

**EU Export Credit Agencies:
Assessing Compliance with EU Objectives and Obligations**

Project: Horizon2020 RESPECT
Deliverable: D4.2. WP 4
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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement no. 770680 (RESPECT).

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Introduction

Exporting companies typically need to obtain loans, guarantees or insurance to cover the sale and safe delivery of their goods and services to overseas markets. Historically, the major industrial governments have supported their domestic exporting companies seeking business opportunities in abroad through establishing export credit agencies (ECAs). These publicly funded ECAs can address market failures by offering support for export transactions not readily offered by the private sector either through lack of availability, or information asymmetries.¹ ECAs finance an average of about 12 percent of their domestic exports,² providing significant fuel to the international trading system.³

Traditionally, a public ECA was the lender of last resort, operating only in cases of market failure causing a lack of resources or commercial appetite in the private financial sector. Indeed, as commercial financial markets became more robust in 1990s, it was thought that the role and significance of ECAs would suffer a commensurate decline. However, following the shock of the 2007 financial crisis, ECAs operated as ‘shock absorbers’,⁴ ensuring liquidity in the international trading system because commercial banks retreated as funders and risk takers of medium and long-term export finance. Once again operating as lenders of last resort, ECA helped the international trading system survive the unexpected shock of the financial crisis. Since then, ECAs have been retained as a crucial cog in government strategies to secure export opportunities in a trading environment of global export stagnation.⁵ New ECAs have also been established in emerging economies such as China, India and Saudi Arabia, increasing competition in the export financing market. By 2018, there were more than 110 national ECAs, delivering approximately US\$211 billion in total trade-related medium to long term (MLT) official export support.⁶ These developments have disrupted the status quo and destabilized the carefully balanced framework that was previously able to govern the industrial countries ECAs and promote a level playing field in official export support.

This shift in the international market for official export support has led to concerns. For while ECAs can be used to correct market processes, they can also distort them. Official export credit support effects the dynamic process of competition between suppliers. If competition among exporters is based on the most favourable officially supported financial terms and conditions rather than on the price or quality of the goods themselves, it can result in an export credit race to the bottom. and by cancelling out other offers, results in a zero-sum game. As one WTO Panel Report noted: ‘among the various forms of export subsidies, subsidized export credits arguably have the most immediate and thus greatest potential to distort trade flows.’⁷

This research report examines the competition and compliance issue related to official export credit support provided by EU Member States. The report presents an analyses of the monitoring, review and enforcement of the legal framework governing ECAs, with specific reference to EU Member States. The report concludes that it is not possible to unequivocally state that the EU Member States ECAs comply or do not comply with the objectives and obligations of the OECD Arrangement and Common Approaches, or the WTO SCM.

¹ D. Coppens. How Much Credit for Export Credit Support under the SCM Agreement? *Journal of International Economic Law* 12(1), 63–113. 2009 p.66.

² Raquel Mazal Krauss. The role and importance of export credit agencies. Institute of Brazilian business and public management issues, George Washington University. 2011.

³ Hidehiro Konno, From Simple to Sophisticated. *The Export Credit Arrangement*. p95.

⁴ Douglas A. Irwin, Kevin H. O'Rourke, Coping with Shocks and Shifts: The Multilateral Trading System in Historical Perspective. In Robert C. Feenstra and Alan M. Taylor, editors, *Globalization in an Age of Crisis: Multilateral Economic Cooperation in the Twenty-First Century*. (2013) University of Chicago Press. 12.

⁵ In 2017 world trade growth stood at 4.6%, dropping to 3% in 2018 and is expected to drop further to 2.6% in 2019. See https://www.wto.org/english/news_e/spra_e/spra255_e.htm (accessed July 3 2019).

⁶ US Competitiveness Report 2018. p20.

⁷ WTO Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil)), WT/DS70/RW, adopted 4 August 2000. ¶5.137.

Following the background introduction, Section 1 sets out the legal obligations applicable to the EU Member State's export credit agencies (ECAs) as participants of the OECD Arrangement and Common Approaches. In Section 2, the report examines the compliance issues that have emerged due to a growth in competition from non-OECD Arrangement covered export support activity. Section 3 examines the compliance issues emerging from the reconfiguration of the legal framework for ECAs towards the WTO SCM. Section 4 concludes. Appendix 1 provides an overview of the available data collected during this research on selected EU Member States export credit support activities.

1. Regulating Official Export Credit Support

Export credit is seen as the fuel that powers the international trading system.⁸ Only around one-fifth of international trade is paid cash-in-advance,⁹ consequently manufacturers routinely rely on outside capital to meet credit financing and insurance needs. In some instances, the private sector is not always able or willing to provide the necessary export finance. As a result, many governments have established export credit agencies as an instrument through which to provide public finance support and help businesses overcome credit constraints. Official export credit support provides varying degrees of financial assistance from governments to their domestic exporting companies seeking business opportunities in developing countries and emerging markets. The first official Export Credit Agency (ECA) was established in 1919 in the UK. By 2019, more than 110 ECAs exist, providing approximately US\$211 billion in total trade-related medium to long term (MLT) official export support.¹⁰ ECA activity exceeds that of all multilateral development banks and overseas development agencies.¹¹

ECAs can be public agencies established by law,¹² or organized as stock corporations under private law, endowed with a trusteeship mandate to handle credit guarantees of their respective government.¹³ Although the mandate of an ECA is generally directed towards promoting domestic exports and foreign investments, these agencies have a wide range of functions and pursue multidimensional objectives influenced by political factors and vested interests. Export financing support can be systematically directed towards selected markets and specific industries, benefiting a clearly identified group of companies and sectors. Export financing support is also often closely intertwined with government policy on official development assistance and other foreign policy goals.

ECAs have a mercantilist thrust – they seek to promote domestic exports to secure employment and create national wealth. Yet although such economic nationalism is antithetical to the tenets of the multilateral trading system under the WTO, ECAs are nevertheless seen to be legitimate and even encouraged, particularly during financial crises.¹⁴ This is because ECAs can address market failures or information asymmetries in the private export financing market. For some commentators, official export financing support can ameliorate distortions in domestic and international markets and may represent the best policy instrument for addressing distortions to the degree that they operate directly on the distorted margin.¹⁵ More specifically, through ECAs, governments can offer support for export transactions not readily offered by the private sector either through lack of availability, or because the private capital market lacks sufficient information to properly assess the risks of the transaction. Governments on the other hand, are better positioned to access the necessary information to assess the risks of the transaction.¹⁶ Pascal Lamy noted this during the 2008-2012 financial markets when he urged governments to support their export credit

⁸ Hidehiro Konno, *From Simple to Sophisticated. The Export Credit Arrangement*. p95.

⁹ According to a large scale survey by the Bankers Association on Finance and Trade (IMF-BAFT, 2009) cited in Marc Auboin and Martina Engemann *Testing The Trade Credit And Trade Link: Evidence From Data On Export Credit Insurance*.

¹⁰ US Competitiveness Report 2018. p20.

¹¹ Raquel Mazal Krauss. *The role and importance of export credit agencies*. Institute of Brazilian business and public management issues, George Washington University. 2011.

¹² Such as the US EX-IM Bank and the British Export Credit Guarantee Department (ECGD).

¹³ Such as in Germany – through Hermes, and France – Coface now BNP

¹⁴ Pascal Lamy quotes.

¹⁵ Johnson, Harry G. 1965. *Optimal Trade Intervention in the Presence of Domestic Distortions*. In Richard Caves, Harry Johnson, & Peter Kenen, eds., *Trade, Growth and the Balance of Payments*. New York: Rand McNally.) cited in Sykes footnote 11.

¹⁶ D. Coppens. *How Much Credit for Export Credit Support under the SCM Agreement?* *Journal of International Economic Law* 12(1), 63–113. 2009 p.66.

agencies and international financial institutions in filling the gap in trade financing caused by ‘one of the most severe financial crises in modern history’.¹⁷

However, unbridled and competing domestic export subsidies can undermine world prosperity and require regulation to prevent the economic distortions they can cause.¹⁸ Official export credit support interferes with the circulation of the trade in goods and services in a specific market. It impacts the dynamic process of competition between suppliers, as they vie with each other to secure their position within that market for trade. Competition between suppliers should lead to the most efficient allocation of resources, theoretically resulting in lower prices, greater choice and propelling innovation. Official trade financing support can undermine this dynamic by advantaging or disadvantaging firms through the specific allocation of export finance. Such export subsidies have been termed corporate welfare that simply “pads the profits of politically connected corporations on the taxpayer’s dime.”¹⁹ Official export finance can thus impact market access by impeding those firms that do not receive official export support and as such, should be analyzed as a crucial element in the interplay of the flow of goods and services.

Competition among ECAs to offer their exporters the best support has significant budgetary implications and, by cancelling out other offers, could result in a zero-sum game. When governments provide export finance support to domestic firms that is more favourable than that available under market conditions, no government can unilaterally decide to stop providing export credits without its exporters losing sales. As such, preventing a subsidy war through export credit support requires international cooperation. Accordingly, a range of organizations and legal instruments have been developed over the past 60 years to provide a wider rules-based system for the more orderly market for export subsidies, including official export credit support.²⁰ These legal instruments and agreements both advocate and regulate ECAs, with the aim of maintaining a level playing field in these markets and avoiding a race to the bottom in terms and conditions. The following sections provide an overview of the two main bodies regulating ECAs – the OECD and the WTO.

1.1 The 1978 OECD “The Arrangement” on Officially Supported Export Credits

The OECD Arrangement seeks to provide the institutional framework for participants to coordinate policies on export credits and provide an orderly market for officially supported export credits. As a soft law instrument, the Arrangement encourages competition among exporters based on quality and price of goods and services exported rather than on the most favourable officially supported financial terms and conditions. For this would amount to an export credit race in which exporters compete on the basis of which are granted the favourable financing terms or subsidization from their respective governments, rather than on the price or quality of the goods themselves. As of 2019, the participants to the Arrangement are Australia, Canada, Japan, Korea, New Zealand, Norway, Switzerland, the United States and all the

¹⁷ WTO, ‘Lamy warns trade finance situation “deteriorating” ’ (12 November 2008, General Council, Informal Meeting of Heads of Delegation), cited in Coppens.

¹⁸ Hufbauer, Gary Clyde, & Joanna Shelton Erb. 1984. *Subsidies in International Trade*. Washington: Institute for International Economics; Gary Clyde Hufbauer, Meera Fickling and Woan Foong Wong. *Revitalizing the Export-Import Bank*. Peterson Institute of International Economics. Policy Brief 11-6. May 2011; For a discussion on the desirability of subsidy control see: Alan O. Sykes. *The Questionable Case for Subsidies Regulation: A Comparative Perspective*. Fall 2010: Volume 2, Number 2. *Journal of Legal Analysis*.

¹⁹ *Corporate Welfare Wins Again in Trump’s Washington*. New York Times Opinion. May 7 2019. <https://www.nytimes.com/2019/05/07/opinion/export-import-bank-trump-corporate-welfare.html>

²⁰ This includes institutions such as the IMF, Multilateral Development Banks (MDBs) and Development Finance Institutions (DFIs), the OECD Development Assistance Committee (DAC), the OECD, the Paris Club and the WTO.

European Union Member States except for The Czech Republic, Poland and Hungary, who are observers. Membership is only by invitation to become a Participant by the current Participants.

Those countries that are Participants agree to discipline their export credit activities in line with the terms of the Arrangement; they also agree to share information on their export credit activities with other Participants. The Arrangement applies to all official support for exports of goods and/or services, or to financial leases, which have repayment terms of two years or more. This is regardless of whether the official support for export credits is given by means of direct credit and financing, refinancing, interest rate support, guarantee or insurance. Special sectoral guidelines apply to ships, nuclear power plant, aircraft and project finance transactions. The Arrangement does not apply to military equipment and agriculture products.

The Arrangement's main disciplines limiting the terms and conditions of official supported export credits set the minimum cash down-payment of credit required for each transaction at 15% of the export contract value. Countries are classified under two Categories based on World Bank thresholds.²¹ The maximum repayment terms are 5 years²² for Category 1 countries, and 10 years for Category 2 countries.²³ The 1998 Knaepen Package determines the minimum risk premium rates by: (1) the country risk category; (2) the time at risk; (3) the quality of ECA cover, in terms of whether it is a direct loan, guarantee or insurance; and (4) the percentage of ECA cover. Minimum interest rates for official financing support²⁴ by the Participants are Commercial Interest Reference Rates (CIRRs),²⁵ intended to reflect commercial rates and adjusted monthly. The Arrangement also incorporates the 1991 Helsinki Package which prohibits tied²⁶ and partially untied aid for richer developing countries, as well as for projects which should be financed commercially. It also sets minimum concessionality levels for transactions that incorporate tied aid credits and grants.²⁷

The participants to the OECD Arrangement have also produced a series of OECD Recommendations on Common Approaches²⁸ for undertaking environmental and social due diligence to identify, consider and address the potential environmental and social impacts and risks relating to applications for officially supported export credits as an integral part of Members' decision-making and risk management systems. Specifically, these include Environmental, Social and Human Rights (ESHR) risks, Sustainable Lending risks through the OECD Principles and Guidelines to Promote Sustainable Lending Practices and the Provision of Official Export Credits to Low-Income Countries; and corruption risks through the OECD Council Recommendation on Bribery and Officially Supported Export Credits.

