

EU Effort Sharing after 2020:

Review and Ratcheting Up EU Climate Targets

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Key messages

- The Paris Agreement requires Parties to scale up their commitments every five years, i.e. with every nationally determined contribution (NDC).
- With coverage of nearly 60 % of the EU emissions, the Commission's legislative proposal for an Effort Sharing Regulation (ESR) is essential for the EU to meet this obligation. The proposed ESR, however, is weak and does not support adequately continuous scaling up of EU targets.

I. Summary

The **Paris Agreement** (PA) requires Parties to scale up their commitments every five years, i.e. with every nationally determined contribution (NDC). Accordingly, the EU is essentially under a legal obligation to make progressively stronger efforts towards the PA's objectives and to submit an NDC every five years that reflects its highest possible ambition (Articles 3 and 4.3 PA). This obligation is binding for the EU legislators – the Council and the Parliament. These provisions – dubbed a ratcheting-up system – are indispensable for holding the increase of global temperatures well below 2°C and achieving climate neutrality in the second half of this century – the central long term goals of the PA. As another crucial obligation, the PA commits Parties to review progress towards its long-term goals, the so-called global stocktake.

With coverage of nearly 60 % of the EU emissions, the Commission's legislative proposal for an **Effort Sharing Regulation (ESR)** is essential for the EU to meet its obligations under the PA, including its commitment to continuously increase its ambition. The ESR proposal – now about to enter the crucial phase of the legislative process – must take account of these obligations. To this end, the proposal for the ESR does contain the **bare bones of a review system**. The proposed system covers adequately the scope of the review under the PA and takes due account of the timing requirements of the PA. This is positive. However, in order to strengthen the review and put meat on its bones, it is an option to base the ESR review on a report by an independent body, either the EEA or a newly established body tasked with providing credible scientific advice.

In terms of implementing the requirements of the PA on **ratcheting up of targets, the ESR proposal is weak and not in line with the requirements of the PA** set out above. The ESR proposal merely states that the Commission may make proposals, if appropriate. This is a standard review clause that is common to many other pieces of EU legislation but it does not contain a dedicated mechanism for scaling-up the EU's targets and ambition. It is up to the political will of the Commission to propose higher targets – or to make no proposal at all. Given the size of the challenge – emission reductions of probably -95 % until 2050 (compared to 1990) – and the requirement of the PA to regularly scale up targets, the new ESR should provide for a system that spurs and maintains the continuous increase of EU ambition over time. To use a standard phrase of EU politics – business as usual is not an option to meet the fundamental challenge of decarbonising

the EU's economies. If adopted as proposed now, the ESR proposal would be a missed opportunity for establishing a system that raises ambition and supports the implementation of the PA and the achievement of its long-term objectives.

There are additional and **alternative options for spurring and strengthening a continuous scaling up of the EU's ambition and targets.**

- **Automatic target adjustment:** The ESR could for instance include an automatic target adjustment according to a previously agreed formula, effective at regular intervals without any further proposals by the Commission. However, this is unrealistic and problematic. It seems impossible – politically and scientifically – to design a pre-defined formula that quasi-automatically accommodates all aspects of a task as complex as target setting.
- **Adjustment through delegated act:** The ESR could delegate the future scaling up of targets to the Commission. However, authorising the Commission to determine the EU's future efforts and targets raises legal problems. Only elected parliaments and governments should take decisions as fundamental as target setting. This is the rationale behind Article 290 of the TFEU, which prohibits the delegation of fundamental decisions to the Commission.
- **Long term EU targets that progress over time:** The ESR could contain a long-term EU target for 2040, 2050 and even beyond that progress over time. In principle it is also possible that the ESR contains reduction targets for the years 2035 and 2045. Because it is not possible to project the economic development and greenhouse gas reduction potential of Member States after 2030, the ESR could not set national targets for the decades after the 2030 at this point in time. Setting of national targets would thus remain subject to the legislative processes, which could be modified as discussed below. This option would not entail individual Member State responsibility and would not provide the basis for infringement procedures. It would, however, support increased ambition over time because national targets for the period after 2030 would have to add up to the increasing EU targets.
- **Scaling up the target following a qualified proposal by the Commission** is another option. There are various ways by which the ESR could qualify the Commission's future proposal in order to ensure a robust ratcheting-up system, but they all have one thing in common: the proposal would start a legislative process that leads to the adoption of higher targets – or not. In other words, the legislator maintains control of whether and how targets are strengthened – or not. It should be kept in mind, however, that the Council and the Parliament have to ensure that the EU fulfills its obligations under the PA, which requires regular scaling up and new NDCs that reflect its highest possible ambition. Options to qualify the Commission's proposal include:
 - **Obligation to propose new measures:** The new ESR could require the Commission to propose new measures, without necessarily requiring higher targets. If the Commission did not propose new measures it is obliged to publish a statement on why it believes that existing policies are sufficient. Since this system

requires the Commission to make its reasoning public, it has some political weight. It is, however, fairly weak because it does not guide the content of the proposed measures, e.g. by requiring the Commission to propose higher targets. The Commission can even refrain from proposing new measures if it provides public reason.

