

Transparency: Changing legal and political framework places new obligations on ECAs

Intro

Improved transparency of ECA-activities has been an NGO demand from the very beginning of the campaign for a reform of export credit agencies. Though we have seen some improvements on this topic over the years, “transparency” is actually still on our “demand list” and still very prominently. Maybe therefore it is worthwhile to recapitulate why we consider transparency to be so important.

Transparency is about

- improving the quality of projects through a broadened base of information, including local knowledge;
- reducing the risks of project failure as public comments may help identifying risks the project sponsor has overlooked or not told;
- lowering reputational risks for the ECAs;
- assessing better the economic viability of a project which helps to prevent the creation of new debts;
- combating corruption through enhanced scrutiny, the presentation on bribery will further elaborate this;
- increasing democratic control over investment decisions as it allows wider stakeholder participation in the decision-making process;
- accountability of public entities towards the public in the “recipient” country and the ECAs home country

I. Directive on public access to environmental information

The importance of transparency has been acknowledged in the Aarhus “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in environmental Matters”.

Kofi Annan described the Aarhus Convention as “*the most ambitious venture in the area of ‘environmental democracy’, so far undertaken under the auspices of the United Nations*”.

The first pillar of the Aarhus Convention has been transposed into the “EU directive on public access to environmental information”.

The transposition of this directive into national law had to be finished mid February 2005. Since then public authorities in EU member states are legally required to share information related to the environment with the public. This new obligation applies to export credit agencies.

We are aware of the fact that ECAs are different in different countries, but all of them fall under one or another definition of “Public authority” in the directive, since the broad definition of “public authority” includes

- a) government or other public administration, including public advisory bodies*
- b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and*
- c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within a) or b).*

The common denominator of export credit agencies is that they all carry out some transactions on their government's behalf, with its support and under its control. And that the activities of ECAs relate to the environment has also been acknowledged by the existence of the "common approaches on environment and officially supported export credits". The European Commission through DG Environment recently confirmed that ECAs are bound by the new Directive in a letter, to the European ECA Reform Campaign . Their answer, dated xx, states, that

"... Export Credit Agencies, whether or not belonging to the public administration, qualify as public authorities within the meaning of Directive 2003/4/EC and are obliged to observe the rules laid down in that directive."

Experiences with the directive so far

This is a very clear interpretation and we are talking here about hard law, to be followed by all European ECAs. However we are concerned that some ECAs will interpret the directive not in the same way as the Commission.

With the transposition timeline of mid February, we only start gaining experience with the interpretation. However we have yet gained some experiences in a couple of countries:

- Spain has answered that the directive does not apply for CESCE at least until the transposition has been done, though without national transposition the directive gets into force directly
- Finvera didn't disclose environmental information and still is not ready to disclose it after the directive came into force
- In Belgium there was no reaction to a question for a report on environmental standards, obviously environmental information
- Hermes provided information it was requested for but emphasized that they consider the type of information that has been asked for is not covered by the directive – though a list of category A and B projects obviously contains environmental information
- Requests to ECGD provided Impact questionnaires on several cases.

New transparency policies

This different interpretation is something that for sure has to change and we see a clear role for the Commission here to assure that all ECAs are interpreting the directive in the same way. What we do expect to happen is export credit agencies to improve their disclosure policy systematically, instead of waiting to be pressed for every single information:

- if you have to provide information anyway by legal obligation, you should follow another obligation of the directive on public access to environmental information: the demand that environmental information is to be disseminated pro-actively; a disclosure policy taking this into account should disclose systematically the kind of information that has to be provided anyway on request;
- this should be done not ex-post but ex-ante since the positive effects of transparency for improved decision making are relevant only if the transparency takes place before a decision is made; therefore it is crucial to assure ex-ante transparency
- one important argument against transparency has always been the "business confidentiality" of ECAs activities; the new directive can be helpful on this question as well since it demands that exceptions that could limit access to information must be "interpreted in a restrictive way" and that in every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Moreover, and more importantly perhaps, wherever full access to a document is

denied (e.g. on the grounds of protecting commercial information), ECAs are obliged to give partial access to information contained in the document in question.

- if new transparency policies are developed, one precondition is transparency and participation of civil society in their development

II. Enhanced transparency through the common approaches

Another area where we have seen changes in the political framework over the last two years in terms of transparency (ex-ante and ex-post) are the common approaches.

With a majority of European export credit agencies having been very secretive about the projects they supported, this has led to changes especially among the European ECAs.

One major concern on this is that the common approaches ask for ex-ante transparency only for category A projects. This can pose an incentive for saving trouble through classifying projects as category B rather than A.

More important even is the fact that the directive on public access to environmental information does not talk about category A, B or C projects but on the obligation for enhanced transparency generally. Given that the EU directive is hard law to be followed by all European ECAs, you might have an interest to integrate the directive's requirements in the common approaches when you start the review of the common approaches, including the demand for transparency regardless the category of a project.

III. Other political demands for transparency

The importance of enhanced transparency in ECAs has recently been acknowledged as well by other players. Outstanding on this is the Commission for Africa, launched in early 2004 by Tony Blair to produce recommendations for Africa, EU, G8 and other wealthy nations on how they can co-operate to alleviate Africa's poverty. Good governance is seen as a key issue on the way forward. To support this, the Commission sees a responsibility as well in the "donor countries" and their role in supporting good governance through enhanced transparency. This goes as well for export credit agencies, which the Commission names explicitly and states:

"Developed countries should encourage their ECAs to be more transparent, and to require higher standards of transparency in their support for projects in developing countries."

The UK seem to have acknowledged this importance of transparency, given the fact that they have been especially open in disclosing export credit agency information recently.

IV. Conclusion

ECAs receive funding from public sources and their financing decisions often have long-lasting effects – sometime irreversible impacts - on the environment as well as on the economic development of the recipient countries (the question of indebted countries). Transparency should therefore be an integral part of ECAs decision-making processes. The European ECA Reform Campaign and other NGOs have been claiming this right to access to information for a number of years. In recent years the importance of transparency and public participation has increasingly been acknowledged in international law (Aarhus Convention and EU Directive) as well as in policy recommendation like the Commission for Africa's report. These developments prove our demands for ECAs to be valid. The Commission for Africa acknowledges as well another important point: disclosure of environmental information may be a start but transparency is not only about environmental information but broader and is something that plays an important role as well in the whole question of debt cancellation and avoiding of new debt, to name just one area.