1.1.2 Enforcing the OECD Arrangement and Common Approaches

The OECD Arrangement and Common Approaches are soft law instruments that do not create enforceable rights and duties.²⁹ However, they express the common position or will of the memberships, and therefore entail important soft power political commitment for the participating governments. Compliance however relies heavily on the attraction of cooperation. The participants have not agreed to an enforcement mechanism. The OECD Secretariat is mandated to monitor the implementation of the 2019 OECD

²¹ Countries that are graduated by the IBRD are in Category 1; Category 2 consists of all other countries.

²² With 8 ½ years after prior notification.

²³ The maximum repayment term for conventional power plant is 12 years.

²⁴ Official Financing support includes direct credits/financing, refinancing or interest rate support.

²⁵ CIRRs have been established for 13 currencies, the majority of which are based on either the 5-year Government bond yields or on 3, 5 and 7 year bond yields, according to the length of the repayment period.

²⁶ Tied aid is aid tied to the purchases from the donor country.

²⁷ 50% concessionality level for the poorest Least Developed Countries (LLDCs) as classified by the UN, and 35% concessionality level for all other developing countries.

²⁸ The current OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence Diligence (the "Common Approaches"), was adopted on 28 June 2012 and revised by the OECD Council on 6 April 2016 (OECD/LEGAL/0393).

²⁹ R.R. Baxter. *International Law in Her Infinite Varieties*. 29 *International & Comparative Law Quarterly*. 549, 1980.

Arrangement under Chapter 1 General Objectives,³⁰ and to varying degrees within some, but not all, of the different Sector Arrangements.

Instead of an enforcement mechanism, a form of ‘self-help’ is available under the Arrangement terms, through the permitted use of ‘matching’ the terms of another offer from an ECA – which can be operating both inside and outside the Arrangement. Despite opening up many legal questions, matching is seen to be the main deterrent mechanism of the OECD Arrangement and operates to prevent a race to the bottom in terms and conditions:

Article 18. Matching

Taking into account a Participant’s international obligations and consistent with the purpose of the Arrangement, *a Participant may match, according to the procedures set out in Article 45, financial terms and conditions offered by a Participant or a non-Participant.* Financial terms and conditions provided in accordance with this Article are considered to be in conformity with the provisions of Chapters I, II and, when applicable, Annexes I, II, III, IV, V, VI and VII.

The Article 18 provision seeks to ensure that before matching financial terms and conditions assumed to be offered by a Participant or a non-Participant, a Participant shall make every reasonable effort to verify that these terms and conditions are officially supported.³¹ It must notify all other Participants of the terms and conditions it intends to support as early as possible. A Participant that has reasonable grounds to believe that financial terms and conditions offered by another Participant are more generous than those provided for in under the Arrangement, there is a requirement to notify and provide the other Participants and the Secretariat information on official support.³² Although the Participants self-police the levels of compliance with the Arrangement, in order to maintain cooperation and compliance, these monitoring reports are not made available to non-Participants or to the public. Non-Participants are able to obtain information only on a reciprocal basis from individual Participants on specific export credit offers. This hinders any comprehensive independent evaluation of compliance.

The implementation of the Recommendation on Common Approaches is also monitored primarily through information provided by the Adherents to the Recommendation for all projects supported that had a potentially high (Category A) or medium (Category B) negative environmental or social impact. The Adherents are required to publish information on how their ECA implements and ensures compliance with the Common Approaches, while monitoring and evaluating their experience with the Recommendation domestically.³³ The Working Group on Export Credit Guarantees (ECG) is tasked with the role of coordinating information exchange with appropriate civil society organizations and non-Adherents, facilitating communications and monitoring the implementation of the 2016 Common Approaches.³⁴ The OECD Secretariat monitor the implementation of this Recommendation through compilation of reporting by the Members and reports annually to the ECG.³⁵

The lack of transparent monitoring and verification of the levels of implementation and compliance has led to concerns regarding the enforceability of such voluntary commitments, as well as the loopholes in their content.³⁶ Of particular concern is that the classification of project applications according to the risk of

³⁰ 2019 OECD Arrangement 9. Monitoring. The Secretariat shall monitor the implementation of the Arrangement. OECD Arrangement on Officially Supported Export Credits Unclassified TAD/PG(2019)1.

³¹ OECD Arrangement on Officially Supported Export Credits. Article 45. Procedures For Matching. TAD/PG(2019)1.

³² Ibid. Article 46. Special Consultations

³³ VIII. Reporting and Monitoring of the Recommendation.

³⁴ VII.42. of the Recommendation.

³⁵ VIII.49. of the Recommendation.

³⁶ Various studies from public interest organizations have suggested that violations of human rights, environmental standards have occurred, as well as unsustainable lending under the export support of EU Member States. For example, ECAWatch - a network of NGOs from around the world campaigning for ECA reform, including better

adverse environment and social impacts is made by the ECA itself. The following section further assesses whether it is possible to make any firm conclusions on the level of compliance with the OECD Arrangement and Common Approaches among the ECAs in the EU Member States.

1.2 Compliance and Official Export Finance in the EU

This section assesses the level of EU Member States compliance with the two main agreements that seek to regulate official export financing activity. It first identifies the obligations under the OECD Arrangement. All the European Union Member States are Participants to the OECD Arrangement, except for The Czech Republic, Poland and Hungary, who are observers. Nevertheless, the soft law OECD Arrangement framework for officially supported export credits has taken on a stronger character in the EU. The OECD Arrangement has been incorporated into Community law by a 1978 Council Decision and has become part of the *acquis communautaire*. Further, as laid down in the founding Treaties of the European Union (TFEU), the EU has exclusive competence in the area of common commercial policy, rooted in Article 207 TFEU:

Article 207.1: The common commercial policy *shall be based on uniform principles*, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. *The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*

Common commercial policy includes international export credit disciplines. In the area of short-term credit insurance, the Commission has provided guidelines to EU Treaty rules in its Short-Term Export Credit Communication. This sets out the Commission's interpretation of the areas where official ECAs cannot compete with the private market.³⁷ The EU Harmonisation Directive further governs some aspects of longer-term credit activities. The EU State Aid rules additionally operate to ensure that public interventions through ECA products such as export guarantees and bonds, do not distort competition and trade inside the EU. The EU State aid rules require notification to the Commission and are closely monitored. However, medium-to-long term (MLT) export credit guarantees provided by the Member States' export credit agencies are not normally notified as State aid because they are deemed to comply with the OECD Arrangement terms and conditions.

As noted, following the Lisbon Treaty, the OECD Arrangement and its revisions must be transposed into EU law, through an ordinary legislative procedure involving both the EU Council and Parliament, on the basis of a Commission proposal. While the European Parliament has no formal role in starting and conducting negotiations involving common commercial policy, the TFEU imposes a duty of information: the European Parliament must be informed immediately and fully at all stages of the procedures. Moreover, the European Parliament has to give its consent, which necessitates discussion. The Commission reports regularly to the European Parliament and Parliament can signal its political position by issuing a resolution.

transparency, accountability, and respect for environmental standards and human rights; the 2011 Eurodad report. Exporting goods or exporting debts? Export Credit Agencies and the roots of developing country debt. <https://eurodad.org/Entries/view/4735/2011/12/06/Exporting-goods-or-exporting-debts-Export-Credit-Agencies-and-the-roots-of-developing-country-debt>; Amnesty International. A History of Neglect. UK Export Finance and Human Rights. Amnesty International UK, June 2013; ECAs go to Market. A critical review of transparency and sustainability at seven export credit agencies in Central and Eastern Europe. <https://bankwatch.org/wp-content/uploads/2018/02/ECAs-go-to-market.pdf>

³⁷ During the 2007 financial crisis when commercial financial liquidity was frozen, a temporary framework to support access to finance was established and official European ECAs entered the “marketable risks” area from which the private markets had withdrawn. This decision is in line with the mandate to complement the private market capacity in difficult times.

The Commission is not legally bound to follow the European Parliament's recommendations but given that the European Parliament's consent is needed to adopt an agreement on common and commercial policy issues, the Commission needs to consider it when devising the EU positions and discussing them with the Council or the other party.

The European Parliament has sought to exercise its greater role in common commercial policy and engage with the other EU institutions in a larger reporting and policy coherence exercise on export credits. In so doing, it has placed a particular emphasis on the OECD Common Approaches and the ethical international agreements which apply to the operations of EU Member States ECAs. This greater engagement aims to ensure compatibility between ECA activities at the Member State level and the EU's obligations pursuant to the TFEU:

TFEU Article 3.5(5): 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.

TFEU Article 21(1). 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 law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organizations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

(2). The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
-
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

However, a major compliance challenge lies in the division in competence within the EU. For despite these treaty obligations and the legal competence the EU possesses in matters of common commercial policy, the competence for providing export credit insurance and guarantees lies at the national level, with the EU Member States. As a result, there is no "European" ECA. This brings about a potential for a dissonance to emerge between the EU and its Member States. For when it comes to setting the rules and disciplines applicable to export credit insurance and guarantee practices, the competence is a European one: thus, the EU negotiates with other countries as a block. But Member States, as individual members of the OECD, participate directly in the OECD Working Party on Export Credits and Credit Guarantees (ECG). They can design their ECA policies with the aim of being attractive to export opportunities and as a part of a broader industrial or policy strategy. EU Member States are free to calibrate their export credit programmes in competition with other ECAs – within the EU and globally, for export markets - as long as these export credit guarantee instruments comply with their commitments under the OECD Arrangement.

The Commission's competence is thus limited to contributing, coordinating and facilitating information exchange with the Member States to form a coherent European view. Environment is a shared competence

between the Member States and the EU. When it is linked to export credits there is a need for the Commission to act as a coordinator. The Commission tries to obtain a common negotiating mandate from all EU Member States to represent at the OECD alongside the other Participants to the Arrangement. This is achieved through the EU Council Working Group on export credits, which reviews all policy issues and formulates common EU positions for OECD negotiations. Discussions are pursued until consensus has been achieved in support of an EU position. When an issue is divisive that appropriate Council decision-making bodies become involved.

1.2.1 Monitoring and Compliance: EU Member States ECA

Given the OECD Arrangement and Common Approaches are transposed into EU law, the disciplines of the Arrangement are legally binding upon the Member States. Under Article 4 of Regulation (EU) 123312011 all Member States are obligated to screen applications for export credit support from the perspective of environmental and associated risk, following the Common Approaches and other EU obligations. This means that there are stricter rules the EU Member States on ECA activity, than for other Participants to the Arrangement. Monitoring levels of compliance in ECA activity at the Member State level has become an important dimension of ensuring the Union's objectives and obligations are met.

Under Article 4 of Regulation (EU) 123312011 it is stipulated 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. Under Annex 1 further details as to reporting requirements are set out.

ANNEX I

1. Without prejudice to the prerogatives of the Member States' institutions exercising the supervision of the national export credit programmes, *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 with 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 ECAs.*
3. *The Commission shall produce an annual review for the European Parliament based on this information, including an evaluation regarding the compliance of ECAs with Union objectives and obligations.*
4. The Commission, according to its competencies *shall provide to the European Parliament an annual report on negotiations undertaken, where the Commission has negotiating authorisation in the various forums of international cooperation, to establish global standards in the field of officially supported export credits.*

Nevertheless, as with the OECD Arrangement and Common Approaches, EU Member States Annual Activity Reports are self-reporting exercises. The Activity Reports present a factual summary, considering Member States' export credit activity in four sections: a) general and financial information; b) treatment of environmental risks and other relevant risks; c) other information contained in the Annual Activity Reports and d) compliance with EU objectives and obligations.

A survey of these EU Member States Activity reports available as of 2019 indicates that since the EU reporting requirement commenced in 2011, none of the ECAs reported a case of non-compliance with

either the OECD Arrangement or the Common Approaches guidelines. The European Commission has therefore consistently reported full compliance from the Member states ECAs with Union objectives and obligations under Article 4 of Regulation (EU) 12331, Article 3.5(5) and Article 21(1) TFEU, discussed above. However, the Commissions' annual evaluations of the EU Member States Activity Reports have caused controversy. The following section notes that this controversy is of direct relevance to this research into EU Member State's ECA compliance with the OECD Arrangement and Common Approaches.

