

Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations

Decision

Case 1026/2020/MAS - Opened on 08/07/2020 - Decision on 17/03/2021 - Institution concerned European Commission (Maladministration found) |

The case concerned the European Commission's failure to finalise a 'sustainability impact assessment' (SIA) before concluding the negotiations on a trade agreement between the EU and Mercosur, a South American trade bloc.

The complainants contended that, by not finalising the assessment, the Commission disregarded its own guidelines on SIAs and breached EU law. The Commission acknowledged that, in general, it would be preferable for SIAs to be finalised before the conclusion of trade negotiations, but argued that there is no legal requirement to do so.

The Ombudsman took the view that, while it was impossible to foresee the dynamics of the negotiations, the SIA in this case has taken much longer to finalise than anticipated. Specifically, the Commission should have ensured that the SIA was finalised before the conclusion of the EU-Mercosur trade negotiations.

The Ombudsman found that the Commission's failure to ensure that the SIA was finalised in good time constituted maladministration. Considering that the negotiations have been concluded and that the Commission appears set to finalise the SIA process imminently, she takes the view that it would serve no purpose to make a recommendation. However, she urges the Commission to ensure that, in the future, SIAs are completed prior to the conclusion of trade negotiations.

Background to the complaint

1. Since 1999, 'sustainability impact assessments' (SIAs) have been carried out for all major trade negotiations that the European Commission has conducted on behalf of the EU. [1] These



assessments provide the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental impacts of trade agreements. SIAs are normally finalised and the findings are published before the end of the negotiation process. [2]

2. SIAs are independent assessments. By identifying issues that may potentially arise, SIAs are intended to feed into the negotiations and ultimately shape their outcome. [3]

3. SIAs are conducted by external contractors in cooperation with the Commission and they include the views of civil society and other stakeholders who are consulted as part of the process. [4] SIAs comprise three phases: an inception report, outlining the methodological approach, an interim report, presenting preliminary findings and a final report, which refines the overall analysis. After the final report, the Commission prepares a position paper explaining how the SIA's findings have contributed, or will contribute, to the ultimate decisions on the negotiations.

4. The EU and Mercosur, a South American trade bloc [5] , started negotiations on a trade agreement in 1999. [6] The EU and Mercosur reached an 'agreement in principle' in June 2019, which ended the negotiation process. [7] The final texts of the agreement have not yet been signed and, as such, the process to ratify [8] the agreement has not yet begun. [9]

5. In 2003, the Commission oversaw a first SIA regarding the EU-Mercosur negotiations. A final report was published in 2009 [10] and a position paper in 2010. [11] In 2017, the Commission started a second SIA process, noting that “ *given that the economic context has since changed, this SIA may no longer provide an up-to-date picture of the potential impact of an EU-Mercosur [...] Agreement. In addition, since the 2009 SIA was concluded, Commission policy and practice on Impact Assessments and SIAs have moved on considerably, e.g. as regards the incorporation of human rights issues.*” [12]

6. At the time of the 'agreement in principle', in June 2019, only the inception report for the second SIA had been completed [13] . A draft interim report was published in October 2019. The interim [14] and draft final [15] reports were published in February 2020 and July 2020 respectively. The final report and the Commission's position paper have not yet been published.

7. The complainants are five civil society organisations [16] . They are concerned that the Commission conducted the trade negotiations in the absence of an up-to date SIA and that, by concluding the negotiations without finalising the SIA, the Commission failed to respect its own guidelines and breached its legal obligations [17] .

8. In January 2020, they sent a letter to the Commission, in which they asked how the Commission had taken into account the potential economic, social and environmental impact of the trade agreement without the final SIA report.

9. The Commission replied in February 2020, stating among other things that the civil society dialogue that accompanied the SIA was one of the ways in which the negotiators had been informed throughout the negotiations.



10. Dissatisfied with the Commission's reply, the complainants turned to the Ombudsman in June 2020.

The inquiry

11. The Ombudsman opened an inquiry into whether the Commission should have finalised the SIA before concluding the EU-Mercosur trade negotiations.

12. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and on additional questions that she had asked. Subsequently, the Ombudsman received the comments of the complainants in response to the Commission's reply. The Ombudsman has drawn on all the material shared by the Commission and the complainants in the assessment below.

Arguments presented to the Ombudsman

The complainants' arguments

13. The complainants considered that, by concluding the EU-Mercosur trade negotiations before the interim and final SIA reports were finalised, the Commission (a) disregarded its own guidelines on the use of SIAs stemming from the 'Trade for all' Communication [18] and the Commission's SIA Handbook [19] and (b) breached its obligations under the Treaty on the European Union (TEU) [20] .

