



# Early Ratification of the Paris Agreement by the EU

## Legal implications

Legal expert note

Ralph Bodle (Ecologic Institute)

Linda Kalcher (European Climate Foundation)

Josh Roberts (Clientearth)

20. September 2016

This note does not constitute official legal advice

**Ecologic Institute**

[ecologic.eu](http://ecologic.eu)

## Contact

Dr Ralph Bodle LLM  
Senior Fellow  
Ecologic Institute  
Pfalzburger Straße 43/44  
10717 Berlin  
Germany

Linda Kalcher  
Senior Associate Climate Policy  
European Climate Foundation  
Rue de la Science 23  
1040 Brussels  
Belgium

Josh Roberts  
Lawyer, Climate and Energy  
ClientEarth  
60 Rue du Trône  
1150 Ixelles  
Belgium

E-Mail:  
ralph.bodle@ecologic.eu  
www.ecologic.eu

E-mail :  
linda.kalcher@Europeanclimate.org  
www.europeanclimate.org

E-Mail:  
jroberts@clientearth.org  
www.clientearth.org

## Suggested citation:

Bodle, Ralph, Kalcher, Linda, and Roberts, Josh (2016): Early ratification of the Paris Agreement by the EU - legal implications. Legal expert note, Ecologic Institute / European Climate Foundation / Clientearth

## Content

<b>1</b>	<b>Introduction .....</b>	<b>4</b>
<b>2</b>	<b>What is ratification?.....</b>	<b>4</b>
2.1	At the international level: .....	4
2.2	At domestic and EU level.....	4
<b>3</b>	<b>What is entry into force? .....</b>	<b>5</b>
<b>4</b>	<b>What <i>content</i> is required for the ratification note from the EU and the MS? .....</b>	<b>5</b>
4.1	Under international law: .....	5
4.2	Under EU law.....	6
<b>5</b>	<b>Does the EU have to have implementing legislation in place at the time of depositing its instrument of ratification? .....</b>	<b>6</b>
5.1	Under international law .....	6
5.1.1	General international law .....	6
5.1.2	The Paris Agreement .....	6
5.2	Under EU law.....	7
5.3	Under domestic laws of the MS.....	8
<b>6</b>	<b>Do the EU and the MS have to submit their ratification notes <i>simultaneously</i>? .....</b>	<b>8</b>
6.1	Under international law .....	8
6.2	Under EU law.....	8
<b>7</b>	<b>What is the likely impact of Brexit on the EU's ratification process?.....</b>	<b>9</b>

## 1 Introduction

It is likely that the Paris Agreement (PA), which was adopted by the parties to the UN Framework Convention on Climate Change (UNFCCC) at the end of 2015, will enter into force by the end of this year. It might even happen in time for the climate conference that starts in Marrakech from 7 November. The EU and its Member States (MS) are in the midst of negotiating internally on how they will collectively implement their contributions towards the objectives of the PA. The EU is also considering whether or not to embark on early ratification of the PA, without necessarily waiting for all the Member States to finalise their own ratification procedures.

Potential early and unilateral ratification by the EU is driven by two major considerations: 1) The EU's desire not to be seen as being unable to contribute to the global momentum to bring the PA into force; and 2) the potential ramifications of not being able to formally take part in decisions made under the PA once it enters into force.

Nevertheless, there are a number of legal – and political – issues and potential consequences of early EU ratification. Within this context, in this paper we assess key legal questions related to the EU's potential early ratification of the PA.

## 2 What is ratification?

### 2.1 At the international level

Ratification means that a State, or the EU, formally expresses its consent to be bound by the treaty under international law. This is normally done by depositing a one-liner document to the depositary, e.g. the UN Secretary General in New York. The PA requires ratification in order to become a Party to it (Article 20).

For the PA, signing does not amount to ratification. However, there is a general obligation under international law that signatories must not defeat the object and purpose of the treaty.

Likewise, concluding domestic procedures, such as Parliamentary approval, does not amount to ratification at the international level. What matters is the depositing the instrument of ratification with the UN depositary.<sup>1</sup>

### 2.2 At domestic and EU level

EU law requires both the EU and each MS to ratify the PA. This is because there is consensus that under EU law, the PA is a so-called “mixed agreement” because its subject matter falls in the competence of both the EU and its MS. However, there is an open question whether the EU and MS must ratify *simultaneously* (see below).