- **Obligation to propose higher targets:** The ESR could oblige the Commission to propose higher targets every five years – in line with the timeframe required by the PA. It is also conceivable to qualify this obligation, stating that the Commission should or must propose targets that are at least x % above the previous targets. Depending on the stringency of these criteria, this system could strengthen the EU's climate action considerably. To keep the system flexible, the ESR could allow the Commission to refrain from proposing higher targets if there are overriding compelling reasons of public interest against it.
- **Obligation to base proposals on independent advice:** The ESR could stipulate that the Commission's future proposals for higher targets have in some way to be based on a preparatory report from an independent body or – alternatively – the EEA. There is a range of options for how strongly the Commission would be required to take that report into account. For instance, the Commission could be bound by the report's findings or recommendations. However, this is legally problematic because it would infringe upon the Commission's right to initiate legislation. As another alternative, the Commission could be allowed to deviate from the report but would have to provide public reasons why it refrained from proposing targets as recommended by the independent body. This system has some political weight because publically deviating from the recommended targets has a political price. A stronger system would require the Commission to consult and coordinate with the independent body if it intends to deviate from the recommended target. In this respect, the mandate of the European Market and Security Authority (ESMA) to develop technical standards could serve as a model for this system.

It is important to note that it is possible to **combine** these options and fine-tune each of their elements in terms of stringency. For coherent and robust ratcheting up of ambition, the reform of the **EU emission trading scheme (ETS)** should take account of these options.

2. Introduction

A legally binding commitment to hold the increase of global average temperature well below 2°C and a commitment to pursue national policies that aim to hold climate change are at the heart of the **Paris Agreement (PA)**. The PA also obliges Parties to aim for peaking emissions as soon as possible and to achieve climate-neutrality in the second half of this century. As another essential commitment, the PA requires Parties to submit nationally determined contributions (NDCs) every five years - starting in 2018. Crucially, the PA states that Parties will scale up their mitigation commitments with every NDC, i.e. every five years. Some call this provision a ratcheting up system. To help ensure compliance with these obligations, the PA contains a comprehensive review mechanism, the so-called global stocktake (Article 14). This mechanism obliges Parties to take stock of the implementation of the PA to assess the collective progress towards achieving the purpose of the PA and its long-term goals. This review process will begin in 2023 and will reoccur every five years thereafter. The stocktake's timing is intended to enable parties to update and enhance their next NDC based on its outcome.

On 20 July 2016 the Commission published its **legislative proposal for an Effort Sharing Regulation (ESR)**. This proposal covers nearly 60 % of the greenhouse gas emissions. In combination with the EU ETS, it is one of the EU's essential instruments for the implementation of the PA. As its main purpose, the ESR proposal distributes the EU's collective reduction targets by setting individual reduction targets for Member States. The ESR proposal also contains a review clause, stipulating that the Commission reports to the European Parliament (EP) and to the Council on "the operation of the Regulation, its contribution to the EU's overall 2030 greenhouse gas emission reduction target and its contribution to the goals of the Paris Agreement" (Article 14 of the proposal). This report is due by 28 February 2024 and every five years afterwards. The report may include proposals for future measures, if appropriate.

This **paper discusses** ESR review and target adjustment. Section 3 analyses the review requirements under the PA and discusses to what extent the proposed ESR review is adequate for the implementation of PAs requirements. Section 4 explores the extent to which the PA requires Parties to scale up their commitments and to what extent the ESR proposal supports the PA's ratchet up system. This section also presents options that support the continuous increase of the EU's ambition and that are in line with the requirements of the EU legislative processes. Annexes 1 and contain graphical overviews of a new review and target adjustment system. Annex 3 suggests concrete amendments to the ESR proposal in an effort to strengthen the ESRs review and target adjustment system – in light of the requirements under the PA.

3. Review under the Paris Agreement and the Effort Sharing Regulation

The PA's global stocktake contains a number of requirements that are relevant for the review under the ESR in terms of scope and timing.

3.1. Scope of the review

According to Article 14 of the PA, the Conference of the Parties must assess the collective progress towards achieving the purposes of the Agreement and its long-term goals – the **so-called global stocktake**. According to the same provision, the global stocktake shall be comprehensive and facilitative. It shall consider “mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science”. The outcome of the global stocktake shall inform Parties in “updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action”. Parties have only started to discuss and elaborate the details of the global stocktake. The only emerging outcome at this (early) stage is that the stocktake will have a technical and a political element.

According to the **ESR proposal**, the Commission reports to the EP and to the Council on the operation of the ESR, its contribution to the EU's overall 2030 greenhouse gas emission reduction target and its contribution to the goals of the PA (Article 14). In essence, the Commission's proposal covers what the scope of the PA's global stocktake encompasses. The 2030 target is what the EU has already submitted internationally in its Intended Nationally Determined Contribution (INDC). The additional reference to the goals of the PA directly links the scope of the ESR review to the scope of the stocktake under the PA. Specifically, the ESR would explicitly evaluate the adequacy of the ESR's new instruments and its targets for achieving the long-term goals of the PA. This direct link to the PA makes sense and is a positive element of the Commission's proposal.

