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Blood from a stone: can the new EU Directive on access to information force ECAs to open up?

1. Introduction

Most of the developing world's large-scale construction projects are funded by the investment of public money through financing organisations known as Export Credit Agencies (ECAs). Yet while many of the projects funded are high-risk operations in terms of their potentially negative impacts locally, there remains an almost complete lack of public disclosure about them – the ECAs usually citing reasons of competition or confidentiality to avoid public scrutiny. Since ECAs back projects that affect peoples' health, their environment and/or their local economy, this lack of transparency is in conflict with the democratic principles to which their home governments claim to aspire. This briefing assesses the potential and limitations of a new European Union (EU) Directive on Public Access to Environmental Information¹ for forcing European ECAs to open up their business.

What are ECAs?

Export Credit and Investment Insurance Agencies (ECAs) are public or semi-public bodies that provide government-backed loans, guarantees and insurance to corporations seeking business opportunities in developing countries and emerging markets that are considered too risky (either commercially or politically) for conventional corporate financing. ECAs are collectively the largest source of public financial support for foreign corporate investment in large-scale industrial

projects in the developing world. Their total financial flow exceeds by far the annual infrastructure loans from multilateral development banks and bilateral aid agencies. Moreover, in contradiction with their governments' commitments to sustainable development, most do not take into consideration the impacts of the projects they support on either the environment or the rights of local peoples.

Like the World Bank 20 years ago, most ECAs have no binding environmental or social guidelines. As a result, export credit funding often goes to highly destructive and risky operations – from pulp and paper mills to nuclear power plants, and from mines to oil pipelines and large dams – that often lead to forest loss, human rights abuses and environmental degradation.

Why transparency is key

The decision to finance a given project through export credits will inevitably lead to long-lasting – and, unfortunately, often harmful – impacts on the environment and the people in the recipient country. At the same time, the funds provided by ECAs are largely dependent on public (taxpayer) money. Transparency, public participation and timely information disclosure should, therefore, be a *sine qua non* condition for these high-impact operations. Unfortunately, the opposite is true, the activities of ECAs typically being shrouded in secrecy. Indeed, an almost total lack of transparency in ECA decision-making, assessing environmental impacts and screening



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of ECA financial commitments has effectively hidden many deals from public scrutiny.

Given the importance of public participation and attentive monitoring in relation to identifying the negative social, environmental or economic impacts of any ECA-funded projects, increased transparency will inevitably lead to better informed financing decisions, thereby contributing to improving the quality of projects. Making ECAs' operations much more transparent and accountable to citizens is, therefore, a crucial step towards limiting their negative social and environmental impacts and ensuring their economic viability.

Since 1996, an international coalition of non-governmental organisations (NGOs)² has been campaigning to reform Export Credit Agencies and to achieve binding environmental, social and human rights standards for ECA operations.³ These NGOs are calling for greater transparency in ECA decision-making, environmental assessment and screening of ECA financial commitments. Specifically, the campaign urges the ECAs to publicise environmental and social impact assessments (EIAs) prior to any funding decision, such that affected local communities can take control over the decisions that affect their lives and economic resources. As yet the only international guidelines with respect to ECA environmental performance are the 'Common Approaches' which were agreed at the OECD.⁴ These guidelines, which are applied only on a voluntary basis, have failed to bring about any meaningful change in ECA disclosure practices. In contrast, the new EU Directive on Public Access to Environmental Information, places legally binding requirements on European ECAs, and thus represents a significantly more powerful tool in terms of shedding light on the spending of these public funds.

2. The Aarhus Convention: a new international framework for transparency and public participation

In recent years increased transparency and public participation have been widely acknowledged to improve the

quality of decisions impacting on the environment – a development which has been reflected in international law through the adoption of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereafter 'The Aarhus Convention').⁵ An international treaty that lays down the basic rules to promote citizens' involvement in environmental matters and the enforcement of environmental law, the Aarhus Convention consists of three pillars, each of which grants different rights: The first provides for access to environmental information, the second for participation in decision-making processes and the third grants access to justice where one of the aforementioned rights, or some other environmental law, has been violated.

The Aarhus Convention has been negotiated among the countries of the United Nations Economic Commission for Europe (UNECE)⁵ and was adopted on 25 June 1998 in the Danish city of Aarhus. All EU Member States at that time signed up to it, as did the European Community. As of November 2004, the Convention has 40 signatories, but so far only 30 countries (15 of which are EU Member States⁷) have ratified the Convention.

In order to align Community law with the legal obligations created by the Aarhus Convention the European Parliament and Council have recently adopted two new Directives – the Directive on Access to Environmental Information and the Directive on Public Participation in Environmental Matters.⁸ They are now considering a proposal for a third Directive on Access to Justice in Environmental Matters,⁹ and a Regulation on applying the Aarhus Convention to EU bodies and institutions.¹⁰

3. The Directive on Public Access to Environmental Information

The new Directive on Public Access to Environmental Information – implementing the first pillar of the Convention – requires public authorities in EU Member States to share information related to the environment with the public. Its objective is: "to guarantee the right of access to environmental information held by or for

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public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise”.¹¹ This new legislation must be transposed into national law by 14 February 2005.

Reasons for optimism

Given that it is crucial to ensure greater disclosure regarding ECA expenditure, the issue of whether the Directive on Public Access to Environmental Information applies to ECAs and the information they hold is a critical one – and there are a number of key reasons to argue strongly that it does.

