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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the written procedure by the Participants to the Arrangement on Officially Supported Export Credits regarding the review of the Sector Understanding on Export Credits for Coal Fired Electricity Generation Projects contained in Annex VI

Delegations will find attached document COM(2021) 418 final.

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2021/0235 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the written procedure by the Participants to the Arrangement on Officially Supported Export Credits regarding the review of the Sector Understanding on Export Credits for Coal Fired Electricity Generation Projects contained in Annex VI

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision establishing the position to be taken on the European Union's behalf by the Commission in the context of the review of the Sector Understanding on Coal Fired Electricity Generation Projects, also referred to as the Coal-Fired Sector Understanding ('CFSU'), which is contained in Annex VI to the Arrangement on Officially Supported Export Credits (the 'Arrangement').

An update of the CFSU is under discussion at the level of the Participants to the Arrangement, following a proposal from the European Union submitted on 21 April 2021 (the 'Proposal'). The Proposal calls on the Participants to align the Arrangement with their shared climate goals – since all Participants signed the Paris Agreement – by amending the rules of the CFSU to end any possibility of support in the form of officially supported export credits and tied aid under the rules of the Arrangement for the exports of coal-fired power plants and related projects.

As climate-related issues – and more specifically the issue of phasing out coal for electricity generation – are under the spotlight, the Participants may be able to reach an agreement on this issue ahead of COP26 in November 2021. In particular, the president of COP26 is urging nations to move away from coal power generation and on 21 May 2021, G7 nations committed to end new direct government support for unabated international thermal coal power generation by the end of 2021, including through Official Development Assistance, export finance, investment, and financial and trade promotion support. In order for the European Union to continue demonstrating its strong ambitions, it is crucial that the Union be ready to take a position on a possible agreement on this issue well ahead of COP26, that would take place from 1 to 12 November 2021.

2. CONTEXT OF THE PROPOSAL

2.1. The Arrangement on Officially Supported Export Credits

The Arrangement is a gentlemen's agreement between the EU, the US, Canada, Japan, Korea, Norway, Switzerland, Australia, New Zealand, Turkey and the United Kingdom, which provides a framework for the orderly use of officially supported export credits. In practice, this means establishing a level playing field (whereby competition is based on the price and quality of the exported goods and services and not on the financial terms provided), while working to eliminate subsidies and trade distortions related to officially supported export credits. The Arrangement entered into force in April 1978, it is of indefinite duration and although it receives the administrative support of the OECD Secretariat, is not an OECD Act[1].

The Arrangement is subject to regular updates, taking into account financial market and policy developments affecting the provision of officially supported export credits. The Arrangement has been transposed, and hence been made legally binding in the EU by Regulation (EU) No 1233/2011 of the European Parliament and of the Council[2] [3]. Revisions

[1] As defined in Article 5 of the OECD Convention.

[2] Regulation (EU) No 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 2001/77/EC (OJ L 326, 8.12.2011, p. 45).

[3] In the past, earlier versions of the OECD Arrangement were transposed into EU law through Council Decisions.

of the terms and conditions of the Arrangement are incorporated into EU law through delegated Acts pursuant to Article 2 of this Regulation.

2.2. The Participants to the Arrangement on Officially Supported Export Credits

The European Commission represents the Union in meetings of the Participants to the Arrangement, as well as in the written procedures for decision-making by the Participants to the Arrangement. Decisions on all amendments of the Arrangement are taken by consensus. The position of the Union is adopted by the Council and is discussed by Member States in the Council Working Group on Export Credits[4].

2.3. The envisaged act of the Participants to the CSFU

The Participants first agreed on the CFSU in 2016 to encourage exporters and buyers to move away from low-efficiency coal-fired power plants. The CFSU consists of sector-specific rules in addition to the horizontal terms and conditions of the Arrangement. It only allows the financing of large plants (above 500 MW) with "ultra-supercritical technology" or with a low emissions intensity (below 750g CO2/kWh of electricity produced) and restricts the financing of smaller plants not meeting high-efficiency standards to the countries eligible for International Development Association resources.

The CFSU includes a review clause with the objective of further strengthening its terms and conditions. Article 6, point (a), provides that "This Sector Understanding shall be reviewed by no later than 30 June 2020 with the objective of further strengthening its terms and conditions in a second phase beginning no later than 1 January 2021, in order to contribute to the common goal of addressing climate change and to continue phasing down official support for coal-fired power plants, including with a view to reducing the use of less efficient coal-fired power plants". In particular, Article 6, point (b), provides that "The review shall take into account: 1) The most recent reports on climate science and the implications for global infrastructure investment decisions of remaining on the path to limit global warming to below 2 degrees Celsius higher than pre-industrial levels".

