

Recommendation of the European Ombudsman in case 212/2016/JN on the European Commission's annual reviewing of Member States' export credit agencies

Recommendation

Case 212/2016/JN - Opened on 28/04/2016 - Recommendation on 23/05/2018 - Decision on 03/12/2018 - Institution concerned European Commission (Recommendation agreed by the institution) |

The case concerned the adequacy of the European Commission's annual reviewing of export credit agencies - national bodies that give financial support to companies doing business in 'risky' markets - in particular with respect to the protection of human rights and the environment.

The Ombudsman inquired into the matter and 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 used by Member States in compiling the reports on export credit agencies which they are required to submit to the Commission each year. The Ombudsman also proposed that the Commission, for its part, should enhance the analysis and evaluation content of the annual reviews of export credit agencies which it submits to the European Parliament.

The Commission rejected the Ombudsman's proposals mainly because it considers that their implementation would require an amendment to the existing legislation. The Ombudsman disagreed with the Commission's position and has now made recommendations to the Commission in the same terms as those of her earlier proposals. The Ombudsman believes that the Commission's annual review, which it sends to Parliament, should amount to more than a compilation of the content of the annual reports received from the Member States and that it should contain an informed and detailed evaluation of the performance of the export credit agencies, particularly, as regards respect for human rights and the environment.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The complainant, ECA Watch, is an international coalition of NGOs that monitor export credit agencies - national bodies that give financial support to companies doing business in markets



(for example, developing countries) considered as too risky for conventional private financing 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.

2. Under Regulation 1233/2011 [2], EU Member States must 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 including respect for human rights and the protection of the environment

3. The complainant challenged the adequacy of the European Commission's annual reviewing of Member States' export credit agencies. In particular, the complainant considered that the Commission's reviewing was not thorough enough with respect to the protection of human rights and the environment. [3]

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

The Ombudsman's proposal for a solution

4. The Ombudsman examined the Commission's annual reviewing and considered that it could be improved in several respects. Accordingly she made the following three proposals:

(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.

5. When proposing the solution, the Ombudsman took into account the arguments and opinions put forward by the parties.



6. In response to the Ombudsman's proposals, the Commission said that it was not in a position to implement them because this would require an amendment of the Regulation. In the Commission's view, the Ombudsman's **first proposal** specifically implies a significant change when compared to the current wording of Annex I of the Regulation. At the same time, the current reporting process reflects what can reasonably be achieved without amending Regulation 1233/2011, given the limited reporting obligations contained therein. The Commission said that it was obliged to implement the Regulation as it currently stands. Nevertheless, the Commission expressed its readiness to "*facilitate and promote a relevant inter-institutional dialogue if the European institutions jointly set themselves more ambitious targets.*"

7. The Commission added that it would continue its efforts to address with Member States the issues raised by the European Parliament in its Resolution of 2 July 2013 (the "Parliament's Resolution") [4] , as well as by civil society, and would do its utmost to facilitate an agreement on a revised checklist, should the Council Working Group on Export Credits agree to proceed along these lines.

8. The Commission said that it will also use the periodic reviews of the OECD Common Approaches to address any concrete limitations in the due diligence procedures therein. In addition, it will continue its efforts to assist Member States in ensuring as comprehensive a reporting as possible within the framework of Regulation 1233/2011, while continuing its discussions with the EEAS and civil society. Finally, the Commission said that "*on the occasion of a review of Regulation 1233/2011, [it] remains open to address this issue in a more comprehensive and concrete manner*" and that it stands ready to continue the dialogue on this matter.

9. As regards the checklist template and the development of common standards for Member State reports [5] , the Commission said that the checklist template had not been proposed by the Commission, but had been developed within the Council Working Group on Export Credits. Regulation 1233/2011 does not entrust the Commission with the task of developing common standards for the Member States' reporting. The institutions agreed that it was up to the individual Member States to structure their reports. They may use the checklist template, refer to a suitable annual report prepared at national level and containing the information required by Annex I of Regulation 1233/2011, or combine both. The diversity of export credit systems currently existing in the Member States has been highlighted in each Annual Review. The development of common standards for the form of the reporting would not respect this diversity. It would not respect Regulation 1233/2011 either because that Regulation leaves the manner and methodology of reporting to individual EU Member States.

