



Proposal of the European Ombudsman for a solution in case 212/2016/ZA on the European Commission's annual reviewing of Member States' export credit agencies

Solution - 29/04/2016

Case 212/2016/JN - Opened on 29/04/2016 - Recommendation on 23/05/2018 - Decision on 03/12/2018 - Institution concerned European Commission (Recommendation agreed by the institution) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The complainant, ECA Watch , is an international coalition of NGOs that monitor export credit agencies - national bodies that give financial support to companies exporting to 'risky' markets.

Under the applicable EU law, the European Commission prepares an annual review of export credit agencies' activities, based on activity reports submitted by EU Member States. This review evaluates whether export credit agencies comply with the EU's objectives and obligations.

The complainant argued that the Commission's 2015 annual review, which covered export credit agencies' activities in 2013, was not thorough enough, in particular with respect to the protection of human rights and the environment.

The Ombudsman inquired into the matter. While she found that the Commission was already taking steps to ensure that Member States made relevant information available to it, she also found that the Commission's methodology and procedures could be improved. In particular, she suggested that the Commission should engage in a dialogue with Member States and other stakeholders with a view to improving the template Member States use to submit reports. The Ombudsman also proposed that the Commission should enhance the analysis and evaluation used in preparing the annual reviews it submits to the European Parliament.

The background to the complaint

1. Export credit agencies are national bodies that support exporters and investors in markets considered as too risky for conventional private financing (for example, developing countries) by providing guarantees, loans and insurance. Export credit agencies can be private, semi-private, or public bodies. Most EU Member States have export credit agencies. The complainant, ECA Watch , is an international coalition of NGOs that monitor the activities of export credit agencies.

2. The OECD brokered ' Arrangement on Officially Supported Export Credits ' is the main



international agreement regulating export credits and the activities of national export credit agencies [2] . It is revised regularly to address the constant evolution of international financing techniques and sectors.

3. The OECD has also adopted a Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence , known as the 'Common Approaches'. The Common Approaches contain an agreed set of rules, applicable to activities under the Arrangement [3] .

4. The EU is a Participant in the Arrangement and the European Commission is responsible for negotiating it on behalf of the Member States.

5. In 2011, the European Council and the European Parliament adopted Regulation 1233/2011 'On the application of certain guidelines in the field of officially supported export credits' which incorporated into the EU legal system the 2005 version of the Arrangement . Regulation 1233/2011 declared the Arrangement to be part of EU law and empowered the Commission to transpose future versions of the Arrangement into EU law by means of delegated acts.

6. Under the Regulation (Annex I), EU Member States are obliged to submit annual reports on their export credit programmes to the European Commission. Based on these activity reports, the Commission submits an annual review of the activities of export credit agencies to the European Parliament. This review includes an evaluation of export credit agencies' compliance with the EU's objectives and obligations.

7. The European Parliament was critical of the Commission's first annual review in 2013 [4] , highlighting gaps and poor quality in the reporting by the Commission and the Member States . Parliament also drew attention to a lack of structured benchmarking tools and made a number of recommendations [5] .

8. In July 2015, ECA Watch complained to the Commission that it had failed to put in place adequate benchmarks and compliance tests in the context of its third annual review of the activity reports of the export credit agencies for 2013 [6] . It also argued that the Commission had failed to assess thoroughly export credit agencies' compliance with EU objectives and obligations, in particular with respect to human rights and environmental protection. In its reply to the complainant, the Commission stated that it was not responsible for the information included in the Member States' activity reports and insisted that it had not breached its reporting obligations under Regulation 1233/2011.

9. The complainant was not satisfied with the Commission's reply and turned to the Ombudsman.

The inquiry

The European Ombudsman's investigation

10. The Ombudsman opened an inquiry into the complaint and identified the following



allegation:

The European Commission fails to ensure that Member States' Export Credit Agencies comply with Regulation 1233/2011.

11. In the course of the inquiry, the Ombudsman's team inspected relevant documents and asked the Commission to clarify various aspects of the annual information gathering and reviewing process. The Ombudsman's solution proposal takes into account the arguments and views put forward by the parties in their exchanges preceding the opening of the inquiry, as well as information in the documents inspected.

Parallel investigations of national ombudsmen

12. In the course of her inquiry, in March 2016, the European Ombudsman invited a number of national ombudsmen who had a mandate to examine national export credit agencies to launch parallel investigations into export credit agencies at national level [7]. These investigations would look at the supervision of the public export credit agencies by the authorities in the respective Member States, specifically in relation to their compliance with human rights and environmental obligations. In this context, the Polish and the Spanish ombudsmen carried out inquiries and informed the European Ombudsman of their findings.