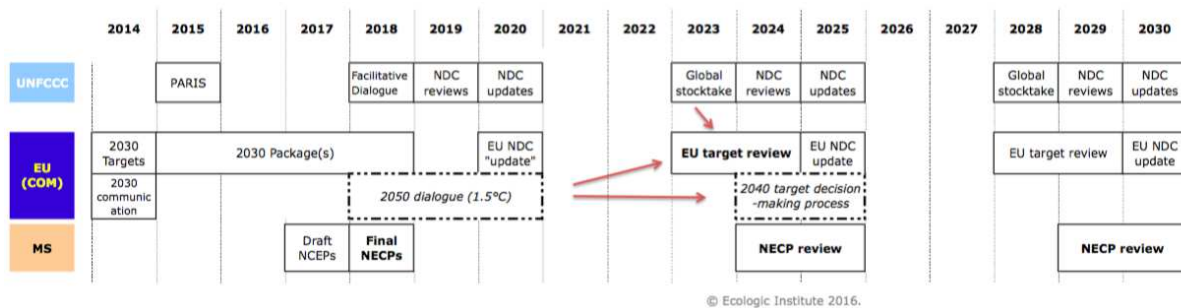
3.2. Timing of the review

Unless Parties decide otherwise, the global stocktake takes place in 2023 and reoccurs every five years thereafter (Article 14 PA). The outcome of the each stocktake informs subsequent new NDCs or updates of NDCs. The PA does not prescribe the timeframe for which an NDC has to apply, although it mandates the first Conference of the Parties to consider common time frames at its first session, which will be in November 2016. But whatever the timeframe of its content, **each NDC has to be renewed or updated every five years** (see Article 4.9 PA and paragraphs 23-24 of the Paris Decision, 1/CP.21).

Because the first global stocktake occurs only in 2023, the Paris Decision convenes a so-called **facilitative dialogue in 2018**. This dialogue is likely to be the precursor of the global stocktake in terms of mitigation efforts. The stated purpose of the facilitative dialogue is to take stock of the collective efforts of the Parties “in relation to progress towards the long-term PA goals under Article 4.1”, which addresses mitigation. The facilitative dialogue also has the purpose to inform the preparation of the NDCs. Following the facilitative dialogue in 2018, the Paris Decision requests all Parties to communicate or update their NDCs with a time frame up to 2030 no later than 2020.

The EU is therefore so far still free to choose whether to maintain the 10-year time frame for its NDC or consider commitment periods in five year length, but it has to communicate or update its contributions in 2020, 2025 and every five years thereafter. The update or new NDC has to be communicated at least 9 to 12 months ahead of the relevant Conference of the Parties, which normally takes place around the beginning of December. This means the **EU has to submit its updated or new NDC for 2030 in January-March 2020, for post-2030 in 2025** and so on.

According to the ESR proposal, the review of the ESR is due by **28 February 2024** and every five years afterwards. This timeframe is adequate to implement the timing requirements of the PA. It is intended to give the **EU sufficient time to take into account the 2023 global stocktake** when it prepares its next new or updated NDC, e.g. with a timeframe up to 2035. The ESR proposal, however, does not take account of the facilitative dialogue because this dialogue will take place in 2018, i.e. probably before the new ESR enters into force.



3.3. Review based on a preparatory report?

According to Article 14 of the ESR proposal, the **Commission will review** the implementation of the ESR (). This is standard practice in terms of how the EU reviews implementation of legislation. In principle this is a proven and reliable approach. However, there are **other models of reviewing EU legislation and policies**, including examples in which the EU bases its policies on the review and advice of independent bodies. The European Food Safety Authority (EFSA) and the European

Chemicals Agency (ECHA) are examples for such bodies. The European Securities and Markets Authority (ESMA) is another example – with particularly far-reaching powers. As another alternative, a newly established independent expert committee could provide the report that is the basis for the review.

Building on these experiences, it is an option to base the ESR review **on independent third party** advice, either an existing EU agency, like the EEA, or a newly established body specifically tasked with reviewing EU climate policies (for the details of this body see below Section 4.5.2). More concretely the ESR review could be based on a preparatory report by an independent body. This preparatory report could cover implementation of the ESR, achievement of the EU's overall 2030 greenhouse gas emission reduction target and its contribution to the goals of the Paris Agreement. Higher levels of independence, lesser exposure to political lobbying and greater levels of expertise in the subject matter argue for such a body and mandate. The size of the required reductions in greenhouse gas emissions over relatively little time is another strong argument for independent, science-driven review. Additional bureaucracy and expenses argue against this body.

4. Ratcheting-up of targets under the ESR

Article 3 of the PA stipulates that efforts of Parties to mitigate climate change “**will represent a progression** over time”. Article 4.3 of the PA determines that “each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting common but differentiated responsibilities and respective capabilities [...]”. Although the wording of these provisions does not contain an explicit obligation to scale up individual efforts (“will” represent a progression is factual language, instead of e.g. the common legal “shall”), the objective and spirit of this provision require a constant increase in the level of ambition and thus ever more stringent reductions. This interpretation is supported by Article 31.1 of the Vienna Convention on the Law of Treaties, according to which treaties are interpreted – among others – “in the light of its object and purpose”. To some extent, progression or continuously scaled-up efforts over time are a leitmotiv of the PA.

