

# Do EU export credit agencies comply with international norms?

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# Official Export Support - background

- Export Credit Agencies – ECAs
  - public agencies established by law
  - private undertakings, endowed with a trusteeship mandate
- Mandate: promoting domestic exports and foreign investment
  - Loans, guarantees, insurance
  - 2019: 110 ECAs - US\$211bn total trade-related (MLT) export support
- International framework – soft OECD law and binding WTO law
- Shifts in market and industry – regulatory challenges

# Regulatory Framework for EU Member States

- EU MS competence for providing export credit
  - No “European” ECA
- **TFEU Article 207**: EU exclusive competence common commercial policy
  - Short-Term Export Credit Communication
  - EU State Aid rules – short term export credit
  - The EU Harmonisation Directive
- **‘Club’ OECD Arrangement and Common Approaches**
  - Soft law transposed in binding EU law
  - Implemented by individual Member States
- **Multilateral WTO SCM Agreement**: prohibits export subsidies
  - Item (K) safe harbour for OECD Arrangement compatible export support

# Article 4 of Regulation (EU) 1233/2011

On the application of certain guidelines in the field of officially supported export credits

- 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.

## ANNEX I

1. *Without prejudice to the prerogatives of the Member States' institutions ... each Member State shall make available to the Commission an **Annual Activity Report** .... 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.*
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.*

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)

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.

## European Ombudsman Investigation:

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. 27 April 2016 CASE 212/2016/JN

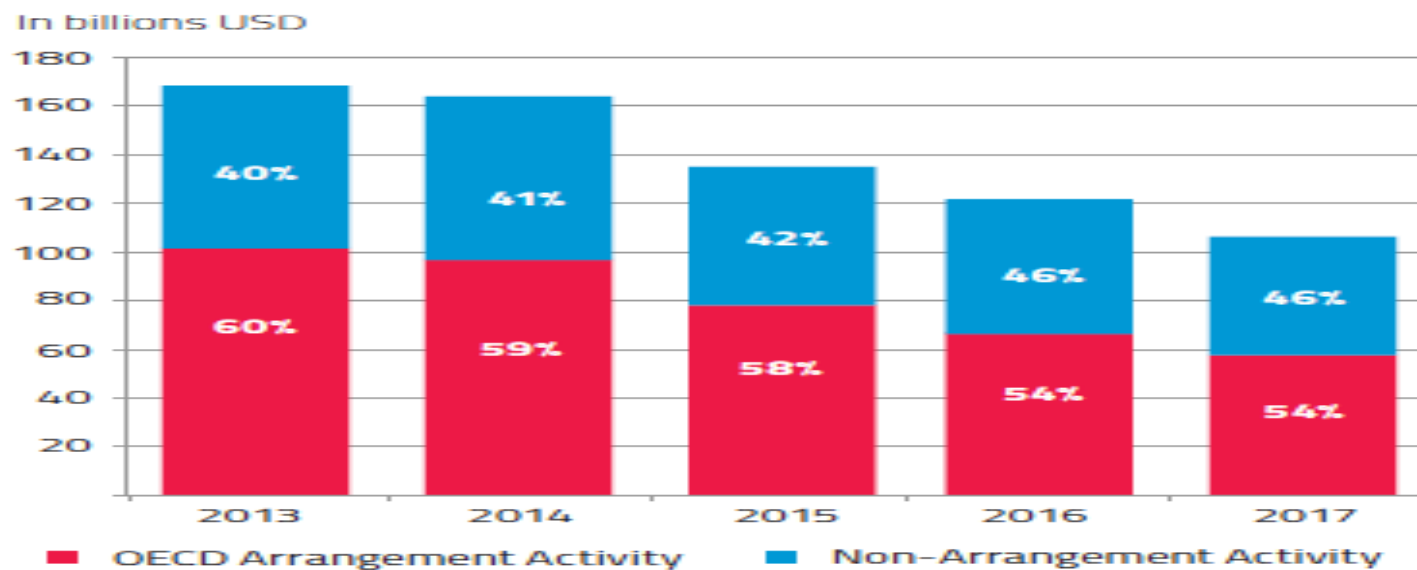
### Ombudsman findings:

- Commission has committed maladministration
- not 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