13. The Polish Ombudsman carried out a fact-finding inquiry that focused on procedural matters only. He informed the European Ombudsman of the procedures the Polish Ministry of Finance follows in complying with its obligation to submit to the European Commission an annual report on the Polish export credit agency's activities. The Polish Ombudsman did not identify any matters calling for further investigation. He closed his inquiry in October 2016. The inquiry of the Spanish Ombudsman is still ongoing [8].

Failure of the Commission to ensure export credit agencies' compliance with Regulation 1233/2011

Arguments presented to the Ombudsman

14. The complainant argued that the Commission's annual review and evaluation for the year 2013 (published in 2015) is not sufficiently thorough and does not provide assurances that export credit agencies comply with EU law and, in particular, with the EU's external action objectives and obligations as regards environmental protection and human rights. Specifically, the complainant contended that: (i) clear benchmarks concerning compliance with EU law were missing; (ii) the Member States did not provide sufficient and reliable information; (iii) the Commission did not appear to analyse the data provided by the Member States.

15. The complainant asked the European Commission to develop compliance tests. It also asked the Commission to put in place comprehensive and detailed reporting templates to ensure proper assessment of compliance by export credit agencies with the EU's external action provisions, the EU Charter of Fundamental Rights, and the EU's Action Plan for Human Rights and Democracy. Specifically, it asked the Commission to: (i) strengthen its



reporting templates, so as to ensure a proper assessment; (ii) carry out a comparative analysis of the Member State reports against the EU's external action provisions; (iii) develop compliance tests that correspond to EU obligations and standards that are broader and stricter than the OECD Common Approaches; and (iv) enhance the human rights aspect of the review exercise.

16. In its replies to the complainant, the Commission took the view that the annual reporting exercise complied with Annex I of Regulation 1233/2011. It maintained this view during the Ombudsman's inspection. The Commission said that it is obliged to use the information contained in the Member States' activity reports when producing the annual review for the European Parliament. It added that it saw no breach of its reporting obligations provided for in Regulation 1233/2011. It also said that any future change in the reporting procedure would require the agreement of both the European Parliament and the Council.

The Ombudsman's preliminary assessment leading to a solution proposal

17. Article 5 of Regulation 1233/2011 states that the transparency and reporting measures to be applied in the Union are set out in Annex I of the Regulation. Annex I states that:

"1. Without prejudice to the prerogatives of the Member States' institutions exercising the supervision of the national export credit programs, each Member State shall make available to the Commission an Annual Activity Report in order to step up transparency at Union level. Member States shall report in accordance to their national legislative framework on assets and liabilities, claims paid and recoveries, new commitments, exposures and premium charges. Where contingent liabilities might arise from officially supported export credit activities, those activities shall be reported as part of the Annual Activity Report.

*2. In the Annual Activity Report, Member States shall describe how **environmental risks, which can carry other relevant risks**, are taken into account in the officially supported export credit activities of their Export Credit Agencies.*

*3. The Commission shall produce an annual review for the European Parliament **based on this information**, including an evaluation regarding the compliance of Export Credit Agencies **with Union objectives and obligations**.*

(...)." (emphasis added)

18. The Ombudsman notes that Regulation 1233/2011 (Annex I) requires the Commission to produce reports based on information from Member States on how export credit agencies take into account the environmental risks **and related risks**, if any. It is generally accepted that environmental risks may also imply risks to social and other human rights [9].

19. The Regulation also states that the Commission's reports should include an evaluation of the compliance of export credit agencies with the EU's "*objectives and obligations*" (Annex I,



paragraph 3). It is the Ombudsman's view that this provision should be applied in conjunction with Recital 4 of the Regulation. This requires Member States to comply with the Union's general provisions on external action, such as "*consolidating democracy, respect for human rights and policy coherence for development, and the fight against climate change when establishing, developing and implementing their national export credit systems*", as well as "*when carrying out their supervision of officially supported export credit activities*".

20. The Treaty on European Union also sets out the principle that the EU's external activities should be guided by respect for human rights [10] .

21. Against this background, the Ombudsman examined the reports made by Member States to the Commission and the checklist template used by the Member States when reporting. In the Ombudsman's understanding, although the original checklist [11] was finalised during the Danish Presidency in 2012, it is open to the Commission to provide instructions to the Member States on how to fill it in. This would enable it to elaborate on the checklist and give more explicit guidance to the Member States regarding the information required.

