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**Amnesty International Position Paper on EU reporting requirements in respect
of Member States' export credit agencies**

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1. Introduction

Export Credit Agencies (ECAs) are institutions set up by governments that use public money to support national companies to engage in commercial projects or trade transactions overseas. ECAs support projects or transactions which carry substantial political or financial risks. The political risks include civil war, social unrest, political coup or sudden change in government – all scenarios frequently connected with human rights abuses.

ECAs often support industries of a particularly invasive nature, such as oil, gas and mining projects. Such projects – particularly in developing countries – are regularly associated with environmental damage and human rights harm because of failure to enforce adequate environmental and social protections.¹ Numerous credible reports have documented adverse human rights impacts on affected communities as a result of ECA-supported projects.² Abuses include incidents of violence, forced displacement of people, violations of the rights of Indigenous People and the undermining of access to basic services.

Over the past decade there has been increasing recognition of the impact of ECAs support for business operations overseas, and the need to ensure better oversight and scrutiny of ECA activities. This was explicitly recognised in the UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011.³

¹ *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 2006, UN Doc. E/CN.4/2006/97, para. 25

² Amnesty International, *Governments withdraw financial support for Ilisu dam in Turkey*, 7 July 2009; Horta, Korinna, et al. *The Chad-Cameroon Oil & Pipeline Project: A Project Non-completion Report*, Environmental Defence, Center for Environment and Development, and Chadian Association for the Promotion and Defence of Human Rights, April 2007; Amnesty International, *Contracting out of Human Rights: The Chad-Cameroon pipeline project*, Sep 2005; ECA-Watch, *A race to the bottom: creating risk, generating debt, and guaranteeing environmental destruction*, March 1999

³ United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN Guiding Principles), 2011, UN Doc. A/HRC/17/31, Principles 4 and 8.

This paper looks at reporting on ECA activities within the context of *EU Regulation 1233/2011 on the application of certain guidelines in the field of officially supported export credits*. Under the Regulation, Member States must submit an Annual Activity Report to the European Commission, which describes “how environmental risks, which can carry other relevant risks, are taken into account in officially supported activities of their ECA”.⁴ The Regulation, in its preamble, affirms that EU Member States “should comply with the Union’s general provisions on external action, such as [...] respect for human rights” when “establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported export credit activities.”⁵

Based on the Annual Activity Reports of Member States, the European Commission is then required to produce “an annual review for the European Parliament, based on the information contained in the Member States’ reports, including an evaluation regarding the compliance of ECAs with Union objectives and obligations.”⁶ Therefore the Commission is under an obligation to report on ECAs’ compliance with these criteria, which include respect for human rights (see Section 2 below).

The Regulation entered into force in 2011. Member States submitted their first annual reports to the European Commission in 2012 at which point the European Commission has drafted its first assessment. This paper outlines Amnesty International’s concerns with the content of a number of EU Member States’ reports and the European Commission’s review of those reports.

2. Reporting on non-financial risks, including human rights

The importance of reporting on non-financial risks associated with commercial operations has been increasingly recognised as vital to the protection of human rights and the environment.⁷ The requirement under the EU Regulation in relation to the activities of ECAs is framed in terms of environmental risks that carry other relevant risks. This narrow phrasing is inconsistent with the preamble to the Regulation,⁸ which affirms that Member States should comply with the Union’s general provisions on external action - including respect for human rights - when establishing, implementing and supervising their ECAs. It is also inconsistent with the subsequent requirement for the European Commission to produce an annual review that includes an evaluation regarding the compliance of ECAs with Union objectives and obligations, which as noted above, include respect for human rights.

The EU’s general objectives, and its specific objectives in relation to external action, are contained in the Treaty on the European Union (TEU), which is legally binding on Member States. The relevant provisions are:

- Article 3, which states that “In its relations with the wider world, the Union ...shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of

⁴ Regulation N. 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2011/77/EC (Regulation N. 1233/2011), Art. 5, Annex I (2).