1.2.2 European Commission's Evaluations of EU Export Credit Activities

In July 2013, the European Parliament issued a resolution on the first annual report from the Commission to the European Parliament on the activities of Member States' Export Credit Agencies.³⁸ In the Context of the scale of Member States' export credit activities, the Resolution noted the importance of the specific reporting requirements formulated in Annex I of the Regulation to ensure that the Commission and Parliament are able to make an assessment of this compliance. The Resolution stressed that the annual reports of the Member States, and the Commission's evaluation of these reports, did not yet satisfy Parliament's intention to be able to make an assessment as to whether the Member States' export credit activities are in compliance with the Union's foreign policy goals, as enshrined in Articles 3 and 21 TEU, and the treatment of environmental risks in the calculation of ECA premiums. The Resolution considered it of prime importance to call on the Member States to monitor and report on the existence, outcome and effectiveness of due diligence procedures in the screening of projects officially supported by export credits with regard to their potential impact on human rights.

Although the European Parliament has acknowledged the difficulty with defining a precise benchmark for measuring compliance in EU law, it nevertheless reiterated that TFEU Article 21 provisions remain the key benchmark against which the policies applied to export credit transactions are to be evaluated. The European Parliament Resolution therefore recommended that the Council Working Group on Export Credits and the Commission consult with the European External Action Service (EEAS) on developing a methodology for meaningful reporting on TFEU Article 21 compliance, and on the application in the EU of certain OECD guidelines in the field of officially supported export credits. The Resolution also insisted that public consultation be part of the process.

Unsatisfied by the slow progress in meeting the European Parliament Resolution recommendations, *ECAWatch*,³⁹ a coalition of non-governmental organization monitoring export credit agency activities made a formal complaint to the European Ombudsman that the Commission 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 2013.⁴⁰ Further, 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. *ECAWatch* specifically requested that the Commission: (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.⁴¹

³⁸ 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)) (2016/C 075/02)

³⁹ *ECAWatch*: <https://www.eca-watch.org/about-us>

⁴⁰ See for example: correspondence to Emily O'Reilly. European Ombudsman concerning the European Commission's evaluation and review of the national Export Credit Agencies' activities under Regulation 1233/2011, from Dame Julie Thérèse Mellor <https://www.ombudsman.europa.eu/en/correspondence/en/68004>;

⁴¹ The European Commission's failure to evaluate the compliance of Member-States Export Credit Agencies with the EU's objectives and obligations, in particular on human rights. Wednesday | 27 April 2016 CASE 212/2016/JN. Opened Friday 29 April 2016 – Recommendation. Wednesday 23 May 2018 - Decision Monday 03 December 2018. Institution Concerned: European Commission. <https://www.ombudsman.europa.eu/en/correspondence/en/68001>

1.2.3 The Statute of the European Ombudsman

The Ombudsman's investigation sided with the complainant, opining that the annual reviews prepared by the Commission so far do not meet the requisite standard. The Ombudsman noted that the 2011-2014 annual reviews were very "light" and contain hardly any independent and objective analysis and evaluation of export credit agencies' compliance with Union objectives and obligations. Further, the relevant sections of the annual reviews were very brief and did 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 reasoned 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.⁴²

The Ombudsman ultimately put forward three proposals to the Commission.⁴³ First, that the Commission should take the appropriate initiative, after 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. Second, 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 are as comprehensive as possible. They should be presented in a manner which facilitates the Commission's subsequent analysis and evaluation of these reports. Third, 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.

Annex 1(1). Without prejudice to the prerogatives of the Member States' institutions exercising the supervision of the national export credit programmes, 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 with 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.

1.2.4 The Evaluation of EU Member States Export Support

Two interpretations of Annex 1 Regulation 1233/2011 emerged in this case – one deferring to the Member States and one referring to the highest level of EU law.⁴⁴ For the Commission in the former position, the current reporting process reflects what can reasonably be achieved within the confines of the limited reporting obligations contained within regulation as it stands because EU Member States are free to have a range of diverse export credit systems in place. Annex 1 of Regulation 1233/2011 respects this diversity through leaving the manner and methodology of reporting to individual EU Member States. The move to develop common standards for the form of the reporting would not operate to respect for this Member State diversity. Any changes to the present reporting system would require an amendment of the Regulation 1233/2011. The checklist template currently in operation was developed within the Council Working Group on Export Credits. The Commission was not involved precisely because the Regulation does not entrust the Commission with the task of developing common standards for the Member States' reporting. The Institutions had agreed that it was up to the individual Member States to structure their reports. They

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Recommendation of the European Ombudsman in case 212/2016/JN on the European Commission's annual reviewing of Member States' export credit agencies.

may use the checklist template, refer to a suitable annual report prepared at national level containing the information required by Annex I of Regulation 1233/2011, or a combination of both.

The Commission opined that pursuant to Regulation 1233/2011 Annex 1, paragraph 3, it is explicitly obliged to base its Annual Review on the information provided by the Member States in their Annual Activity Reports.

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

Significantly, this means it is not required to verify such information. 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 case to launch an investigation. The Commission further submitted that the proposed revision of the checklist template implies a significant change to the current interpretation of Annex I of the Regulation. The Commission noted the 2013 European Parliament Recommendation that the Council Working Group on Export Credits and the Commission consult with the EEAS on developing a methodology. When the European Commission had raised this Recommendation, several Member States indicated that were not ready to consider any changes to the initially agreed reporting practices.

The Ombudsman otherwise contended that the proposals did not require an amendment of Regulation 1233/2011. The Regulation states that the Commission's reports should include an *evaluation of the compliance* of export credit agencies with the Union's "*objectives and obligations.*" This, when read in conjunction with paragraph 2 and paragraph 4 of Annex 1, provides an obligation for Member States ECAs to comply with the EU's general external action provisions and for the Commission to meaningfully evaluate ECA compliance with the Union's objectives and obligations. These are set at the highest level, in the Treaties and the EU Charter of Fundamental Rights. A combined reading of the Treaties and the Charter clearly considers the protection of fundamental rights and of the environment to be Union objectives and obligations, including in its external action. They are illustrated under paragraph 4 of Annex I:

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.

The Ombudsman highlighted the right to good administration as provided by Article 41 of the EU Charter of Fundamental Rights and the principles of good administration. To avoid committing maladministration, EU institutions, including the European Commission, are obligated to ensure the evaluations contained in the annual reports are accurate, objective, independent, thorough and based on adequate information. The reporting methodology need not be harmonized for the Commission to gather the relevant information necessary to perform an effective evaluation of the compliance of export credit agencies with Union objectives and obligations. Regulation 1233/2011 does not prevent the Commission from taking appropriate initiatives to define the applicable methods, benchmarks and standards necessary prerequisites for any meaningful evaluation of export credit agencies' compliance with Union objectives and obligations, with engagement with the Member States. The ECA reporting exercise seeks to increase the transparency and accountability of ECAs. It should not rely on citizens and civil society to submit complaints and evidence of infringements of EU law in specific cases. 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. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission the European Commission was requested

to shall send a detailed opinion by 23 August 2018.⁴⁵ At the time of writing, this opinion has not been made public or publicly commented upon by the Ombudsman to the European Parliament.

Indeed, the latest available European Commission Annual Review presented in 2018 to the European Parliament maintained its previous approach and language.⁴⁶ It again stated that based on the information provided that Member States with export credit activities have established policies to accompany the management of their export credit programmes that are in line with the EU's objectives. Moreover, the export credit-specific Policy Recommendations developed in the OECD are in common use, but the activities of Member States go beyond this level. As regards compliance with international obligations and obligations under EU competition law, there have been no disputes at WTO level involving European export credit programmes during the reporting period. No complaints concerning potential infringements of EU law involving export credit agencies were received by the European Commission in 2015. As it stands, the 2018 Annual review continues to report on EU Member State's ECAs using the same evaluation approach as its previous Annual Reviews. Only in the first Annual Review in 2012, did the Commission note that: "It is difficult to define a precise benchmark for measuring "compliance" in EU law."⁴⁷

The findings from the present research into levels of compliance with EU ECAs concur with this statement. Given the lack of transparent disclosure, use of matching clauses and the self-reporting nature of the Member States' export activities, coupled with the lack of substantive evaluation by the Commission of this activities' compliance with the Union objectives and obligations, it is not possible to assess fully the EU Member States' ECA compliance with the OECD Arrangement and its Common Approaches. Given that the OECDs transparency and monitoring requirements are also based on self-reporting, any violations rely disproportionately on investigations of infringements initiated by complaints from citizens and civil society.

⁴⁵ Decision in case 212/2016/JN on the European Commission's annual reviewing of Member States' export credit agencies.

⁴⁶ European Commission Annual Review By The Commission of Member States' Annual Activity Reports on Export Credits in the sense of Regulation (EU) No 1233/2011. Brussels, 4.5.2018 COM(2018) 262 final.

⁴⁷ European Commission Annual Review of Member States' Annual Activity Reports on Export Credits in accordance with point 3 of Annex I to Regulation (EU) No 1233/2011. Brussels, 7.3.2014 COM(2014) 123 final. p6.

1.3 Conclusions

The evolution of international official export credit support has both competition and compliance implications. A complex legal framework has emerged that seeks to eliminate excessive subsidies and trade distortions related to officially supported export credit guarantees. Its market orientation and the positive effect on trade explains why official export finance support is not altogether prohibited. When providing export credit or insurance, the ECAs are expected to operate according to sound financial principles and should be expected to cover expected claims. ECAs also usually prohibit any discrimination between domestic exporting companies operating in the same sector.

The OECD Arrangement is a non-binding legal instrument, without an independent monitoring or enforcement mechanism. Nevertheless, it expresses the common position or will of the memberships, and therefore entails important soft power political commitment for the participating governments. Compliance therefore relies heavily on the attraction of cooperation. The participants have not agreed to an enforcement mechanisms. Yet despite this weak monitoring and enforcement character, the soft law approach has hitherto played a positive role within international negotiations between diverse parties seeking to respond to complex cross border export credit support issues that challenge domestic sovereignty.⁴⁸ The OECD Arrangement has been a rational choice for governments – but only as long as the benefits of deterring violations exceeds the costs of the expected loss from any violations. The Arrangement presented the most sensible option in an area where there was uncertainty about the appropriateness of hard rules on export credit activities due to unknown future circumstances. It provided the governments and industry of the major ECA countries with the essential knowledge and security that competition was based on the quality of products and services.

However, the OECD Arrangement is increasingly suffering from its limited membership. As of 2019, the 35 participants to the Arrangement include: Australia, Canada, Japan, Korea, New Zealand, Norway, Switzerland, the United States, the United Kingdom and all other the EU Member States except for the Czech Republic, Poland and Hungary, who are observers. Membership is only by invitation to become a Participant by the current Participants. New players in export financing such as China, India and Saudi Arabia, are not members and therefore do not have to abide by these guidelines. Moreover, while the Arrangement offers some flexibilities for its Participants to adapt more competitive programmes, there has been an emergence of export credit support mechanisms that lie outside of the OECD Arrangement's scope. This elevates the role of the multilateral rules under the WTO ASCM when regulating export credit support. Section 2 looks more closely at these developments.

⁴⁸ Andrew T Guzman, Timothy L Meyer. International Soft Law. *Journal of Legal Analysis*. Spring, 2010: Volume 2, Number 1.

2. Changes in Official Export Credit Support: Markets and Regulation

2.1 Introduction:

Since the turn of the twenty-first century, the official export financing industry has been undergoing a fundamental transformation. ECAs have been redefining their activities as a crucial element of a strategic big picture of government's industrial policies. These developments are effecting a complex change in the official export credit market. The distinction between the private sector and official ECAs has become more blurred. In the context of rising export finance from the emerging economies, established ECAs who were Participants of the OECD, are increasingly competing, not only against each other but with first - the newer ECAs in emerging economics that were not Participants to the OECD Arrangement, and second - increasingly also with the private sector. This has reduced the role of the OECD Arrangement and placed more pressure on the WTO SCM rules to regulate these growing non-Arrangement export activities. Consequently, the OECD Arrangement's influence over export credit agencies is shrinking in relative terms, both geographically and in substance, just at a time when governments are increasingly seeking to spur domestic growth through exports.

This section looks at the three distinct areas of official export credit support that have emerged, with reference to the scope of both the OECD Arrangement and the WTO SCM. It first looks at the flexibilities that existing under the OECD Arrangement; second it looks at the rise in ECA activity by OECD Arrangement Participants that does not fall under the scope of the Arrangement's provisions; third it examines the official export credit support that is provided by countries that are not participants to the OECD Arrangement. The following Section 3 then focuses on the role of the WTO in regulating these activities that do not fall under the aegis of the OECD Arrangement and Common Approaches.