22. The Ombudsman is pleased to see that Section III of the checklist template provides that Member States: (i) include in the reports "*all information that can help the Commission in carrying out its evaluation regarding the compliance of the ECAs with EU objectives and obligations (in the sense of Article 3, Annex I of the EU Regulation 1233/2011)*"; and (ii) explicitly provide information about the **environment** (point 1) and **human rights** (point 2) [12] . However , the Ombudsman considers that there is still room for improvement in the gathering of information aiming at assisting the Commission to carry out its evaluation regarding the compliance of ECA's with EU objectives and obligations.

23. The Ombudsman notes that the Commission has not so far set **common standards** as to how detailed and/or substantiated the Member States' reports on these matters (human rights and environment) should be [13] . Such standards would be of paramount importance given the considerable variation in Member States' checking and evaluation practices, prior to the approval of export credit projects [14] .

24. It would be preferable if the checklist template were to refer explicitly to the EU legal obligations and standards against which the export credit policies and activities will be evaluated [15] . As argued by the complainant, the references to relevant OECD instruments do not have the same weight as binding requirements resulting from EU law [16] . In this respect, the Ombudsman notes that preliminary results from the Spanish Ombudsman's investigation suggest that there are export credit activities that are assessed by the national administration on the basis of lower human rights and environmental standards than those required by EU law.

25. Furthermore, the checklist template could set clear and precise benchmarks ensuring consistency and allowing for a comparative assessment. The Commission's experience with impact assessment tools could prove useful in this regard.

26. In addition to the Annual Reports that Member States submit to the Commission, the



Ombudsman examined the reports the Commission has submitted to the Parliament [17] and a number of other documents related to the annual evaluation cycle.

27. The Ombudsman's investigation did not find evidence that the Commission carries out any kind of verification and/or comparative assessment of the information the Member States provide. There was also no evidence that the Commission engages in a dialogue with the Member States on an individual basis regarding evaluation or reporting methods or best practice dissemination, thus exploiting fully its role as a focal point for information-gathering.

28. Taking such steps would improve the process for preparing the annual reviews the Commission submits to Parliament. At present, the Commission's reports provide a rather descriptive enumeration of what the export credit agencies do, rather than a more comprehensive analysis and evaluation of their initiatives and actions [18].

29. Finally, it does not appear that the Commission has taken any concrete initiatives to consult with the European External Action Service on improving the reporting methodology [19]. It also does not seem to have consulted with civil society as to how to improve the review procedure. Such consultations were suggested by the Parliament in its report of July 2013. In that report, Parliament also called for more rigorous reporting and evaluation by the Commission.

30. Against this background, the Ombudsman is proposing a solution [20] which should improve the Commission's current reviewing practices.

The proposal for a solution

Taking into account the above analysis, and bearing in mind that substantive changes in the reporting procedure would require the agreement of both the European Parliament and the Council [21], the Ombudsman makes the following proposal for a solution:

(i) The Commission should take the appropriate initiative, following consultation with civil society and with the European External Action Service, to have the checklist template revised with a view to enhancing the reporting methodology and, in particular, to ensure (a) the inclusion of explicit references to the relevant principles in the Treaties and in the Charter of Fundamental Rights and (b) the establishing of a methodology for the reporting of non-financial issues.

(ii) Following its engagement with the Member States, the Commission should draw up guidelines to assist the Member States in their reporting to the Commission and with the aim of ensuring that the Member State reports will be as comprehensive as possible as well as presented in a manner which facilitates the Commission's subsequent analysis and evaluation of these reports.

(iii) Building on (ii) above, the Commission should take steps to enhance the analysis and evaluation it uses in preparing the annual reviews it submits to the European Parliament, in compliance with Annex I of Regulation 1233/2011.



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European Ombudsman

Strasbourg, 11/05/2017

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] <http://www.oecd.org/tad/xcred/theexportcreditsarrangementtext.htm>

[3] The Common Approaches apply to all types of officially supported export credits with a term of two-year or more (exports for medium and long term export credits). The Recommendation provides for the screening of export credit projects, their classification according to their potential environmental and social impact, and the drafting of environmental and social impact assessments among other things. The Common Approaches refer to UN Guiding Principles on Business and Human Rights, as well as, to a number of international decisions/declarations/etc. concerning human rights and environmental protection. In the 2016 version of the Common Approaches the human rights' aspect has been reinforced with the addition of a number of provisions explicitly concerning human rights.

[4] Annual Review of the Member States' Annual Activity Reports on Export Credits in the sense of Regulation (EU) 1233/2011 . This review covered the year 2011.

[5] ECA Watch was also critical of the Commission's 2013 annual review. In 2013, ECA Watch had published a shadow report entitled *Still Exporting Destruction* . The report provided an alternative assessment of export credit agencies' compliance with Regulation 1233/2011 and criticised the Commission's first report submitted to the European Parliament. It also included examples alleging lack of compliance by ECAs in different Member States.

