



German Advisory Group

Policy Paper Series [PP/03/2017]

## **An Export Credit Insurance Agency for Ukraine: Analysis of the current legislation and the Statute**

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Berlin/Kyiv, August 2017

## About the German Advisory Group

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The German Advisory Group on Economic Reforms, which has been active in Ukraine since 1994, advises the Ukrainian Government and other state authorities such as the National Bank of Ukraine on a wide range of economic policy issues and on financial sector development. Our analytical work is presented and discussed during regular meetings with high-level decision makers. The group is financed by the German Federal Ministry for Economic Affairs and Energy.

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## **An Export Credit Insurance Agency for Ukraine: Analysis of the current legislation and the Statute**

### **Executive Summary**

In late December 2016, the Ukrainian Parliament adopted a law on the establishment of an Export Credit Insurance Agency (ECA) in Ukraine. In principle, the decision to establish an Export Credit Agency in Ukraine is understandable and deserves support. Ukraine has had discussions about this topic for much more than a decade and several previous attempts have not led to any results. Compared to other countries Ukraine is one of the very few important industrialized countries which have not yet established an ECA.

Since the state budget foresees no funding in 2017, the agency is not yet operational. As agreed with the IMF, the authorities will make the ECA operational only once all costs and capital needs are identified for the next three years and included in the state budget. This should be seen as a chance, as it gives some time to amend the legal framework further, and adopt the necessary secondary legislation. The amendments should be done before the ECA becomes operative.

Our analysis of the adopted law and the draft Statute reveals the following points:

1. General remarks on the Law and Statute: If the Law and the Statute should be amended in a more fundamental way, a re-balancing between both documents could be considered. The ECA-Law should focus (only) on key objectives, main governance regulations and financial framework of the ECA. More operational matters should (only) be regulated by legal documents below the level of a state law, most suitably by the Statute of the ECA. This could also reduce the large number of often literal repetitions in both documents.
2. Capitalization and state support: The limited state support and the low level of capitalization is a fundamental structural weakness for the ECA. An ECA needs either a strong capitalization, or a strong and reliable state support to achieve its objectives in the case of possible future financial difficulties.
3. Interest rate compensation: It is strongly recommended not to establish any kind of interest subsidization.
4. Corporate Governance: The distribution of responsibilities between Cabinet of Ministers, General Shareholders Meeting, Supervisory Board and Management Board should be discussed again. We recommend having Independent Directors in the Supervisory Board.
5. Goods, works, services supported: The term “originating in Ukraine” for goods, works and services to be supported seems to be not precise enough.
6. Areas for support: Taking into account (5), the support of the ECA should be open to all types of goods, works and services.
7. Types and conditions for ECA operations: We strongly recommend that investment insurance should only cover non-commercial risks, but never commercial risks.
8. Special status of ECA: The regulatory rules must be worked out very carefully and must guarantee a comparable level of solvency, good governance, financial regulation and control like the one foreseen in the Law on Insurance.

The amount of time foreseen in the Law for the establishment of the ECA is much too short. The Agency should be given sufficient time for a careful and proper set-up. The ECA’s product portfolio should be carefully and selectively built up based on the highest short term value for Ukrainian exporters. Since the covered exports will partly be directed to EU and OECD markets, it makes very much sense to start the ECA from the outset with a public account for non-marketable risks and an own account for marketable risks, respectively.

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## 1. Introduction

Export Credit Insurance has proven its ability to foster export performance and to increase the competitiveness of national export industries. With the help of an Export Credit Insurance Agency (ECA), many countries have rapidly and significantly increased their integration into global trade. Particularly for non-traditional branches of the industry, export credit insurance offers instruments to open up markets and assure a fruitful and financially sound economic development.

With the “Law of Ukraine on Providing for Large-Scale Export Expansion of Goods (Works, Services) Originating in Ukraine through Insurance, Guarantees and Cheapening of Export Credits”<sup>1</sup> that was adopted at the end of 2016 and later signed by the President, Ukraine has established the legal basis for such a state-owned agency. However, since the budget law for 2017 did not foresee any funding, and the respective secondary legislation is not yet adopted, the planned agency is not operational so far<sup>2</sup>.