2.2 Flexibilities under the OECD Arrangement

2.2.1 Content Related Flexibilities

In response to greater competition, the EU Member States, along with other Participants to the OECD Arrangement, are recalibrating their export credit support programmes to better meet the needs of their exporters. Under the OECD Arrangement, Participants may finance up to 85% of an export contract's value regardless of the level of domestic content that contract contains.⁴⁹ Subject to this rule, Participant ECAs are free to implement a content policy that supports its own domestic economy. This flexibility under the OECD Arrangement has led to significant variation. Content requirements are one of the primary areas of flexibility that Participants' ECAs can use to support national champions and to help internationalize domestic suppliers. Aggressive content policies give ECAs the ability to help pull sourcing to their own countries in sectors of strategic interest.

ECAs have two content-related policies they can adjust to maximize flexibility. First, they can lower the minimum domestic content an export contract must contain to qualify for maximum allowable support. For example, in the UK, in all credit contracts, the maximum level of support for all Foreign Content is 80% of the contract value, thus requiring a minimum 20% UK content.⁵⁰ The US EXIM bank content policy, on the other hand, will support the lesser of either 85% of the value of goods or services within the US export contract, or of 100% of the US-produced or US-originated content within the US export contract.⁵¹

⁴⁹ Foreign content consists of any portion of an export that originates outside the ECA's, the exporter's, and the foreign buyer's countries.

⁵⁰ <https://www.gov.uk/government/consultations/public-consultation-on-foreign-content-policy/foreign-content-policy-consultation-document>

⁵¹ Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2017. p31.

Second, ECAs are free to determine what qualifies as eligible domestic content, based on national interest or value-added. These are broader concepts that examine factors like overall company exports, research and development, dividends and royalties associated with a given transaction, and an evaluation of how a given transaction will contribute to the long-term competitiveness of a national champion. This use of a broader national-interest calculation reflects a belief that if an ECA maximizes its support for an exporter's competitiveness, the exporter will in turn support domestic employment and growth. In support of these aims, many ECAs will even support overseas subsidiaries of domestic companies. These countries and their ECAs emphasize the value creation inherent in product development, design innovation, marketing, after-sale service, and similar high value-added activities. This is a shift away from transaction-specific considerations in favour of long-term strategic assessments of how an ECA can contribute to macroeconomic expansion and overall national employment. These are broader concepts than, for example, the US EXIM's content policy, which traditionally uses domestic content as a proxy for U.S. jobs. In contrast, in using national interest or value-creation concepts other factors are considered, such as overall company exports, research and development, dividends and royalties associated with a given transaction, or an evaluation of how a given transaction will contribute to the long-term competitiveness of a national champion. A broader concept of Participant ECAs clearly offers a more flexible approach towards their transactional assessment for support.

To take advantage of these Arrangement flexibilities, in 2019 the UK government recalibrated its activities to provide UKEF further flexibility in foreign content.⁵² First, the 80:20 Foreign Content rule now applies to the value of UKEF's participation in the financing of a contract or a project that consists of multiple contracts under a single supply chain, in addition to the traditional one-buyer/one-supplier/one-contract model. UKEF can now consider the amount of UK content contained within related (but not directly financed or supported) contracts or projects when forming a view about a specific contract or provide support for a share of a contract where there is a specified amount of UK content.⁵³ This facilitates the aggregation of UK content relative to a financing tranche. UKEF also now provides support if it can be demonstrated that the proposal is conducive to supporting or developing UK exports. This could include increasing future production in the UK, increasing the value or proportion of spend in the UK supply chain in the future, or increasing the number of jobs created in the UK in the future.⁵⁴

However, the UKEF is not alone in re-designing its activities to take advantage of these flexibilities under the Arrangement. For example, in 2017, SACE in Italy agreed to fully provide support to buyers of Boeing 787 aircraft, despite the Boeing 787 only containing approximately 14% Italian content.⁵⁵ The government of France transferred its guarantee from COFACE, a private insurer, to Bpifrance, which is a government bank, in December 2016. Bpifrance now offers a direct state guarantee as opposed to COFACE's guarantee on behalf of the French state. This enhances France's export credit support, making it more accessible to commercial banks in the context of a challenging regulatory regime through circumventing the capital adequacy rules applicable to commercial banks. For under the Basel III standards, commercial banks such as COFACE need to hold additional capital and to undertake initiatives to address maturity mismatches between their assets and liabilities. In Germany, Euler Hermes has made its content policy more streamlined

⁵² UK Export Finance. Foreign Content Policy Consultation Document April 3 2019.

<https://www.gov.uk/government/consultations/public-consultation-on-foreign-content-policy/foreign-content-policy-consultation-document>. (Accessed June 3 2019)

⁵³ Such a commitment would involve a statement by the applicant justifying the application of this Principle, which in UKEF's determination justifies UKEF's provision of support. UK Export Finance. Foreign Content Policy Consultation Document April 3 2019. <https://www.gov.uk/government/consultations/public-consultation-on-foreign-content-policy/foreign-content-policy-consultation-document>. (Accessed June 3 2019)

⁵⁴ Such a commitment would involve a statement by the applicant justifying the application of this Principle, which in UKEF's determination justifies UKEF's provision of support. UK Export Finance. Foreign Content Policy Consultation Document April 3 2019. <https://www.gov.uk/government/consultations/public-consultation-on-foreign-content-policy/foreign-content-policy-consultation-document>. (Accessed June 3 2019)

⁵⁵ Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2017. p19.

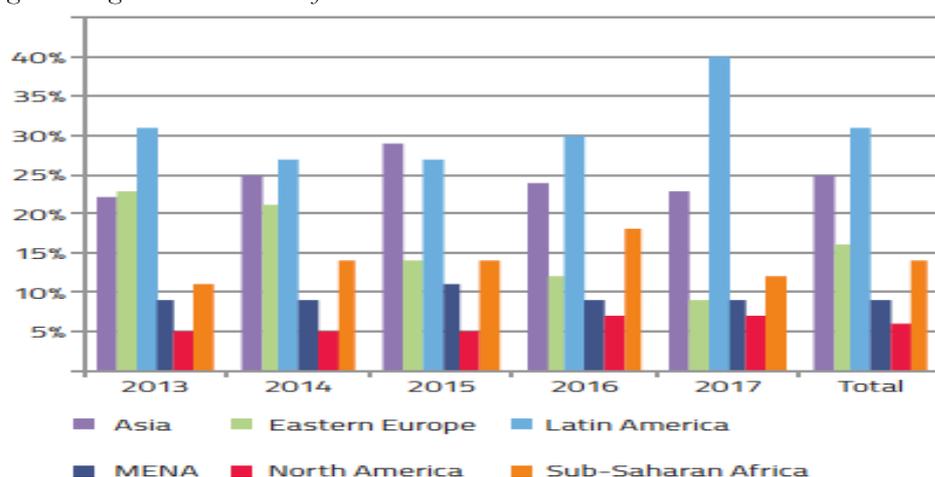
and flexible, now allowing 49% foreign content for all transactions (including local costs) with room to negotiate the percentage even higher on a case-by-case basis.⁵⁶

2.2.2 Increasing Risk Appetite

Participants to the OECD Arrangement are required to charge a minimum premium rate for all relevant transactions based on two risk-related factors: a country rating, which is standardized; and a buyer rating, where the discretion is given to ECAs. In the case of the latter rating, there is significant inter-ECA variation in the assignment of buyer-risk ratings for the same buyer in the same country in a given year. A two-notch difference in risk rating can correspond to differences in up-front exposure fee pricing of more than 1.5%.

ECAs are utilising this flexibility through their risk appetites, as reflected in the degree and method of taking on additional risk varies significantly by country. There has been a shift towards riskier markets over the last five years. In 2012, 48 percent of transactions reported to the OECD occurred in markets with a credit rating agency (CRA)-equivalent rating of 'B+' or lower. By 2017, that number had increased to 65 percent led by Italy, Germany, and Austria. As shown in Figure 1, OECD ECAs appear to be conducting an increasing percentage of their riskiest transactions in Latin America. This increased activity appears largely tied to an increasing number of transactions in Argentina. Activity in Asia, the Middle East and North Africa, and North America remained flat, with only Eastern Europe and sub-Saharan Africa seeing significant drops.

Figure 1. Regional Distribution of OECD Transactions to Borrowers Rated B+ or Lower⁵⁷



Source: OECD

In 2017, EKF (Denmark), Finnvera (Finland), ECN (Norway), and JBIC (Japan) began to take steps to increase their risk appetite away from an analysis of the borrower's and borrower country's risk. They are now undertaking a "risk-versus-reward"⁵⁸ calculation. On the "reward" side, ECAs are looking at domestic content and the strategic value of the exporter and of the recipient country. For example, in Denmark, EKF balances the amount of risk it will accept on a given transaction with the Danish content that particular transaction contains. In Japan, JBIC has created a "Special Account" which needs to break even on a portfolio basis, rather than on a transactional basis, which gives JBIC the ability to better compete in emerging markets. In Germany, Euler Hermes has increased its political and commercial risk coverage to the OECD Arrangement maximums (100%).⁵⁹

⁵⁶ *Ibid.* p19

⁵⁷ *Ibid.* p35.

⁵⁸ *Ibid.* p36.

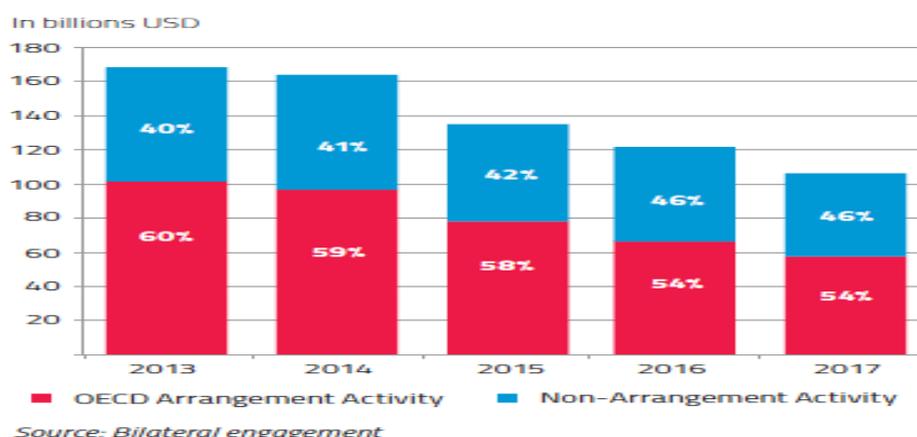
⁵⁹ *Ibid.* p11.

UKEF has also exploited flexibilities under the OECD Arrangement to expand its risk appetite. Remaining in line with the Arrangement, UKEF has grown its risk appetite, doubling its maximum exposure limits from £2.5 billion (\$3.4 billion) to £5.0 billion (\$6.8 billion).⁶⁰ This change was supplemented by an expansion in the types of programmes UKEF offered in 2016, including its first long-term Euro-denominated direct loan for a gas-fired power plant into Turkey, supporting roughly \$26 million in British exports. Significantly, UKEF has expanded the number of local currencies in which it can provide support.⁶¹

2.3 EU Member State's ECAs use of Non-Arrangement Covered Export Credit Support

The EU Member States are also establishing export support programmes that fall outside the scope of the OECD Arrangement rules altogether. These new mechanisms include most notably investment insurance and window-arrangements. OECD mid-to-long term (MLT) activity was approximately \$66 billion in 2016, down 15% compared with the year prior.⁶² This fall continued the trend of declining MLT official export credits under the Arrangement that began in 2013, with a corollary surge in trade-related activity occurring outside Arrangement terms.⁶³ Table 4 indicates the extent to which OECD Arrangement Participants have been shifting towards non-Arrangement activity since 2013. It highlights that Between 2013 and 2017, OECD Arrangement covered activity dropped 6% to just under 55% of total activity, with a commensurate gain in non-arrangement covered export support. This shift has occurred at the same time that the total value of export support has decreased by approximately \$60 billion.

Figure 2 Arrangement vs. Non-Arrangement Activity By Participants to the OECD Arrangement⁶⁴



2.3.1 Investment Financing

There has been a move towards providing untied investment financing by OECD Participants. Under this activity, an ECA provides support to a domestic company seeking to take an equity stake overseas. This investment is a form of untied support in that there may not be any international trade of goods or services. Technically, untied investment financing does not fall under the Arrangement and appears to be a reaction by some OECD Participants to promote national interest in the face of the increased activity by non-

⁶⁰ Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2018. p26.