---

<sup>1</sup> For instance, the *Washington Post* claimed on 12 September that Brazil had “ratified” the PA, [https://www.washingtonpost.com/news/energy-environment/wp/2016/09/12/brazil-just-ratified-the-paris-climate-agreement-heres-why-thats-a-really-big-deal/?utm\\_term=.c28f526e88c9](https://www.washingtonpost.com/news/energy-environment/wp/2016/09/12/brazil-just-ratified-the-paris-climate-agreement-heres-why-thats-a-really-big-deal/?utm_term=.c28f526e88c9). However, apparently it meant that Brazil had concluded some or all of its domestic procedures. However, until the United Nation's „Ratification Ceremony“ on 21 September 2016, Brazil had not deposited its instrument of ratification and was not officially counted as having ratified. See , and the United Nations Treaty Collection at <https://treaties.un.org>, both websites last accessed 20 September 2016.

The EU and each of the 28 MS have to satisfy their internal constitutional procedures for ratifying international agreements before they can deposit their instrument of ratification (see below).

Regarding ratification by each MS, the domestic constitutional law of most MS requires that the treaty has to go through an internal procedure before they can deposit their instrument of ratification at the international level. In many countries the procedure involves approval by Parliament. Some MS have already completed their internal procedure but have not yet deposited their instrument of ratification with the UN.

Regarding ratification by the EU, EU law requires a procedure involving a Council decision and European Parliament approval before the EU can submit its instrument of ratification to the UN (Article 218(6) of the Treaty on the Functioning of the EU, or TFEU). For this Council decision, by default a qualified majority is required unless the agreement covers a field for which unanimity is required for the adoption of an EU act. For the PA, qualified majority is likely to apply. For example, the decisions to be bound by the UNFCCC and Kyoto Protocol were based on what is now Article 192(1) TFEU, which was a field which did not require unanimity. For the PA, the Commission's proposed draft decision also refers to this article. Some MS (e.g. Poland) may prefer the Council to decide by unanimity because in their view the subsequent implementing acts would require unanimity under Article 192(2).

### 3 What is entry into force?

Entry into force means that the countries, or the EU, that have ratified the PA are bound by its obligations under international law.

Entry into force also means that only these countries are “parties” and only they count when implementing decisions are adopted or rejected by the regular Conference of the Parties to the PA. However, countries that are not parties because they have not yet ratified may participate in the negotiation of such decisions, e.g. by being allowed in the room or to make submissions. However, their agreement or objection will not matter when it comes to adoption of actual decisions.<sup>2</sup>

The PA sets conditions for its entry into force: Ratification by 55 parties accounting in total for at least an estimated 55% of global greenhouse gas (GHG) emissions (Article 21). The PA will come into force 30 days after these conditions have been met. The EU does not count as additional to the MS when it comes to counting the number of parties necessary for entry into force (Article 21.4) Likewise, the emissions of the EU are not counted as additional to those of the MS.

## 4 What *content* is required for the ratification note from the EU and the MS?

### 4.1 Under international law

The EU (as an organisation in its own right) and each MS that wants to be a Party to the PA need to submit its own instrument of ratification. In principle the content of the ratification note can be a one-liner.

---

<sup>2</sup> See UNFCCC Legal Affairs Programme (7 April 2016). Information Note: Entry into Force of the Paris Agreement: legal requirements and implications, para 18, [https://unfccc.int/files/paris\\_agreement/application/pdf/entry\\_into\\_force\\_of\\_pa.pdf](https://unfccc.int/files/paris_agreement/application/pdf/entry_into_force_of_pa.pdf), last accessed 20 Sep 2016.

For the EU, the PA requires that it declares its competence regarding all matters governed by the PA in its instrument of ratification (Article 20.3). This is a standard text that is added to the ratification note and should not be controversial.

The PA does not require that the EU's or each MS's ratification note expresses an intention to implement or to legislate. However, there is a requirement for the EU and the MS to communicate, *when they communicate their nationally determined contributions*, who takes up which share of the emission reductions (as outlined below under section 4.1.)

## 4.2 Under EU law

There is no EU legal requirement for the EU to state its intent to legislate in its ratification instrument. The EU must merely comply with the requirements established by the PA, as stated above.

# 5 Does the EU have to have implementing legislation in place at the time of depositing its instrument of ratification?

## 5.1 Under international law

In sum, there is no requirement in general international law or specifically in the PA or to have implementing legislation in place at the time of ratification. However, the EU may consider it useful or necessary to adopt legislation before it submits its ratification note, even though it is not required to do so by international law, in order to establish legal certainty and as a matter of political legitimacy on the international stage:

### 5.1.1 General international law

The default position under general international law is that there is no requirement in the PA or in general international law to have implementing legislation in place at the time of ratification.