The objective of this policy paper is to contribute to the ECA discussion in Ukraine. Specifically, we provide comments to the law recently adopted, as we think a number of features should be reconsidered and eventually changed. In addition, we provide some comments to the draft Statute of the ECA that has not been adopted yet. The paper is structured as follows: In chapter 2, we highlight some basic features of credit insurance. The analysis of the Ukrainian ECA law and Statute and our recommendations can be found in chapter 3.

## 2. Basic features of credit insurance

Export Credit Insurance provides insurance cover against the non-payment of export claims due to commercial and/or political risks. Cover can be given for one individual transaction or for consecutive deliveries to one and the same foreign buyer or to various buyers in a multitude of countries. The core activity of the credit insurer is to check the creditworthiness of the foreign buyer and to analyze the political risk of the buyer country. A satisfactory result is a precondition for granting a credit limit which then can be used by the exporter for one or several deliveries to this foreign buyer.

The art of underwriting is the key know-how and the unique selling proposition of a Credit Insurer. If the credit assessment is too rigid, too strict, the credit insurance product loses its value for the customers because too few transactions are finally protected. If the credit policy is too loose, the Credit Insurer takes in too high risks and puts the own balance sheet into danger.

“Sound Underwriting” is the key word and the very difficult challenge for Credit Insurers. And this is not only a question of one specific foreign buyer’s creditworthiness; it is also a question of risk portfolio composition, accumulation of country risks, of a possible over-exposure in certain industry branches etc. Therefore Credit Insurance needs highly qualified employees with a long lasting industry experience. Compared with other branches of the insurance industry Credit Insurance continues to be a high risk operation. However, the data base and risk management techniques have significantly improved in the last years. Most or even all Credit Insurers currently present commercially viable results. This demonstrates that the whole Credit Insurance Industry has meanwhile achieved a mature level.

Credit Insurance is not to get free of charge. But it is usually much less expensive than comparable bank products. And Credit Insurance is often available when bank credit is not or so expensive that it is not affordable for exporters. For credit insurance cover the exporter has to pay certain fees for the

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<sup>1</sup> Law dated 20. December 2016 No. 1792-VIII, Vidomosti Verkhovnoi Rady Ukrainy, VVR 2017, No. 4, p. 43

<sup>2</sup> In the latest version of the cooperation memorandum with the IMF (Ukraine: 2016 Article IV Consultation and third review under the Extended Arrangement, Letter of Intent, April 2017), the authorities pledge to make the ECA operational only after all costs and capital needs are identified for the next three years and included in the state budget.

credit risk analysis and an insurance premium for the risk coverage. The insurer normally covers 85-90 percent of the claim and in an insured cause of loss the indemnification will be paid out after a certain waiting period of usually six months.

Global experience with credit insurance proves that there are a number of undeniable benefits of the existence of credit insurance systems:<sup>3</sup>

- Improved access for national exporters to global trade markets;
- Diversification of export markets;
- Increasing the share of SME's in export business;
- Shifting financial risks from exporter's balance sheet to an ECA or financing bank;
- Making trade finance available for exporters which would otherwise have no or limited access to bank credit;
- Reducing interest rate for export credits to levels of sovereign risk for covered portion of the export credit;
- Strengthening and further developing international competitiveness of national exporters;
- Acceleration of export growth, particularly in non-traditional branches of the industry.

The official Export Credit Agencies usually offer risk protection against risks which are characterized as "non-marketable". The purpose of official ECAs thus is to fill a market gap. Under WTO-Regulations export subsidies are in principle prohibited. Export Credit Insurance is allowed according to the WTO Agreement on Subsidies and Countervailing Measures (ASCM) only if the premium rates are adequate to cover the long-term operating costs and losses of the programs.<sup>4</sup> The rationale behind this regulation is that state-supported export credit insurance shall not become an export subsidy. Furthermore amongst the industrialized and emerging markets being members of the OECD there is a common understanding that competition between exporters should be based on quality and price of goods and services exported rather than on the most favorable officially supported financial terms and conditions.<sup>5</sup> The state-linked ECAs shall therefore cover only risks which are normally not covered by the private sector, e.g. transactions with medium/long repayment terms for risks outside of high income industrialized countries<sup>6</sup>, unless there is a proven market gap for a high income industrialized country, and short term risks in countries classified "non-marketable". According to an EU Communication "non-marketable countries" are currently defined as all countries outside of EU and OECD. The EU- or OECD-countries Chile, Greece Israel, Mexico, South Korea und Turkey are currently also treated as non-marketable.<sup>7</sup>