These provisions **require the EU to scale-up targets continuously** and to take additional measures necessary to ensure the EU makes mitigation contributions that are required for the attainment of the PA’s long-term objectives. It is important to note that these provisions apply to the EU emission reduction efforts and targets as whole, not only to the ESR targets. It should also be noted that more stringent reduction targets are not the only eligible contributions under the PA. International offsets continue to be possible contributions, but scaled up domestic mitigation efforts – expressed as more ambitious reduction targets – continue to be the backbone of (EU) climate action.

According to the PA, it is up to the Parties to decide how they increase their national contribution. In view of the EU's governance system, there are **various design options** to ensure that the NDC and its targets are progressively and continuously strengthened over time:

1. Maintain the status quo, i.e. the Commission makes a legislative proposal for new targets
2. Automatic target adjustment already provided for in the ESR legislation
3. Target adjustment delegated to the Commission
4. Inclusion of long term EU targets that continuously progress over time
5. Scaling-up targets in the legislative process based on a qualified Commission proposal

4.1. Maintain the status quo: Target adjustment through legislative proposal by the Commission

Article 14 of the **ESR proposal** stipulates that the Commission reports to the European Parliament and to the Council. If appropriate, the Commission may make proposals, i.e. the Commission may propose changes to legislation or new policies. It may also propose new targets, either more or less ambitious. This system allows the Commission to propose a target adjustment but it contains no requirement to do so. It is at the discretion of the Commission whether or not it presents a legislative proposal at all, and whether that proposal contains more ambitious targets or not. It remains possible that the Council requests the Commission to propose higher targets.

In essence, the Commission proposes merely a **standard review clause** that is common to many other pieces of EU legislation – not more. The Commission's proposal maintains the status quo in terms of future adjustments and does not contain a dedicated mechanism for scaling targets and ambition. This clause does not explicitly take account of the PA system that – in essence – requires a continuous increase in ambition.

It should be noted, however, that the ESR proposal contains a number of specific target adjustment provisions (Article 10). The target adjustment regime under the ESR allows for adjusting the MS' individual annual emission budgets in **specific circumstances**, such as adjustment of emission budgets because of changes in the coverage of ETS emissions or because of adjustments in line with Annex 4 of the ESR. However, this specific adjustment mechanism does not allow for scaling up targets as an effort to increase the EUs overall reduction efforts.

4.2. Automatic scaling-up of target

There are proposals for an automatic target adjustment. The ESR could provide that targets could be automatically increased, for example, according to a **previously agreed formula** which

integrates indicators on responsibility, capability, mitigation potential and the global emissions gap.¹ The 2009 NGO Proposal for the Copenhagen Agreement envisaged an automatic ratcheting-up procedure based on a fixed percentage.² Although (potentially) environmentally ambitious, such a mechanism is problematic. It seems impossible – politically and even scientifically - to design a fully pre-defined formula that quasi-automatically accommodates all aspects of setting targets for Member States. It would be difficult to take of account additional information, such as new scientific findings or larger economic developments. There are also **potential legal problems** – only elected parliaments and governments may take decisions as fundamental as target setting. To some extent, a formula for automatic target adjustment could sideline parliaments but it should be noted that it would be parliaments that adopt the formula, thereby ensuring its democratic legitimacy. Last but not least, such an automatism seems **politically unviable**.

4.3. Scaling up delegated to the Commission

The ESR could delegate the future scaling up of the EU's climate mitigation commitments to the Commission. However, authorising the Commission to determine the EU's future efforts and targets raises **legal problems** similar to those of an automatic scaling up of targets. Only elected parliaments and governments may take decisions as fundamental as target setting. Echoing these concerns, Article 290 of the TFEU prohibits the delegation of fundamental decisions to the Commission; only “non-essential” elements of legislation can be delegated to the Commission. Similar political feasibility issues arise.

4.4. Long term EU target that progresses over time

The ESR could contain a long-term EU target for 2040, 2050 and even beyond that progress over time. In principle it is also possible that the ESR contains reduction targets for the years 2035 and 2045. In line with estimates by the European Commission, an ESR target for 2050 would be 70% (compared to 2005) – if the EU were to reduce emissions by 80% in 2050. If the EU adopts a higher long-term target in the range of 90-95%, the target would be adjusted accordingly. The Commission did not calculate non-ETS reduction contributions for EU targets above 80%. There are equally no estimates for the interim targets. For an adequate contribution to keeping temperature increases “well below 2°C”, the EU would probably have to commit to reductions of – 95 % in 2050 for the economy as a whole.

¹ Donat, Lena and Ralph Bodle (2014): A Dynamic Adjustment Mechanism for the 2015 Climate Agreement, Rationale and Options. Carbon & Climate Law Review Vol. 8 No. 1, p. 13-22

² Alden Meyer et al. (2009): “A Copenhagen Climate Treaty, Version 1.0”, A Proposal for a Copenhagen Agreement by Members of the NGO Community, June 2009.

To this end the ESR could stipulate that it is its ultimate objective to contribute to reducing the GHG emissions of the EU by 95 % in 2050 and to achieve climate neutrality in the second half of the century. To achieve these objectives, the ESR could determine that Member States reduce the GHG emissions covered by the ESR annually in a linear manner beyond 2030, leading to a reduction of – x % compared to 2005 levels by 2050 and – y % by 2040 compared to 2005.³ The ESR could also include additional interim targets for 2035 and 2045.