⁵ Regulation N. 1233/2011, Preamble at para 4

⁶ Regulation N. 1233/2011, Art. 5, Annex I (4).

⁷ UN Guiding Principles, Principles 3 and 21; OECD Guidelines for Multinational Enterprises, III. Disclosure

⁸ Regulation N. 1233/2011, Preamble at para 4

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.”⁹

- Article 21, which specifically requires that that EU “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.” Article 21 also states that the EU “shall promote multilateral solutions to common problems, in particular in the framework of the United Nations” and that the EU will “consolidate and support democracy, the rule of law, human rights and the principles of international law ... foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.”

The EU also has in place a common commercial policy. Under the terms of the Treaty on the Functioning of the European Union, “the common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.”¹⁰

The Treaty of Lisbon reinforces the Union’s commitment to human rights, both within the Union and externally. The Treaty established a new legal framework that places promotion and respect for human rights at the heart of EU external action. The Commission and Council have responded to this new legal framework with various policy and strategy statements.

In December 2011 the European Commission and the High Representative of the EU for Foreign Affairs and Security Policy issued a Communication, titled ‘Human Rights and Democracy at the Heart of the EU External Action,’¹¹ which states that “the EU’s obligation to respect human rights implies not only a general duty to abstain from acts violating these rights, but also to take them into account in the conduct of its own policies, both internal and external.” With respect to trade specifically, the Communication states that “the EU’s trade and human rights agenda needs to be coherent, transparent, predictable, feasible and effective. The challenge is to make trade work in a way that helps rather than hinders human rights concerns.” Recalling that the EU and Member States welcomed the UN Guiding Principles on Business and Human Rights, it also affirms that “European businesses should be encouraged to undertake adequate due diligence to ensure that their operations respect human rights, wherever they are performed.”

The recently adopted ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, endorsed by the Council in June 2012, also states that “the EU will promote human rights in all areas of its external action without exception.” More specifically, in relation to trade, the EU and its Member States commit to: i) develop methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements and

⁹ TEU Article 3, para 5

¹⁰ TFEU Article 207

¹¹ European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *Human Rights and Democracy at the Heart of the EU External Action*, Brussels, 12.12.2011, COM (2011) 886 final

ii) ensure that EU investment policy takes into account the principles and objectives of the Union's external action, including on human rights.¹²

Moreover, the EU Charter of Fundamental Rights has become legally binding on the EU institutions and Member States when they implement EU law. The European Commission's Strategy for the effective implementation of the Charter, which sets out a system to ensure that human rights concerns are identified and assessed throughout the legislative process and at implementation stage by Member States, also explicitly acknowledges that the Charter applies to the EU's external action.¹³

At minimum the foregoing would require that any evaluation by the European Commission of "the compliance of ECAs with Union objectives and obligations" should be able to consider if the actions or impacts of ECAs run contrary to Union obligations and objectives, as detailed above. This would require that Member States provide sufficient information, in their Annual Activity Reports, on the risks posed by ECA activity to the fundamental objectives of the Union, including respect for human rights, and on how these risks are addressed, and the Commission should include a specific evaluation of this information in its report to the European Parliament.

3. States, ECAs and Human Rights

States whose ECAs provide export credit support to businesses should ensure that such support is not given to business operations that cause or contribute to human rights abuses. When a State supports company activities in another country – as they do through ECAs – the State providing support should put in place safeguards to ensure that companies do not cause or contribute to human rights abuses. This requires the regulation of ECAs to ensure that they carry out mandatory due diligence processes to screen and assess projects and commercial activity in order to identify potential risks, and take appropriate action to ensure they are not supporting activity that causes or contributes to human rights violations.

