

Evaluating European Union Export Credit Agencies Compliance with Regulation (EU) No 1233/2011

Preliminary Gap Analysis of OECD Common Approaches versus illustrative European Union objectives

submitted on behalf of ECA Watch

Summary

As part of continued advocacy with the European institutions on Export Credit Agencies (ECAs), European groups are working to enhance the reporting requirements of the EU ECAs under EU Regulation No 1233/2011.

The Regulation requires that the European Commission produces an annual evaluation "regarding the compliance of ECAs with Union objectives and obligations", specifically the "external action" obligations set out in Articles 3 and 21 of the Treaty of the European Union (TEU). These promote, inter alia, the consolidation of democracy, respect for human rights, policy coherence for development and action against climate change

The Commission argues that it is difficult to define a precise benchmark for measuring 'compliance' in EU law". Nonetheless, it has deemed member states compliant on the basis that their ECAs screen projects against the standards laid down in the OECD's Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The "Common Approaches").

This Memorandum argues that the proper benchmark should be the body of EU laws, directive and obligations that enforce the objectives set out in Article 3 and 21 of the TEU.

To date, the Commission has not undertaken any review to identify gaps between the Common Approaches and European legislation of environment and human rights. Yet, without such a gap analysis, claims that compliance with the Common Approaches is an appropriate benchmark for evaluating the compliance of ECAs with EU objectives and obligations lack credibility and constitute maladministration.

To assist the Commission, we have therefore conducted a preliminary gap analysis, comparing the scope of The Common Approaches against the scope of European legislation; and the requirements of the IFC's Performance Standards (one of the Common Approaches' recommended international benchmarks) against three key instruments of the European Acquis relating to environmental impact assessment, human rights and climate.

The Memorandum concludes that compliance with the Common Approaches is a wholly insufficient benchmark for evaluating compliance with the EU's External Action obligations.

A. BACKGROUND

Regulation (EU) No 1233/2011

1. On 8 December 2011, *Regulation (EU) No 1233/2011 of the European Parliament and of the Council on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC*¹ entered into force.
2. Recital 4 of the Regulation sets out the clearly expressed expectation that:

“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”.²

The Union’s general provisions on External Action are enshrined in Articles 3 and 21 of the Treaty of the European Union (TEU).

3. The Regulation also sets out reporting requirements.
 - Article 5 states:

“The transparency and reporting measures to be applied in the Union are set out in Annex I.”³
 - Annex 1, paragraph 1 states:

“Without prejudice to the prerogatives of the Member States’ institutions exercising the supervision of the national export credit programs, 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”.⁴
 - Annex 1, Paragraph 2 requires that:

“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**”.⁵

B. PROBLEM

Concerns over Commission Reporting

¹<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1233&from=EN>

² *ibid.*

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

4. In December 2012, the Commission transmitted its first Annual Report under the Regulation to the Committee on International Trade of the European Parliament (INTA) and the Council's Trade Policy Committee. The report⁶ acknowledged that Articles 3 and 21 of the TEU are an appropriate benchmark for evaluating the compliance of Member State export credit with Union objectives and obligations (for further discussion, see paras 10-15 below). However, the Commission did not make an explicit assessment of such compliance, arguing that "it is difficult to define a precise benchmark for measuring 'compliance' in EU law".⁷ Nonetheless it concluded that member states were in compliance. The same argument has been made in subsequent reports.
5. In February 2013, the INTA Committee of the European Parliament initiated an "own Initiative report", which was approved by an overwhelming majority in July 2013. The report concluded that the information provided by the Member States to the Commission, and the Commission's evaluation of these reports, "do 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".⁸

INTA also 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 Article 21 compliance".

The Ombudsman's Ruling

6. In 2016, ECA Watch submitted a complaint to the Office of the European Ombudsman, arguing that the Commission's annual reviewing of export credit agencies was inadequate and constituted maladministration.
7. In 2018, the Ombudsman upheld the Complaint, concluding that the Commission's "methodology and procedures could be improved".
8. In particular, the Ombudsman recommended that the Commission:

"should engage in a dialogue with Member States and other stakeholders with a view to improving the template used by Member States to compile the reports on export credit agencies which they are required to submit to the Commission each year. The Ombudsman also recommended that the Commission, for its part, should enhance the analysis and evaluation content of the annual reviews of export credit agencies which it submits to the European Parliament".⁹
9. The Commission undertook to consult the Council, Parliament and the European External Action Service, and engage with civil society, in order to implement the Ombudsman's recommendations – in particular by developing a revised checklist template to be used by Member States for their annual reports.