Because it is not possible to project the economic development and greenhouse gas reduction potential of Member States after 2030, the ESR could not set national targets for the decades after the 2030 at this point in time. Setting of national targets would thus remain subject of the legislative processes, which could be modified as discussed below. In other words the option of a long term EU target would not oblige Member States to achieve quantified reductions after 2030. It would not entail individual Member State responsibility and would not provide the basis for infringement procedures. This option would, however, support progression over time because national targets for the period after 2030 would have to add up to the increasing EU targets.

4.5. Scaling-up targets in legislative process based on a qualified Commission proposal

As a third possible option, the ESR could specify the Commission’s mandate to propose new measures:

- **Obligation to propose new measures:** According to the ESR proposal the Commission may make proposals, if appropriate. This leaves the Commission unfettered discretion regarding whether to propose new measures or not. It has also full discretion regarding which measures it proposes. Instead, the new ESR could *require* the Commission to propose new measures, while maintaining its discretion regarding the content of the proposal. In case the Commission does not propose new measures, it could be obliged to publicly state its reasons for why it believes that existing policies are sufficient and why it intends to refrain from new proposing new measures. Because this system requires the Commission to make its reasoning public it has some political weight. It is, however, still fairly weak because it does not address the content or require the Commission to propose higher targets. It also does not ensure that there will be a proposal, because the Commission can refrain from proposing new measures as long as it has and publishes reasons.

³ It should be noted that comprehensive scientific analysis of how much developed countries need to reduce their emissions to be in line with global efforts to stay “well below 2°C” or 1.5°C has yet to be carried out. It is probable that the EU’s current reduction pathway will need to be re-adjusted towards the higher end of the current 2050 range, i.e. reductions of - 95% by 2050. For a detailed proposal for the inclusion of this option in the ESR see Annex 3 below.

- **Obligation to propose higher targets:** The ESR could oblige the Commission to propose increased targets every five years – in line with timeframe required by the PA. It is also possible to further qualify this obligation in terms of content, e.g. by stating that the Commission should or must propose targets that are at least x % above the previous targets. Depending on the stringency of these criteria, this system could strengthen the EU's effort to continuously increase its ambition. To keep the system flexible, the ESR could allow the Commission to refrain from proposing higher targets if overriding compelling reasons of public interest argue against proposing higher targets.
- **Obligation to base proposal on independent advice:** The ESR could stipulate that the Commission proposal for higher targets will be based on a preparatory report from an independent body or – alternatively – the EEA. This report would include proposals for increased targets. There are various options for determining whether and to what extent the Commission may deviate from the recommendations of the report.⁴

It is possible to combine these options and fine-tune each of its elements in terms of stringency. For example, the Commission could be required only to propose new measures – on the basis of an independent report or regardless of a report. The ESR could also oblige the Commission to propose new measures and / or higher targets – either with or without an independent report. But in any of these options, the **Commission proposal starts the regular legislative process**. The rationale behind it is that the legislator should decide whether targets will increase or not. In other words, the legislator maintains control of whether targets are strengthened – or not. It should be kept in mind, however, that the Council and the Parliament have to ensure that the EU fulfills its obligations under the PA, which requires regular scaling up and new or updated NDCs that reflect its highest possible ambition.

An (additional) requirement to base proposals on an independent body, or a requirement to scale-up targets every five years, would be a significant change to the basic system as currently proposed. There are a **number of reasons to strengthen the proposed system** through an obligation to continuously propose more ambitious targets, possibly based on independent advice:

- **Size of the challenge:** The EEA has shown that the EU is currently not on a realistic reduction trajectory towards 2050.⁵ According to the EEA, annual emission reductions of 3.3 % are required after 2030 if the EU intends to reduce emissions by 80 % in 2050. If the EU aims to reduce emission by 95 % in 2050, annual reductions of 4.6 % would be necessary. As the EU has achieved average annual reductions of 1 % since 1990, such a reduction path appears unrealistic. The size of the challenge argues for a mechanism that helps ensure continuous scaling up of targets.
- **More balanced legislative proposals:** Over the last decade, the European Council has taken an ever more active role in EU climate policies, mainly by adopting detailed conclusions. Since such conclusions represent a high-level political indication of what Member States would unanimously be willing to commit to, it made sense for the

⁴ See next section that also discusses the composition and mandate of the independent body.

⁵ EEA (2015): Trends and projections in Europe 2015 — Tracking progress towards Europe's climate and energy targets.

Commission to include these conclusions in its policy and legislative proposals. However, because the European Council decides by consensus, this development has not helped to adopt policies that are adequate for the decarbonisation of Europe's economy. Public and independent advice could help to balance the Commission proposal and to shield it from interference by the European Council.

- **Ensure higher levels of independence and credibility:** Independent advice could also help ensure that scientific evidence is a particularly important consideration in the proposal for increased targets.