Given that ECAs frequently support commercial activity in countries with weak or unstable governance systems where the risk of human rights abuses is often higher than in stable States, the need for adequate due diligence is particularly acute. The failure of a State to take adequate steps to prevent decisions and actions taken by its agencies - including ECAs - from leading to abuses in another country may, in some cases, represent a breach of the State's international legal obligations.¹⁴

The importance of States taking steps to this end is highlighted in the UN Guiding Principles on Business and Human Rights. Principle 4, on the state-business nexus, states:

“States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies **such as export credit agencies** and official investment insurance or guarantee agencies, including,

¹² Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, Luxembourg 25 June 2012, 1855/12, Objective 11, a) and c) Action plan

¹³ European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, Brussels, 19.12.2010, COM (2010) 573 final, p, 2,4.

¹⁴ Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (Article 12), UN. Doc. E/C.12/2000/4, 11 August 2000; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, available at: www.maastrichtuniversity.nl/humanrights, para 16.

where appropriate, by requiring human rights due diligence.”¹⁵ (emphasis added)

Principle 8, on policy coherence is also relevant:

“Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.”

Public reporting on the activities of ECAs, including due diligence actions and outcomes, should be seen as a vital component of States’ commitments to ensuring that they do not provide financial support to activities outside their borders that result in the abuse of human rights.

4. The 2012 EU Member States’ reports on the activities of their ECAs

Amnesty International reviewed the ECA reports of seven Member States, with particular attention to whether the reports reflected due diligence actions by ECAs in relation to human rights. The content of the reports reviewed was very limited. While a number of Member States noted that their ECA policy includes human rights risk assessments of credit applications, none of the reports provided any information on the application of such risks assessments or the outcomes. Some annual reports do not mention human rights. Some States say that they perform ‘social risk evaluations’; others do not even do that. The information available in the Member States’ reports reviewed falls far short of information that would be adequate to assess whether ECAs complied with Union objectives and obligations.

While the wording of the Regulation does not explicitly mention human rights, as noted above, the preamble text makes clear that the operation of ECAs should be consistent with respect for human rights. Moreover, beyond the Regulation itself, there is a strong case, as demonstrated above, for EU Member States to report on how their ECAs ensure that they do not support business operations or transactions that cause or contribute to human rights abuses, in order to increase transparency on the use of public funds.

5. The European Commission Assessment of Member States Reports

The European Commission initiative to assess Member States’ reports is welcome; however, the Commission’s first report has several weaknesses and it does not provide any guidance to Member States on how to improve reporting in the future.

Although the Commission report refers to its obligation to evaluate compliance with EU objectives, it does not include any statements of evaluation, only a series of statements about what policies some ECAs reported having in place. No assessment is made about the adequacy of these policies in relation to compliance with the objectives and obligations of the EU, particularly human rights.

¹⁵ UN Guiding Principles, Principles 4 and 8

The Commission report notes that “Several Member States¹⁶ explicitly attach importance to human rights considerations in export credits” but does not make any recommendation to those States that do not refer to human rights.

Claims by Member States that they adhere to certain international standards are insufficient to enable the Commission to evaluate ECAs’ respect for human rights. The Commission would need to consider the content of these standards in relation to the objectives of the Union.

The Commission reaches the conclusion that “It is difficult to define a precise benchmark for measuring “compliance” in EU law.” Amnesty International would argue that a minimum benchmark would be that ECAs have in place effective due diligence systems to ensure that they do not support projects or transactions that would lead to impacts that are contrary to the objectives and obligations of the EU as expressed in Articles 3 and 21 of the Treaty of Europe. All Member States ECAs should be able to demonstrate through reporting that they have in place adequate due diligence processes that are explicitly aimed at ensuring respect for human rights.

Amnesty International believes that the Commission is well placed to provide far better guidance to Member States and makes a number of recommendations in this regard, as well as recommendations to the Commission on improving its own assessment of Member States’ reports.

