jointly.⁴ Parties could endorse a more flexible approach with regard to Article 4.16 by simply ignoring any missing notifications. This, however, would also set a precedent for the future implementation of the Paris Agreement, may result in different interpretations of Party obligations and consequently a degree of legal uncertainty. The EU, in its internal legal instrument, explicitly acknowledges the need to notify the secretariat of the joint action, including the emission level allocated to each Party.

Hence, the more sustainable approach may be to clarify expectations in a decision by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA). To confirm the relevance of Article 4.16 parties could, for example, call on (or urge, remind, encourage etc.) parties that act jointly under Article 4.2 to also notify the secretariat of the term of their agreement when they communicate their NDCs, at a later point in time or as soon as they reach agreement on the emission level allocated to each party. Alternatively or in addition, parties with a joint NDC could be encouraged to provide additional explanations (for example in their NDC) if they encounter specific challenges in meeting the requirement of Article 4.16.

³ R Jennings, A Watts, 'Oppenheim's International Law: Volume 1 Peace (9th edition), (2008), p423, fn 22; C Gray, 'International Law and the Use of Force by States', (3rd edition) (2008), p.122; See also D. W. Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?', (International and Comparative Law Quarterly), (2017).

⁴ Oberthür S., Ott H.E. (1999) Joint Fulfilment of Commitments (Article 4). In: The Kyoto Protocol. Springer, Berlin, Heidelberg