### Commission defense:

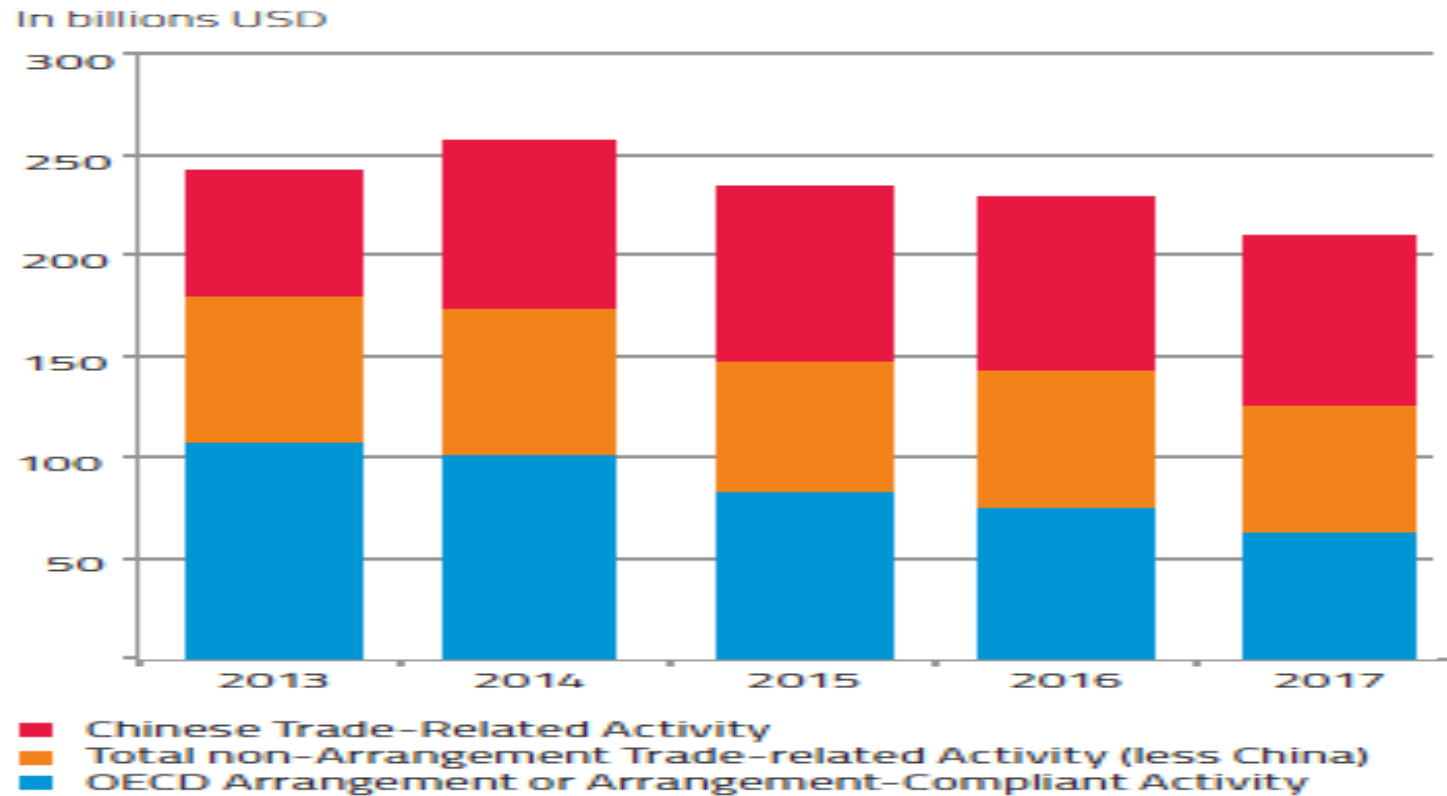
- Annex 1 of Regulation 1233/2011 respects diversity of EU ECAs by leaving manner and methodology of reporting to individual EU MS
- Any move to develop common standards for the form of the reporting would not respect MS diversity
- Any changes to the present reporting system require an amendment of Regulation 1233/2011

# Arrangement vs. Non-Arrangement Activity by Participants *to the OECD Arrangement*



Source: *Bilateral engagement*

# Total Official Trade Related Support



Source: EXIM, bilateral engagement, Berne Union, annual reports



# WTO SCM prohibitions on export subsidies

Item (k) paragraph 2:

- *... if in practice a Member applies the interest rates provisions of the relevant undertaking [OECD], an export credit practice which is in conformity with those provisions **shall not be considered an export subsidy prohibited by this Agreement***
- OECD Arrangement Article 18 permits *matching* of Participants and Non-participant ECA offers
  - OECD derogation not covered by Item (k) safe harbour
  - Self-help deterrent?
  - Transparency issues

## WTO Item (k) disputes

- Appellate Body Report, Brazil – Export Financing Programme for Aircraft, 181, WT/DS46/AB/R (Aug. 20, 1999), DSR 1999:III, 1161; Panel Report,
- Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU, 6.83, WT/DS46/RW, WT/DS46/AB/RW (Aug. 4, 2000), DSR 2000:IX, 4093; Appellate Body Report,
- Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU, 61-77 WT/DS46/AB/RW ( Aug. 4, 2000), DSR 2000:VIII, 4067 Panel Report,
- Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU, 5.236, WT/DS46/RW/2 (Aug. 23, 2001), DSR 2001:X, 5481.

# Why aren't there more WTO challenges?

- Requesting party makes *prima facie* case:
  1. Respondent **government** provides export financing
  2. Financing is **contingent** on export performance
  3. Rates of financing provided **below market rates**
- Burden of proof procedurally shifts to responding party
  - qualify for Item(k) safe harbour?
- Non Transparency / access to information?
- Grey area of *matching* derogation
- Bilateral enforcement in WTO
  - ⇒ Fear of tit-for-tat retaliation?
- Growth in non OECD Arrangement activity
  - ⇒ Fear of non-compliance?
- Fast paced export credit transactions vs slow paced WTO DSM?

# EU MS Compliance With International Norms

Shifts in Export Credit market / industry

=> pressures on regulatory framework

- New players outside OECD Arrangement
- New products outside OECD Arrangement
- OECD Arrangement shrinking relevance
- OECD and EU monitoring based on self reporting
  - compliance not 'evaluated'
- WTO not best forum for regulating ECAs
  - Not detailed provisions
  - Bilateral enforcement => compliance questionable?
  - No Common Approaches
- Progress under International Working Group on ECAs?