The European Acquis as embodiment of European Union objectives

⁶http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/annualreview_reg1233_/annualreview_reg1233_en.pdf

⁷http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/annualreview_reg1233_/annualreview_reg1233_en.pdf

⁸<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0193+0+DOC+PDF+V0//EN>

⁹<https://www.ombudsman.europa.eu/en/decision/en/107200>

10. As noted above, the Commission has held that it is difficult to define a precise benchmark in EU law for measuring ‘compliance’ with the EU objectives stipulated in Articles 3 and 21 of the TEU.¹⁰
11. We find this surprising as the Commission itself has stated that the “content, principles and political objectives of the Treaties” are embodied in the legally binding body of common rights and obligations known as the European Acquis.¹¹
12. The linkage between EU Directives and the objectives of the Union is specifically recognised in legislation. For example, *Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment* specifically states that it is intended “to achieve one of the objectives of the Union in the sphere of protection of the environment and the quality of life”.¹²
13. Many elements of the Acquis concern action within the EU and not external action outside the EU. Since Regulation (EU) No 1233/2011 only requires compliance with the EU’s External Action objectives, it would be disproportionate to expect the activities of ECAs to comply with the entire European Acquis. However, compliance with those elements that enforce the objectives set out in Article 3 and 21 of the TEU is a legitimate expectation. The External Action elements of the Acquis should therefore be the benchmark for evaluating ECA compliance with the EU’s foreign policy objectives as required under the Regulation.
14. The Treaty on the Functioning of the European Union provides further practical guidance as to explicit benchmark standards. Article 208 (paragraph 2), for example, states: “The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations”. It can be inferred that, as instruments of development cooperation, ECAs must therefore respect the provisions of international treaties that member states have concluded within the framework of the UN or other international organizations. Examples include the Aarhus Convention, the Espoo Convention and the Paris Agreement.
15. Our own analysis suggests that, in order to comply with the objectives singled out in Recital 4 of the Regulation, the activities and projects of EU member state ECAs should be compliant the following elements of the European Acquis:
 - Treaty of the Functioning of the European Union.
 - Treaty on European Union.
 - The European Charter of Fundamental Rights¹³ and/or the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁴, together with those UN human rights treaties that member states have adopted within the framework of the UN.

¹⁰http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/annualreview_reg1233_/annualreview_reg1233_en.pdf

¹¹ <https://eur-lex.europa.eu/summary/glossary/acquis.html>

¹² Recital 4, https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

¹³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

¹⁴ https://www.echr.coe.int/Documents/Convention_ENG.pdf.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has been ratified by the Member States of the EU (within the Council of Europe). The EU itself has not yet acceded; but under Art. 6 par. 3 of the Treaty on EU: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

- The Environmental Impact Assessment Directive as amended.¹⁵
- The EU Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive).¹⁶
- The Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora¹⁷.
- The EU Directive 2009/147/EC on the conservation of wild birds¹⁸.
- The EU Directive 2000/60/EC establishing a *framework* for Community action in the field of water policy¹⁹.
- The EU Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)²⁰.
- The EU Directive 2008/50/EC on ambient air quality and cleaner air for Europe²¹.
- The EU Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air²².
- The EU Directive 2008/98/EC on waste (Waste Framework Directive)²³.
- The EU Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control).²⁴
- The EU Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances.²⁵
- Aarhus and ESPOO conventions (including Directive 2003/4/EC and 2003/35/EC).
- Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change²⁶ (“The Paris Agreement”).

The Common Approaches

16. The Commission and member states have argued that ECA compliance with the European Union’s environmental and human rights objectives achieved through implementation of the OECD’s Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”).²⁷
17. The Common Approaches were adopted on 28 June 2012 and revised by the OECD Council on 6 April 2016. They set out a framework 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”. Unlike the Directives and other

¹⁵https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

¹⁶<https://ec.europa.eu/environment/eia/sea-legalcontext.htm>

¹⁷<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01992L0043-20130701>

¹⁸<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02009L0147-20190626>

¹⁹<https://eur-lex.europa.eu/legal-content/AUTO/?uri=CELEX:32000L0060&qid=1592317416032&rid=1>

²⁰<https://eur-lex.europa.eu/legal-content/AUTO/?uri=CELEX:32008L0056&qid=1592317599873&rid=1>

²¹<https://eur-lex.europa.eu/legal-content/AUTO/?uri=CELEX:32008L0050&qid=1592317735542&rid=1>

²²<https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:02004L0107-20150918&qid=1592317796324>

²³<https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:02008L0098-20180705&qid=1592318208664>

²⁴<https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:02010L0075-20110106&qid=1592318410028>

²⁵<https://eur-lex.europa.eu/legal->

<content/EN/TXT/PDF/?uri=CELEX:32012L0018&qid=1592318563030&from=EN>

²⁶<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1841&from=EN>

²⁷<https://legalinstruments.oecd.org/public/doc/280/280.en.pdf>

instruments that make up the European Acquis, the Common Approaches are not legally binding.