These OECD principles and EU-Regulations have developed into internationally shared best practice of modern credit insurance business far beyond OECD or EU member countries. The world of credit insurance therefore in principle is separated into two segments, the private and the state account

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<sup>3</sup> Recent economic research: *Auboin/Engemann*, Testing the Trade Credit and Trade Link: Evidence from Data on Export Credit Insurance, World Trade Organization, Economic Research and Statistics Division, Staff Working Paper ERSD-2012-18, 28.02.2013; *Felbermayr/Yalcin*, Export Credit Guarantees and Export Performance: An Empirical Analysis for Germany, *The World Economy*, Vol. 36 (8), 2013, p. 967-999

<sup>4</sup> WTO ASCM, Illustrative List of Export Subsidies, lit. j.

<sup>5</sup> OECD Arrangement on officially supported Export Credits, so-called OECD Consensus, current edition of 01.02.2017.

<sup>6</sup> Usually longer than a 2 years risk period.

<sup>7</sup> Communication of the EU Commission, EU Official Journal 2014 C 392. The exceptional treatment for Greece as "non-marketable" has recently been extended until 30. June 2018, see Communication of the EU Commission, EU Official Journal 2017 C 206/1

insurers. There are some smaller overlaps however. And, very important, every country has to develop the model most appropriate for the structure and needs of the own export industry. Some countries have ECAs clearly separated from private credit insurance activities and exclusively focused on non-marketable risks. Other countries operate hybrid forms of export credit insurance, i.e. state owned companies or private companies with partial state guarantees operating a “public account” and an “own account” for non-marketable or marketable business respectively.

### 3. The Ukrainian ECA legislation and the Statute: Analysis and recommendations

The following remarks are based on the already mentioned “Law of Ukraine on Providing for Large-Scale Export Expansion of Goods (Works, Services) Originating in Ukraine through Insurance, Guarantees and Cheapening of Export Credits” and on the [Draft] “Charter of the Public Joint-Stock Company Export Credit Agency”<sup>8</sup>.

Based on an analysis of the two documents mentioned above it can make sense to check again how an ECA for Ukraine can be set-up according to best international practices. It should be made very clear from the outset that not the concept of an ECA as such is put in question. This paper only tries to trace weaknesses of the current legislation which could be repaired through amendments to the law. Following this route opens Ukraine the possibility to start with a state of the art ECA which is able to support the national export industry and improves competitiveness of Ukrainian export products on the global market.

#### 3.1 Remarks on the ECA-Law<sup>9</sup>

##### 1. High level of details

The law shows a very high degree of itemization. This can have advantages and disadvantages. Many of the items regulated by the ECA-Law are of a highly operative nature. In the case of practical needs arising in the future operational day-to-day work of the ECA this legislative environment may be too narrow and make frequent amendments of the ECA-Law necessary. This may be a cumbersome and time consuming procedure.

**It should be considered to focus in the ECA-Law on key objectives, main governance regulations and financial framework of the ECA. More operational matters should be regulated by legal documents below the level of a state law, most suitably by the Charter of the ECA. This could also reduce the large number of often literal repetitions in both documents.**

##### 2. Capitalization and state support

The charter capital of the ECA shall be at least UAH 200 m (Art. 2 par. 4 sub-par. 2, currently about USD 7.7 m). This is a relatively low capitalization for an ECA<sup>10</sup>. An ECA with such a limited charter capital can either cover only limited business or needs a high re-insurance arrangement. This should be currently obtainable in the re-insurance market, but only for a relatively high price. Under a risk management perspective operating with such limited resources may be feasible, but it leaves the ECA little room for maneuver. If a high amount of business must be re-insured (quota share or

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<sup>8</sup> English version of draft charter developed by MEDT, to be approved by Resolution of the Cabinet of Ministers of Ukraine

<sup>9</sup> All quotations without further details refer to the ECA-Law dated 20. December 2016.

