

Recommendation of the European Ombudsman in case 150/2017/JN on the European Commission's failure to carry out a human rights impact assessment before approving the inclusion of a Sector Understanding on Export Credits for Coal-fired Electricity Generation Projects as Annex VI to the OECD Arrangement on Officially Supported Export Credits

Recommendation

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) |

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

This complaint to the European Ombudsman was lodged by ECA Watch - an international coalition of NGOs monitoring the activities of Export Credit Agencies. ECA Watch considered that the European Commission had 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 negotiated in the context of the OECD Arrangement on Officially Supported Export Credits.

The Commission considered that no impact assessment was needed because the sector understanding was not likely to have any significant impacts.

The Ombudsman inquired into the issue and found no evidence that the Commission's decision - that an impact assessment was unnecessary - was based on a thorough analysis of the situation. The Ombudsman found maladministration on the part of the Commission for having taken this decision in the absence of a thorough analysis of whether it was likely there would be any significant economic, social or environmental impacts, including on human rights. The Ombudsman recommended to the Commission that, for the future, and in advance of a substantive decision, it should ensure that it systematically performs an internal analysis of whether an envisaged measure, proposal or international agreement is likely to have significant economic, social or environmental impacts, including human rights impacts. The Ombudsman considered that the Commission should keep a written record of its analysis and assessment.



Background to the complaint

1. This complaint to the European Ombudsman was lodged by ECA Watch - an international coalition of NGOs which monitors the activities of Export Credit Agencies. The complainant considers 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* negotiated in the context of the OECD Arrangement on Officially Supported Export Credits ("the Arrangement").

2. The Arrangement is a "Gentlemen's Agreement" among participating OECD members, which provides "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 disciplines for export credit activities. [2] The *Sector Understanding on Export Credits for coal-fired electricity generation projects* is the most recent sector understanding that has been annexed to the Arrangement. [3]

3. The complainant and the Commission exchanged correspondence about this issue. The Commission considered that the requirement to carry out a human rights impact assessment did not apply in the given context. The complainant was dissatisfied with the Commission's position and referred the matter to the Ombudsman on 31 August 2016.

The inquiry

4. The Ombudsman opened an inquiry into the complainant's concern that the Commission had failed to carry out a human rights impact assessment in keeping with its obligations under the EU's Strategic Framework and Action Plan on Human Rights and Democracy.

5. In the course of the inquiry, the Ombudsman received the reply of the European Commission on the complaint and, subsequently, the complainant's comments in response to the Commission's reply. The Ombudsman further received the Commission's response to her further inquiry. The Ombudsman's recommendation takes into account the arguments and views put forward by the parties.

Arguments presented to the Ombudsman

6. In its reply, the Commission said that it shares the general emphasis on respect for human rights. However, in this case it decided not to carry out a human rights impact assessment for the following reasons:

Ø The two EU Action Plans on Human Rights and Democracy are political documents that set out the European Union's priorities, objectives and guiding principles in the field of human rights and democracy protection in external affairs. They do not contain precise and detailed rules obliging the Commission to carry out human rights impact assessments for all the proposals that



it presents to the European Parliament and the Council. In light of the wording [4] of these documents, the question would rather be whether the Commission should have carried out an impact assessment in this case.

Ø The Commission's guidelines on better regulation require impact assessments for legislative proposals and certain non-legislative initiatives expected to have significant economic, social and environmental impacts. However, they also require impact assessments to be carried out according to the principle of proportionate analysis. Thus, only the most significant impacts must be studied.

Ø The Commission understood that, in practice, the Arrangement's provisions on export credits in the case of coal-fired power plants was a limited step forward and with a limited impact. The Commission said that, in practical terms, the impact of the Arrangement would be to give a significant positive political signal in support of efforts to achieve ambitious results at the forthcoming United Nations Climate Conference in Paris (COP 21). The actual effect of export credits, granted by the OECD member participants to the financing of coal-fired power plants, is in fact limited. In October 2014, the OECD Secretariat found that, based on 2005-2012 statistics, the role of export credit financing covered by the Arrangement appeared marginal. Depending on the calculation methods used, the portion of Arrangement-type financing in average annual new installed capacity could be as low as 1.35%. Apart from the marginal quantitative role OECD export credits actually play in the financing of coal-fired power plants, it is important to keep in mind that the main implication of the provisions in question is a reduction of the existing (though rarely used) possibilities to finance coal-fired power plants with export credits. Therefore, the Commission felt it was unlikely that a significant human rights or environmental impact would occur.

Ø The Commission considered that it was highly desirable to pursue the negotiation process given the opportunity to provide political support for the EU's broader objectives on climate change. However, the Commission said that it had no reason to expect a significant economic, social or environmental impact to arise from its adoption of the provisions on export credits and coal-fired power generation. Therefore, no impact assessment was undertaken.

Ø The Commission finally stated that the complainant has so far not explained why it believes that the rules in question are likely to raise any concern or risk for the protection of human rights.

