

Gaps between the Common Approaches¹ and the OECD Guidelines².

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The Forum Suape, Conectas and Z8 colony of fishermen in Brazil prepared together with Both ENDS in the Netherlands a notification concerning alleged violations of the OECD Guidelines for Multinational Enterprises (the “OECD Guidelines”) by Atradius Dutch State Business (ADSB) in issuing export credit insurance for two projects of the Dutch dredging company Van Oord in the port of Suape, Pernambuco, Brazil. The Dutch NCP observed in its initial assessment³ that ADSB is a multinational enterprise for the purpose of the Guidelines. In their reaction to the notification and supplementary submissions of the notifiers, ADSB and the Ministry of Finance argued that ADSB should not be considered a multinational enterprise and is therefore not subject to the OECD Guidelines, but rather to the Recommendation of the OECD Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the “Common Approaches”) as a set of regulations specifically written for ECAs.

In this paper we like to reflect on some of the differences and shortcomings of these Common Approaches in comparison to the OECD Guidelines. Although one can also observe some recommendations of the Common Approaches for ECAs being more specific than the general recommendations of the Guidelines, the shortcomings of the Common Approaches are such that they may contribute to ECAs potentially violating the Guidelines on a more or less regular and systematic basis. This is problematic as the Common Approaches are applicable to officially supported export credits, i.e. export credits that are provided on behalf of governments. These same governments are committed under the Guidelines to “*maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective*” (para 9, p. 15). Hence the inadequacies of the Common Approaches highlighted in this paper could be helpful in raising the standards as currently applied by ECAs to prevent negative social, environmental and human rights impacts.

It is important to point out that this paper is not exhaustive. To develop and ensure further coherence of the Common Approaches with the OECD Guidelines a much more detailed assessment of the differences between the two is recommended. To that end, individual ECAs and the OECD Working Party on Export Credits and Credit Guarantees, often referred to as the Export Credit Group (ECG), stand to benefit from the expertise of NCPs and the OECD Working Party on Responsible Business Conduct.

Scope

The Foreword of the OECD Guidelines opens with a clear description of the scope of the Guidelines (p. 3):

The OECD Guidelines [for Multinational Enterprises] are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global

¹ Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”), OECD, 7 April 2016.

² OECD Guidelines for Multinational Enterprises, OECD, 2011 Edition.

³ See: <http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2015/12/17/notification-both-ends--forum-suape-atradius-dsb/151217-initialassessment-bothends-suape-atradius.pdf>

context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.

....

The Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide.

The Guidelines are an instrument introduced by governments to encourage enterprises to contribute positively to economic, environmental and social progress. They are universal in character and ambition and apply to all activities by all multinational enterprises operating in or from adhering countries.

By contrast, the Common Approaches are specifically formulated to address environmental and social issues relating to exports of capital goods and/or services with a repayment term of more than two years and to the locations to which these exports are destined (p. 3). As such, they have a much more limited scope (p. 5):

This Recommendation applies to all types of officially supported export credits for exports of capital goods and/or services, except exports of military equipment or agricultural commodities, with a repayment term of two years or more.

In a footnote it is explicitly recognized that not all ECA products fall within the scope of this Recommendation, depending on various technical features of the product. The nature of the product in individual transactions is not disclosed, due to which it remains unclear for outside stakeholders to assess for which specific transactions the Common Approaches actually do apply.

As the Common Approaches furthermore only apply to exports for Medium and Long Term (MLT) export credits with a repayment term of two years or more, a vast majority of the export credits provided by ECAs are not subject to the application of the Common Approaches. The statistics of the Berne Union for the period 2010-2014⁴, show for example for the year 2014 the following figures (in million US\$):

Year	Short Term	%	Medium & Long Term	%	Investment Insurance	%	Total	%
2014	1,709,246	86.5	166,864	8.5	97,919	5	1,974,029	100

From these figures it emerges that globally only 8,5 % of the total volume of export credits issued by ECAs is effectively covered by the Common Approaches.

As the Common Approaches are the only social and environmental standards officially applied to export credits, it must be concluded that more than 90% of the volume of export credit supported transactions is not subjected to any such safeguards at all.