14. The complainants pointed out that the SIA Handbook states that SIAs take place "*hand-in-hand with the negotiations*" and should start as early as possible "*to ensure that the analysis can usefully feed into the negotiating process at a useful stage*". The complainants argued that the SIA for the EU-Mercosur negotiations does not adhere to the procedure set out in the SIA Handbook.

15. The complainants argued that the EU should not conclude trade agreements without knowing whether they have the potential to undermine the principles set out in the EU Treaties concerning the protection of human rights and the promotion of sustainable economic, social and environmental development (in Article 21 of the TEU).

16. The complainants observed that the Commission itself, in the terms of reference for the SIA in this case, stated that the first SIA on the EU-Mercosur negotiations may no longer provide an up-to-date picture of the potential impact of the agreement. [21] The terms of reference also indicate that the SIA "*shall be concluded before or in any case no later than the end of the negotiations so that its results can inform the negotiations and decision-making process*".



17. The complainants argued that the SIA in these negotiations could not play its intended purpose of shaping the negotiations, since the negotiations were concluded prior to the SIA being finalised. According to the complainants, this means that the Commission concluded the negotiations without appropriate and updated information about the potential social, environmental and economic impacts of the proposed agreement and without properly taking into account the views of all stakeholders.

18. According to the complainants, the failure to complete the SIA meant that the Commission and its negotiators did not have access to all relevant information during the negotiations. Several important issues, such as on deforestation and other environmental issues were dealt with only in the draft final report, which was published long after the end of the negotiations. In addition, certain information on these issues that was already publicly known at the time of the interim report was not included therein.

19. The complainants criticised the limited opportunities afforded to stakeholders to review and contribute to the preliminary findings before the SIA was finalised and the negotiations were closed, despite stakeholder input being deemed important in the SIA Handbook. [22]

20. The complainants said that the SIA process included only public consultations on the methodology of the report, but that there was no opportunity for civil society or stakeholders to feed into the findings of the draft reports. According to the complainants, comments from stakeholders were not analysed and integrated into the interim SIA report in February 2020, which merely included a summary of the comments received and indicated that “[t]he final report will take account of the above comments into the relevant analyses” [23] .

21. The complainants are of the view that the Commission should have waited for the results of the SIA in order to conclude the negotiation process in an informed manner.

The Commission’s arguments

22. In its reply to the Ombudsman, the Commission explained that, over the course of the twenty years of trade negotiations with the Mercosur bloc, it had overseen two separate SIAs, which is not usual in trade negotiations. It started the process for the second SIA in 2017, so as to include the most recent data available and focus more on human rights.

23. The Commission stated that there is no legal requirement to finalise an SIA prior to concluding trade negotiations, nor is this specified in the SIA Handbook. The Commission stated that the SIA for the EU-Mercosur negotiations had followed the procedure set out in the SIA Handbook. It acknowledged that it would be preferable for SIAs to be finalised before the end of negotiations but that it is not always possible to predict the pace of the negotiation process.

24. As the EU-Mercosur negotiations began to gather pace, it had not been possible to speed up the ongoing SIA. The Commission had given the contractors more time to finalise some



elements of the SIA compared to other SIAs. This was due to the complexity of the multi-lateral negotiations, which meant that the SIA had to analyse the situation in four different countries. The Commission noted that the first SIA during the EU-Mercosur negotiations took even longer (from 2005 to 2009).

25. According to the Commission, despite the fact that the SIA was not finalised, it fed into the negotiations. The Commission and its negotiators had access to the preliminary results of the interim report. The Commission stated that sustainability standards were taken into account when negotiating the agreement, as evidenced in the agreement's Chapter on trade and development [24] .

26. The Commission stated that, in the course of the two SIAs, civil society had extensive possibilities to provide input and to discuss with the Commission's negotiators the economic, social and environmental impact of the potential agreement. That input fed into the work of the negotiators as the negotiations evolved. The Commission explained that the contractor had placed substantial importance on the consultation of stakeholders and made input received through these consultations a key component of the SIA. Civil society and other stakeholders were able to provide comments and input on the interim report for a period of several months. The Commission also stated that it had organised regular 'civil society dialogues' where the chief negotiator was present and during which sustainability issues were discussed.