18. Under the Common Approaches, OECD member states are expected (but not required) to “benchmark projects against international standards as part of their environmental and social due diligence”. The standards that are recommended include:
 - The World Bank’s Safeguard Policies
 - The World Bank’s Environmental and Social Standards
 - The International Finance Corporations (IFC)’s Performance Standards
 - The World Bank Group EHS Guidelines
19. The Common Approaches allows for ECAs to “use other internationally recognised standards, such as European Union standards, that are more stringent than those standards referenced above” (para 26).

C. GAP ANALYSIS

20. A key question arises as to whether or not the Common Approaches are sufficiently robust and comprehensive to stand as “equivalent” to the obligations set out in the European Acquis.
21. **To date, the Commission has not (to our knowledge) undertaken any review to identify gaps between the Common Approaches and the European Acquis. Yet, without such a gap analysis, claims that compliance with the Common Approaches is an appropriate benchmark for evaluating the compliance of ECAs with EU objectives and obligations lack credibility and constitute maladministration.**
22. To assist the Commission, we have therefore compared the:
 - a) scope of The Common Approaches against the scope of the European Acquis
 - b) IFC’s Performance Standards (one of the Common Approaches’ recommended international benchmarks) against three key instruments of the European Acquis relating to environmental impact assessment, human rights and climate.

Gap Analysis 1: Scope and Assessment Thresholds

23. The Common Approaches only apply to officially supported export credits with a repayment term of more than two years. Other ECA products (support for bonds and working capital, for example)²⁸ are not covered. Military equipment or agricultural commodities are also excluded.
24. By contrast, there is no financial or other threshold below which the European Acquis does not apply. The objectives of the European Union are binding on member states in all circumstances.
25. A further issue is environmental assessment is limited to those where an ECA’s share of support is equal to or above SDR 10 million.²⁹
26. As a result, the vast majority of the export credits provided by ECAs are not subject to any form of environmental assessment.

²⁸ [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg\(2016\)3](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg(2016)3)

²⁹ OECD Common Approaches, paras 6-8,

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg\(2016\)3](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg(2016)3)

27. It is, however, open for ECAs to go beyond the Common Approaches and to screen and assess all projects. A number of OECD members already do so, including some EU member states (for example, The Netherlands).
- 28. Where projects are exempted from environmental screening, it is clearly impossible to ensure compliance with Article 3 and 21 of the TEU. It is therefore evident that adherence to the screening and assessment requirements of the Common Approaches alone is insufficient to ensure compliance with the European Union’s foreign policy goals: to comply all projects must be screened. The Commission’s Annual Report should reflect this.**

Gap Analysis 2: Environmental Impact Assessment

29. Table 1 below compares the main elements of the EU’s main environmental impact assessment instruments – The Environmental Impact Assessment Directive (85/337/EEC) as amended³⁰ and the EU Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)³¹ – with the IFC’s Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts.³²
30. Both of the EU Directives explicitly state that they are intended to fulfil the objectives of the Union in the sphere of protection of the environment.³³
31. By contrast, the objective of PS1 (para 1) is merely to provide *guidance* on identifying, avoiding, mitigating and managing risks and impacts of projects “as a way of doing business in a sustainable way”. Sustainable development is only part of the EU’s objectives.
32. Given that the Commission is charged with evaluating the compliance of member state ECAs with the European Union’s objectives and obligations, the benchmark used for comparing the two sets of standards is whether specified actions are mandatory, since discretion automatically allows for non-compliance. A positive green tick (✓) is used where the action is mandatory: where the action is either absent from the standard or discretionary, ⊗ is used.
33. We note that both the EIA Directive and the Common Approaches³⁴ allow for environmental assessment to be waived in its entirety. However in both cases, this is only in exceptional circumstances. In the OECD case, a justification must be given to the Export Credit Group of the OECD: by contrast, the EU EIA requires that the public are informed of the decision. The EU EIA adds a further condition: that the objectives of the Directive must still be met.³⁵

³⁰Informal Consolidated Version of EIA Directive, European Commission, https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

³¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0042&from=EN>

³² https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQlfe

³³ EIA Directive Recital 4, https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf | SEA Directive Recital 1-8, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0042&from=EN>

³⁴ OECD Common Approaches, para 30, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg\(2016\)3](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg(2016)3).

