

NDC submission date

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*This advice is provided in response to **Q17/20***

Query:

1. Following the postponement of the 26th Conference of Parties (“COP26”) (originally planned for November 2020), by when do Parties have to communicate or update their Nationally Determined Contributions (“NDCs”) pursuant to Article 4 of the Paris Agreement (or “Agreement”)?
2. If the Parties are bound to communicate or update their NDCs by 2020, is there any legal basis to say that, in view of the pandemic and the unprecedented burden it has created for Parties with limited resources, in particular low income and developing countries, the requirement does not apply?

Summary:

The relevant deadlines for submitting NDCs are governed by Article 4.9 of the Paris Agreement, the interpretation of which is assisted by Decision 1/CP.21 (2013) (the “Paris Decision”).¹ However, the Agreement is silent on the exact deadline and the Paris Decision gives rise to some legal uncertainty as it contains ambiguous (and arguably conflicting) provisions as regards submission. In summary, while it is impossible to reach a definitive view of the relevant deadline, given the competing provisions within the Agreement and the Paris Decision, our view is that:

- paragraphs 23 and 24 of the Paris Decision may impose a non-mandatory deadline to submit “by 2020”, whereas paragraph 25 imposes a mandatory deadline of at least 9 to 12 months prior to the relevant COP session;
- relevant context, related decisions and interpretations by Parties and stakeholders and state practice support the view that the relevant paragraphs of the Paris Decision co-exist, such that Parties are expected to submit new or updated NDCs in 2020 and every five years thereafter and, within each five year cycle (including 2020), Parties must submit their NDCs 9 to 12 months prior to the relevant COP session;
- it is therefore arguable that, for the 2020 cycle, Parties were required to submit their NDCs by 9 February 2020, in advance of COP26 which was originally scheduled for 9

¹¹¹ Decision 1/CP.21 of 11 December 2015, available here.

November 2020. However, given the subsequent postponement of COP26 to 1 November 2021, the better interpretation, we would argue, is that the ‘hard’ deadline for submission is now 1 February 2021;

- there is some support within the text and context of the Agreement and Decision 20/CMA.1², which sets out the terms of reference for the committee of experts (the enforcement mechanism for the Agreement) (the “Committee”), for Parties to submit their NDC after the deadline. This is also supported by the UNFCCC Secretariat’s Notification to the Parties dated 13 August 2020 (the “Notification”),³ which anticipates that some Parties may need to submit their NDCs throughout the course of 2021 (albeit, in any event, in advance of COP26 on 1 November 2021); and
- in any event, the enforcement mechanism under the Paris Agreement is non-punitive in nature and, while the Committee has powers to make decisions or recommendations and take measures in respect of Parties who fail to submit their NDCs on time, any investigation into such breach would be reliant on co-operation from the relevant Party and (whilst the position in this regard cannot be guaranteed) would be unlikely to result in severe legal sanctions.

Advice:

Background and introduction

All parties to the Paris Agreement are required to submit successive NDCs.⁴ The use of “*shall*” in the text indicates that the requirement is legally binding and enforceable rather than discretionary. Indeed, this was a key point that the Parties discussed prior to finalisation of the Agreement.⁵

Similarly, Article 4.9 requires Parties to communicate an NDC “*every five years*” in accordance with the Paris Decision and any other COP decisions (again using the term “*shall*”).⁶ These are procedural obligations (to maintain and communicate successive NDCs) and, while there are certain substantive obligations,⁷ the NDCs are not, themselves, enforceable under the Paris Agreement.⁸ The question of whether NDCs encapsulate commitments that are legally enforceable is one for national (or, in the case of the EU, supranational) law.⁹

Furthermore, both the implementation and compliance mechanism and the enhanced transparency framework under the Agreement take a “*non-punitive*” approach,¹⁰ so (whilst the position in this regard cannot be guaranteed) it is unlikely that a breach of a Party’s mandatory

² Decision 20/CMA.1, Annex I (available here).

³ Notification available here.

⁴ Article 4(2) states that “*Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.*”

⁵ Daniel Klein, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017), page 147.

⁶ Article 4(9) states that “*Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14.*”

⁷ For example, under Article 4.8, “*all Parties shall provide the information necessary for clarity, transparency and understanding*” when “*communicating their [NDCs]*”.

⁸ ECBI, *Paris Agreement Pocket Guide*, page 7 (available here).

⁹ ECBI, *Paris Agreement Pocket Guide*, page 7 (available here).

¹⁰ Articles 15.2 and 13.3.

obligations under the Agreement would lead to any severe legal sanctions by the compliance body, albeit that there may be other domestic legal or political consequences.

