

Decision in case 150/2017/JN on the European Commission's failure to carry out a human rights impact assessment before agreeing to new OECD provisions on export credits for coal-fired electricity generation projects

Decision

Case 150/2017/JN - Opened on 27/03/2017 - Recommendation on 17/07/2018 - Decision on 14/03/2019 - Institution concerned European Commission (Recommendation agreed by the institution) |

The complainant considered that the European Commission had wrongly decided not to carry out a human rights impact assessment before agreeing to new provisions, which were developed within the Organisation for Economic Cooperation and Development (OECD), on export credits for coal-fired electricity generation projects.

The Commission considered that no impact assessment was needed because the provisions were not likely to have any significant impact.

The Ombudsman found that the Commission had not carried out any thorough analysis before deciding not to carry out an impact assessment. She found that this constituted maladministration. The Ombudsman recommended that, in the future, in advance of a substantive decision, the Commission should ensure that it systematically assesses whether an envisaged measure, proposal or international agreement is likely to have significant economic, social or environmental impacts, including human rights impacts. The Ombudsman stressed that the Commission should keep a written record of this.

The Commission informed the Ombudsman that it already has in place procedures that address her recommendations.

The Ombudsman notes, however, that the Commission was unable to provide her with a record of the internal analysis carried out in this case before it was decided that no impact assessment was needed.

The Ombudsman therefore calls on the Commission to apply its procedures consistently and to keep a written record of its analysis and assessment. On this basis, the Ombudsman closes the case.



Background to the complaint

1. This complaint was made by ECA Watch, an international coalition of non-governmental organisations that monitors the activities of export credit agencies. It considered that the European Commission wrongly decided not to carry out a human rights impact assessment before agreeing to the 2015 *Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects* [1] negotiated in the context of the *Arrangement on Officially Supported Export Credits* [2] (the Arrangement) within the Organisation for Economic Co-operation and Development (OECD).
2. The Arrangement is an informal agreement among participating OECD members, which sets out “*a framework for the orderly use of officially supported export credits*”. The Arrangement seeks to provide for a level playing field for exporters, as well as to eliminate subsidies and trade distortions in this area. It establishes guidelines and rules for export credit activities, such as the Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects.
3. The complainant and the Commission exchanged correspondence about this issue. The Commission considered that it was not required to carry out a human rights impact assessment. The complainant was dissatisfied with the Commission's position and turned to the Ombudsman in August 2016.

The Ombudsman's recommendation

[3]

4. The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy requires the Commission to include human rights as a criterion in impact assessments “*carried out for legislative and non-legislative proposals, implementing measures and trade agreements that have significant economic, social and environmental impacts, or define future policies*”. The 2015 EU Action Plan on Human Rights and Democracy calls on the Commission to “*continue to improve the incorporation of human rights in Commission impact assessments for proposals with external effect and likely significant impacts on human rights*”.
5. The Ombudsman considered that, as a matter of good administration, the Commission should always thoroughly examine whether an envisaged measure, proposal or agreement may have any significant impacts - including on human rights - before it decides whether it should carry out an impact assessment. Such an analysis constitutes a necessary prerequisite for a well-informed decision on whether an impact assessment should be carried out. It is as important as the impact assessment itself.
6. The Commission was unable to provide the Ombudsman with any internal analysis showing that it had assessed whether the sector understanding was likely to have significant economic, social or environmental impacts. It thus appeared that the Commission had not performed any serious and thorough internal analysis before deciding that it would not carry out a human rights



impact assessment.

7. The Ombudsman found that this was maladministration and made the following recommendations:

“The European Commission should ensure that, in the future and in advance of a substantive decision, it systematically performs an internal analysis on whether an envisaged measure, proposal or international agreement is likely to have significant economic, social or environmental impacts, including human rights impacts. The Commission should keep a written record of its analysis and assessment.”