4.5.1. Deviation from independent body's proposal?

One crucial aspect of involving an independent body is whether the Commission would be allowed to deviate from the recommendations of the body's report and its recommendations. In principle, there are at least three models for addressing this:

- **Commission is bound by the report:** In this model, the Commission could not deviate from the report. This not only a politically unrealistic but also legally problematic because it would undermine or infringe the Commission's right and virtual monopoly to initiate legislation – according to Article 17(2) TEU.
- **Commission must provide and make public its reasons:** As another option, the European Commission could be allowed to deviate from the recommendations of the independent body, but be obliged to provide and make public its reasons for doing so. EU legislation contains relevant examples. Article 241 TFEU, for example, states that the Council may request the Commission to submit to it any appropriate proposals. If the Commission refuses to make a proposal, it must inform the Council of the reasons. The public exposure and potential related pressure could be a fairly strong way to avoid that the Commission deviates from the recommendations in an unaccountable way..
- **Coordination between Commission and independent body:** The process of adopting regulatory technical standards under the **ESMA Regulation⁶ is an informative model.** According to Article 10 of the ESMA-Regulation, the European Securities and Markets Authority (ESMA) drafts regulatory technical standards. The standards enter into force after endorsement by the Commission. Where the Commission does not endorse a draft standard, it sends the draft back to ESMA for adjustments. If ESMA disagrees with the Commission's proposed amendments, the Commission may adopt the regulatory technical standards with the amendments or reject them. In this case, the Commission must coordinate with the Authority. Importantly, the Commission may adopt a regulatory technical standard without a draft from the Authority only where the Authority did not submit a draft to the Commission within a specific time limit.

⁶ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)

Applying the ESMA model to the ESR proposal entails that (1) the independent body or the EEA would draft the report and (2) the Commission would have to send back the report to this body for adjustment in case of disagreement. If disagreement continues, the Commission could only deviate from the initial report and its recommendations after consultation with the body. It is important to note, however, that ESMA may only propose regulatory technical standards that are technical and do not imply strategic decisions or policy choices (Article 10.1 ESMA regulation). In this sense, the analogy to ESMA does not hold because emission target adjustments are a political choice of strategic importance. At the same time, there is no legal requirement that would prevent the legislator from adopting a coordination requirement for the Commission when proposing increased targets.

4.5.2. Who provides guidance: European Environment Agency or another body?

There are two options to task a body with the review of the ESR and target adjustment: an **existing body** could be tasked or the EU sets up a **new body**. Given its expertise, the EEA would be a natural institution to inform the review. A newly established body would be the alternative.

4.5.2.1. European Environment Agency

In line with its legal basis (Regulation 401/2009), the EEA is a **fairly independent institution**. According to Article 2 of Regulation 401/2009, the EEA provides “objective information necessary for framing and implementing sound and effective environmental policies”. To ensure high scientific quality, the EEA is assisted by a scientific committee which delivers public “opinions on scientific matters concerning the agency’s activity” (Article 10 of Regulation 401/2009). Although the EEA is funded by the EU and despite the fact that the European Commission has an important role in the EEA’s budgeting process (Article 12 of Regulation 401/2009), the independence of the EEA has not been put into systematic doubt.

If target adjustment were based on an independent report, there is a **case to mandate the EEA** with providing this input. The EEA has a strong record of providing sound and credible advice to environmental policy making in the EU. In times when the EU is under scrutiny and struggles to maintain its legitimacy, there is a strong argument for strengthening existing EU institutions. If the independence of the EEA were an issue, it would make more sense to strengthen the agency’s independence than to establish another body, making an already complex governance system even more complicated. However, tasking the EEA with the review also has its downsides. Giving the EEA the mandate to propose targets would significantly change its current role and could politicise it – with uncertain consequences.

4.5.2.2. New independent body

As another alternative, a newly established body could be tasked to review and to propose target adjustments. This body has to be independent, i.e. there need to be **safeguards to ensure independence** of senior staff (nomination, appointment, tenure security) and the institutions itself (budget autonomy). To ensure the body's credibility, its members and staff has to embody the highest scientific expertise. The new body needs to have a strong mandate, which supports for an economy wide review and continuous increasing of targets. ESMA's governance structure can serve as a model for a strong independent body,

Key features of an independent body: the example of ESMA

- **Nomination, appointment:** ESMA's chairperson is appointed by the Board of Supervisors (Article 48 ESMA regulation). He or she is appointed the basis of "merit, skills, knowledge", following an open selection procedure.
- **Mandate:** ESMA has significant powers. For example, it has the power to (a) develop draft regulatory technical standards and to (b) issue guidelines and recommendations. Draft standards enter into force after the endorsement by the Commission. It is important to note that regulatory technical standards are only technical and may not imply strategic decisions or policy choices.
- **Independence:** The ESMA regulation provides for extensive independence rules. For example, the Chairperson and voting members of the Board of Supervisors "act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body". Neither Member States, EU institutions nor any other public or private body may influence the members of the Board of Supervisors (BoS). Similar provisions protect the independence of the Executive Director and the BoS.