1. Question 1 re submission dates for successive NDCs

Parties submitted a first set of NDCs upon ratification of the Paris Agreement (although this was not strictly required by the Agreement)¹¹ in 2015 and 2016; the next date for submission of successive NDCs is 2020, as highlighted in the Paris Decision. The text of the Agreement is silent on the exact timeframes for submission, although the Parties appear to have discussed ‘by 2020’ and ‘by 2021’ as the original target date in the underlying negotiations,¹² before ratification – albeit without any codification of a specific date.

As noted above, Article 4(9) requires the NDCs to be submitted in accordance with the Paris Decision and any other COP decisions, but it does not provide (and no other provision provides) a precise deadline for submission. Reference must therefore be made to the implementing decisions. The embedded reference in Article 4(9) to the Paris Decision strongly suggests that the Decision itself must be considered as part of the textual matrix to be interpreted when assessing the relevant timeframe. However, as set out below, that Decision contains ambiguous provisions as regards the submission deadline.

Paragraphs 23 and 24 of the Paris Decision “request”: in respect of NDCs that cover a period up to 2025, to provide new NDCs by 2020 (and every five years thereafter) ‘and in respect of NDCs that cover a period up to 2030, that Parties communicate updated versions by 2020 (and every 5 years thereafter). By contrast, paragraph 25 “decides” that Parties “shall” submit to the Secretariat their NDCs at least 9 to 12 months in advance of the relevant COP session. The “relevant COP session”, COP26, was originally planned for 9 November 2020. That leads to two potential interpretations:

Under paragraphs 23 and 24, updated or new NDCs were required to be submitted “by 2020”. The context, preparatory works and practice by the Parties appear to favour a ‘by the end of 2020’ interpretation of this phrase (rather than by the *start* of 2020). For instance, Decision 1/CP20 (2014) makes use of both the terms “before 2020” and “by 2020” in relation to certain deadlines (although not the NDC deadline),¹³ which suggests that “by 2020” is distinct from “before” and therefore means during (or by the end of) the year. Similarly, a Notification by the Secretariat to all Parties interprets “by 2020” to mean by 31 December 2020.¹⁴

However, under paragraph 25, updated or new NDCs were required to be submitted by 9 February 2020 (i.e. 9 months prior to COP26). While legally uncertain, the deadline having passed on 9 February 2020 due to the postponement of COP26, it is likely to be construed to have been amended by virtue of the postponement of COP26 to a new legally binding deadline of 1 February 2021.

¹¹ Daniel Klein, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017), page 156.

¹² Daniel Klein, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017), page 156; on expectations for the first NDC submission date, see also ‘World misses symbolic February deadline to ratchet up climate action before Cop26’, *Climate Home*, 7 February 2020, available [here](#).

¹³ Decision 1/CP20 of 14 December 2014, available [here](#).

¹⁴ Secretariat Notification of 13 August 2020, footnote 23.

On an ordinary reading, paragraph 25 imposes a mandatory deadline which parties are legally obliged to meet (“*decides*” that the Parties “*shall*”), whereas paragraphs 23/24 impose a deadline which seems to be non-mandatory (“*requests*”).

On this basis, the ‘soft’ obligation is for Parties to submit updated or new NDCs “*by 2020*” (on the meaning of “*by 2020*”, see *Conclusions on the likely deadline* below), and the ‘hard’ obligation is to submit NDCs 9 months prior to COP26. However, given the ambiguity (and potential conflict between the provisions), additional principles of interpretation should be used to ascertain the intended deadline. These are captured in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“*VCLT*”):¹⁵

1.1 Context

Decision 1/CP.17 (2011) “*decided*” that a new accord (to become the Agreement) must be adopted by 2015 and implemented by 2020.¹⁶ The intention therefore appeared to be that the Parties would only begin submitting NDCs once the Agreement was adopted in 2020, although the Agreement was adopted much sooner and most Parties submitted an initial NDC on ratification in 2015/2016.¹⁷ In light of this, paragraph 25 of the Paris Decision might be read as applying to future NDCs but not to the new or updated NDCs that are required to be submitted “*by 2020*” (pursuant to paragraphs 23/24). In other words, the 2020 NDCs may not necessarily be required to be submitted 9 to 12 months prior to the relevant COP, but future NDCs should be. This is an interpretation favoured by certain US experts.¹⁸

On the other hand, taking into account the full context of the Paris Decision, the paragraph 25 deadline may prevail. In particular, the language in paragraph 25 that the deadline was decided “*with a view to facilitating the clarity, transparency and understanding of [NDCs], including through a synthesis report prepared by the secretariat*”, combined with the subsequent “*request*” in Decision 1/CMA.2 that the Secretariat make its NDC synthesis report available to COP26,¹⁹ indicates an intention for the reports to be submitted prior to the relevant COP session in the year of submission.