### 5.1.2 The Paris Agreement

However, the PA could go beyond that default position and specifically require the EU have to have implementing legislation in place at the time of depositing its instrument of ratification. Such a requirement could follow from the fact that the EU wants to implement the PA jointly with its MS. The PA allows this but contains special provisions: Parties who agreed amongst themselves to implement the PA jointly have to notify the PA's Secretariat of the terms of that agreement, including the emission level allocated to each Party (Article 4.16).

Some may argue that the EU agrees on its internal burden sharing through a revised Effort Sharing Regulation (ESR), which is EU legislation, and that therefore the EU has to have this legislation in place in order to notify it. However, several reasons speak against such an argument:

The PA is silent about the *legal form* of the burden sharing agreement that has to be notified. The PA requires "the terms" of the burden sharing to be notified, but it does not require that the burden sharing agreement is enshrined in EU or MS law in order to satisfy the ratification process.

Second, the PA is at best ambiguous regarding *at which point in time* the burden sharing agreement has to be notified to the Secretariat. While politically it may make sense to let the other parties know about the terms of joint implementation at the time of ratification, this is not reflected in the PA's legal language. The drafters of the PA could have drawn on the similar requirement in the Kyoto Protocol, which explicitly required the EU to notify its internal burden sharing agreement at the time of ratifica-

tion. Instead, Article 4.16 of the PA requires that the burden sharing agreement is notified *at the time when the 'NDC' is communicated*. This point in time is not necessarily the time of depositing the instrument of ratification: Paragraph 22 of the Paris Decision shows that it can be afterwards, as it merely “invites” parties to submit their first NDC at the time of ratification. In contrast, paragraph 24 of the Paris Decision “requests” parties with an existing INDC up to 2030 to communicate or update “these contributions” by 2020. The EU submitted its INDC on 6 March, 2015.<sup>3</sup> Under international law, the wording of Article 4.16 PA, together with the Paris Decision, is not clear enough to express an unequivocal legal requirement relating to ratification. Therefore there is a strong argument that the EU and its MS do not have to submit their internal burden sharing agreement (i.e. the revised ESR) before 2020. However, in case the PA enters into force and the EU ratifies after 2020, the EU has to have the burden sharing agreement in place at the time of ratification.

The EU may consider it useful or necessary to adopt legislation before it submits its ratification note, even though it is not required to do so by international law. One reason could be that once the PA enters into force, the EU has to comply with its obligations, in order to establish legal certainty in terms of delivery and potential compliance. Moreover, as a matter of political legitimacy on the international stage, because it is delivering its contributions to PA objectives through a ‘regional economic integration organisation’, the EU may want to demonstrate through legislation how it will deliver its collective contribution towards PA objectives.

Side note: A related but separate question is whether the PA, once it is in force, requires parties to enact *legislation* in order to implement and comply with the PA. The Council's legal opinion seems to suggest that “in principle, compliance with [the PA's] obligations requires that the necessary measures are provided in legally binding instruments” (para 31). However, the opinion does not state reasons or authority for this view. There is no requirement in the PA or under general international law that a treaty must be implemented specifically *by way of legislation*. Although it is argued that there is a general duty to bring internal law into conformity with international obligations, a failure to bring about such conformity would not in itself be a breach of the PA.<sup>4</sup>

## 5.2 Under EU law

Under EU law, there is no general legal requirement under Article 218 TFEU for EU legislation to be in place at the time the EU deposits its instrument of ratification of an international agreement.

Specifically for the Paris Agreement, the EU has agreed internally, through the Council conclusions of October 2014, to implement the PA through an internal burden-sharing agreement via EU legislation. Based on this political commitment, the EU it will need to adopt such instruments, e.g. the proposed ESR, an Emissions Trading Scheme etc. Also, from a political point of view, this will legitimise its shared contribution and establish legal certainty for delivery. However, there is no legal requirement under EU law that this legislation must be in place at the time it deposits its instrument of ratification.