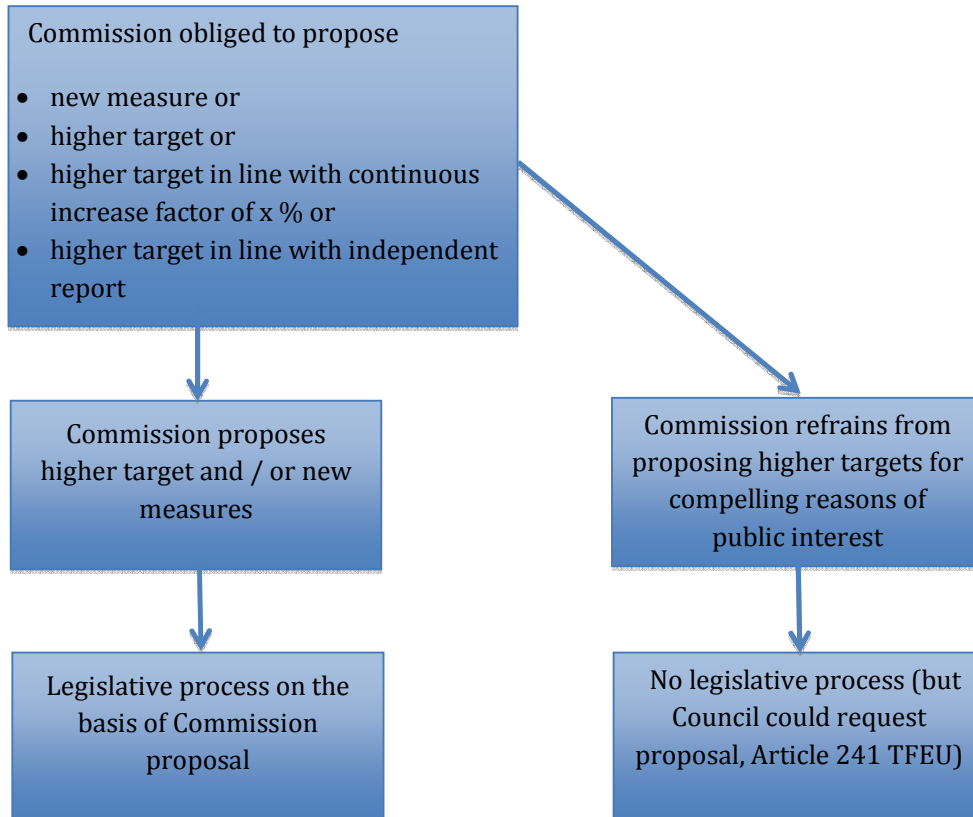
4.6. Conclusions

This table provides an overview of potential benefits and shortcomings of each ratcheting up option:

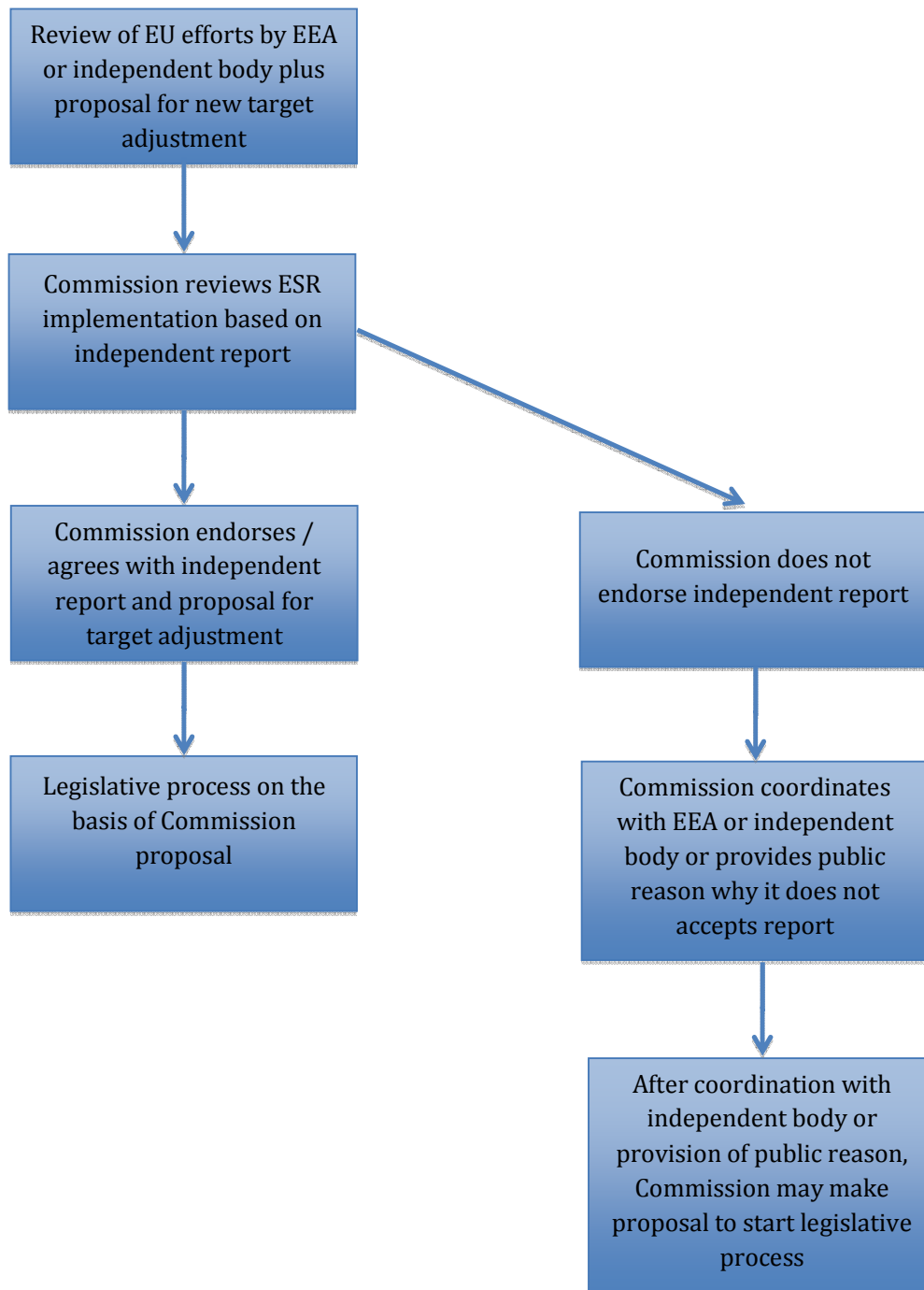
	Pro	Con
COM may make proposal, but no obligation (= status quo)	<ul style="list-style-type: none"> • High levels of political support • Proven standard method 	<ul style="list-style-type: none"> • Inadequate to support long-term reductions • Politically weak because depends on COM's ambition
ESR provides for automatic ratcheting up	<ul style="list-style-type: none"> • In theory high levels of ambition • Avoids potentially long legislative process 	<ul style="list-style-type: none"> • Undemocratic and legally problematic • Politically not viable
Adjustment delegated to COM	<ul style="list-style-type: none"> • Avoids potentially long legislative process 	<ul style="list-style-type: none"> • Legally problematic and not democratic
Long term EU targets that progress over time	<ul style="list-style-type: none"> • Simple and clear progression over time • High predictability helps ensure investor certainty 	<ul style="list-style-type: none"> • Does not break the current cumbersome system of negotiating national targets • Does not introduce an obligation on Member States • Introduces an obligation on the EU that is not enforceable because only Member States are subject to law enforcement
COM obliged to propose new measures	<ul style="list-style-type: none"> • Ensures that there is a proposal; • COM retains full discretion regarding content 	<ul style="list-style-type: none"> • No guarantee that Commission will propose higher target
COM obliged to propose <u>higher</u> targets	<ul style="list-style-type: none"> • Ensures that there is a proposal for a higher target 	<ul style="list-style-type: none"> • Limited flexibility
Obligation to propose <u>higher targets in line with predefined criteria</u>	<ul style="list-style-type: none"> • Ensures that there is a proposal; • Ensures essential content 	<ul style="list-style-type: none"> • Difficult to agree on criteria