⁶¹ *Ibid.* p28

⁶² Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2017. p18

⁶³ Activity under the Arrangement was not down across the board. For example, the UK, France, Italy and Sweden experienced growth in their MLT programmes but this was offset by falling values in Japan, Germany, Korea and the US. *Ibid.* p18

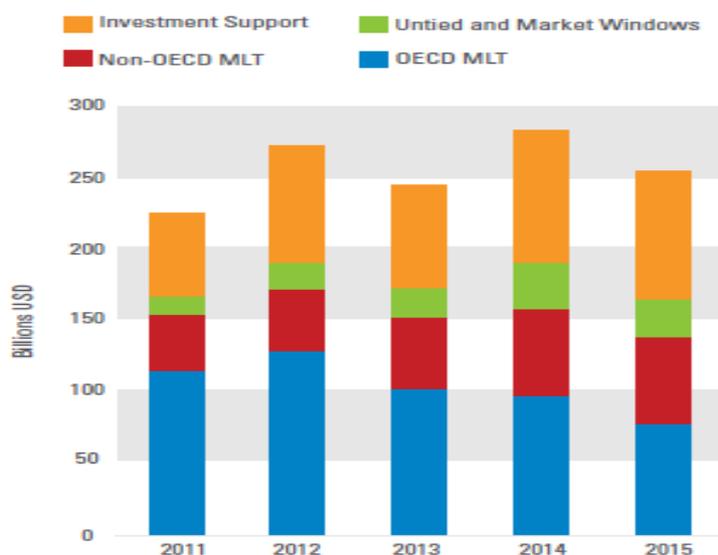
⁶⁴ Reproduced from The Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2018. p19.

OECD Participants, such as China and India. In an untied financing programme, an ECA provides debt financing that facilitates international trade, but for which procurement from the ECA's home country is not a prerequisite. It also helps buyers mitigate some of the due diligence burdens associated with identifying suppliers from unfamiliar markets that would be necessary for tied financing. Untied financing can lead to procurement or other benefits. By taking an equity stake, domestic companies can potentially drive future procurement or play a role in the selection of an engineering, procurement, and construction contractor. Many programmes use strategic sourcing of raw materials or other national interests as their justification, versus the traditional export promotion model. OECD ECAs such as EDC (Canada), NEXI and JBIC (Japan), KEXIM and K-sure (Korea), and Euler Hermes (Germany) have provided more than \$35 billion in investment support, representing the vast majority of OECD investment support.⁶⁵ In Japan, export loans now make up less than 10% of their total business, compared with nearly 80% in overseas investment loans.⁶⁶

2.3.2 Market Windows

Programmes operating under market-oriented principles have traditionally been referred to as “market windows.” The market window concept reflected the historical fact that the programmes were a “window” off the main ECA menu for which only a few cases qualified. Specifically, market windows may (a) allow more flexible amortization structures or longer repayment terms; (b) waive or reduce the 15% down payment requirement, or (c) allow for local cost financing in excess of 30%. In a market-window program, an ECA offers pricing competitive with the commercial market; a market window does not necessarily result in lower financing costs compared with financing provided under the OECD Arrangement. However, ECAs have more flexibility on tenor, down payments, and fees as the transaction is not covered by OECD rules. Although often provided at costs higher than the OECD Arrangement, the terms and conditions offered under market window programmes can be more flexible than those permitted under the Arrangement. Historically, Canada's EDC and the German KfW/IPEX Bank – both OECD Participants - have offered such commercial approaches to official financing. Japan and Korea are now also following such an strategy.

Figure 3 Official Trade-Related Activity⁶⁷



⁶⁵ The Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2018. p19.

⁶⁶ Reported Ibid. Japan Bank for International Cooperation. Annual Report. 2017.

⁶⁷ The Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2016 p21.

2.4 Non-OECD Participants' Export Credit Support

In addition to competing against these new non-OECD Arrangement export credit support programmes implemented by OECD Participants, EU ECAs are also facing the pressure from non-OECD Participants such as China, India, Saudi Arabia and Brazil. Figure 4 indicates that the top two ECA providers in 2017 were not OECD Arrangement Participants, and do not therefore have to follow the guidelines set out by the Arrangement and Common Approaches.

Figure 4: Top 10 ECA providers 2017⁶⁸

	Country	Billion US\$
1	China	36.3
2	India	9.7
3	Italy	8.9
4	Korea	7.9
5	Germany	7.0
6	France	6.8
7	Finland	5.5
8	Belgium	3.1
9	Netherlands	2.4
10	United Kingdom	2.1

Figure 5 indicates the relative size of OECD Arrangement compliant activity; non-Arrangement compliant activity by both OECD Participants and non-Participants less China, and China trade-related export support activity. It suggests that in less than 5 years, OECD arrangement compliant activity has been displaced as the primary source of export support, by China and non-Arrangement activity.

Figure 5 Total Official Trade Related Support⁶⁹

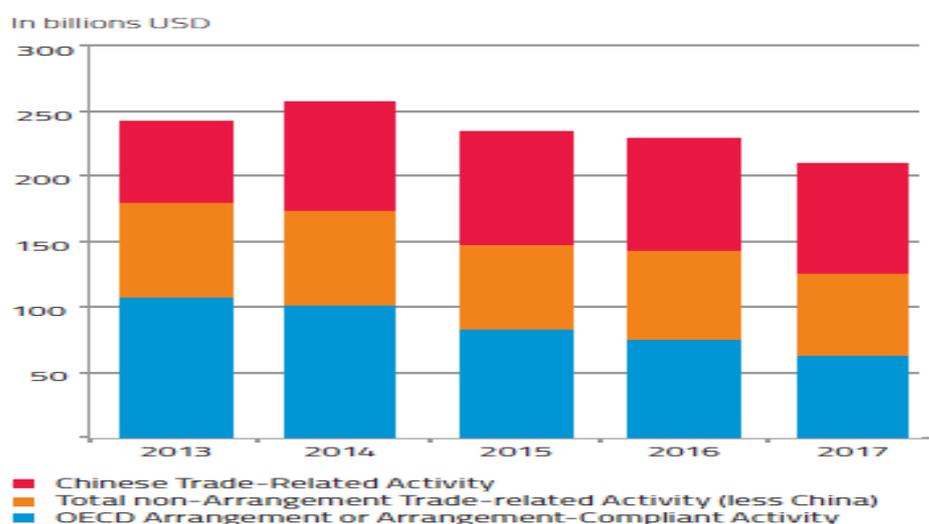
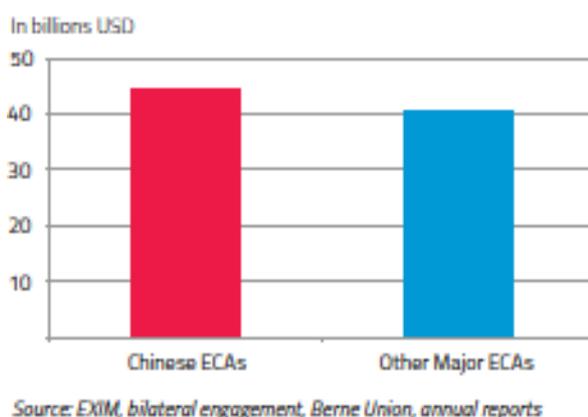


Figure 6 indicates that the Chinese ECAs provided more MLT investment support than the rest of the world combined at nearly \$45 billion.

⁶⁸ *Ibid.* p22.

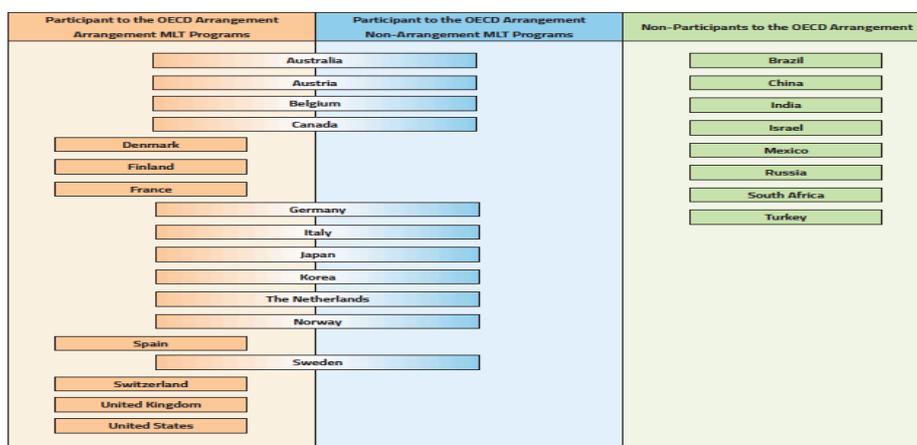
⁶⁹ The Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2018. p20.

Figure 6 Comparison of Global Trade-Related Investment Support – Chinese ECA vis-à-vis Other Major ECAs in 2017⁷⁰



Participants to the OECD Arrangement are faced with a strategic dilemma in the context of uneven global competition. The expansion of non-Arrangement activities increases the pressure on them to create their own OECD Arrangement avoidance programmes. However, this further jeopardizes the level playing field and contributes to an export subsidy race. Figure 7 sets out the distinction between the three models of ECA operating and indicates that only a minority of seven ECAs that have not expanded their Non-Arrangement activities.

Figure 7 Major ECA Countries by Programme Type⁷¹



⁵ Brazil is a member of the OECD Aircraft Sector Understanding.
⁶ Israel, Mexico, and Turkey are OECD members but are not Participants to the OECD Arrangement.

This expansion of non-Arrangement export credit support programmes has implications not only for the level playing field, but also for the regulatory framework governing export credit support and the compatibility of some of these new programmes with the obligations under the WTO SCM. The following section focuses on this issue of WTO compliance, with reference to EU Member State’s ECAs.

⁷⁰ The Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2018. p19.

⁷¹ Reproduced from The Report to the U.S. Congress on Global Export Credit Competition. EXIM Bank. 2017. p10.

3. EU ECAs and the WTO Agreement on Subsidies and Countervailing Measures (SCM)

The WTO agreements are the legal ground-rules for international commerce, guaranteeing member countries important trade rights. They bind the government's *pacta sunt servanda* to keep their trade policies within agreed limits.⁷² The WTO members are automatically subject to the SCM.⁷³

The SCM offers a definition of a subsidy in Article I.1(iii).⁷⁴ This definition establishes a traffic lights system for discriminating between prohibited, actionable and other subsidies. Article 1 stipulates that a subsidy exists if there is a financial contribution by a government or any public body within the territory of a Member,⁷⁵ or there is any form of income or price support⁷⁶ and a benefit is thereby conferred.⁷⁷ That is, a subsidy exists only when the measure in question satisfies all three elements of this test.⁷⁸ Although a benefit is not explicitly defined in the SCM, four examples are set out as guidance for calculating benefits under Article 14 SCM. The Appellate Body found, during the *Canada–Aircraft* dispute,⁷⁹ that a financial contribution had to make the recipient “better off” and that the appropriate basis for comparison was the marketplace in order to identify its trade-distorting potential. If no advantage can be found, when for example a government body purchases goods and services at a market price, there can be no benefit and therefore no subsidy exists.⁸⁰

Within its traffic-light system, the SCM differentiates between prohibited subsidies and actionable subsidies. Subsidies prohibited under the WTO SCM Agreement Article 3, include subsidies contingent in law or fact, whether solely or as one of several other conditions, upon export performance. Export subsidies pursuant to SCM Article 3.1 are those targeted to directly affect exports by assisting the domestic producer against its competitors in foreign markets. They inherently favour domestic goods that are exported over competing foreign goods in export markets., and in so doing, they give an advantage to the domestic goods. There is no burden of proof as to its specificity or adverse effects. A prohibited subsidy must be withdrawn.⁸¹

3.1 The Link between the WTO SCM and the OECD Arrangement

Annex I's Illustrative List of export subsidies referred to under Article 3.1(a) SCM further clarifies what can be considered to be a prohibited “export subsidy.” If the measure at issue is banned by the List, a Member does not have to demonstrate that the measure falls within the scope of Article 3.1(a) SCM. Of relevance to official export credit support are the prohibited export subsidies under Items (j) and (k)

⁷² Marrakesh Agreement Article II

⁷³ URAA, summary of provisions.

⁷⁴ The GATT and the Subsidies Code of 1979 did not provide an express definition of this term

⁷⁵ Article 1.1(a)(1)

⁷⁶ Article 1.1(a)(2)

⁷⁷ Article 1.1(b).

⁷⁸ The Panel Report from *US–Export Restraints as Subsidies* suggests that the introduction of the two-part definition of subsidy, consisting of ‘financial contribution’ and ‘benefit’, was intended specifically to prevent the countervailing of benefits from any sort of formal, enforceable government measures, by restricting to a finite list the kinds of government measures that would, if they conferred benefits, constitute subsidies. See Report of the Panel, *United States – Measures Treating Export Restraints as Subsidies*, June 2001, ¶8.73.

⁷⁹ *Canada–Aircraft* dispute Appellate Body Report, ¶157.

⁸⁰ This was reinforced by the *EC–Drams* Panel finding that: “In sum, if the financial contribution is not provided by the government (or directed or entrusted by the government), it is of no concern to us. If the financial contribution is provided (or directed or entrusted) by the government but still does not confer an advantage over what was available on the market, there is no need to discipline such government behaviour which lacks a trade distorting potential.” *European Communities – Countervailing Measures On Dynamic Random Access Memory Chips From Korea*, ¶7.175.