Despite many NGOs calling for many years on the ECG to expand the scope of the Common Approaches to all transactions covered by ECAs, the latest revision dated 7 April 2016 still retains this

⁴ See page 3: <http://www.berneunion.org/wp-content/uploads/2012/10/Berne-Union-2015-Charts-and-numbers-for-website.pdf>

very limited scope of the Common Approaches. The scope of the Common Approaches remains much more narrow than the scope of the OECD Guidelines.

General policies

The very first recommendation of the Guidelines under the heading of “General Policies” is that enterprises should *“contribute to economic, environmental and social progress with a view to achieving sustainable development”* (page 19, para A.1). However, in the preamble of the Common Approaches it is explicitly mentioned that *“the primary role of ECAs is to promote trade in a competitive environment, whereas multilateral development banks and development agencies focus primarily on development assistance”* (page 2, 3). This seems to reflect the general position of ECAs, including ADSB, that it is their primary role to promote domestic enterprises doing business abroad, and that development impacts are less of a concern to ECAs. As will be set out hereunder, the same position is reflected in the specific provisions of the Common Approaches.

The Guidelines recommend a much more proactive attitude of enterprises than the Common Approaches recommend to ECAs. Government supported ECAs assume a much lighter approach to due diligence than the same governments recommend for the enterprises they support. Many of the 15 + 2 recommendations of the Guidelines (page 19, 20 + commentary page 21-26) ought to be explicitly taken on board in the objectives of the due diligence requirements of ECAs and for that purpose be incorporated in the Common Approaches (in particular in section 4, page 6).

Disclosure

The Guidelines are explicit in encouraging enterprises to adopt [public] disclosure policies that *“should include, but not be limited to, material information on”* a range of issues (para 2, page 27) regarding the enterprise and its performance. Also enterprises are encouraged to communicate additional information in areas where reporting standards are still evolving, *“such as, for example, social, environmental and risk reporting”* (para 33, page 29). It is anticipated that such disclosure will enhance the ability of enterprises to engage with stakeholders and thus enhance the sustainable development outcomes of their activities. The Guidelines acknowledge that disclosure policies of enterprises should be tailored to interests such as costs, business confidentiality and other competitive concerns.

The Common Approaches are also explicit about the disclosure of information (section VII, p. 12-13). However concerns about the *“competitive context in which they operate and constraints of business confidentiality”* lead in the direction of information sharing between the different adherents - read ECAs subscribing to the Common Approaches - rather than to public disclosure of information. Thus the Common Approaches lead the ECAs to a much more defensive approach to information disclosure at the expense of transparency to the public, as compared to the recommendation of the Guidelines.

The Common Approaches recommend public information disclosure of:

- a) limited project information - including environmental and social impact information - in the case of Category A projects, to be made available as early as possible in the review process and at least 30 calendar days before a final commitment to grant official support (para 39, p. 12), and,
- b) environmental and social information on projects classified in Category A and Category B at least annually after final commitment to provide support (para 41, p. 12-13).

The Common Approaches also allow the information referred to under a) for exceptional reasons NOT to be disclosed. In those cases ECAs are only required to report to the ECG, the body that convenes the ECAs at the OECD. As a result, the public may not even know that ECA support for such a specific project has been provided (para 40, p 12). As Category A and B projects will cover a small part of the total portfolio of projects supported by ECAs, it must be concluded that the Common Approaches recommend the public disclosure of only a very small part of the operations and transactions that ECAs support.

In sum, most of the information that the Common Approaches recommend ECAs to disclose is only shared amongst peers organised in the ECG and not made available to the public. In comparison the Guidelines require enterprises to adopt a much more proactive information disclosure policy and practice.

Human Rights

The Guidelines are explicit in underscoring that states have the duty to protect human rights. Supplementary to that, enterprises then have - within the framework of internationally recognised human rights - the responsibility to respect human rights. This means that enterprises *“should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”* (para 1, p. 31).

The Common Approaches have incorporated language calling on ECAs to respect human rights as well. State backed ECAs are encouraged to protect and respect human rights, *“particularly in situations where the potential impacts from projects or existing operations pose risks to human rights”* (para 4.iv, p. 6). There is reference to the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (p. 2, 15) but specific human rights due diligence is left to the discretion of individual ECAs.