COM proposal bound independent report	<ul style="list-style-type: none"> • Process science-driven • Legislator has final word 	<ul style="list-style-type: none"> • COM retains virtually no discretion • Undermines COMs right of initiative • No democratic control of the body
COM proposal may deviate from report only after coordination	<ul style="list-style-type: none"> • Strong safeguard against unaccountable refusal to raise ambition 	<ul style="list-style-type: none"> • Slows down processes, potentially cumbersome
COM may deviate from report if it publishes its reasoning	<ul style="list-style-type: none"> • Balance between maintaining COM's prerogative and independent input 	<ul style="list-style-type: none"> • No guarantee that recommendations of independent body will be implemented

Annex I: Target adjustment system – based on a qualified Commission proposal



Annex 2 Review and target adjustment system – based on an independent report



Annex 3: Options for amending the ESR proposal

New Article on long term targets that progress over time⁷

It is the ultimate objective of this Regulation to contribute to reducing the greenhouse gas emissions of the EU by 95 % in 2050 and to achieve climate neutrality in the second half of the century. To achieve these objectives, Member States shall continue reducing the greenhouse gas emissions covered by this Regulation annually in a linear manner beyond 2030, leading to a reduction of – x % compared to 2005 levels by 2050 and – y % by 2040 compared to 2005.

Article 14 review (amendments in bold)

The Commission shall report to the European Parliament and to the Council by ~~28 February~~ **31 October 2024 2019** and every five years thereafter on the operation of this Regulation, its contribution to the EU's overall 2030, **2040, and 2050 [if adopted]** greenhouse gas emission reduction target and its contribution to the goals of the Paris Agreement, ~~and may make proposals if appropriate.~~ **The report shall be accompanied by legislative proposals to adjust increase targets in line with Art. 3 and 4 of the Paris Agreement and every 5 years thereafter. Alternatively: The report shall be accompanied by a proposal to increase targets [alternatively: by xy %] with every NDC in line with Art. 3 and 4 of the Paris Agreement and every 5 years thereafter. The report does not include a proposal of stricter targets if compelling overriding reasons make proposing stricter targets unviable.**

Alternatively: The review shall be informed by a report published by the European Environment Agency (**alternatively**: independent body) on the implementation of this Regulation. The report should / shall include recommendations on increased targets. The European Commission shall provide explicit reasons if it intends to deviate from the recommendations contained in the report. **Alternatively**: the European Commission shall coordinate with European Environment Agency (**alternatively**: independent body) in case it intends to deviate from the recommendations contained in the report.

⁷ Taken from Nils Meyer-Ohlendorf, Proposals for Reforming the EU Effort Sharing Decision (2016)http://ecologic.eu/sites/files/publication/2016/21_04_2016_ecologic_esd_reform_paper-1_0.pdf