27. The Commission contended that, in overseeing the SIA, it had respected all internal rules and acted in line with the principles of and its obligations under the Treaty on the European Union. The Commission was of the view that it had exercised due diligence during the negotiations to ensure that the agreement complied with existing standards on human rights, social and environmental protection.

28. The Commission stated that SIAs are launched during the negotiation process and accompany the negotiations. As such, SIAs are based on hypothetical scenarios and on assumptions that are made at a very early stage. These assumptions cannot be changed at a later stage, because the analysis would then have to be restarted. However, certain information was updated between the interim report and the draft final report. The Commission said that the SIA draft final report included the most recent data to the greatest degree possible, notably on issues such as deforestation, greenhouse gas emissions and indigenous peoples' rights.

29. The Commission clarified that, as the assessment takes place during the negotiations and is based on assumptions about the potential impacts, the SIA would not be updated to take into account the result of the negotiations. [25]

30. The Commission stated that it intended to publish the final report of the SIA and its position paper before submitting the final text of the trade agreement for ratification. It hoped that the final report would inform the debate during the ratification process and any subsequent measures to implement the agreement.



The Ombudsman's assessment

31. SIAs are an important tool for ensuring that EU trade negotiations are conducted based on evidence and that the resulting agreements respect human rights and economic, social and environmental standards.

32. The Ombudsman understands that, even before the interim and final reports are finalised, the process of conducting an SIA feeds into the negotiations. Negotiators can access preliminary findings and take into account comments received from stakeholders on the methodological approach of the SIA.

33. However, the Commission itself acknowledged that *"in an ideal situation"* an SIA should be finalised before the negotiations on trade agreements are concluded . Furthermore, the Commission's SIA Handbook [26] states that SIAs should be conducted *simultaneously* with major trade negotiations. The terms of reference for this particular SIA are even more explicit, stating that the SIA should be *" completed before and in any case not later than the end of the negotiations so that its results can inform the negotiations and decision-making process "* [27] . In addition, they state that the *' SIA findings must be available well in advance of the end of the underlying negotiation '* . [28] Furthermore, they state that the contractor should complete the draft final report within 9.5 months. [29] In this case, the SIA was to be completed within one year of signing the contract [30] and the tasks for the overall project should have taken no more than 14 months [31] .

34. For the EU-Mercosur negotiations, the inception report and the preliminary version of the draft interim report, as well as the stakeholder consultations that were conducted before the end of negotiations, were able to feed into the negotiations. However, those parts of the SIA process that were finalised after the end of the negotiations and those that are still to be finalised - namely the final interim and the final report, as well as the accompanying stakeholder consultations - could not.

35. While the Ombudsman recognises that the SIA is, for the most part, carried out by external contractors, it is the Commission's responsibility to oversee the contractors' work and to ensure that the SIA is finalised before the end of negotiations.

36. The Ombudsman acknowledges the Commission's argument that it is not always possible to anticipate the exact timing of trade negotiations. She also appreciates that the SIA concerning the trade negotiations between the EU and Mercosur was particularly complex due to the number of countries involved and the issues analysed. However, in this case, the SIA process has taken more than four years and is still ongoing.

37. As acknowledged by the Commission, in order to serve its intended purpose, an SIA should be finalised before the negotiations conclude. In addition, the SIA should be *" based upon the most up-to-date economic, social, human rights and environmental data available"*. [32]

38. The Ombudsman recognises the Commission's efforts to include the latest information



available in the SIA process for the EU-Mercosur negotiations. She also understands the Commission's point that it needs to provide a stable basis on which the contractor can work without constantly updating the underlying data. However, to this end, it would appear that finalising the SIA within a reasonable timeframe would have helped ensure that the data used as a basis for the SIA is as up-to-date as possible.

39. The Ombudsman notes that the principles set out in Article 21 TEU also apply to trade policy. [33] While Article 21 TEU does not set out an explicit and legally binding requirement to conclude an SIA before the end of trade negotiations, SIAs are one of the Commission's most important tools to ensure that the principles set out in Article 21 TEU are respected in trade agreements. [34]

40. Against this background, the Ombudsman finds that the Commission's failure to ensure the SIA was finalised in good time, notably before the end of the EU-Mercosur trade negotiations, constitutes maladministration. However, since the negotiation process has already ended and the Commission appears set to finalise the SIA process imminently, the Ombudsman does not consider it useful to make a recommendation in this case.

41. The Ombudsman welcomes the Commission's intention not to propose the final agreement to the parties responsible for signature before the SIA has been finalised. She notes the Commission's expectation that the SIA results will contribute to an informed debate during the ratification process.