⁸¹ The WTO SCM Article 3.2 states: A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Item (j): The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

Item (k) paragraph 1: The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of *export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets* in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, *in so far as they are used to secure a material advantage in the field of export credit terms.* (Emphasis added)

While Item (k) of Annex I sets out export credits as an example of prohibited export subsidy, it is, however, followed in its second paragraph by an legal exception to the prohibition. The second paragraph provides a safe haven to those export credits provided below Members who are a party to an agreement which as described, could include the OECD Arrangement.

Item (k) paragraph 2: *Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.* (Emphasis added)

The second paragraph of Item (k) has been held to refer to the OECD Arrangement. In the *Brazil- Export Financing Programme for Aircraft* dispute the Panel stated that: “It is not in dispute that the phrase ‘an international undertaking on official export credits [...]’ is a reference to the OECD Arrangement.”⁸² This report spoke of the linkage between the OECD Arrangement and the WTO SCM rules noting that: “The second paragraph of item (k) provides that ‘an export credit practice’ which is in conformity with the “interest rate provisions” of the OECD Arrangement shall not be considered an export subsidy prohibited by the SCM Agreement”.⁸³ The Article 21.5 implementation Appellate Body Report provided further clarity. It stated that although Article 15 of the OECD Arrangement defines the minimum interest rates applicable to the officially-supported export credits as the Commercial Interest Reference Rates (“CIRRs”), it is not the only benchmark to assess the material advantage of an export subsidy. However, the Member has to provide evidence from comparable transactions in the marketplace. On the other hand, any WTO Member may use the exception allowed by the second paragraph of Item (k) – applying the OECD standards. This includes the whole content of the Arrangement and its annexes, which is to be understood in its dynamic negotiation. Any new arrangement in the OECD and its Annexes replacing the 1979 undertaking is to be considered by the WTO.⁸⁴

However, this application of the Item (k) paragraph two ‘safe harbour’ is not unequivocal, most significantly in the area of ‘matching’ clauses. As noted above, under Article 18 of the OECD Arrangement, Participants are provided the possibility of matching the terms of an offer from an ECA operating both inside and outside the Arrangement.⁸⁵ This is seen as a form of ‘self-help’ for the Participants, and a deterrent against

⁸² Panel Report ((16 July 2001)). *Brazil- Export Financing Programme for Aircraft* – Second Recourse by Canada to Article 21.5 of the DSU. WT/DS46/RW/2.

⁸³ Panel Report ((14 April 1999)). *Brazil- Export Financing Programme for Aircraft*. WT/DS46/R. WT/DS46/R. ¶¶1.1-1.10.

⁸⁴ *Brazil – Export financing programme for aircraft*: Recourse by Canada to Article 21.5 of the DSU; Report of the Appellate Body (WT/DS46/AB/RW) and Report of the Panel (WT/DS46/RW)

⁸⁵ Article 18. Matching. Taking into account a Participant’s international obligations and consistent with the purpose of the Arrangement, a Participant may match, according to the procedures set out in Article 45, financial terms and conditions offered by a Participant or a non-Participant. Financial terms and conditions provided in accordance with

undercutting OECD Arrangement terms.⁸⁶ In the *Brazil-Export Financing Programme for Aircraft dispute*, Canada argued that its contested subsidies were permitted because they fell within the safe harbour of paragraph 2 of Annex I Item (k) in the SCM Agreement. Further, that the OECD Arrangement permitted matching of concessional interest rates, either those offered by a competing country on the basis of provisions of the OECD Arrangement, or as was relevant here, in derogation from the Arrangement, through matching. The Panel, however, opined that while it recognized that matching of derogations is permitted under the OECD Arrangement, this did not alter the fact that both the original derogation and the matching remain, by the Arrangement's own terms out of conformity with the provisions of the Arrangement.⁸⁷ Matching can only be permitted under the safe harbour if the matched export credit support did not derogate from the OECD Arrangement. The Panel further reasoned that if the OECD Arrangement was incorporated into the SCM Agreement such as to permit matching of derogations of participants, non-participants in the OECD Arrangement would be at a disadvantage, as they would lack knowledge of such derogations and therefore the opportunity for matching them.⁸⁸

The relevant findings of the *Brazil - Export Financing Programme for Aircraft* dispute indicate that the Item (k) paragraph 2 safe harbour has been interpreted narrowly. It is available only for those forms of export credit support to which the interest rates provisions of the OECD Arrangement are applicable – that is, direct credits. It does not apply to export credit support in the form of pure cover (Item (j)), when it is provided to exporters on terms more favourable than the market rate. This is even if it conforms fully to the minimum premium and other disciplines in the OECD Arrangement. As such, matching is no defense to export subsidy claims in a WTO dispute. Some commentators argue that in theory, export credit support benefiting from the safe harbour remains vulnerable (i) to WTO challenge if it causes certain enumerated forms of economic harm to other WTO Members' interests - so-called adverse effects; and (ii) to unilateral countervailing duty action if injury to another country's domestic industry is shown.⁸⁹

For a 'matched offer' permitted under the OECD Arrangement's Article 18 derogation for its Participants to be assessed under the WTO SCM, a separate challenge would need to be brought by an injured party as a Member of the WTO. To bring a successful WTO challenge to suspected export credit subsidy programmes, the requesting party needs to make a *prima facie* case that: first, the other government provides export financing, second, that the financing is contingent on export performance, and third, that the rates at which the financing is provided are below market rates. Having made this case, the burden of demonstrating that the official export credits comply with the WTO SCM, or qualify for the safe harbour, procedurally shifts on to the responding party.

3.2 Compliance with the WTO SCM and Official Export Credit Support

The EU is a signatory Member of the WTO representing its Member States. While the EU rules on State aid set out under Article 107-109 TFEU follow a similar approach to the international trade law rules in the SCM, the GATT/WTO does not have direct effect within the EU. The European Court of Justice (EJC) considered the GATT/WTO to be an instrument of negotiation, rather than adjunction, and not precise

this Article are considered to be in conformity with the provisions of Chapters I, II and, when applicable, Annexes I, II, III, IV, V, VI and VII.

⁸⁶ See D. Coppens. How Much Credit for Export Credit Support under the SCM Agreement? *Journal of International Economic Law* 12(1), 63–113. 2009.

⁸⁷ Panel Report, *Canada – Aircraft* (Article 21.5 – Brazil), ¶ 5.125; Panel Report, *Canada – Aircraft Credits and Guarantees*, ¶7.169.

⁸⁸ Panel Report, *Canada – Aircraft Credits and Guarantees*. ¶7.177.

⁸⁹ Dominic Coppens and Todd Friedbacher. A tale of two rules: The intersection between WTO and OECD disciplines on export credit support. *The Future of Foreign Trade Support – Setting Global Standards for Export Credit and Political Risk Insurance.* 2015. <https://www.globalpolicyjournal.com/blog/26/11/2014/tale-two-rules-intersection-between-wto-and-oecd-disciplines-export-credit-support> (accessed June 3 2019).

enough for the purpose of the direct effect. Based on jurisprudence from the European Court of First instance,⁹⁰ WTO Law cannot be invoked to challenge a measure adopted by the EU.

3.3 Monitoring EU Member States ECA Compliance with the SCM

The WTO SCM Agreement contains a number of notification requirements in the areas of subsidies and countervailing measures. In some cases, notification entitles the notifier to certain benefits that it otherwise would not enjoy. Generally, a Member failing to notify runs the risk that another Member will raise issues about its programmes, etc., in the Committee, and potentially could institute dispute settlement proceedings. The basic subsidies notification requirement is contained in Article 25.2 of the SCM Agreement and in Article XVI:1 of GATT 1994. Article 25.2 requires notification of any subsidy as defined in the Agreement, which is specific, as also defined in the Agreement. In addition, GATT Art. XVI:1 requires notification of any subsidy (whether or not specific) that directly or indirectly causes trade effects. However, WTO data indicates that this notification requirement has not been comprehensively adhered to.⁹¹

Given the extent of official export support that is being conducted outside of the OECD Arrangement, it could be expected that more export credit programmes would be brought to the attention of the WTO through dispute settlement. Enforcement under the WTO SCM is conducted on a bilateral basis. A Member that believes its rights under the agreement have been violated, can bring a dispute with the non-compliant Member. Nevertheless, in rare cases the Drafters agreed that each Member possesses a legal right in the compliance by any other contracting parties with the obligations imposed by the rule. In the case of violation, each is to be considered as an injured State, regardless of any actual or potential adverse impact on its economic interests.⁹² This is theoretically the case for prohibited subsidies as defined under the SCM. The two categories of prohibited subsidies set out under Article 3 are presumed to distort international trade and have adverse effects on the interest of other Members. These subsidies are seen as so egregious that they may be challenged through the WTO DSM on the basis of special accelerated procedures. If the subsidy is found to be prohibited it must be withdrawn without delay. Prohibited subsidies may also be subject to countervailing measures if subsidized imports are causing injury to the domestic industry.

Article 4.1 SCM States that:

Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member. [Emphasis added].

That is, pursuant to Article 4.1, the trade effects of the prohibited subsidy become immaterial for the purpose of bringing a claim and of reacting to breaches because any Member that 'has reason to believe that a prohibited subsidy is being granted or maintained by another Member' can request the establishment of a panel. Thus, in a seemingly collective manner, all Members are entitled to resort to the dispute settlement system regardless of the effects of the alleged violation. The findings of the *US – FSC* dispute emphasized that 'trade effects', 'adverse effects', or 'trade impacts' are immaterial.⁹³

⁹⁰ *Chiquita - United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, FIAMM Jointed Cases C-120/06 P and C-121/06 P, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau* C-377/02.

⁹¹ WTO Notification Provisions under the Agreement on Subsidies and Countervailing Measures. Background Note By The Secretariat G/SCM/W/546/Rev.8 31 March 2017.

⁹² Grazzini, Tarcisio. The Legal Nature of WTO Obligations and the Consequences of their Violation. *European Journal of International Law* Vol. 17 no.4. 2006.

⁹³ *US – FSC*, at ¶5.39. See also *Canada – Export Credit and Loans for Regional Aircraft*, WT/ DS222/ARB, at ¶3.29.

In theory then, *erga omnes* obligations are attached to violations of these specific WTO provisions and that all Members could be considered *ipso facto* injured States. Each Member is entitled to refer the dispute to the DSB, even if the measure concerned has no actual or potential adverse impact upon it. Indeed, a violation of Article 3 SCM ‘entails an irrebuttable presumption of nullification or impairment. It is therefore not necessary to refer to it.’⁹⁴ This is not the case for actionable subsidies, where countervailing measures can be resorted to only if the subsidy in question is causing or potentially causing injury to another Member on a bilateral basis.

However, any linear movement towards interpreting a collective enforcement approach towards prohibited subsidies was way-laid by the subsequent findings of the Arbitration Report to the *US – Upland Cotton* dispute.⁹⁵ Here, pursuant to Article 7.10 SCM, the Arbitrator was called upon under paragraph 6 of DSU Article 22 to determine whether Brazil’s countermeasures to US cotton subsidies were commensurate with the degree and nature of the adverse effects determined to exist. This involved considering whether the proposed countermeasures should include a calculation of the effects of the “global impact” of eliminating the subsidies at issue, as argued by Brazil. Or, conversely whether countermeasures should be limited to the adverse impact of the subsidy on Brazil alone.⁹⁶ In making this determination, the Arbitrators pointed out that the specific type of “adverse effect” at issue, within the meaning of Article 5 SCM was under paragraph (c) serious prejudice. This clause was drafted specifically with reference to the interest of “another Member,” rather than all Members.⁹⁷ This is not an *ergo omnes* obligation. Until further interpretation to the contrary, any collective character attributed to prohibited subsidies under Article 3 SCM, is limited in practice. The relationship between Members remains bilateral in character:

Moreover, even if the other prohibited subsidy provisions defined under SCM Article 3 have been endowed with collective obligations, an examination of the disputes brought under Article 4.1 indicates that in practice the legal infrastructure supporting the enforcement of the obligation remains wholeheartedly bilateral. Cases are brought bilaterally. The costs and benefits of bringing a dispute are not shared collectively. For not even in the most egregious subsidies cases will all other Members necessarily suffer from resulting negative consequences on their production. This means assessing the level of EU Member State’s export credit schemes’ compliance with the WTO SCM remains overly dependent on investigations from injured Members of the WTO, or actions against infringements of EU law within the EU.

The enforcement challenge in such an environment is that the incentive system created by bilateral enforcement cannot rise about the mercantilist self-interest of individualistic parties. A Prisoners’ Dilemma emerges because each Member fears its own official export support may be non-compliant; any challenge will trigger a wave of tit-for-tat retaliation. While many countries have raised concerns about official export financing activities that do not conform to the OECD Arrangement standard, disputes over an export credit subsidies in the WTO remain rare. The only two cases that have directed addressed this are the Canada-Brazil Aircraft cases which are over 15 years old.