10. As regards the Commission's assessment of the information provided by Member States [6] , the Commission said that Regulation 1233/2011 explicitly obliges it to base its Annual Review on the information provided by the Member States in their Annual Activity Reports. The Commission is therefore limited, in its evaluation, by the information provided by Member States. It is not required to verify such information (see Annex I, paragraph 1, first phrase of the Regulation). In the absence of any factual evidence that EU law is not respected in the context



of a Member State's export credit programme, the Commission has no reason to launch an investigation.

11. As regards the references to the relevant OECD instruments contained in the checklist template [7] (in particular the OECD Recommendation on Common Approaches to the Environment and Officially Supported Export Credits and the OECD Recommendation on Common Approaches to the Environment and Officially Supported Export Credits and Environmental and Social Due Diligence), the Commission agreed with the Ombudsman that the relevant OECD Recommendations are not legally binding. In the Commission's view, their legal status was, however, not relevant with respect to their technical and factual quality as tools in due diligence work. The OECD Common Approaches explicitly recognise the possibility that, when undertaking a project review, as an alternative to World Bank Safeguard Policies, IFC Performance Standards or the Standards of Major Multilateral Financial Institutions, adherents may benchmark projects against the relevant aspects of any other internationally recognised and more stringent standards, such as EU standards. This provision has been part of the OECD Common Approaches for at least 14 years. The Commission regards this as a good indication that applying OECD Recommendations does not mean a "watering down" of EU standards, where EU standards are relevant for an export credit project and more stringent than other standards. The OECD Common Approaches are regularly reviewed (there have been 5 versions since 2003), which means that there are sufficient opportunities to address any perceived shortcomings in a constructive manner.

12. As regards the Commission's contacts with the EEAS on the development of the reporting methodology [8], the Commission said that it had had informal service level contacts with the EEAS and other experts on non-financial reporting at the time when Regulation 1233/2011 entered into force. It also took part in a discussion organised by the European Parliament's INTA Committee [9]. The Commission said that it is clear, from these exchanges that the contribution of such external actors, to the process is not a substitute for an agreement between the institutions directly concerned with Regulation 1233/2011. The Commission took note of the Parliament's Resolution, including its recommendation that the Council Working Group on Export Credits and the Commission consult with the EEAS on developing a methodology. The European Commission has raised the issue of the Parliament's Resolution with the Council Working Group on Export Credits on several occasions (Council Working Group Meetings of October and December 2013). However, several Member States were not ready to consider any changes to the initially agreed reporting practices. This situation would have been clear from some of the documents made available to the Ombudsman in the course of this inquiry. Moreover, the EEAS is regularly consulted on the Annual Reviews produced by the European Commission under Regulation 1233/2011.

13. The complainant commended the Ombudsman's proposal for a solution and challenged the Commission's position. The complainant argued that Regulation 1233/2011 requires the Commission to undertake an evaluation of export credit agencies' compliance with the EU's objectives and obligations. To conduct such an evaluation, the Commission is entitled to solicit information from the Member States and to undertake its own investigations allowing it to verify the information it receives. The complainant said that the Commission already carries out its



own investigations concerning Union objectives and obligations under EU competition law. In the complainant's view, there is no reason why such investigations should not be extended to other areas.

14. The complainant further argued that the fact that the Commission requests certain information from the Member States does not interfere with the latter's prerogatives relating to the supervision of their own national export programmes. Member States are entitled to respond as they wish, including giving no information in response to a request. It is, however, incumbent on the Commission to seek the information necessary to enable it to carry out a credible evaluation and to probe the responses it receives.

15. The complainant contended that Regulation 1233/2011 requires the Commission to carry out a proper assessment, based on verified facts. Otherwise, there is a real danger that the Commission's reports would be misleading and would undermine the transparency objectives of Regulation 1233/2011. Without any assessment of its own, the Commission will not be able to produce an annual review for the European Parliament.

16. The complainant further argued that no change to Regulation 1233/2011 is needed to implement a robust and thorough assessment by the Commission. In its view, the Commission has significant space to make proposals and negotiate on behalf of the EU in the relevant OECD group and it has a *de facto* status of co-chair of the European Council Working Group on Export Credits.

The Ombudsman's assessment after the proposal for a solution

17. The Ombudsman notes that the Commission has rejected her solution proposal, mainly because it considers that her three proposals go beyond what is permissible for the Commission to do under the current legislation. In the Commission's view, it would be necessary to amend Regulation 1233/2011 in order to implement the Ombudsman's proposals.

