

The EU–Mercosur agreements: are they actually treaty-compatible?

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Just weeks before the EU is expected to sign its [trade deal with the Mercosur bloc](#) (Argentina, Brazil, Uruguay and Paraguay), political groups in the European Parliament drafted a motion calling on the Court of Justice of the EU to assess whether the two EU-Mercosur agreements — [the Interim Trade Agreement \(ITA\)](#) and [EU-Mercosur Partnership agreement](#) (EMPA) — comply with EU law.

Their arguments are well-founded.

Indeed, the procedure led by the European Commission has been chaotic, untransparent and, more importantly, raises significant legal issues.

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This is particularly true of the way the commission proposes that the Council signs and concludes the two agreements with Mercosur, as well as the compatibility of several arrangements with the founding treaties and the EU Charter of Fundamental Rights.

Three problems

First, a key issue is whether the commission is competent to endorse a splitting approach after the council mandated it in 1999 and 2018 to negotiate an association agreement — a format that requires unanimity in the council, not a qualified majority.

There is also the question, if in light of the Court of Justice of the EU case law, the commission could propose different legal bases to the council for concluding the EMPA, rather than relying on a single basis such as that used for an association agreement, as originally envisaged.

The choice of the correct legal basis is not a purely formal matter but one of substance — a question of ‘constitutional significance’ that is subject to the court’s review.

Secondly there is the question of whether, by endorsing a splitting approach, the European Commission has breached the principles of institutional balance and sincere cooperation.

In practice, the council has been presented with a *fait accompli*: the commission has pursued a different type of agreement, subject to different voting procedures, than the originally mandated association agreement.

In addition, the commission’s proposal to base the council’s decision on several legal bases, rather than a single one, has not been clarified in its proposal’s memorandum.

This raises serious constitutional issues with the principles of transparency and obligation of the EU Charter, which require EU institutions to state the reasons of any measure with binding legal effects.

Upholding this duty is all the more important given the need to respect procedural and democratic safeguards.

Thirdly, there is also a potential risk of breaching the principles of a high level of [protection for the environment](#), health and consumers, given that the rebalancing mechanism in the agreements could create a chilling effect and undermine the EU's regulatory autonomy.

This mechanism would allow the contracting parties to challenge each other's policies — including the implementation of the Green Deal — even when such policies do not undermine any rights but only have the (vague) consequence of substantially impairing a “trade benefit”.

Lastly, the envisaged agreements may breach the EU's precautionary principle enshrined in EU treaties.

The principle means that when there is uncertainty about risks to health or the environment, protective measures may be taken without having to wait until those risks become fully apparent.

The definition of precautionary principle in the agreements trade and sustainability chapter is significantly weaker than the one applied by the Court of Justice of the EU, which takes a far more preventive approach: *“where there is uncertainty as to the existence or extent of risk to human health, protective measures may be taken without having to wait until the reality of seriousness of these risks become fully apparent”*.

In addition, the precautionary principle only appears in the trade and sustainability chapter, which is excluded from the EU-Mercosur agreement's main enforcement mechanism — meaning it is not enforceable in practice.

In light of these significant legal concerns and potential breaches of fundamental EU law principles, the European Parliament should refer the matter to the Court of Justice of the EU and exert its role to uphold EU's democratic integrity, the rule of law, and the values on which the EU is founded.

In the EU's system of separated powers, it is for the directly elected representatives within the parliament to enable the court to assess whether there are no incompatibilities between the envisaged agreements and the founding treaties.

The court can be requested to issue an opinion given that the commission intends to obtain the decision from the council to sign these agreements.

The parliament can request the court to deliver such an opinion, individually, without any consultation or pre-agreement with other institutions or member states.

Crucially, such a request by the parliament must be made before the agreements are signed.

An early referral allows the court to assess whether the proposals are fully compatible with the EU's founding treaties.

If the request comes too late, the procedure may become irrelevant or even inadmissible, leaving incompatibilities to be addressed only through lengthy annulment actions brought by member states.

In this context, it is deeply worrying to see that the European parliamentary services have rejected the request of 145 MEPs from various political groups to table a vote for resolution, based on unfounded legal arguments.

The highest court of the European Union holds review powers in the opinion procedure to act as the guardian of fundamental principles of EU law.

The European Parliament's primary role is to uphold these values, so requesting the court's opinion is a perfectly legitimate and necessary step.