Since 2016, the Common Approaches recommend ECAs to consider complementary specific human rights due diligence only in case of projects with *“a high likelihood of severe project-related human rights impacts occurring”* (p.9). A footnote on the same page describes these impacts *“For example, impacts that are particularly grave in nature (e.g. threats to life, child/forced labour and human trafficking), widespread in scope (e.g. large-scale resettlement and working conditions across a sector), cannot be remediated (e.g. torture, loss of health and destruction of indigenous peoples’ lands) or are related to the project’s operating context (e.g. conflict and post-conflict situations)”*. The Common Approaches do not further define how ECAs should ensure that their due diligence efforts effectively result in respect for human rights.

Employment and Industrial Relations

The Guidelines contain a full chapter on employment and industrial relations (p. 35-41). The Common Approaches mainly refer to these issues in the context of social and human rights due diligence. The scope seems more narrow. The Common Approaches, for example, make no reference to the need for non-discrimination and equal opportunity, unlike the Guidelines (para 1e, p 35).

Environment

The Guidelines explicitly recommend enterprises to establish and maintain a system of environmental management which should amongst others include *“regular monitoring and verification of progress”* (para 1c, p. 42). Enterprises are expected to seek continual improvements of

environmental performance (para 6, p. 45) and to “contribute to the development of environmentally meaningful and economically efficient public policy” (para 8, p. 46).

The Common Approaches recommend attention for the environment mainly in the context of ECAs’ screening of projects (p. 8). In reviewing projects, benchmarking against a wide range of standard of other agencies is recommended, in particular the World Bank Safeguard Policies and the IFC Performance Standards (para 21-26, p. 10, 11). However, where a project does not meet the relevant aspects of the international standards against which it has been benchmarked, an ECA may under the Common Approaches still issue cover while reporting this to the ECG (para 30, p. 11). This illustrates the primarily commercially motivated character of the Common Approaches as opposed to that of the OECD Guidelines.

Where an ECA decides to support a project, the Common Approaches state that it may formulate additional conditions a project sponsor is required to implement (para 32-33, p.11). ECAs should ensure that appropriate procedures are in place to monitor the project in order to ensure compliance with these conditions. The Common Approaches also state that ECAs “*should - where appropriate - encourage project sponsors to make ex post monitoring reports and related information including concerning how environmental and/or social impacts are being addressed publicly available at regular intervals, including in forms accessible to local communities directly affected by the project and other relevant stakeholders*” (para 36, p. 12).

Bribery and Corruption

While the Guidelines have a specific chapter dealing with the need to combat bribery, bribe solicitation and extortion, these issues are not at all covered by the Common Approaches. Anti-bribery measures of ECAs are separately covered by the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits⁵.

Consumer Interest

The Guidelines have a specific chapter on the need for enterprises to “*take all reasonable steps to ensure quality and reliability of the goods and services that they provide*” (p.51-54). Although ECAs clearly provide significant services to enterprises, there is no reference in the Common Approaches to the need for ensuring quality and reliability in the services of ECAs.

Science and Technology

The Guidelines have a specific chapter on the role of enterprises in the transfer of science and technology across borders (p. 55-56). Again, the Common Approaches have no reference to recommendations on this issue.

Competition

The Guidelines have a specific chapter with recommendations on the “*importance of competition laws and regulations to the efficient operation of both domestic and international markets*” (para 95, p. 57). Interestingly the Common Approaches lack recommendations to ensure fair and transparent competition. This is quite remarkable as transparency in the issuing of official export credit support

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<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=td/ecg%282006%2924&doclanguage=en>

seems to be a necessity to prevent market distortions. Thus the absence of any recommendations on this issue in the Common Approaches seem to be a significant shortcoming as compared to the Guidelines.

Taxation

The Guidelines have a last and final chapter devoted to taxation (p. 60 - 63). *“It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities”* (para 1, p 60). Again, the Common Approaches make no reference to concerns or recommendations regarding the issue of taxation and thus fall behind the standard set in the OECD Guidelines⁶.

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⁶ To raise concern about the need to firm up tax due diligence of ECAs, Both ENDS published in 2013 a report under the title “Cover for What?”, followed by a second report in 2015 under the title “Shady Dealings”. In both reports Both ENDS reviewed a series of complex ADSB supported transactions that were structured via tax havens. See: http://www.bothends.org/uploaded_files/document/Cover_for_what.pdf and http://www.bothends.org/uploaded_files/document/Shady_dealings_online.pdf