<sup>10</sup> While making this judgement, we take the currently very limited fiscal space into account.

facultative reinsurance) the ECA will hardly be able to cover the administrative costs or even to accumulate (some) profits.

According to WTO rules the ECA is not obliged to be profitable or to reach break-even very soon. But in a medium time perspective the ECA must cover administrative costs and possible losses with earned fees and premium. This will be difficult enough. Since the ECA shall have the legal form of a joint stock company and assuming that profitability will be difficult to achieve, privatization of up to 50 percent minus one share<sup>11</sup> of the charter capital (Art. 2 par.3 sub-par 3) will not be attractive for investors. This may raise the question whether another legal form with permanent or at least long term 100 percent state ownership could be an option too.

Compliance with WTO (Agreement on Subsidies and Countervailing Measures) requirements is difficult if at all to achieve under these circumstances.

According to Art. 2 par. 1 and Art. 3 par. 2 sub-par. 4) and 5) the state can provide credits or state guarantees to the ECA for indemnification payments or to secure the ECA's honoring of its debt obligations. These are options only, no unconditional obligation. There are no other regulations in the ECA-Law stipulating a state liability for possible future losses of the ECA. In the ECA's Statute in sections 18 and 20 it is made clear that there is neither a liability of the ECA for its shareholders nor a liability of the shareholders for the ECA.

Since there is no additional financial state liability for the ECA (except the charter capital) the company cannot achieve an attractive credit rating. The usual effect that the ECA insurance cover leads to a credit rating for the covered portion of the export loan equal to the country's sovereign rating will not happen in Ukraine. The reduction of the interest rate for usually 85-90 percent of the export loan will not be achieved.

**The limited state support and the low level of planned capitalization is a fundamental and structural weakness for the Ukrainian ECA. An ECA needs either a strong capitalization, or a strong and reliable state support in the case of possible future financial difficulties. Otherwise the ECA will be unable to achieve its main objectives, i.e. fostering exports and reducing costs of credit.**

### 3. Program of partial compensation of the interest rate

The ECA "shall participate in implementing the program of partial compensation of the interest rate" (Art. 2 par. 1; Art. 3 par.2 sub-par. 3). Any details of such a program are not known yet.

Interest support is very close to a subsidy or even must be characterized as such. This needs to be thoroughly assessed in regard of the WTO requirements. Most probably such form of financial support is not in conformity with WTO ASCM rules.<sup>12</sup>

As experience from the past show, interest support is extremely expensive. It has also been systematically misused as invitation for massive fraud. The most telling example is the UK's interest rate support program in the late 1980ies. Many companies used ECGD's interest support program in the intention to receive cheaper bank loans for working capital for their regular domestic activities through faked export transactions. ECGD, Great-Britain's ECA at that time, faced heavy financial losses due to these criminal activities.

**We are highly skeptical of the foreseen interest support, as this is extremely expensive and a possible invitation for fraud. We severely doubt that this instrument is in conformity with WTO ASCM rules.**

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<sup>11</sup> In Art. 2 par. 3 sub-par. 3 second sentence it must read "50 percent **minus** one share" instead of "50 percent plus one share". The Law needs to be corrected respectively.

<sup>12</sup> WTO ASCM, Illustrative List of Export Subsidies, lit. k.

#### 4. Corporate Governance: Distribution of powers

The ECA's highest management body is the General Shareholders Meeting (Art. 5 par. 2). The roles, responsibilities and duties of the General Shareholders Meeting and the Cabinet of Ministers should be considered again. Examples:

- a. Regulations require approval of Cabinet of Ministers. Why do the "Supervisory Board Regulations" need the approval of the Cabinet of Ministers (Art. 5 par. 3 sub-par. 2) and not that of the General Shareholders Meeting? The same applies for the "Management Board Regulations" (Art. 5 par. 4 sub-par. 2) and the "Audit Committee Regulations" (Art. 5 par. 5 sub-par. 2).
- b. Representation of state organs in the General Shareholders Meeting. Which persons will represent the state organs in the General Shareholders Meeting and how are these persons selected? Shall it really be the task of the Management Board to establish this procedure with the approval of the Cabinet of Ministers (Art. 5 par. 2 sub-par. 2)? Before partial privatization the state's corporate rights will be executed by the Ministry of Economic Development and Trade (par. 72 of ECA-Statute).