18. The Ombudsman does not share this view. The Ombudsman's mandate is to uncover and address issues of maladministration in the activities of EU institutions and bodies and the Ombudsman duly takes the applicable legislation into account in her proposals. The Ombudsman considers that her proposals are in line with Regulation 1233/2011 as it currently stands.

19. Article 3 of Annex I to Regulation 1233/2011 requires the Commission to “*produce an annual review for the European Parliament based on [the] information*” provided by Member States. The same provision sets out that the Commission's annual review **shall** include “*an **evaluation** regarding the compliance of [export credit agencies] with Union objectives and obligations*” [10]. Thus, it is clear that the Commission's involvement goes beyond summarising or compiling Member States' contributions and involves “*evaluation*” of the information provided regarding export credits agencies' compliance with Union objectives and



obligations.

20. In accordance with the right to good administration (Article 41 of the EU Charter of Fundamental Rights [11]) as well as with the principles of good administration, **when EU institutions proceed to evaluation, their evaluations must be accurate, objective, independent, thorough and based on adequate information** . This applies also in the context of the Commission's annual reviews of export credit agencies. Otherwise, the legal requirement to provide an evaluation (Article 3 of Annex I of Regulation 1233/2011) could not be implemented effectively and would lose its purpose.

21. The Ombudsman notes that Regulation 1233/2011 does not harmonise the methodology to be used and does not set out any uniform standards for reporting. It does not set out any benchmarks for the assessment of export credit agencies' compliance with Union objectives and obligations either. However, this does not imply that Regulation 1233/2011 prevents the Commission from proactively taking adequate steps aimed at obtaining all relevant information which it needs to be able to thoroughly evaluate export credit agencies' compliance with Union objectives and obligations. It does not prevent it from taking adequate steps to define relevant benchmarks either. In fact, **the gathering of all relevant information and the definition of applicable methods, benchmarks and standards are necessary prerequisites for any meaningful evaluation by the European Commission of export credit agencies' compliance with Union objectives and obligations** .

22. In the Ombudsman's view, in the absence of any legislative rules governing this issue, it is necessary to rely on principles of good administration. It would be good administration for the Commission to seek to obtain relevant information for instance by means of **guidelines** for Member State officials in charge of completing the relevant questionnaire. **Revising the questionnaire and including explicit references to the relevant EU rules** could also prove helpful. [12] Nevertheless, it is open to the Commission to reflect upon the best way on how to improve the information gathering and evaluation process. In this regard, the Ombudsman points out that her first proposal referred to the Commission taking an "*appropriate initiative*", which leaves enough space to the Commission to determine the most adequate course of action. The Ombudsman's second proposal further specifically referred to the Commission's "*engagement with the Member States*", which may in fact be needed to achieve the desired outcome.

23. As regards the scope of the Commission's evaluation, it follows from Article 3 of Annex I of Regulation 1233/2011 that the Commission shall evaluate "*the compliance of [export credit agencies] with Union objectives and obligations*". Regulation 1233/2011 does not give any specific definition of "*Union objectives and obligations*". However, recital 4 of Regulation 1233/2011 says that: "*The Member States should 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 and when carrying out their supervision of officially supported export credit activities.*" Article 2 of Annex I of Regulation 1233/2011 further specifically requires Member States to describe, in their annual reports, "*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]”.

24. The Ombudsman further notes that the Union’s objectives and obligations are set out, at the highest level, in the Treaties and the EU Charter of Fundamental Rights. A combined reading of the Treaties [13] and the Charter [14] clearly considers the protection of fundamental rights and of the environment to be Union objectives and obligations, including in its external action.

25. Thus the Ombudsman considers that since Article 3 of Annex I of Regulation 1233/2011 provides for a legal obligation to carry out the evaluation, and since the intended purpose of this provision would certainly be undermined if the evaluation **of export credit agencies’ compliance with the Union’s objectives and obligations in the area of human rights and the protection of the environment** were not as thorough as possible, [15] **the Commission is required to take adequate steps to ensure that it receives all relevant information from the Member States and that its evaluation is based on solid and objective methods including well-defined benchmarks** .