³⁵ Article 2 (as amended) specifies that member states "may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in the Directive . . . provided the objectives of the Directive are met". The public must be informed. Where a project is adopted by a specific act of national legislation, the provisions related to public consultation may also be waived, provided the objectives of the Directive are met.

Table 1:
EU Environment Impact Assessment Instruments versus IFC Performance Standard
1

	EU EIA	IFC PS1	Comments
Mandatory screening of all projects	✓	✓	
Mandatory disclosure of screening decision	✓	⊘	
Mandatory assessment for specified projects	✓	⊘	
Precautionary Principle Applies	✓	⊘	
Polluter Pays Principle Applies	✓	⊘	
Compliance with local law required	✓	✓	
Mandatory disclosure of project information	✓	✓	
Grievance Mechanism enforceable through courts is required	✓	⊘	PS1 requires a grievance process but makes no requirement that the public be able to challenge decisions before a court
Mandatory public consultation	✓	⊘	PS1 only requires consultation where impacts have been identified, leaving scope for discretion.
Legally-binding right of public to participate in decision-making	✓	⊘	PS1 requires stakeholder engagement and participation but it is not a legally binding right
Requirement to consult on transboundary impacts	✓	⊘	PS1 only requires identification of transboundary impacts not consultation on them
Mandatory climate impact assessment	✓	✓	
Mandatory assessment of	✓	✓	The EU requirements are set

wider impacts beyond project			out in the SEA Directive
Mandatory consideration of supply chain risks	⊘	✓	
Mandatory identification of vulnerable groups and adoption of differentiated measures to mitigate impacts	⊘	✓	
Prior Informed Consent required for indigenous communities	⊘	✓	PSI requires FPIC but only in “certain circumstances”.

Commentary:

Mandatory screening

- EU EIA Directive: Article 4 requires all projects to be screened to determine whether an EIA is necessary.
- PS1: Requires all projects to be screened to determine whether an EIA is necessary.³⁶ As already noted, the Common Approaches requires screening of all projects but those where the ECA’s share of support is below SDR 10 million are automatically excluded from further assessment.³⁷

Mandatory disclosure of screening decision

- EU EIA Directive: Article 4 (5) requires that once a decision has been made on whether an EIA is required, a “Screening Decision” must be issued and made public.³⁸
- PS1: There is no requirement to disclose screening decisions.
- The Common Approaches encourages disclosure of all screened projects but, other than for Category A (high impact) projects, there is no requirement to do so prior to the project support being approved.

Automatic assessment for specified projects

- EU EIA Directive: Annex 1 lists projects that automatically require an EIA. These include long-distance railway lines, motorways and express roads. A separate list (Annex II) allows for discretion in assessing.
- PS1: No list of projects that must be assessed automatically.

Precautionary Principle and Polluter Pays Principle

³⁶ IFC, Guidance Note 1: Assessment and Management of Environmental and Social Risks and Impacts, para 18, https://www.ifc.org/wps/wcm/connect/6df1de8f-2a00-4d11-a07c-c09b038f947b/GN1_English_2012.pdf?MOD=AJPERES&CVID=mRQjKE9

³⁷ OECD Common Approaches, paras 6-8,

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg\(2016\)3](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/ecg(2016)3)

³⁸ European Commission, Environmental Impact Assessment of Projects Guidance on Screening, 2017, p.14, https://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf

- EU EIA Directive: The recital affirms that European Union policy on the environment “is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority be rectified at source and that the polluter should pay”.
- PS1: No mention of either the Precautionary Principle or the Polluter Pays Principle.

Compliance with local law required

- EU EIA Directive: The directive become national law and compliance is obligatory. Member states may introduce higher standards but not lower ones.
- PS1: Requires that project complies with “the applicable laws and regulations of the jurisdictions in which it is being undertaken” (para 6).

Mandatory disclosure of Information

- EU EIA Directive: Article 4 (5) and Article 6(5) require, respectively, disclosure of screening decisions and of environmental assessment.
- PS1: The project developer must “provide Affected Communities with access to relevant information on: (i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process; and (v) the grievance mechanism” (para 29).
- The Common Approaches only requires disclosure for Category A projects.

Mandatory Consultation with public

- EU EIA Directive: Article 6 (5) requires that the public is informed and consulted (for example through a public inquiry) about the project under consideration. Authorities must “take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level”.
- PS1: Consultation is required where Affected Communities “are subject to identified risks and adverse impacts from a project”. Opportunities must be available for Affected Communities “to express their views on project risks, impacts and mitigation measures” and for project developers “to consider and respond to them”.