To bring a successful WTO challenge to these subsidy programmes, the complainant must make out a prima facie case that the non-conforming government provides export financing, that the financing is contingent on export performance, and that the rates at which the financing is provided are below market rates. Although the US has been vocal in its criticism of China’s export support programmes, it has yet to bring a case to the WTO DSM nor has it attempted to countervail an export credit subsidy. In addition to the chilling factor of potential retaliation, there is a systemic lack of transparency surrounding financial details of specific transactions. Moreover, the increasingly time-consuming nature of the WTO dispute settlement procedure, is unable to respond effectively to the fast pace of negotiated trade finance transactions.

⁹⁴ *Brazil – Export Financing Programme for Aircraft*, Art. 22(6), WT/DS46/ARB, 28 Aug. 2000, at ¶3.48(a).

⁹⁵ *United States – Subsidies on Upland Cotton* Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the *SCM Agreement* WT/DS267/ARB/2 31 August 2009.

⁹⁶ *Ibid.* ¶4.66.

⁹⁷ *Ibid.* ¶4.75.

Instead, the US and other countries with major ECAs have chosen to diplomacy rather than litigation with China. In 2012, the US launched negotiations with China, through the Strategic and Economic Dialogue to try to come to an agreement on guidelines to govern export credit financing. The International Working Group on Export Credits (IWG) was established: “To make concrete progress towards a set of international guidelines on the provision of Official Export Financing that, taking into account varying national interests and situations, are consistent with international best practices, with the goal of concluding an agreement by 2014”. The first plenary meeting of the IWG took place in 2012.⁹⁸ Many delegations in principle supported the view that the overall objective should be to eventually agree on a “successor undertaking” to the current OECD Arrangement, in sense of Item (k) of Annex I of the SCM. However, by 2019 no clear consensus over these issues had emerged from the IWG.⁹⁹

⁹⁸ Altogether 15 major export credit providers attended the plenary, including the OECD Participants as well as China, Brazil, the Russian Federation, Turkey, Malaysia and Israel.

⁹⁹ The EU, for example, favours a horizontal approach that look first at general provisions on maximum repayment terms, down payments, interest rates, premia etc. applicable to all export credit transactions irrespective of the industrial sector concerned. China on the other hand, prefers the option of starting the process by looking at sectors, such as medical equipment and shipping. See: A Brief Background Note on the ongoing negotiations of the International Working Group (‘IWG’) on Export Credit. CAPEXIL. <http://capexil.org/background-note-iwg-on-export-credit/> (accessed June 3 2019).

4. Conclusions

The international market for official export credit support has become unprecedentedly aggressive and unruly. While previously ECA activity was primarily conducted by OECD countries, by 2019, there were more than 110 national Export Credit Agencies (ECAs). Since the financial crisis, ECAs have proliferated, and many do not belong to the “club” level Arrangement on MLT Officially Supported Export Credits (‘the Arrangement’). This is a non-binding ‘gentlemen’s agreement’ negotiated within the OECD, with 9 participants, including the EU representing its Member States. The Arrangement sets the export credit terms and conditions that may be supported by its Participants, including minimum interest rates, risk fees and maximum repayment terms. It also encompasses several ‘Common Approaches’¹⁰⁰ requiring ECAs to address anti-bribery, environmental, social and human rights (ESHR) impacts, and sustainable lending to heavily indebted poor countries.

This has resulted in greater pressure on the multilateral, binding rules contained in the WTO’s Agreement on Subsidies and Countervailing Measures (SCM). These mandatory rules prohibit subsidies that are contingent in law or fact, upon export performance, such as export credit support. The SCM interacts with the OECD Arrangement through providing a safe harbour for those export credits that respect the terms and conditions set out by the OECD Arrangement. This governance framework is under pressure. The OECD Arrangement’s influence over export credit agencies is shrinking in relative terms, both geographically and in scope, just at a time when governments are increasingly seeking to spur domestic growth through exports. Now ECAs are largely governed by the WTO SCM if a Member challenges another Member’s ECA instrument. This shift in regulatory balance has both competition and compliance implications.

Competition Concerns

Under the OECD Arrangement, Participants compete in the market by using the flexibilities that are permitted under the Arrangement, such as in domestic content requirements and risk appetite. Participant ECAs have begun lowering the minimum domestic content an export contract must contain and shifting towards riskier markets over the last five years. For example, in 2012, 48 percent of transactions reported to the OECD occurred in markets with a credit rating agency (CRA)-equivalent rating of ‘B+’ or lower. By 2017, that number had increased to 65 percent, led by Italy, Germany, and Austria.¹⁰¹ Many OECD Participant ECAs have also expanded their export support programmes falling outside the scope of the OECD Arrangement rules, such as investment insurance and market window arrangements. The flexibility of untied financing allows buyers to mitigate some of the due diligence burdens necessary for tied financing. Between 2013 and 2017, OECD Arrangement covered MLT activity dropped 6% to 54% of total activity, with a commensurate gain in non-arrangement covered export support. Moreover, today’s two largest providers are not Participants to the OECD Arrangement, China and India. By 2017, Chinese trade-related ECA activity had risen above the OECD Arrangement covered activity.¹⁰²

¹⁰⁰ The OECD Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits.

¹⁰¹ Report to the U.S. Congress on Global Export Credit Competition. 2018. EXIM Bank. p 35.

¹⁰² Chinese MLT Tables are composed of CEXIM’s Buyer’s and Seller’s Credit programmes and Sinasure’s MLT activity. *Ibid.* p 19.

Compliance Concerns

Even where OECD terms and conditions remain applicable, it is not self-evident that Participant ECAs are complying with them. This is particularly with respect to *matching*. Matching is a deterrent mechanism that permits OECD Participants to match the terms of another ECA offer, both from other Participants but also from those ECAs operating outside of the terms of the Arrangement. The threat of an offer being matched by a competitor should operate to deter ECAs from a race to the bottom in their terms and conditions.

Matching lacks transparency. Non-Participants are only able to obtain information on a reciprocal basis from individual Participants on specific export credit offers. This lack of transparency means it is not possible to evaluate the final terms and conditions of a matched offer, or the extent to which matching takes place between both Participants and non-Participants. The information used in the monitoring of the implementation of the Arrangement and Common Approaches Recommendations is based on self-reporting.

Data to assess compliance is difficult to obtain. EU Member States Annual Activity Reports since 2011 are self-reporting exercises. They suggest complete compliance with the OECD Arrangement and Common Approaches guidelines. The European Commission has also consistently reported full compliance by Member States' ECAs with Union objectives and obligations. This view has been contested. A July 2013 European Parliament Resolution¹⁰³ emphasized that neither the annual reports of the Member States nor the Commission's evaluation of these reports allowed for an assessment whether Member States' export credit activities comply with the Union's foreign policy goals, or for assessment of the treatment of environmental risks in the calculation of ECA premiums. Various public interest organizations have also expressed concerns regarding implementation, as well as the loopholes in their content.¹⁰⁴ ECAWatch¹⁰⁵ made a formal complaint to the European Ombudsman that the Commission had failed to put in place adequate benchmarks and compliance tests in its review of the activity reports of export credit agencies, in particular with respect to human rights and environmental protection. The Ombudsman's investigation sided with the complainant. The Commission counter-argued that pursuant to Regulation 1233/2011 it is obligated to "base" its Annual Review on the information provided by the Member States in their Annual Activity Reports – that is, it is not required to verify such information.¹⁰⁶

While EU ECAs have not been subject to the WTO dispute settlement mechanism, there have only ever been two export credit disputes and these date back to 2005¹⁰⁷ and 2003.¹⁰⁸ The WTO prohibits official export credits if they are "*provided at rates below those which they actually have to pay for the funds or if they borrowed on international capital markets in so far as they are used to secure a material advantage in the field of export credit terms.*" Significantly, under paragraph 2 of Item (k) of the Illustrative List, there is a safe harbour for those export credits provided by Members who are a party to an agreement that, as described, includes the OECD Arrangement.¹⁰⁹ In the past, when most ECAs were Participants, this may have been one reason why disputes over export credit subsidies in the WTO were rare.

However, in today's aggressive ECA market, litigation is strategically unattractive because of the expansion of export support instruments falling outside of the Arrangement's scope and therefore the SCM safe harbour. The WTO DSU has stated that the OECD matching clause derogation is not covered by the WTO

¹⁰³ For example, ECAWatch, Eurodad, Overseas Development Institute, Cafod.

¹⁰⁴ See UK House of Commons Select Committee Reports

¹⁰⁵ See: www.eca-watch.org.

¹⁰⁶ The European Commission's failure to evaluate the compliance of Member-States Export Credit Agencies with the EU's objectives and obligations, in particular on human rights. Wednesday | 27 April 2016 CASE 212/2016/JN.

¹⁰⁷ *Korea - Measures Affecting Trade in Commercial Vessels* - Report of the Panel. WT/DS273/R 07/03/2005.

¹⁰⁸ *Canada - Export Credits and Loan Guarantees for Regional Aircraft*. WT/DS222/R 28/01/2002.

¹⁰⁹ Panel Report ((16 July 2001)). *Brazil - Export Financing Programme for Aircraft* – Second Recourse by Canada to Article 21.5 of the DSU. WT/DS46/RW/2.

safe harbour provision.¹¹⁰ So if matching below Arrangement terms is widespread, litigation could trigger a wave of tit-for-tat retaliation.

Evidently WTO prohibitions on export credit subsidies were not designed to be the primary regulator of ECAs. They do not possess sufficient monitoring or enforcement mechanisms, nor do they address due diligence and sustainability requirements for ECA activities. It is therefore not clear whether or not ECA activity is compliant with either the WTO or the OECD Arrangement and Common Approaches.

Escaping the Prisoners' Dilemma

The European Commission and Member States have a collective incentive to rethink the function of their ECAs under current aggressive and unruly market conditions. Prevailing strategies of competing with the new and biggest ECAs while avoiding litigation in the WTO have significant budgetary, competition and sustainable development implications.

There is a shared global interest in preventing a subsidies race through publicly funded export credit support. Since 2012, the International Working Group on Export Credits (IWG) has been negotiating an agreement between the major ECA countries, including the EU. As yet there has been little progress, indicating how entrenched these protectionist instruments have become within broader industrial strategies. The EU and its Member States need to strengthen plurilateral coalitions among the main ECA players to establish a “successor undertaking” to the current OECD Arrangement, in sense of Item (k) of Annex I of the SCM.

In the meantime, EU ECAs need to return to their original role as lenders of last resort. Businesses should rely primarily on the private financial sector to secure the necessary financing for their exports. Exporting companies should not be competing on the terms and conditions of official export credit support but by becoming more competitive through upgrading technology, production techniques and skills, which require government support. The European Commission has an active role to ensure a more competitive level playing field among the EU ECAs, rigorously monitoring and evaluating longer term export credit instruments, as it does for short term support under the EU State aid regime. The EU would not only be ensuring compliance with Union objectives and obligations, but it would have the clean hands necessary to pursue litigation and greater enforcement in the WTO.

¹¹⁰ Panel Report, *Canada – Aircraft Credits and Guarantees*. ¶7.177.

Appendix 1. Overview of EU ECA Activity

I. Overview

This research attempted to provide a basic analysis of the annually reported business parameters of the Export Credit Agencies (ECAs) in the EU. The specific parameters examined were the annual business covered, premium income, claims and recoveries. The broad scope of the research was 14 countries in the European Union for the time period 1997-2017. The data was collected using the publicly available annual reports of the ECAs covered. The list of the countries covered, and their corresponding agencies can be found in Table 1.

Table 1: Country wise Export Credit Agencies

S.No.	Country	Export Credit Agency	Data availability
1	Austria	Oesterreichische Kontrollbank AG (OeKB)	2005-2017
2	Belgium	Credendo	2006-2016
3	Bulgaria	Bulgarian Export Insurance Agency (BAEZ)	2010-2011
4	Czech Republic	Export Guarantee and Insurance Corporation (EGAP)	1997-2016
5	Denmark	Eksport Kredit Fonden (EKF)	2002-2017
6	Estonia	KredEx	2011-2014
7	France	Bpifrance Assurance Export - Coface	2013-2017
8	Germany	Euler Hermes Aktiengesellschaft	1997-2017
9	Netherlands	Atradius	2011-2016
10	Poland	Korporacja Ubezpieczeń Kredytów Eksportowych (KUKE)	2010-2015
11	Portugal	Companhia de Seguro de Créditos	2011
12	Spain	Compañía Española de Seguros de Crédito a la Exportación (CESCE)	2011-2015
13	Sweden	Exportkreditnämnden (EKN)	2008-2017
14	United Kingdom	Export-Import Bank of the United States (Ex-Im Bank)	1997-2017

There was very poor data availability for most of the countries (displayed in Table 1), with Germany and the United Kingdom being the only countries with the entire 20 years of data available, and Czech Republic came a close second with the data available for 19 years. Due to these gaps in data, it is difficult to perform a comprehensive comparative analysis. For countries such as Portugal, Estonia and Spain, the publicly available reports display a low level of clarity regarding their annual business. Another challenge encountered, was the definitions of the metrics being used across the agencies. Even though these countries form a part of the European Union, they did not report the same parameters and an extensive research led to matching the parameters across ECAs. A common reporting mechanism would prove to be beneficial and can help with inter-country ECA analysis. The metrics used in this analysis were chosen to understand the basic running of the ECAs. Based on the data limitations, conclusions cannot be drawn for Bulgaria, Estonia, France, Portugal and Spain. The trends over time for the ECAs of the rest of the countries are displayed in Table 2.