Assuming that the shareholder is not represented by only one person, the question arises, how the responsibilities are distributed between these representatives in the General Shareholders Meeting. The ECA-Law gives no answers to this question. It needs to be determined whether one Ministry has the lead and whether other Ministries, e.g. Ministry of Finance, have specific rights like a right of veto for example.

- c. Selection Board. In contrast the selection of Supervisory Board members is regulated in a very detailed manner (Art. 5 par. 3 "Selection Board").
- d. Deputy Chairperson of Supervisory Board. For the Supervisory Board a minimum number of five members is foreseen and the Chairman is being elected with simple majority. The position of a deputy Chairman of the Supervisory Board is not foreseen. This is unusual and should be changed.
- e. Independent Directors. Three out of five Supervisory Board members shall be Independent Directors. This is not mentioned in the ECA-Law but can be found in par. 98 of the ECA-Statute. Having Independent Directors in the Supervisory Board is strongly recommended; this should be stated in the ECA-Law.
- f. Overruling. The "Supervisory Board Regulations", the "Management Board Regulations" and the "Audit Committee Regulations" need the approval of the Cabinet of Ministers (Art. 5 par. 3, 4 and 5). If other shareholders than the state join the ECA, changes of these regulations can be made by the General Shareholders Meeting. This seems non logic, since usually a legal act can only be amended by the same hierarchy level which has taken/approved the original decision. This problem could be avoided if all these legal acts would be decided upon by the General Shareholders Meeting (without approval of the Cabinet of Ministers), see also a) above.<sup>13</sup>

**Within the corporate governance structure of the ECA, the roles, responsibilities and duties of the General Shareholders Meeting and the Cabinet of Ministers should be considered again.**

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<sup>13</sup> The identical problem exists for the Charter of the ECA, see Art. 2 par. 4

## 5. Goods (works, services) originating in Ukraine

The ECA-Law contains definitions for “works or services originating in Ukraine” (Art. 1 par. 1 sub-par. 5), “goods originating in Ukraine” (Art. 1 par. 1 sub-par. 12) and “Ukrainian exporter” (Art. 1 par.1 sub-par. 13).

For any ECA it is a fundamentally important question which exports, works or services shall be supported. The term “originating in Ukraine” seems to be not precise enough. This question is of nearly philosophical nature and of high importance for foreign economic policy. Global trade patterns have dramatically changed in the last decades. Supply chains, multi-sourcing and globalization of production and distribution need to be reflected.

The concepts of ECAs differ between “national content”<sup>14</sup> and “national interest”<sup>15</sup> concepts. The reference made to the Customs Code of Ukraine most probably is insufficient to reach satisfactory clarity.

**The term “originating in Ukraine” for goods, works and services to be supported seems to be not precise enough. Internationally, the concepts of ECAs differ between “national content” and “national interest”. Further clarification is needed.**

## 6. Areas for support

Not all goods, works and services produced or originating in Ukraine are eligible for ECA support according to the ECA-Law. Art. 8 contains an enumerative listing of certain areas or branches for Foreign Economic Activity.

This list seems to be an exhaustive one. According to information compiled by the Ministry of Economic Development and Trade, the sectors of the industry eligible for ECA support represented only 16.5 % of Ukraine’s total goods exports in 2016. The immediate question arises why other products or industry branches, representing 83.5 % of Ukraine’s goods exports, are not eligible.

The quotation of certain chapters of the Ukrainian Classification of Commodities for Foreign Economic Activity while other chapters are not mentioned gives the impression that lawmakers intended the preferred support for specific branches of the industry whereas other branches were deliberately discriminated.

**Usually, ECA’s don’t distinguish between different goods, works and services to be supported, as demand for cover can change rapidly and no branch of the industry should be formally excluded. All branches of the Ukrainian export industry must have the same access to ECA support.**

## 7. Types and conditions for ECA operations

General conditions for the individual insurance, guarantee and interest support products are presumably not yet made. Therefore the wording of the ECA-Law only provides for a rough overview about possible products without any further details (Art. 6 par. 1). A few remarks can be made already on this basis:

- a. Re-insurance. The term re-insurance should be further defined. There are various forms of re-insurance: active reinsurance (offering re-insurance for other insurance companies covering commercial and non-commercial risks), passive re-insurance (seeking re-insurance

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<sup>14</sup> To this group usually the Eximbank of the USA and Euler Hermes of Germany are counted. National regulations in these countries define a minimal national production share, usually 50 percent.