Once the PA enters into force and is binding on the EU and its MS, they must have the proper arrangements in place to ensure that they are in compliance with the PA. One could argue that if the PA enters into force for the EU and MS and they have not been able to adopt their burden sharing under an ESR, there is a risk of non-compliance with the PA. There could be a legal requirement under EU law to avoid this risk. However, there is no obligation under the PA that the EU risks of breaching by not having its burden agreement in place at the time of ratification:

---

<sup>3</sup> Submission by Latvia and the European Commission on Behalf of the European Union and its Member States (Riga, 6 March 2015), <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>, last accessed 20 Sep 2016.

<sup>4</sup> Brownlie, *Principles of international law*, 6th ed., p. 35.

First, non-compliance could arise if the EU was required to notify the burden sharing agreement at the time of ratification. However, there is no obligation for the EU under the PA to notify the burden sharing agreement until 2020 (see above).

Second, non-compliance could arise if the EU was unable to fulfil what it has set out to do in its INDC for the period 2020-2030. If the EU ratifies the PA without its burden sharing in place, there is no guarantee that it will subsequently be able to agree on it. The argument could be made that EU law requires the avoidance of this situation. However, this problem is the same for many international agreements. EU law does not generally *require* having implementing legislation in place at the time of ratification and there is no reason why the PA should be legally different in this respect.

From a political perspective, because the EU is not required under EU law to have the revised ETS/ESR in place in order to ratify the PA, this arguably alleviates pressure to seek expedited adoption of the revised ETS/ESR. Indeed, pushing for expedited adoption of this legislation arguably risks locking the EU into sub-optimal solutions. The EU could ratify and still have time to properly discuss its implementing legislation and carry out the normal legislative process for adopting it.

### 5.3 Under domestic laws of the MS

If there is no burden sharing in place at the time of ratification, some MS might have concerns about getting the PA approved in their national procedures and Parliaments, or about submitting the ratification note at the international level. The concern could be that the MS would approve a treaty, or even assume an international obligation, while *under EU law it is* still unclear what that MS's specific obligation is. This could create legal uncertainty with regard to who is ultimately accountable for meeting obligations under the PA. This might not serve as a legal hurdle at national level, per se, but it will play a role in assessing relevant political considerations and could create political pressure against ratification prior to conclusion of the ESR.

## 6 Do the EU and the MS have to submit their ratification notes *simultaneously*?

### 6.1 Under international law

No. The PA does not require simultaneous ratification (cf. Article 20.2, first sentence).

### 6.2 Under EU law

As highlighted in section 2.2, the PA is a mixed agreement. Nevertheless the legal position is unclear and there is room to argue one way or the other. There are no specific legal rules on mixed agreements. In its case law, the Court of Justice of the EU has determined that the respective legal duties of the EU and its MS stem from the general duty to cooperate, and it has decided cases on its interpretation of this duty.

There is little practical precedence governing the issue. There have been cases in the past where the EU and the MS have ratified mixed agreements at different times. For instance, in ratifying the Aarhus Convention, the EU and MS all ratified at different times. However, that case is probably not analogous because implementation does not envision joint action in the same way that the PA does. The Council Decision on the Doha amendment states that EU and MS shall "endeavour" to ratify simultaneously.

However, it might be argued that because the PA is a mixed agreement and has to be implemented by the EU and its MS together, depositing their instruments of ratification has to be simultaneous in order to avoid a mismatch between legal obligations under international law and the ability to fulfil



them under EU law. The argument might be that for GHG reductions in particular, the EU factually cannot reduce emissions on its own. Therefore the EU would not ratify and assume an international legal obligation unless the MS also do so at the same time.

Unless MS act quickly to ratify, the EU is unlikely to be in a position to support the global effort to bring the PA into force quickly, which could happen as early as the end of 2016. Practically speaking, this will be felt most strongly with regard to the decision-making process of building out the institutional and procedural framework of the PA. Slow EU ratification means there is a risk the PA will enter into force without the EU being a formal Party. This means that while the EU might be able to be in the room and speak, it will be unable to participate in decision-making about the rules of procedure and other decisions governing implementation of the PA.

On the other hand, the EU ratifying without burden sharing in place, or the EU ratifying before its MS, also bears long-term political risks for future EU internal cooperation that should be assessed.

## **7 What is the likely impact of Brexit on the EU's ratification process?**

At this moment in time, because the United Kingdom (UK) has not triggered Article 50 of the TFEU, which will initiate an official process of UK withdrawal from the EU, legally speaking nothing has changed. Therefore, it would be too early to speculate on the impacts of Brexit on the EU's ratification of the PA. Uncertainty around the precise conditions of Brexit (which have to be negotiated), nevertheless, must be kept in mind when reading this analysis.