Table 2: Trends in Business covered, premium income, claims net recoveries for 1997-2017

S.No.	Country	Business Covered	Premium Income	Claims net Recoveries
1	Austria	Decreasing	Decreasing	Decreasing
2	Belgium	Increasing	Increasing	Increasing
3	Czech Republic	Increasing	Increasing	Increasing
4	Denmark	Increasing	Increasing	Increasing
5	Germany	Constant	Constant	Constant
6	Netherlands	Decreasing	Increasing	Can't say
7	Poland	Can't say	Can't say	Can't say
8	Sweden	Decreasing	Increasing	Increasing
9	United Kingdom	Can't say	Can't say	Can't say

It was possible to observe a negative value for Claims net Recoveries from 2005 to 2007 for Belgium, Germany, Netherlands and United Kingdom. Austria is the only country with a decreasing trend of the metrics observed. The data available for United Kingdom indicates that the UKEF has been performing at similar levels for the past 20 years. For most of the countries, we can observe a peak in the business activities in 2009, which could be an indication of an increase in the aftermaths of the financial crisis, because the business again stabilizes or follows the pattern exhibited by the rest of the data.

The figures are available in the local currencies for most of the countries. The ones available in Euro can be compared well to each other. Given the conditions of poor data and different currencies used, the only comparable countries are Austria, Belgium, Netherlands and United Kingdom (figures for United Kingdom are available in GBP). The following graphs represent the figures for business covered, premium income, claims and recoveries from 2005 to 2017. These years have been chosen due to availability of data. Belgium has seen a particular increase in the business covered and premium income compared to the other countries. This sharp increase can be seen from 2009 onwards, when the Belgian Export Credit Agency, Credendo, set up a Russian Joint Venture with Ingosstrakh (a major insurance company of Russia). In 2009, Credendo-Short term Non-EU risks also increased its stake in Credendo Short-term EU risks from 33% to 67%¹¹¹. There was a drop in Credendo's claims from 2011-14, the reason for which is not apparent from just Credendo's activities, and more factors need to be looked at.

There is an observable decrease in the metrics for the Austrian Export Credit Agency, Oesterreichische Kontrollbank Group (OeKB). Although OeKB was awarded the best export credit agency in 2016, it has suffered due to external factors such as economic and international political environments. Also, the interest rate environment has led to a fall in their overall performance over the years. Netherlands on the other hand does not show any particular trend in the business covered. There is a steep reduction in the claims and recoveries of United Kingdom compared to the other countries.

¹¹¹ About us. Retrieved from <https://www.credendo.com/about>

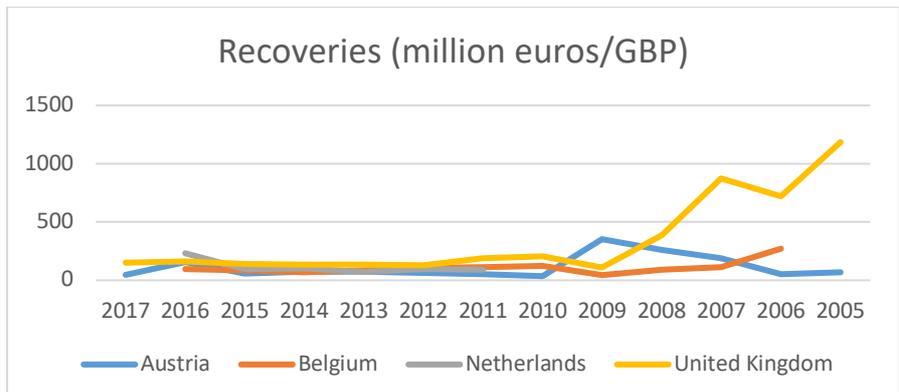
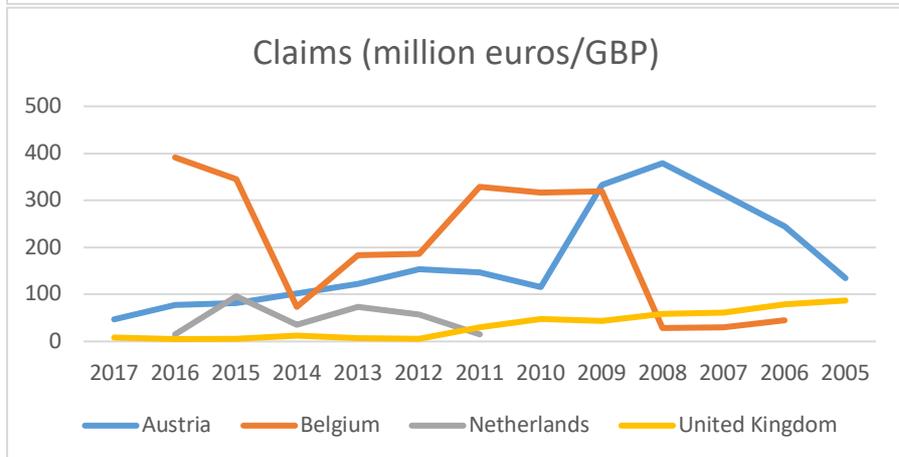
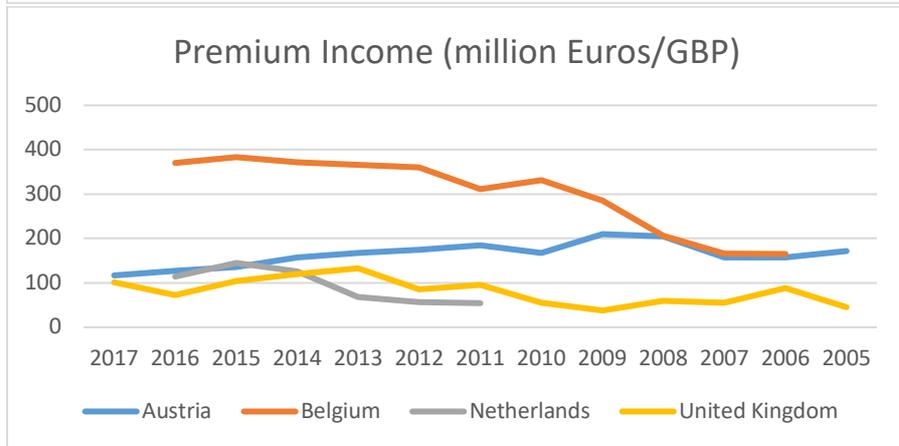
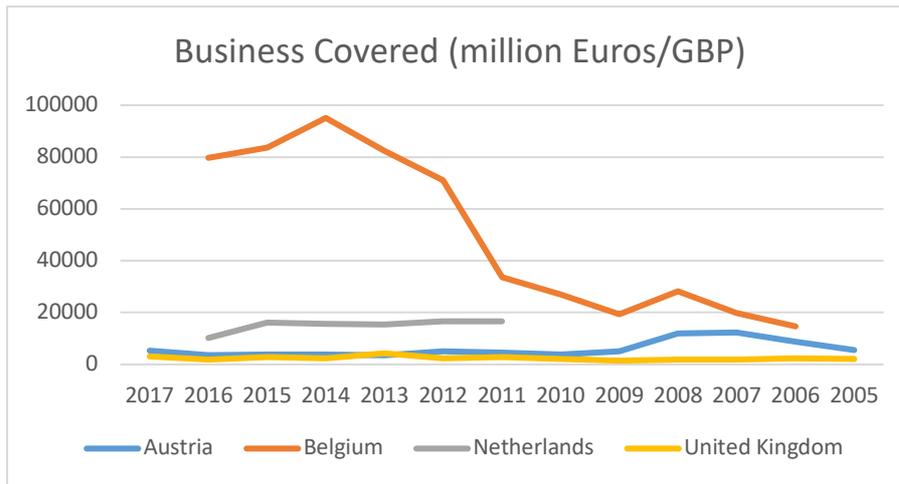


Table 3 represents the mean values of the metrics considered. While a better measure would have been median values, the data available did not permit the calculation for all the countries.

Table 3: Mean values of metrics

	Business Covered	Premium Income	Claims	Recoveries	Claims-Recoveries
Austria(Millions Euro)	3688.2	101.6	107.2	70.9	36.3
Belgium(Millions Euro)	26411.5	158.0	107.0	57.1	49.9
Czech republic(Millions CZK)	36488.0	1028.0	1246.5	280.6	909.6
Denmark(Millions DKK)	7854.4	569.8	137.0	30.5	106.4
France(Millions Euro)	9471.9	384.6	142.7	0.0	-860.0
Germany(Millions DM)	24249.1	645.5	747.2	1046.0	-298.8
Netherlands(Millions Euro)	4310.5	26.9	13.9	32.7	-18.8
Poland(Millions PLN (business covered in millions USD))	851.0	6561.7	2262.8	3897.2	0.0
Spain(Millions Euro)	0.5	24.0	4.7	6.7	-2.0
Sweden(Millions SEK)	72189.3	866.0	2724.1	127.6	2596.5
United Kingdom(Millions GBP)	2688.3	86.6	109.9	346.0	-236.1

II. Conclusions from Overview of Available Data for 14 EU Member States

To conclude, the poor availability of data can be taken as an indication of low levels of transparency. Most of the countries exhibit an increasing trend in the business covered, premium income and claims net recoveries over the years, indicating a growth in the credit being provided by these agencies.

	Business Covered	Premium Income	Claims	Recoveries	Claims-Recoveries
Austria (Millions Euro)	3688.2	101.6	107.2	70.9	36.3
Belgium (Millions Euro)	26411.5	158.0	107.0	57.1	49.9
Czech Republic (Millions CZK)	36488.0	1028.0	1246.5	280.6	909.6
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United Kingdom (Millions GBP)	2688.3	86.6	109.9	346.0	-236.1

Appendix 2 - Definitions of metrics used

Country	Business Covered	Premium Income	Claims	Recoveries	Other Information
Austria	Addition of nine levels of guarantees	This is the premium income excluding the interest income less other expenses	Claims paid, excluding HIPC	Recoveries on claims paid	Credit period in years- Guarantee business by credit period of transactions guaranteed; HIPC- Heavily Indebted Poor Countries
Belgium	Value of transactions insured during the financial year before cession to insurers	Premiums issued during the financial years before cession to insurers	Claims paid during the financial year before cession to insurers	Claims recovered during the financial year before cession to insurers	
Bulgaria	Nominal risk exposure under insurance policies issued	Premium income	Claims paid	Recoveries	Reports only available in the local language
Czech Republic	Insured volume (with state support)	Premiums written (with state support)	Paid claims (with state support)	Debts successfully recovered	
Denmark	New export credits + working capital guarantees + loans	Gross premiums	Net claims	Recovered amounts- repayments including interest	
Estonia	Risk portfolio- active insurance limits	Gross premiums	Claims		Reports available, but the required measures not easily identifiable
France	Total exposure	Gross earned premium	Gross claims expenses	Claims- Recoveries available, which is, change in claims provisions net of recoveries	
Germany	Volume of cover for exports in that year. Consists of newly covered business, export guarantees for export in countries (breakdown into central and eastern European countries, industrial countries) and also a breakdown into, horizon of risk and type of cover) cover for new export business newly covered export volume				Policies not provided for all years
Netherlands			In 2016 no claims were paid under either foreign investment insurance policies or		

Country	Business Covered	Premium Income	Claims	Recoveries	Other Information
			foreign exchange rate risk insurance policies		
Poland	Value of exported turnover in USD million	Gross premium income	Provision for outstanding claim	Available as Claims-Recoveries; Net benefits and claims	Very limited information, no information on recoveries and claims, but there are receivables.
Portugal					No data available
Spain					Not enough details
Sweden	New offer plus new guaranteed issued		Outstanding indemnified claims, nominal		
United Kingdom	Total exposure including unrecovered claims		Annual value of claims authorized by the ECGD continued to fall since 1990/1991	Claims recoveries plus interest on recoveries	