<sup>15</sup> Countries following national interest concepts apply a broader perspective and support foreign subsidiaries of national corporations as well and corporates which have their headquarters and/or research centers in the home country whereas the production may be in another country. To this group belong NEXI of Japan, Credendo of Belgium and Sace of Italy.

for the own business covered in the international re-insurance market). Whereas active re-insurance increases the ECA's own risk exposure, the passive re-insurance is an important instrument of risk mitigation and risk management. Both forms of re-insurance show up in the forms of quota-share or facultative re-insurance, covering either a certain proportional share of the respective insurer's risk book or facultative re-insurance for individual insurance contracts.

Another form of re-insurance can emerge in international trade and multi-sourcing projects. If suppliers from more than one country jointly deliver components for a joint export transaction the offer of a one-stop-shop insurance solution is highly attractive. A network of bilateral re-insurance agreements between ECAs has been established. If Ukraine joins the ECA community sooner or later this type of re-insurance becomes necessary. In such cases only one ECA covers the transaction for 100 percent and receives re-insurance from the other ECA(s) involved in the transaction according to their exporter's share in the export contract.

- b. Insurance of direct investments. The product "insurance and re-insurance of direct investments" (Art. 6 par.1 sub-par. 4) foresees the cover against "non-commercial risks". In the draft of the Law this had been different, as cover against "commercial risks" was included as well. And in Art. 6 par. 1 it is stated that the listing of insurance products mentioned in the sub-paragraphs of this clause is not limited to the products explicitly mentioned. Legally it would therefore not be excluded to offer investment cover against commercial risks as well.

It is absolutely unusual for an ECA (or private insurer) to cover commercial investment risks abroad. Such risks represent the pure and original entrepreneurial risk which should never be taken away from the investor. The danger of fraudulent insolvencies to the disadvantage of the ECA is immense. Only non-commercial or political risks in a narrow sense should be covered.

In the ECA-Statute only the investment insurance against non-commercial risks is mentioned (Par. 9 sub-par. 4) of ECA-Statute). This shows that cover against commercial losses shall not be provided by the ECA. However, it should be made totally clear and without any allowed exception: Commercial risks of Ukrainian foreign direct investments mustn't be eligible for cover.

- c. Insurance/issue of contractual bank guarantees. Very frequently exporters need to provide contractual bank guarantees ("contract bonds"). This product is dealt with in Art. 6 par. 1 sub-par. 6) and 9). The tender guarantee is a classical type of a contract bond. The reason for mentioning this type of guarantee separate from other contractual guarantees is not necessary unless the ECA shall also act as direct issuer of such a guarantee.

If the ECA should issue this type of bonds itself it enters into a completely different product line, the "Aval" or "Bonding business", which normally is banking activity.<sup>16</sup> If the issue of own bonds is intended, one should ask why only tender bonds and not down-payment, performance and maintenance bonds are being offered as well. In this case it needs to be calculated how much additional capital the ECA needs for entering into this business.

- d. Issue of securitization-guarantees to lending banks. This product is a very sophisticated product which the Ukrainian ECA will not need for a medium time perspective. If it is mentioned in the law at all, it should be described in an understandable manner. The

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<sup>16</sup> Some private Credit Insurers, Surety Companies and some ECAs offer bonds as well.

purpose of this product is to support banks in bundling and refinancing covered export loans in the capital market by offering risk-protection in the form of a 100 percent unconditional first demand guarantee instead of an insurance product. Additional capital will be needed when offering this product.

- e. Issue of counter-guarantees to banks of Ukrainian exporters. The wording of the ECA Law is not clear. It needs to be differentiated between fair and unfair calling of bonds. Usually ECAs cover the unfair calling only (see c) above). If the fair calling shall be covered as well, the risk exposure of the ECA increases significantly because the ECA then also covers the performance risks of the Ukrainian exporter. This must be reflected in the risk analysis procedure (the ECA's risk is not the foreign buyer but the Ukrainian exporter!), in the premium rates and in the ECA's capital.