8. The Commission replied that it already has in place procedures addressing the Ombudsman's recommendations. The Commission said that:

- All new initiatives are included in a central planning system [4] . In principle, the Commission carries out an impact assessment whenever the expected impacts are likely to be significant. The Commission's Better Regulation Toolbox (Toolbox) provides guidance on how to carry out such assessments and how to screen and identify possible impacts, including on fundamental rights [5] .
- The lead Commissioner, the relevant Vice-President and the First Vice-President of the Commission must approve ' *major* ' initiatives - that is, initiatives with the greatest political significance and greatest potential impacts - based on the information supporting each request. These measures include a proposal of whether the Commission considers it necessary to carry out an impact assessment or not. These documents are publically available sufficiently early in the process so that stakeholders can react [6] .
- ' *Non-major* ' initiatives are approved by the lead Commission department and the lead Commissioner. The Commission verifies the significance of the expected impacts and often determines that there is no need for an impact assessment. The final decision is always recorded. When an impact assessment is carried out, the Commission informs the public.
- All legislative proposals must respect the EU Charter of Fundamental Rights. The Commission therefore reinforced its assessment of the impact of new legislative proposals on fundamental rights. In 2010, the Commission committed to strengthening the “fundamental rights culture” at all stages of the procedure leading to the adoption of legislation and other acts. This concerns, in particular, the preparatory phase of consultation, the preparation of impact assessments and the drafting of proposals. The fundamental rights aspects of impact assessments have to be summarised in the explanatory memoranda of legislative proposals that have a particular impact on fundamental rights. The Commission adopted a set of guidelines on fundamental rights in impact assessments [7] and, since 2015, the Toolbox contains a dedicated tool for fundamental and human rights.

9. In its comments on the Commission's reply, the complainant said that the Commission should implement the Ombudsman's recommendation. In its view, the Commission should properly assess whether a human rights impact assessment is needed in the context of the future work concerning the Arrangement, including the planned review of the Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects. The complainant argued that the Commission should always adequately document its work. In this case, the Commission



provided no evidence that it had considered whether an impact assessment was needed, despite the obvious impacts on the environment and on human health linked to the sector understanding.

The Ombudsman's assessment after the recommendation

10. According to the Commission, it already has in place procedures that ensure that it systematically assesses whether there are *likely* significant economic, environmental or social impacts, including on human rights, before deciding whether it should carry out an impact assessment. The Commission says that this is so for both major and other initiatives and that all relevant information is properly recorded.

11. In this case, however, the Commission was unable to provide the Ombudsman with a record of the internal analysis carried out in this case before it was decided that no impact assessment was needed. Given that the Commission was unable to demonstrate that its decision to dispense with an impact assessment was based on a thorough internal analysis of whether there were any likely significant impacts, the Ombudsman had to proceed on the assumption that the Commission performed no serious and thorough internal analysis of that issue. This rendered the Commission's decision, not to perform an impact assessment, arbitrary. The lack of such a record also made it impossible for the public, including the complainant, to scrutinise the decision not to carry out an impact assessment.

12. The Ombudsman's recommendation was that the Commission should ensure that, in the future and in advance of a substantive decision, it systematically performs an internal analysis on whether an envisaged measure, proposal or international agreement is likely to have significant economic, social or environmental impacts, including human rights impacts. The Ombudsman believes that if the Commission applies its procedures consistently and ensures that the system it has in place functions well in practice, it is giving effect to the Ombudsman's recommendation on this aspect.

13. The Ombudsman's recommendation was also that the Commission should keep a written record of its analysis and assessment. In its reply, the Commission limits itself to stating that the final decision is always recorded. The Ombudsman found that in this case that was not sufficient. She therefore confirms her recommendation on this aspect.

14. To address the complainant's specific concerns, the Ombudsman encourages the Commission to be particularly vigilant when the Arrangement at issue in this case is being revised.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion :



The Ombudsman confirms her finding of maladministration and her recommendations. The Commission should give effect to her recommendations by applying its procedures consistently and by keeping a written record of its analysis and assessment.

The complainant and the European Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 14/03/2019

[1] Full text:

[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/PG\(2015\)9/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/PG(2015)9/FINAL&docLanguage=En) [Link].

[2] For more information, see: <http://www.oecd.org/tad/xcred/arrangement.htm> [Link].

[3] The full text of the Ombudsman's recommendation is available at:

<https://www.ombudsman.europa.eu/en/recommendation/en/99655> [Link].

[4] Tool 6 "Planning and validation of initiatives" of the Commission's Better Regulation Toolbox (https://ec.europa.eu/info/better-regulation-toolbox_en [Link]).

[5] Tools 9 'When is an impact assessment necessary?', 19 'Identification/screening of impacts' and 28 'Fundamental rights and human rights' (https://ec.europa.eu/info/better-regulation-toolbox_en [Link]).

[6] More information on how the Commission plans and proposes laws can be found at:

https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law_en [Link].

[7] Commission Staff Working Paper Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final, 6.5.2011.