26. The Ombudsman closely examined the annual reviews prepared by the Commission so far and considers that they do not meet the requisite standard. Regrettably, the 2011-2014 annual reviews are very “light” and contain hardly any independent and objective analysis and evaluation of export credit agencies’ compliance with Union objectives and obligations. The relevant sections are very brief and do not provide any explanation for the Commission’s conclusion that export credit agencies’ complied with Union objectives and obligations during the reporting period. The annual reviews, whose content is very similar from one year to another, give the impression of overly general executive summaries rather than a genuine evaluation of compliance. In the absence of a transparent explanation of the method applied and of the considerations leading to the Commission’s conclusions, the Ombudsman agrees with the complainant that the Commission’s conclusions appear unfounded.

27. The Ombudsman is not convinced by the Commission’s arguments that the current wording of Regulation 1233/2011 prevents it from implementing the Ombudsman’s proposals. Although Regulation 1233/2011 does not specifically address the minutiae concerning Member States’ reporting and the Commission’s evaluation, it leaves the Commission sufficient space to take adequate steps to render the annual review process effective in terms of information gathering and evaluation as regards respect for both human rights and the environment. [16]

28. The Commission said in its reply that it has no reason to launch an “investigation” unless there is **evidence** that EU law is not being respected in the context of a Member State’s export credit programme. However, this begs the question: how can such evidence be obtained if Member States’ reports are not informative?

29. In the Ombudsman’s view, should the Commission’s evaluation in the context of its annual review lead to the conclusion that a Member State export credit agency failed to comply with Union objectives and obligations, or that a Member State’s export credit programme does not comply with EU law, this should be adequately reflected in the annual review addressed to the



European Parliament. The very purpose of the reporting process is to increase the transparency of the activities of export credit agencies and thus to increase their accountability, including in the area of respect for human rights and for the environment. This should be the case without there being any need for citizens and civil society to submit complaints and evidence of infringements of EU law in specific cases. In any event, investigations of infringements of EU law cannot be taken as a substitute for the Commission's duty to properly evaluate export credits agencies' compliance with Union objectives and obligations in the context of the annual review.

30. The Commission's explanation of why it cannot act on the Ombudsman's earlier proposals is not convincing. The Ombudsman concludes that, by not having taken adequate steps allowing it to evaluate export credit agencies' compliance with Union objectives and obligations, in particular as regards respect for human rights and the environment, the Commission has committed maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendations

On the basis of her inquiry into this complaint, the Ombudsman makes the following recommendations to the European Commission:

(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.

The European Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the European Commission shall send a detailed opinion by 23 August 2018.



Emily O'Reilly

European Ombudsman

Strasbourg, 23/05/2018

[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] Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC, OJ L 326, 8.12.2011, p. 45

[3] 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. More detailed background information can be found in the Ombudsman's solution proposal:
<https://www.ombudsman.europa.eu/cases/solution.faces/en/95453/html.bookmark> [Link]

[4] European Parliament resolution of 2 July 2013 on the first annual report from the Commission to the European Parliament on the activities of Member States' Export Credit Agencies (2012/2320(INI))

[5] The Commission referred to paragraphs 21, 23 and 24 of the Ombudsman's solution proposal.

Paragraph 21 read as follows:

“ 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 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. ”

Paragraph 23 read as follows:

“ 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. 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. ”

Paragraph 24 read as follows: “ *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. As argued by the complainant, the references to relevant OECD instruments do not have the same weight as binding requirements resulting from EU law. 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. ”*

[6] The Commission referred to paragraph 27 of the Ombudsman’s solution proposal, which read as follows:

“ 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. ”

[7] The Commission referred to paragraph 24 of the Ombudsman’s solution proposal, which is quoted in footnote 5 above.

[8] The Commission referred to paragraph 29 of the Ombudsman’s solution proposal, which read, in relevant part, as follows:

“ ... 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. 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. ”

[9] The Committee on International Trade.

[10] Emphasis added by the Ombudsman.

[11] In accordance with Article 51(1) of the Charter, “[t] he provisions of [the] Charter are addressed to the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law. ... ”

[12] At present, the questionnaire merely refers to the OECD non-binding rules although the



Commission is required to evaluate export credit agencies' compliance with “ *Union objectives and obligations* ” resulting, in the first place, from the Treaties and the Charter.

[13] Notably Articles 2, 3, 6 and 21 TEU.

[14] In accordance with Article 37 of the Charter, “[a] *high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*”

[15] Only the Court of Justice is empowered to provide authoritative interpretation of EU law.

[16] Only the Court of Justice is empowered to provide authoritative interpretation of EU law.