**Regarding types and conditions for ECA operations, we recommend further defining "re-insurance". Investment insurance should only cover non-commercial risks, but not commercial risks. In the starting phase only basic products in the area of export credit insurance should be offered and more sophisticated products following later step-by-step.**

#### 8. Special status of ECA

- a. No license required. The ECA does not need an insurance license (Art. 9 par. 1). This is not unusual and not critical since the ECA-Law replaces an insurance license.
- b. Insurance Law not applicable. The ECA is excluded from the application of the Insurance Law (Art. Art. 9 par. 2). Due to this fact also the regulations on Insurers Solvency (Art. 29 Insurance Law) and State Supervision over Insurance Activities (Art. 35 Insurance Law) do not apply. It needs to be determined which rules apply instead. In the event of financial difficulties of the ECA the ECA-Law only offers relatively weak options of financial support by the state (Art. 11 par. 1, 5 and 8). The regulatory aspects concerning the ECA are dealt with in Art. 9 par. 5. These regulations refer to "rules approved by the Cabinet of Ministers".

**The regulatory rules must be worked out very carefully and must guarantee a comparable level of solvency, good governance, financial regulation and control like the one foreseen in the Law on Insurance. Whether the existence of the Audit Committee (Art. 5 par. 5) and the risk management sub division (Art. 5 par. 6) is sufficient or whether regular external audits are needed as well needs to be discussed further.**

### 3.2 Remarks on the draft ECA Statute

With 173 paragraphs, the Statute of the ECA is an extremely long document. In many parts this Statute is nothing but a repetition of what is laid down in the ECA-Law. In some other parts the ECA-Statute regulates certain aspects, again, in an extremely detailed manner. A few points are worded more precise in the Statute than in the Law. Some omissions and mistakes in the Law are not repeated and thus regulated better in the Statute.

For this paper it is sufficient to refer to the Statute only in such cases where the Statute is more precise or correct compared to the ECA-Law. The respective remarks have been included in the comments on the ECA-Law where necessary.

**If the Law and the Statute should be amended in a more fundamental way, a re-balancing between both documents could be considered. Both documents can be shortened and topics of principal**

**importance should be treated (only) in the ECA-Law, whereas corporate management and more practical matters should be dealt with (only) in the Statute.**

#### **4. Implementation**

According to Art. 13 par. 4 the ECA shall be established within six months after the effective date of the Law. Within only two months the Cabinet of Ministers should have taken the necessary actions for becoming a member of the OECD Consensus and the working group on export credits and credit guarantees.<sup>17</sup>

These deadlines have expired without results in the meantime.

The approximation of Ukraine and its ECA to the OECD Consensus must follow the procedure rules (Guidelines) established by the Participants of the Consensus. Ukraine as a non-member of OECD can apply for an observer status only. The main criteria to be considered by the Consensus Participants when checking such a request are “major player” and “mutual benefit”. If the request is decided positively the Participants will invite the Observer on an ad hoc basis or on a permanent basis. This process cannot be accomplished within two months.

The establishment of an ECA needs sufficient time and must be made in a careful, reliable and proper manner. A six months period is by no means sufficient. Even for the legal establishment of the ECA the deadline of six months is extremely short. Developing the products, setting up the core team of the ECA, buying and adapting proper IT systems, training of employees and starting of marketing and sales activities needs a considerably longer time. This should not be done without consultations with and advice by international consultants. The professional exchange with other ECAs being members of the Berne Union Prague Club Committee should be established as early as possible.

The Ukrainian ECA must be given the necessary time for establishing its operations in a professional manner and for building up good relations to international fora for Export Credit Agencies like OECD Working Party for Export Credits and Credit Guarantees or Berne Union Prague Club Committee.

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<sup>17</sup> The correct wording according to OECD terminology would be „Working Party on Export Credits and Credit Guarantees (the “Export Credits Group” or ECG)”. The “five annexes thereto” mentioned in Art. 13 par. 4 according to OECD terminology are the five Sector Understandings (Annexes I-V to the OECD Consensus).

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