1.2 Subsequent practice of the Parties

Most of the NDCs communicated or updated by Parties in 2020 are silent as to the relevant Party’s interpretation of the legal deadlines for doing so and, where Parties have publicly indicated their interpretations of the relevant deadline, these often differ. For example, on 7 February 2020 (i.e. prior to the postponement of COP26), Norway submitted its updated NDC and issued a press statement stating that “*According to the Paris Agreement, each country has to submit new or updated [NDCs] every 5 years. 2020 will be the first time countries submit new or updated emission goals, and the deadline is February 9,*”²⁰ (i.e. 9 months before the date of COP26, prior to its postponement). In contrast, in New Zealand’s Submission of 22 April 2020,²¹ it states that: “[t]his submission is in response to paragraphs 24 and 25 of decision 1/CP.21 and in particular meets New Zealand’s commitment to communicate or update its nationally determined

¹⁵ The Vienna Convention on the Law of Treaties concluded on 23 May 1969.

¹⁶ Decision 1/CP.17 of 11 December 2011, paragraph 4, available here.

¹⁷ For further detail on this context, see Will governments pass the first test of the Paris climate agreement in 2020?, *Climate Change News*, 12 March 2020 (available here).

¹⁸ *Ibid* (two US experts, Isabel Cavellier and Sue Biniarz, are reported as supporting a “*by 2020*” interpretation).

¹⁹ Decision 1/CMA.2 of 15 December 2019, paragraph 10, available here.

²⁰ *Norway steps up 2030 climate goal to at least 50% towards 55%*, Government press release, 7 February 2020, available here.

²¹ Submission under the Paris Agreement Communication and update of New Zealand’s Nationally Determined Contribution, 22 April 2020.

contribution (NDC) by 2020.” It is unclear why, and in our view not the better interpretation that, New Zealand favours the “*by 2020*” deadline in paragraphs 23 and 24 of the Paris Decision over the 9 to 12 months before COP26 deadline effectuated by paragraph 25.

Various non-binding policy documents and guides, including the ECBI Pocket Guide on NDCs, suggest that, as far back as 2016, Parties understood the paragraph 23/24 deadline and the paragraph 25 deadline to co-exist so that, for every year of submission (including 2020), the new or updated NDC must be submitted prior to the relevant COP session.²²

Also persuasive, although not legally binding, is the interpretation offered by the Notification. It refers to both the “*request*” in paragraphs 23 and 24 of the Paris Decision to submit NDCs “*by 2020*” and the requirement in paragraph 25 that they “*shall*” be communicated 9 to 12 months prior to the relevant COP, thus effectively recognising that the Parties are requested to submit “*by 2020*” but that Parties are obliged to submit by 9-12 months in advance of COP26.

The Notification strongly encourages Parties to submit their NDCs by 31 December 2020. However, it also recognises that: “[i]n view of the impact of the COVID-19 pandemic on the NDC preparation process, the Secretariat will update the NDC synthesis report closer to COP26 to ensure that it contains the latest available information.” The Secretariat therefore appears to recognise that some Parties may be unable to submit their NDCs by the end of 2020. However, this should not be taken as a qualification of the Secretariat’s position on the existing deadline²³ and, in any event, the Secretariat’s interpretation of the deadline is not legally authoritative.

1.3 Other aspects

Some scholars have been quoted as suggesting that the *lex specialis* rule may apply here to favour the specific rule over the general rule.²⁴ In other words, because paragraphs 23/24 can be said to refer to a specific regime (the NDCs spanning to 2025 or 2030 being submitted *by 2020*) as opposed to a general one (NDCs generally must be submitted prior to the relevant COP session), the “*by 2020*” deadline should prevail. However, in light of the textual and contextual insights above, as well as subsequent practice on the part of key stakeholders, we would suggest that the paragraphs are better understood to co-exist, creating two deadlines of differing degrees of legal authority, rather than be in conflict.

1.4 Conclusions on the likely deadline

It is impossible to reach a definitive view of the relevant deadline given the competing provisions within the Agreement and the Paris Decision. However, in light of the text of the implementing decisions, along with state practice to date, we consider the better interpretation to be that the ‘hard’ deadline for submission of a new or updated NDC to be 9 to 12 months prior to COP26 – i.e. 9 February 2021, with a discretionary deadline under paragraphs 23 and 24 of “*by [the end of] 2020*”. While an analysis of the original deadline and any consequences for having missed it is outside the scope of this advice (and potentially unhelpful to Parties to address in further detail), it is worth noting that, if the original deadline had already passed, any consequences (or lack thereof) Parties have already experienced as a result of missing it may offer some indication of

²² ECBI Pocket Guide on NDCs, pages 37 to 38, available here; see also UNFCCC presentation on the NDC cycle, 18 October 2016, available here.

²³ Indeed, the Secretariat stated on 29 June 2020 that “*the historic economic recession caused by the COVID-19 pandemic has not changed countries’ obligations to submit new or updated NDCs by the end of this year*” and “[t]he pandemic represents an additional challenge for climate action in general and for the preparation of new or updated NDCs. Yet climate action cannot be delayed. That’s why the NDC deadline remains.” (available here).