42. The Ombudsman further notes the Commission's renewed emphasis on promoting sustainability through trade in its 2021 trade policy review. [35] She trusts that, in the context of future trade negotiations, the Commission will ensure that SIAs are finalised in good time and, in any case, before the end of the negotiations.

Conclusion

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

The European Commission failed to ensure the finalisation of the sustainability impact assessment in good time, notably before the end of the EU-Mercosur trade negotiations. This constitutes maladministration.

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

Emily O'Reilly European Ombudsman

Strasbourg, 17/03/2021



[1] For a list of SIA which have been conducted since they were first introduced in 1999, see <https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/> [Link].

[2] Research conducted by the Ombudsman's inquiry team suggests that since the introduction of SIA, this is the only case where no SIA final report was issued before the end of negotiations.

[3] Handbook for trade sustainability impact assessment (SIA Handbook), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF [Link], p 5.

[4] SIA Handbook, p 10.

[5] Mercosur is a South American trade bloc consisting of Argentina, Brazil, Paraguay and Uruguay. For more information see <https://www.mercosur.int/en/about-mercursosur/mercursosur-in-brief/> [Link].

[6] For more information see <https://ec.europa.eu/trade/policy/in-focus/eu-mercursosur-association-agreement/agreement-explained/> [Link]

[7] See the Commission's press release: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039> [Link]. Both sides will now perform a legal revision of the agreed text to come up with the final version of the agreement. The Commission will then translate it into all official EU languages and submit it to EU Member States and the European Parliament for approval.

[8] As a so-called 'mixed agreement', both the European Parliament and the Council of the EU, as well as all individual Member States have to ratify the agreement.

[9] More information on EU trade policy and negotiations is available at: <https://ec.europa.eu/trade/policy/policy-making/> [Link].

[10] https://trade.ec.europa.eu/doclib/docs/2009/april/tradoc_142921.pdf [Link]

[11] https://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146386.pdf [Link]

[12] Terms of reference related to a contract to provide a sustainability impact assessment (SIA) in support of the association agreement (AA) negotiations between the European Union and Mercosur, https://trade.ec.europa.eu/doclib/docs/2017/august/tradoc_155999.docx.pdf [Link], p 1.

[13] https://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156631.pdf [Link] (January 2018).



[14] https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158632.pdf [Link]

[15] https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158632.pdf [Link]

[16] ClientEarth, Fern, Veblen Institute, La Fondation Nicolas

Hulot pour la Nature et l'Homme and International Federation for Human Rights.

[17] Under Article 21 of the Treaty on the European Union.

[18] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Trade for All - Towards a more responsible trade and investment policy*, COM/2015/0497 final, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0497&qid=1614695852952> [Link]

[19] European Commission Handbook for Trade Sustainability Impact Assessment, Second Edition, April 2016, available at: https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF

[20] In particular, Article 21 TEU, which states: “ 1. *The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of*

human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

[...]

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law; [...]

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; [...].”

[21] Terms of reference, p1.

[22] SIA Handbook, page 10.



[23] Interim report, page 242.

[24]

https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158166.%20Trade%20and%20Sustainable%20Development.pdf
[Link]

[25] This is the case for all trade negotiations. At the end of the negotiations, the Commission prepares a separate economic analysis of the negotiated outcome (EANO) before the signature of the agreement. It should then launch an evaluation of the agreement five to eight years after the agreement's entry into force.

[26] SIA Handbook, page 9.

[27] Terms of reference related to a contract to provide a Sustainability Impact Assessment (SIA) in support of association agreement (AA) negotiations between the European Union and Mercosur, page 5, https://trade.ec.europa.eu/doclib/docs/2017/august/tradoc_155999.docx.pdf
[Link].

[28] Terms of reference, page 26.

[29] Terms of reference, page 26.

[30] Terms of reference, page 5. The specific contract was signed in 2017.

[31] Terms of reference, page 26.

[32] SIA Handbook, page 16.

[33] Article 207(1) TFEU provides that: "[...] *The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.* " Article 21(3) TEU provides as follows: "[t]he Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and Part Five [TFEU ...]" . Part Five TFEU covers, among other things, the common commercial policy. See to this regard the Ombudsman's decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, <https://europa.eu/!gv94nV> [Link], paragraph 11.

[34] The inception report, page 79 refers to Article 21. The SIA Handbook, page 5 draws a connection between the human rights analysis that is part of an SIA and Article 21 TEU.

[35] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review - An open, Sustainable and Assertive Trade Policy,



https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf [Link].