7. The complainant challenged the Commission's position and argued that:

Ø The OECD Arrangement applies only to “*pure cover*” export credit finance, that is, export credit guarantees and insurance. Other forms of export finance are not covered. In that respect, the Commission correctly says that “[t]he actual role of export credits granted by the OECD member participants under the Arrangement to the financing of Coal-Fired Power Plants is in fact limited”.

Ø The historical contribution of “pure cover” export credits should not have been used as the



test for whether or not to undertake an impact assessment. The new rules were explicitly intended to discourage (and indeed ban) export credit finance for certain types of coal-fired power stations and to encourage a switch to, and an expansion of, “ *ultra-super-critical technologies* ”. As a result, the new rules were likely to increase export credit finance.

Ø The complainant considered that the Commission interprets the principle of proportionality wrongly. In its view, the Commission has sought to use the principle of proportionality to exclude a whole body of law from assessment, rather than using it to focus on the most important impacts of that body of law.

Ø The complainant contended that there is a wide range of health impacts associated with emissions deriving specifically from coal combustion by all types of power plants. “Ultra-super-critical” coal-fired power plants, for which the Arrangement allows financing without any restriction, may bring the same human rights problems as all the other varieties of such power plants that are partially barred from OECD ECA support. The Sector Understanding fails to incorporate human rights concerns, as it only distinguishes coal-fired power plants based on the efficiency of electricity production by coal combustion.

Ø EU legislation on technical standards for coal-fired power plants has recently been made much more stringent with the assumption of severe negative impacts produced by these plants on local population’s health. The Commission played a key role in the definition of these new standards, which according to several experts will accelerate the closure of a significant percentage of existing coal plants in EU countries.

Ø The right to health is a fundamental part of our human rights and of our understanding of a life lived with dignity, as defined in several international Conventions and Declarations. Recently, judicial authorities in EU countries have ordered the closure of specific coal plants because of the danger for public health. Coal-fired power plants in Europe and abroad have been blamed for thousands of premature deaths associated with their emissions, as documented in several public reports in the last years.

Ø There is a wide range of severe human rights problems in the global coal supply chain (e.g. regarding the import of so-called “blood coal” from Colombia). Human rights impacts associated with global coal supply have been specifically documented with relevant evidence. Therefore, the complainant was surprised by the Commission’s claims that these impacts did not need to be assessed. In its view, the Commission should have made a prior assessment of the specific human right dimension of the supply chain management associated with coal plants that export credit agencies finance.

The Ombudsman's assessment leading to a recommendation

8. The Ombudsman notes that the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy (Action 1) requires the Commission to “ *Insert human rights in Impact*



Assessment, as and when it is 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 (Action 28) 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 ...”

9. The Ombudsman considers 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.**

10. In the context of her inquiry, the Ombudsman requested the Commission to provide a copy of its internal documents showing how it analysed and assessed whether the sector understanding was likely to have significant economic, social or environmental impacts. The Commission informed the Ombudsman that it had identified only one such document. Regrettably, the document in question, which the Commission forwarded to the Ombudsman, contains no relevant analysis and does not clarify how the Commission assessed this issue before deciding that an impact assessment was not needed.

11. The Ombudsman finds it surprising that the Commission does not have a written record of its internal analysis. Had such an analysis been performed and had it been considered at different levels of the Commission’s administration, there would necessarily be a written record of its content. In these circumstances, it appears that the Commission did not perform any serious and thorough internal analysis before deciding that it would not carry out an impact assessment. The reasons provided in the context of the Ombudsman’s inquiry thus appear to be simply justifications after the event.

12. Given that the Commission was unable to demonstrate that its decision to dispense with a human rights impact assessment was based on a thorough internal analysis of whether there were any likely significant impacts, the Ombudsman must proceed on the assumption that the Commission performed no serious and thorough internal analysis of that issue. This renders the Commission’s decision, not to perform an impact assessment, arbitrary.

13. On the question of whether a human rights impact assessment should have been carried out, the Ombudsman considers that the arguments of both parties have their merits. However, it is not the role of the Ombudsman to seek to replace that of the Commission’s services and to carry out the complex assessment of whether the changes arising from the Arrangement are likely to have significant economic, social and environmental impacts. A thorough examination of those questions should have been performed by the Commission. The Ombudsman’s role is to examine whether there was maladministration arising from the manner in which the Commission decided that an impact assessment was not necessary.



14. The Ombudsman finds that the arbitrary manner in which the Commission decided that an impact assessment was not necessary constituted maladministration. That decision should have been based on a thorough analysis of whether it was likely that any significant economic, social or environmental impacts, including on human rights, would arise from the operation of the Arrangement. The Ombudsman therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendation

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

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.

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 17 October 2018.

Emily O'Reilly

European Ombudsman

Strasbourg, 17/07/2018

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

[3] <http://www.oecd.org/tad/xcred/sector-understanding.htm>

[4] The 2012 *EU Action Plan on Human Rights and Democracy* (Action 1) explicitly commits the Commission to "insert human rights in Impact Assessment, as and when it is 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 (Action 28) refers to the " incorporation of human rights in Commission impact assessments ".