[6] European Commission, Annual Review by the Commission of the Member States' Annual Activity Reports on Export Credits in the sense of Regulation (EU) 1233/2011, COM(2015)130, 17.03.2015.

[7] The European Ombudsman coordinates the European Network of Ombudsmen (ENO). She invited the following ENO members to consider opening parallel inquiries: the UK Parliamentary Ombudsman, the Belgian Ombudsman, the Finnish Ombudsman, the Danish



Ombudsman, the Dutch Ombudsman, the Polish Ombudsman, and the Spanish Ombudsman. The selection was based on whether national export credit agencies were within the remit of the respective national ombudsman.

[8] The Spanish Ombudsman informed the European Ombudsman of her preliminary findings on 23 November 2016 and 6 February 2017.

[9] For an analysis see: de Zayas, Alfred-Maurice, 'Report of the Independent Expert on the promotion of a democratic and equitable international order', UN, Human Rights Council, July 2015. See also, Reid Emily, *Balancing Human Rights, Environmental Protection and International Trade, Lessons from the EU experience*, Oxford and Portland: Hart Publishing, 2015, p: 195. She argues that " *The very clear lesson which emerges from that EU experience is that these interests [economic interests and non-economic interests, including, specifically human rights and environmental protection] are inherently interrelated, even mutually dependent, and that they should be pursued together*".

[10] Article 21 of the Treaty on European Union (TEU) states that " *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 ."* Article 3(5) TEU states that: " *In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, **the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights**, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter ."*

[11] The checklist template to be used by the Member States comprises six sections:

- (i) Reporting country information;
- (ii) Reporting country legal and policy information (including the respective export credit agency's annual report available on reporting year);
- (iii) Information on the reporting of Member States' Export Credit policies;
- (iv) Annual activity report data;
- (v) Contingent Liabilities; and
- (vi) Evaluation and incorporation of environmental risks.

[12] Besides this information, Section III requires that Member States provide information about Anti-bribery measures (point 3); Sustainable Lending Practices (point 4); and Other



Policies (point 5).

[13] The information Member States provide for in Section III of the checklist varies considerably, from simply affirming that OECD Common Approaches are respected to giving information on initiatives they take which may go beyond the OECD requirements, or inviting the Commission to consult their respective credit agencies' annual reports submitted in the context of the evaluation cycle.

[14] For example Sweden, France, Italy, Germany carry out environmental screening of transactions beyond those covered by the OECD's Common Approaches (2011, 2012, and 2013 reporting years). Germany (2011 Report) and Austria (2011 Report) assess human rights parameters on matters not addressed by the Common Approaches or in transactions not covered by them. France publishes environmental and social information on its website regarding projects with potentially significant impact at least 30 days before the final decision is taken. For more information on Member States' individual practices see their respective export credit agencies' Annual Reports submitted to the Commission (also available on line in their respective credit agencies' websites).

[15] Concerning environmental and human rights matters (section iii, points 1 and 2 of the checklist template) Member States are simply asked whether they apply the OECD's *Common Approaches*. The OECD's Recommendation on Bribery and Officially Supported Export Credits, as well as OECD's principles and Guidelines to promote Sustainable Lending in the Provision of Official Export Credits to Low Income Countries are mentioned as reference documents in points 3 and 4, respectively.

[16] In fact, the 2016 version of the Common Approaches encourages Members to “*benchmark projects against the relevant aspects of any other internationally recognised standards, such as the European Union Standards that are more stringent than those standards referenced above*” (point 26 and Annex III, point 5, v).

[18] The Commission has produced four annual reviews up to now. They follow the same structure and comprise three main sections: (1) Introduction focusing on the legal context and background information; (2) Annual Activity Reports received for the calendar year XXXX indicating which Member States submit annual activity reports and reiterating that Member States follow the same template for their reporting; (3) Analysis of the Annual Activity Reports. Section 3 comprises four sub-sections: (a) general financial information; (b) treatment of environmental risks, which can carry other relevant risks; (c) other information contained in the Annual Activity Reports; and (d) Compliance of ECAs with Union objectives and obligations.

[19] The Ombudsman notes the Commission's willingness to '*facilitate and promote*' an inter-institutional dialogue if the European institutions want to set more ambitious political targets concerning Member States' compliance with the Union's objectives and obligations. See 2015 Annual Review (covering the 2013 Member States Activity Reports), page 7. This approach has been reconfirmed in the Commission's most recent Annual Review published in February 2017 (covering the 2014 Member States Activity Reports), page 7.



[20] In accordance with Article 5 of the Implementing Provisions of the European Ombudsman.

[21] See point 16.