Legally-binding Right of Public to Participate in decision-making

- EU EIA Directive: The recital underlines the importance of participation by the public in decision making and affirms the legal obligation to ensure such participation under Article 6 of the Aarhus Convention.
- PS1: requires the development and implementation of a “Stakeholder Engagement Plan” that is “scaled to the project risks and impacts and development stage” and “tailored to the characteristics and interests of the Affected Communities” (para 27). However, there is no legally-binding right to participate in decision making.

Grievance Mechanism enforceable through courts

- EU EIA Directive: Article 11 requires that members of the public “have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive”.
- PS1 (para 35) requires a grievance mechanism to be established to receive and facilitate resolution of Affected Communities' concerns but does not require access to judicial and administrative remedies.

Requirement to consult on transboundary impacts

- EU EIA Directive: Article 7(4) and Article 8 require that consultations are carried out with affected neighbouring states “regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects”; and that the results are taken “duly taken into account”.
- PS1: requires identification of “potential transboundary effects, such as pollution of air, or use or pollution of international waterways” (para 7). There is no requirement to consult with affected states.

Mandatory Climate Risk Assessment

- EU EIA Directive: Recital (as amended) stresses that climate change considerations are an important element in assessment and decision-making processes and that it is “appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change”. Article 3 (as amended) requires identification, description and assessment of the direct and indirect significant effects of a project on climate.
- PS1: Requires consideration of “the emissions of greenhouse gases, the relevant risks associated with a changing climate and the adaptation opportunities” (para 7).

Mandatory assessment of wider impacts beyond project

- EU EIA Directive: Article 3 (as amended) requires assessment of the “direct and indirect significant effects of the project” on population and human health, biodiversity, land, soil, water, air, climate, material assets, cultural heritage and the landscape and the interaction of these factors.
- PS1: Requires identification of “environmental and social risks and impacts . . . in the context of the project’s area of influence”. These include impacts “from unplanned but predictable developments caused by the project that may occur later or at a different location”; the “indirect project impacts on biodiversity or on ecosystem services upon which Affected Communities’ livelihoods are dependent”; associated facilities that would not have been constructed or expanded if the project did not exist and without which the project would not be viable”; and “cumulative impacts that result from the incremental impact on areas or resources used or directly impacted by the project” (para 8). Such impacts must be addressed in a manner commensurate with the project developer's control and influence over the third parties (para 9).

Identification of Supply Chain risks

- EIA Directive: There is no mention of assessing supply chain impacts.
- PS1: Where a project developer can “reasonably exercise control”, the risks and impacts identification process must also consider “the risks and impacts associated with primary supply chains” (para 10)

Mandatory identification of vulnerable group

- EIA Directive: There is no mention of special provisions for vulnerable groups.
- PS1: Project developers are required to identify individuals or groups who are disadvantaged or vulnerable and to “propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities” (para 12).

Mandatory Free Prior Informed Consent for Indigenous Communities

- EIA Directive: There is no mention of obtaining Free Prior Informed Consent (FPIC) from indigenous peoples. However, FPIC is recognised by the EU through other instruments,

notably the Convention on Biodiversity. The European Council³⁹ has also confirmed the EU's support for the right indigenous peoples' right to their "self-development", including the right to object to projects, in particular in their traditional areas, and the right to full and effective participation of indigenous peoples at all stages of the project cycle."⁴⁰

- **PS1:** For projects that have adverse impacts for Indigenous Peoples, the project developer is required in certain circumstances to obtain their Free, Prior, and Informed Consent (FPIC) (para 32).

Gap Analysis 2: Human Rights

34. The Common Approaches takes a broad discretionary approach to human rights. It promotes the compliance with relevant international agreements and conventions as well as encourages protection and respect for human rights (Objectives, para 3(i), 4(iv)). It distinguishes human rights risk during the screening, yet only recommends, but does not require, that "Where there is a high likelihood of severe project-related human rights impacts occurring, the environmental and social review of a project may need to be complemented by specific human rights due diligence" (para 14).
35. The same approach is taken in the IFC's performance standards. Although there is wording encouraging "respect" for human rights, there is no obligation to conduct human rights due diligence. Some rights, however, are protected through requirements to undertake specific actions (for example ensuring environmental assessment or consultation). Nonetheless, the discretionary nature of the approach to human rights means that compliance with the IFC Performance Standards cannot be taken as evidence of compliance with the Union's foreign policy objectives and obligations.
36. By contrast, the body of human rights laws that EU member states have adopted within the framework of the UN, together with other human rights instruments such as the EU's Charter of Fundamental Rights⁴¹ and The European Convention for the Protection of Human Rights and Fundamental Freedoms are legally binding and judiciable.
37. Table 2 compares the fundamental human rights guaranteed by UN, member states' and EU legislation with the provisions of the 8 IFC Performance Standards. Again, a positive green tick (✓) is used where the action is mandatory: where the action is either absent from the standard or discretionary, ⊘ is used.