6. RECOMMENDATIONS TO THE MEMBER STATES OF THE EUROPEAN UNION

General Recommendations on the operation of ECAs

- States should establish a clear requirement for ECAs to exercise adequate due diligence to ensure that they do not support projects or other business actions that cause or contribute to human rights abuses. In the context of ECAs two levels of human rights due diligence are required:
 - (1) ECAs should perform adequate due diligence to ensure that the projects or other commercial activities they support do not result in human rights abuses.
 - (2) ECAs, in turn, should require client companies they support to carry out adequate human rights due diligence, **in relation to the project or activity for which ECA support is sought, to assess, prevent, mitigate, and monitor the human rights impacts of their operations.**
- **ECAs should clarify in the contractual agreements with clients that sanctions may be imposed on clients who fail to ensure adequate human rights due diligence and monitoring** of project impacts. Sanctions could include suspension of ECA funding, termination of insurance policies or blacklisting clients from future support.
- **ECAs must operate in an open and transparent manner and apply a policy of maximum disclosure of information on all projects receiving support** – information disclosed should include basic project details, any impact assessment and due diligence actions carried out, any subsequent evaluation, and clear information on the non-financial standards applied by the ECA to review the project.

¹⁶ For example Austria, Belgium, Denmark, Germany, Italy, Netherlands and Sweden

- Any exceptions to disclosure should be limited, clearly defined and narrowly-drawn.
 - Information should be made available and accessible in a timely manner, in formats that can be easily understood by people likely to be affected by supported projects.
- **States should place ECAs under stronger scrutiny by an independent oversight mechanism** – for example, parliamentary committees or other appropriate national processes.

Specific Recommendations on reporting in line with EU Regulation 1233/2011

States should ensure their ECA reporting in the context of EU Regulation 1233/2011 is significantly improved in the next reporting period and includes detailed information on the steps the ECA is taking to ensure that it does not support projects or transactions that cause or contribute to human rights abuses. This should include:

- Information on the full range of activities supported over the reporting period
- Specific information on support given to projects in high-risk sectors or areas, and how risks were addressed
- Information on the existence, outcome and effectiveness of due diligence measures/procedures
- Information on any supported project or transaction that has been the subject of concern (for examples, concern expressed by any stakeholder, including affected communities, civil society organizations or national agencies in other countries) over its social, human rights or environmental impacts, and action taken in respect of such concerns

7. RECOMMENDATIONS TO THE EUROPEAN COMMISSION

- The European Commission, in close cooperation and coordination with the Council and the European External Action Service, should develop clear guidance for Member States on the required content of reports for the next reporting period. This should be done as soon as possible to enable proper preparation by Member States. Guidance to the Member States should take the form of clear benchmarks that Member States can use in their reporting to demonstrate the compliance of their ECAs with Union objectives and obligations. These benchmarks should be reflected in a tool provided to Member States that requires more precise information on human rights (as well as social and environmental) risks and impacts associated with ECA support to business. This should include:
 - Does the ECA have a policy statement committing itself to ensure that it carries out due diligence to assess the human rights risks associated with projects and transactions the ECA is considering for support? A copy of the policy or a link to it should be provided.
 - The ECA should provide a description of how the due diligence process operates, specifying the process it uses to identify risks, the ECA's threshold for refusing support, the process for mitigating risks and monitoring.
 - Does the ECA have a requirement that clients carry out human rights due diligence as a condition of support? What specifically does the ECA require of clients?

- Has the ECA been made aware, during the reporting period, of any concerns with regard to projects or transactions that have resulted in harm to human rights or the environment? If so, what action was taken?
- In addition, the Commission, in close cooperation and coordination with the Council and European External Action Service, should provide specific guidance / questions that will enable ECAs to improve their processes and associated reporting in specific sectors. This should take the form of questions that are specific to well-known human rights risks associated with major projects in areas such as infrastructure and extractive industries.
- The Commission should ensure that its 2013 annual review for the European Parliament contains a thorough evaluation of Member States' ECA reports and the extent to which they demonstrate compliance with Union objectives and obligations. The Commission's annual review should also include a specific section on Recommendations aimed at supporting Member States to improve reporting where necessary.