²⁴ ‘Will governments pass the first test of the Paris climate agreement in 2020?’, *Climate Change News*, 12 March 2020 (available here).

the potential consequences (or lack thereof) that Parties might experience if they miss the amended deadline.

2. Question 2 re possibility for extension of deadline

The Paris Agreement acknowledges the different status of developing countries, including in relation to mitigation efforts under Article 4.²⁵ While the Agreement does not define which Parties are developing countries, [XXX] is included in the United Nations' latest List of Least Developed Countries,²⁶ and can, therefore, be considered eligible under Article 3 to be given "*additional support*" to effectuate its obligations. Such support could conceivably include an extension, although this is not expressly allowed for, Article 3 being unparticularised and more nebulous in scope.

Similarly, Article 4(5) states that support shall be provided to developing country Parties for the implementation of Article 4, although such support appears to mean financial and capacity building assistance.²⁷ Article 15(2) of the Agreement requires the Committee to pay particular attention to the respective national capabilities and circumstances of Parties (including when considering any breach of NDC submission obligations, as detailed further below).

While there is no direct provision for an extension for developing countries, or for extenuating circumstances such as those brought about by the COVID-19 pandemic, the provisions above are indicative of the spirit of the Paris Agreement, including the recognition of the particular difficulty potentially faced by, and additional support potentially required by, developing countries. While differentiation in the Agreement between developed and developing countries is primarily in recognition of the heightened economic impact of climate change response measures,²⁸ this differentiation should also apply to recognise the heightened economic impact of responding to the COVID-19 pandemic on developing country Parties.

As mentioned above, there are no punitive consequences for non-compliance arising from the Agreement and the Committee is facilitative and non-punitive in nature. However, it is worth noting that the Committee now has an express mandate to "*initiate consideration*" where a Party has not communicated or maintained an NDC,²⁹ and can make findings measures and recommendations for the Party concerned.³⁰ Any such measures, findings or recommendations "*shall be informed by the legal nature of the relevant provisions of the Paris Agreement, shall take into account the comments received from the Party concerned and shall pay particular attention to the national capabilities and circumstances of the Party concerned. Special circumstances of small island developing States and the least developed countries, as well as situations of force majeure, should also be recognised, where relevant*".³¹

²⁵ By way of example, the preamble to the Agreement recognises "*the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention*"; in relation to NDCs, Articles 3, 4(1), 4(4) to 4(6) and 4(15) acknowledge the special status of developing country Parties.

²⁶ List available here.

²⁷ Article 4(5) states that "*Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.*" Those referenced Articles specifically address financial support, technological support and capacity building.

²⁸ Article 4(15), for instance, states that "*Parties shall take into consideration in the implementation of this Agreement the concerns of the Parties with economies most affected by the impacts of response measures, particularly developing country Parties.*"

²⁹ Decision 20/CMA.1, Annex I, paragraph 22(a)(i) (available here).

³⁰ Decision 20/CMA.1, Annex I, paragraphs 25(d) and 28 (available here).

³¹ Decision 20/CMA.1, Annex I, paragraph 28 (available here), emphasis added.

This supports the view that if measures, findings or recommendations were made, although they may have political consequences, they are unlikely to be punitive or severe. Furthermore, while advising on whether the pandemic can be said to constitute a force majeure event is beyond the scope of this note, it is worth noting that the concept is not defined by the Paris Decision (or in any other legally binding decision or instrument) but is an established rule of customary international law.³² It is therefore at least arguable that the pandemic constitutes a force majeure event. There may, therefore, be scope not to submit a new or updated NDC by the end of this year, or more than 9 to 12 months before COP26, if this is not possible.

Although not legally authoritative on the issue of extensions, it is worth noting that the NDC registry, which is the formal registry for publication of NDCs pursuant to Article 4.10 of the Agreement, indicates that a handful of countries have been able to submit updated NDCs throughout the pandemic (for example, Jamaica on 30 June, Andorra and Rwanda in May, New Zealand and Chile in April and Japan and Singapore at the end of March).³³

Recent press reports suggest that *“the year long delay to [COP26] coupled with the disruption caused by the coronavirus crisis has fuelled fears that many countries will fail to submit ambitious new NDCs ahead of the original 2020 deadline”*,³⁴ suggesting there is some institutional recognition that deadlines may slip. The Secretariat has asked Parties to indicate when they expect to be in a position to submit their NDC.³⁵

³² See previous LRI analysis on force majeure under international law (2010), available [here](#).

³³ Latest submissions available: [here](#).

³⁴ Business Green press report, 17 August 2020.

³⁵ Secretariat Notification of 13 August 2020, footnote 23.