³⁹ Council Resolution of 30 November 1998 "Indigenous peoples within the framework of the development cooperation of the Community and the Member States".

⁴⁰ European Commission, Joint Staff Working Document, Implementing EU External Policy on Indigenous Peoples, <http://gitpa.org/web/europe.pdf>

⁴¹ <https://www.consilium.europa.eu/media/29726/qc0116985enn.pdf>

TABLE 2
Fundamental Human Rights Versus IFC Performance Standards

Right	EU Charter	PS1: Environment	PS2: Labour	PS3: Pollution	PS4: Health	PS5: Land acquisition ⁴²	PS6: Biodiversity	PS7: Indigenous Peoples	PS8 Cultural Heritage
Human Dignity	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to Life	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to integrity of the person	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Prohibition of torture and inhuman or degrading treatment or punishment	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Prohibition of slavery and forced labour	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to liberty and security	✓	⊗	⊗	⊗	⊗	✓	⊗	✓	
Respect for private and family life	✓	⊗	⊗	⊗	⊗	✓	⊗	✓	
Protection of personal data	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Right to marry and right to found a family	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Freedom of thought, conscience and religion	✓	⊗	⊗	⊗	⊗	✓	⊗	✓	
Freedom of expression and information	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Freedom of assembly and of association	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Freedom of the arts and sciences	✓	⊗	⊗	⊗	⊗		⊗	⊗	
Right to education	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Freedom to choose an occupation and right to engage in work	✓	⊗	✓	⊗	⊗	✓	⊗	⊗	

⁴² There is a requirement to comply with host country obligations under international law (para 5). For most countries this would mean complying with Universal Declaration of Human Rights. Hence the boxes gets ticked in most cases.

Freedom to conduct a business	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to property	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to asylum	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Protection in the event of removal, expulsion or extradition	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Equality before the law	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Non-discrimination	✓	✓	✓	✓	✓	✓	✓	✓	
Cultural, religious and linguistic diversity	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Equality between women and men	✓	⊗	✓	⊗	⊗	✓	⊗	⊗	
Rights of children to protection and care	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Rights of the elderly to dignity and independence	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Integration of persons with disabilities	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Workers' right to information and consultation within the undertaking	✓	⊗	✓	⊗	⊗	✓	⊗	⊗	
Right of collective bargaining and action	✓	⊗	✓	⊗	⊗	✓	⊗	⊗	
Right of access to placement services	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Protection in the event of unjustified dismissal	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to Fair and just working conditions	✓	⊗	✓	✓	✓	✓	⊗	⊗	
Prohibition of child labour and protection of young people at work	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to family and professional life	✓	⊗	⊗	⊗	⊗	✓	⊗	✓	
Right to social security and social assistance	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Right of access to Health care	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Right to access to services of general economic interest	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	

Right to Environmental protection	✓	✓	⊗	✓	✓	⊗	✓	✓	
Right to Consumer protection	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Right to vote and stand as candidate	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Right to good administration	✓	⊗	⊗	⊗	⊗	⊗	⊗	⊗	
Right of access to documents	✓	✓	✓	✓	✓	✓	✓	✓	
Right to petition	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Freedom of movement and of residence	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right to an effective remedy and to a fair trial	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Presumption of innocence and right of defence	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Principles of legality and proportionality of criminal offences and penalties	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	
Right not to be tried or punished twice in criminal proceedings for the same criminal offence	✓	⊗	⊗	⊗	⊗	✓	⊗	⊗	

Commentary:

Performance Standard 1 – Assessment and Management of Environmental and Social Risks and Impacts:⁴³ PS1 states that “Business should respect human rights” (para 3) but does not impose an obligation to do so. There is no requirement to conduct human rights due diligence. Even in "limited high-risk circumstances", the advice is only that such due diligence "may be appropriate" (Footnote 12). Nonetheless, some specific requires of PS1 serve to protect rights. For example, the requirement to ensure that project impacts do not fall disproportionately on vulnerable groups uphold the right to freedom from discrimination. The requirements to conduct an environmental impact assessment similarly respect the right to environmental protection. PS1 also requires disclosure of environmental impact assessments, in line with the right of access to documents.