Since the adoption of the CFSU in 2016, significant analysis has highlighted the rapid pace and scale of thermal coal power generation phase out needed to hold warming to below 2°C: scenarios are broadly consistent about the need for closure of almost all coal-fired power plants before 2040. However, under the rules of the CFSU adopted in 2016, direct and indirect support to coal-fired power plants is still possible. As such, a consistency issue arises. The Council Working Group on Export Credits has been working since 2020 on a proposal to review the CFSU to address it.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The European Commission, on behalf of the Union, submitted a Proposal for the review of the CFSU on 21 April 2021 to the Participants to the Arrangement, which was initially discussed and adopted in the Council Working Group on Export Credits. The Proposal foresees a global phase out of export finance for the coal-fired power sector. More specifically, it calls for an immediate end of officially supported export credits and tied aid for:

– the export of new unabated coal-fired power plants and parts thereof,

– the supply of equipment to existing unabated coal-fired electricity generation plants unless the purpose of the equipment supplied is pollution abatement and it induces neither an extension of the useful lifetime of the plant nor a capacity increase, and

[4] Council Decision setting up a Policy Co-ordination Group for Credit Insurance, Credit Guarantees and Financial Credits, (OJ 66, 27.10.1960, p. 1339).

– the export of goods and services related to the development, the construction or the expansion of thermal coal mining and to any kind of transport predominantly used to move thermal coal.

This Proposal seeks to bridge the gap between the commitment of the Participants to meet the long-term goals of the Paris Agreement and the provisions of the CFSU that still make it possible to support exports of coal-fired power plants and the global value chain of thermal coal power generation. The Proposal is fully in line with the European Union's policy priorities. In particular, on 25 January 2021, the Council of the European Union in its Conclusions on climate and energy diplomacy called for a global phase-out of environmentally harmful fossil-fuel subsidies along a clear timeline and a resolute and just worldwide transformation towards climate neutrality, including a phasing out of unabated coal in energy production and – as a first step – an immediate end to all financing of new coal infrastructure in third countries.

As it is crucial that the OECD export credit community adequately translate climate policy objectives into the Arrangement rules and into practical measures, the European Union will push for agreement on this phase out in the coming meetings. Several other Participants will most certainly also push into the same direction (mainly, the United Kingdom, Canada and the United States) and others (Korea and Japan) announced this year that they would end support to unabated international thermal coal power generation. If the negotiations are fruitful, the Participants might be called to adopt modifications to the CFSU – and possibly to some articles of the Arrangement to reflect the review of the CFSU – during one of their next sessions, possibly during an extraordinary meeting of the Participants ahead of COP26, in September or October 2021. In this scenario, the European Union should be able to take a position on the review of the CFSU in a timely manner.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing 'the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.'

The concept of 'acts having legal effects' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are 'capable of decisively influencing the content of the legislation adopted by the EU legislature'[5].

4.1.2. Application to the present case

The envisaged act is capable of decisively influencing the content of EU legislation, namely Regulation (EU) No 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 2001/77/EC. This is because of Article 2 of this Regulation, which states that "[t]he Commission shall adopt delegated acts in accordance with Article 3 to amend Annex II as a result of amendments to the guidelines

[5] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

agreed by the Participants to the Arrangement". This includes amendments of annexes to the Arrangement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to export credits, which is within the scope of the common commercial policy. Therefore, the substantive legal basis of the proposed decision is Article 207 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207(4), first subparagraph, TEFU in conjunction with Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The guidelines contained in the Arrangement on Officially Supported Export Credits (the 'Arrangement'), including the Sector Understanding on Export Credits for Coal Fired Electricity Generation Projects ('CFSU') contained in its Annex VI, have been transposed, and hence been made legally binding in the Union by virtue of Regulation (EU) No 1233/2011 of the European Parliament and of the Council[6].

(2) In accordance with Article 6 of the CFSU, the participants to the Arrangement (the 'Participants') should review the Sector Understanding with the objective of further strengthening its terms and conditions in order to contribute to the common goal of addressing climate change and to continue phasing down official support for coal-fired power plants.

(3) The envisaged decision to review the CFSU should be in line with the international commitments of the European Union pursuant to the Paris Agreement and the Union's climate policy.

(4) The Council of the European Union in its Conclusions on climate and energy diplomacy of 25 January 2021 called for a global phase-out of environmentally harmful fossil-fuel subsidies along a clear timeline and a resolute and just worldwide transformation towards climate neutrality, including a phasing out of unabated coal in energy production and – as a first step – an immediate end to all financing of new coal infrastructure in third countries.

(5) It is appropriate to establish the position to be taken on the Union's behalf regarding the review of the Sector Understanding on Export Credits for Coal Fired Electricity Generation, as the envisaged decision of the Participants to the Arrangement will be binding on the Union and capable of decisively influencing the content of Union law, by virtue of Article 2 of Regulation (EU) No 1233/2011,

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[6] Regulation (EU) No 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 2001/77/EC (OJ L 326, 8.12.2011, p. 45) ('Regulation (EU) No 1233/2011').

HAS ADOPTED THIS DECISION:

Article 1

The Annex sets out the position to be taken on the Union's behalf regarding the review of the Sector Understanding on Export Credits for Coal Fired Electricity Generation Projects contained in Annex VI of the Arrangement on Officially Supported Export Credits.

Article 2

Modifications to Annex VI of the Arrangement on Officially Supported Export Credits, which are in accordance with the orientation of the Annex, may be agreed to by the representatives of the Union without further decision of the Council.

Article 3

Where new proposals regarding the subject matter in Annex are made at, or before, a meeting of the Participants, on which there is not yet a Union position, the Union position shall be specified by means of Union coordination before the Participants are called to adopt an amendment to the Arrangement. In such cases, the Union position shall be in line with existing policies and legislation.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President