First, the Directive refers to the institutions that will be subject to new obligations as “public authority”. This is broadly defined so as to include all sectors and levels of government as well as state bodies, semi-state bodies and any private bodies performing functions related to the environment which are under the control of governmental bodies.¹² As explained earlier, ECAs are rather varied in nature and may be government departments, semi-public agencies or commercial institutions administering on behalf of their government. The common denominator of these institutions is that they all carry out some transactions on their government’s behalf, with its support and under its control. They must, therefore, fall under the scope of the new Directive.

Second, the Directive describes the information that the public is entitled to access as “environmental information”, which is defined to include any kind of environmental information. This includes information not only on the state of the environment, but also on measures and policies that are likely to affect – or are designed to protect – the environment.¹³ Significantly, in relation to projects funded outside the European Union, this definition of “environmental information” is not limited to information within the EU. Thus, any environmental information relating to projects – including Environmental Impact Assessments – should be subject to disclosure once the new Directive is in force.

Last, the Directive does not distinguish on the basis of nationality, citizenship or place of residency in relation to

granting public rights to access information. This is of great significance for communities in recipient countries who want to know more about a planned or operating project which has been financed through one or more EU-based ECA.

Causes for concern

While we have seen that the definitions of “public authority” and “environmental information” are sufficiently broad to cover ECAs and information relating to relevant projects, the new Directive does contain a number of exceptions (to the obligation of disclosure) that could limit access to information about their activities. For example, public authorities are allowed to refuse a request for information where disclosure would adversely affect national safety, international relations, confidentiality of commercial or industrial information or intellectual property rights.

In the case of ECAs the provisions for the protection of commercial or industrial information¹⁴ are of particular relevance, since ECAs are governed by commercial confidentiality requirements. This could see ECAs invoke this ground for denying a request for information, and indeed, in the past ECAs have continuously cited risks relating to loss of competitiveness and conflict with national legislation safeguarding the business confidentiality of the exporter as the main reasons for non-disclosure.

While confidential business secrets must, of course, be respected, ECAs have been hiding behind this argument of protecting commercial confidentiality for too long. Significantly, the new Directive does state that all exceptions to disclosure 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”.¹⁵ Moreover – and perhaps more importantly – it states that wherever a request for information is denied (e.g. on the grounds of protecting commercial confidentiality), the public authority is obliged to consider whether or not partial access could (and should) be given.¹⁶ There is reason to hope that

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this provision for partial access to material containing confidential information will help to end the ECAs' characteristic secrecy.

4. Conclusion

The Directive on Public Access to Information, implementing the first pillar of the Aarhus Convention, does apply to Export Credit Agencies, in that their activities are officially supported and that they affect the environment. However, a number of exceptions and loopholes in the text leave Member States with significant room for manoeuvre in the transposition process and could eventually allow ECAs to withhold certain types of information or delay the disclosure of material. Nevertheless, strong provisions to limit the scope and applicability of these exceptions have been included in the legal text. As a general rule, exceptions must be interpreted in a restrictive way and each individual refusal must be justified on a case-by-case basis. How

broadly these exceptions will ultimately apply depends, therefore, on the political will of the Member States to ensure rigorous and consistent implementation and transposition of the Directive into national law.

ECAs receive funding from public sources. Projects in the South that rely on public financial support should serve to promote and implement ethical business practices. Transparency, therefore, should be an integral part of the decision-making process of these agencies. A wide coalition of non-governmental organisations has been claiming this right of access to information for a number of years. The Aarhus Convention and its implementation through EU legislation confirm their demands as valid and establish a binding framework to achieve this goal. Non-compliance with the new obligations created by the Directive on the side of the ECAs, or attempts by EU governments to water down the Directive in the process of transposition, means violating this international agreement – if not in the letter then certainly in the spirit.

Notes

¹ Directive 2003/4/EC of 28 January 2003 on Public Access to Environmental Information and repealing Council Directive 90/313/EEC

² For the global campaign see: www.eca-watch.org; for the European ECA Reform Campaign see: www.fern.org

³ For the full demands of the European ECA Reform Campaign see: *Key Reforms Needed for Export Credit Agencies*, January 2003. Available at: www.fern.org

⁴ Organization of Economic Co-operation and Development (OECD): Recommendation on Common Approaches on Environment and Officially Supported Export Credits, December 2003.

⁵ For the full text see: www.unece.org/env/pp/documents/cep43e.pdf

⁶ The UNECE is one of five regional commissions of the United Nations. It has 55 Member States, which are geographically situated in the Northern hemisphere. Members include the current 25 EU Member States, the US, Canada, Turkey, Romania, Bulgaria, the Balkan countries and the countries of the former Soviet Union.

⁷ Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal and Slovenia

⁸ Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

⁹ Proposal for a Directive on Access to Justice in Environmental Matters, COM (2003) 642 final

¹⁰ By signing the Aarhus Convention, the European Community committed to applying the provisions of the Convention also to its own institutions and

bodies. The Commission's proposal for a Regulation defines "Community institutions and bodies" as "any public institution, body, office or agency established by, or on the basis of, the Treaty establishing the European Community and performing public functions except when, and to the extent to which, they act in a judicial or legislative capacity". This definition includes, for example, The European Economic and Social Committee, the Court of Auditors and the European Investment Bank (EIB). See: Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM (2003) 622 final.

¹¹ Article 1(a)

¹² Article 2, 2.

¹³ Article 2, 1.

¹⁴ Article 4, 2 (d): "Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy".

¹⁵ Article 4, 2. Public Authorities may not, however, refuse a request for information where the request relates to information on emissions into the environment.

¹⁶ Article 4, 4.

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