Performance Standard 2 – Labour and Working Conditions:⁴⁴ The PSI does not make any general statement on the need to respect or promote human rights or impose any obligation to do so. There is no requirement for human rights due diligence. However, it requires a number of measures that uphold labour rights, including respecting collective bargaining (paras 10, 13, 14), ensuring non-discrimination and equal opportunity (para 11, 15, 16), respecting workers’ freedom of movement and of association (para 12, 13, 14), prohibiting forced labour (para 22), providing a safe and healthy

⁴³ https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQIfc

⁴⁴ https://www.ifc.org/wps/wcm/connect/88f1f09e-5fe4-4fad-9286-33ecb221ab23/PS2_English_2012.pdf?MOD=AJPERES&CVID=jiVQIns

working environment (para 23). There is also a requirement to conduct due diligence where there is a risk of child or forced labour in the supply chain (para 27). However, PS2 does not prohibit child labour – it is permitted provided the child is not employed “in any manner that is economically exploitative, or is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral, or social development” (para 21).

Performance Standard 3 – Resource Efficiency and Pollution Prevention:⁴⁵ The PSI does not make any general statement on the need to respect or promote human rights or impose any obligation to do so. There is no requirement for human rights due diligence. However, the measures required to encourage the efficient use of resources and to prevent pollution uphold the right to environmental protection and the Right to fair and just working conditions. The procedural requirements are the same as for Performance Standard 1 (para 3): rights to consultation, participation, non-discrimination and document disclosure are thus upheld.

Performance Standard 4 – Community Health, Safety and Security:⁴⁶ Human rights are not mentioned at all in PS4. The PSI does not make any general statement on the need to respect or promote human rights or impose any obligation to do so. There is no requirement for human rights due diligence. Nonetheless, the measures taken “to avoid or minimize risks to and impacts on the health and safety of the local community during the project life cycle from both routine and non-routine circumstances” and to “ensure that the safeguarding of personnel and property is carried out in a legitimate manner that avoids or minimizes risks to the community’s safety and security” uphold a number of rights. These include: the right to environmental protection and the Right to fair and just working conditions. The procedural requirements are the same as for Performance Standard 1 (para 3): consultation, participation and document disclosure are required. There is no specific prohibition of torture by security personnel: PS4 merely requires that “unlawful or abusive acts of security personnel” are investigated and action is taken “to prevent recurrence” (para 15).

Performance Standard 5 – Land acquisition and involuntary resettlement:⁴⁷ The PSI does not make any general statement on the need to respect or promote human rights or impose any obligation to do so. There is no requirement for human rights due diligence. There is, however, a requirement to comply with host country obligations under international law (para 5). For most countries this would require compliance with the International Declaration of Human Rights and hence with the majority of the rights guaranteed under the European Charter. Community engagement is required (para 10) as is a grievance mechanism (although there is no requirement for enforceability through courts) (para 11). There is a requirement to consult with affected persons (para 14). The procedural requirements for conducting resettlement plans are the same as for Performance Standard 1 (para 4): rights to consultation, participation, non-discrimination and document disclosure are thus upheld.

Performance Standard 6 – Biodiversity Conservation and Sustainable Management of Living Natural Resources:⁴⁸ The PSI does not make any general statement on the need to respect or

⁴⁵ https://www.ifc.org/wps/wcm/connect/1f9c590b-a09f-42e9-968c-c050d0f00fc9/PS3_English_2012.pdf?MOD=AJPERES&CVID=jiVQIwF

⁴⁶ https://www.ifc.org/wps/wcm/connect/f69651b9-3080-4870-a9c5-7d5ee8cb1af7/PS_4_CommHealthSafetySecurity.pdf?MOD=AJPERES&CVID=jqeu2Wm

⁴⁷ https://www.ifc.org/wps/wcm/connect/75de96d4-ed36-4bdb-8050-400be02bf2d9/PS5_English_2012.pdf?MOD=AJPERES&CVID=jqex59b

⁴⁸ https://www.ifc.org/wps/wcm/connect/3baf2a6a-2bc5-4174-96c5-eec8085c455f/PS6_English_2012.pdf?MOD=AJPERES&CVID=jxNblCO

promote human rights or impose any obligation to do so. There is no requirement for human rights due diligence. However, the measures required to encourage the efficient use of resources and to prevent pollution uphold the right to environmental protection. The procedural requirements for conducting resettlement plans are the same as for Performance Standard 1 (para 4): rights to consultation, participation and document disclosure are thus also upheld.

Performance Standard 7 – Indigenous Peoples:⁴⁹ PS7’s explicit objective is “to ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples” (para 2). As such it recognises the cultural rights of indigenous peoples and requires that they be upheld (para 11) – for example, through the requirement to obtain Free Prior Informed Consent from indigenous peoples for projects that affect them, but only under limited circumstances (paras 12-17). However, there is no requirement to carry out specific human rights due diligence. The procedural requirements are the same as for Performance Standard 1 (para 3): rights to consultation, participation, non-discrimination and document disclosure are thus upheld.

Performance Standard 8 – Cultural Heritage:⁵⁰ The PSI does not make any general statement on the need to respect or promote human rights or impose any obligation to do so. There is no requirement for human rights due diligence. The procedural requirements are the same as for Performance Standard 1 (para 3): rights to consultation, participation, non-discrimination and document disclosure are thus upheld.

Gap analysis 3: Climate

38. The Paris Agreement is adopted at EU level as well as at national level of EU Member States and thus it should be binding on Member States agencies. The EU’s objectives and interests include the EU’s commitments under the Paris Agreement. As such the Paris Agreement is an EU objective. Article 2.1c of the Paris Agreement states that finance flows should be made consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.⁵¹
39. The reserves in currently operating oil and gas fields alone, even with no coal, would take the world beyond 1.5°C. The potential carbon emissions from the oil, gas, and coal in the world’s currently operating fields and mines would take us beyond 2°C of warming.⁵²
40. EU EIA Directive: Recital (as amended) stresses that climate change considerations are an important element in assessment and decision-making processes and that it is “appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change”. Article 3 (as amended) requires identification, description and assessment of the direct and indirect significant effects of a project on climate. A description should be made of the likely significant effects of the project on the environment resulting from, inter alia the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change.⁵³
41. The Performance Standards ask clients to consider:

⁴⁹ https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7_English_2012.pdf?MOD=AJPERES&CVID=jiVQI.D

⁵⁰ https://www.ifc.org/wps/wcm/connect/a02b1f32-1d64-4454-a7c4-aac49c9daa04/PS8_English_2012.pdf?MOD=AJPERES&CVID=jiVQJ7k

⁵¹ https://unfccc.int/sites/default/files/english_paris_agreement.pdf

⁵² <http://priceofoil.org/2016/09/22/the-skys-limit-report/>

⁵³ Annex 4, 5f.

- a. the emissions of greenhouse gases and relevant risks associated with a changing climate in the identification process.
- b. the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change.
- c. alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions during the design and operation of the project. These options may include, but are not limited to, alternative project locations, adoption of renewable or low carbon energy sources, sustainable agricultural, forestry and livestock management practices, the reduction of fugitive emissions and the reduction of gas flaring.
- d. for projects that are expected to or currently produce more than 25,000 tonnes of CO₂ - equivalent annually, quantify direct emissions from the facilities owned or controlled within the physical project boundary, as well as indirect emissions associated with the off-site production of energy used by the project. Quantification of GHG emissions will be conducted by the client annually in accordance with internationally recognized methodologies and good practice.

42. Both the EU EIA directive and IFC PS ask for action on climate change. Both do not go as far as to put a limit to support for fossil fuel related projects. The major difference is that the EU has adopted the Paris Agreement and therefore has put a limit on global temperature rise. It is the responsibility of governmental agencies like export credit agencies to contribute to achieving this limit. Also the EU legislation is legally binding on member states and thus on their agencies.

43. Political processes around the European Green Deal and the European Climate Law highlight the European legislative agenda. The IFC PS are not following that same political process. The policy framework of ECAs, if left with only the Common Approaches, IFC PS, etc, is therefore in serious threat to conflict with political and legal obligations coming from the EU.

D. CONCLUSION

The above gap analyses, even though only preliminary, strongly suggests that compliance with the OECD Common Approaches is an entirely deficient benchmark for evaluating compliance of EU member state ECAs with the EU's External Action obligations.

The proper benchmark for evaluating compliance is those elements of the European Acquis that are intended to enforce Articles 3 and 21 of the TEU.

It is entirely open for EU member states to use European Union standards for the screening and evaluation of projects, even if those standards only have legal force for projects within the EU. Indeed, as noted, the use of EU standards is approved under the Common Approaches.

The Commission should in future employ the use of EU standards as a key test for evaluating the compliance of member state ECAs with the EU's external action obligations. Not to do so would, in our view, constitute **maladministration**.