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PROPOSAL

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Subject:	Proposal for a COUNCIL DECISION establishing the position to be adopted on the Union's behalf by the Participants to the Arrangement on Officially Supported Export Credits (“Arrangement”) with regard to the modernisation of the Arrangement

Delegations will find attached document COM(2022) 456 final.

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Proposal for a

COUNCIL DECISION

establishing the position to be adopted on the Union's behalf by the Participants to the Arrangement on Officially Supported Export Credits ("Arrangement") with regard to the modernisation of the Arrangement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision according to Article 218(9) of the Treaty on the Functioning of the European Union ('TFEU'), establishing the position to be taken on the Union's behalf regarding the modernisation of the Arrangement on Officially Supported Export Credits ('Arrangement').

2. CONTEXT OF THE PROPOSAL

2.1. The Arrangement

The Arrangement on Officially Supported Export Credits entered into force in April 1978 as a gentlemen's, i.e. non-binding, agreement. The Arrangement is administratively embedded in the OECD and receives support from the OECD Export Credit Secretariat, although it is not, in fact, an OECD Act.[1]

The purpose of the Arrangement is to provide a framework for the orderly use of officially supported export credits ('official support'), and to foster a level playing field for official support, in order to encourage competition among exporters based on quality and price of goods and services exported rather than on the most favourable officially supported financial terms and conditions. The WTO Agreement on Subsidies and Countervailing Measures ('ASCM') recognises the role of the Arrangement in preventing trade distortions and creates an exemption from its general prohibition of government export credit support. This so-called 'WTO safe haven' is granted to practices of WTO Members who are Arrangement Participants, but also to practices of the non-Participants, provided that they are in conformity with the rules of the Arrangement (Annex I item k) of the ASCM).

The European Union is a Participant to the Arrangement which is transposed into the acquis communautaire by virtue of Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011.[2] Hence the Arrangement is legally binding as a matter of Union law.

2.2. The Participants

There are currently eleven Participants to the Arrangement ('Participants'): Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland, Turkey, the United Kingdom and the United States. The Participants take decisions on amendments to the Arrangement by consensus.

The European Commission represents the Union in the meetings of the Participants, including when the Participants take decisions.

2.3. The envisaged act of the Participants

The envisaged decision is the outcome of negotiations between the Participants to the Arrangement on modernization of its rules, as set out in the annex to the present draft decision.

The Arrangement has seen regular updates to individual terms and conditions since its adoption in 1978, but there has never been a comprehensive review of the overall adequacy of

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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).

the rules for present day conditions. This has left the Arrangement in need of modification for a number of reasons.

First, the rise in aggressive export finance from large emerging economies, which are not Participants to the Arrangement. Second, the Arrangement terms are disproportionately rigid relative to their objectives of securing a level playing field between the Participants and avoiding crowding out of the private sector. In the same vein, the lack of a comprehensive review over decades has resulted in an overly complex patchwork of modifications. Finally, it should be noted that an overhaul of the Arrangement is also needed in terms of its relationship to EU priorities on sustainability, not least in relation to climate change. This issue is tackled in the separate proposal for the Council decision according to Art. 218(9) TFEU concerning Sector Understanding on Export Credits for Renewable Energy, Climate Change Mitigation and Adaptation and Water Projects ('CCSU') (COM(2022) 455).

Against this backdrop, informal reflections among EU Member States on a possible streamlining of the Arrangement's rules began in 2018, and discussions began at the OECD in 2019, leading to agreement on a "common framework" for the modernisation in 2020, setting out the scope and key principles of the reform, and kicking off technical work. The main objectives of the modernisation are:

(1) to ensure that the level playing field for official support for export finance reflects sound market practices and is built on a foundation of appropriate pricing rules, in order to enable the export credit agencies ('ECAs') to better address market failures and fill financing gaps,

(2) to address competitive issues with non-Participants in global trade finance, and

(3) to streamline and simplify the Arrangement rules and ensure that they are necessary and proportional in order to avoid unnecessary administrative burdens for users.

In June of this year, Participants agreed on the parameters of an agreement on a package of issues for adoption at their meeting in November 2022. Negotiations to finalise the details are ongoing. The package includes the following elements:

- Maximum repayment terms (MRT): The maximum times allowed for a buyer to make all repayments under the financing package, would be extended and simplified, moving from 8-14 years depending on the product to a longer duration with fewer exceptions, 20 years in the EU view. Notably excluded from the extension, for sustainability reasons, is the 12-year MRT for non-nuclear power plants.
- Repayment profile: The general rule for repayments would no longer require these to be in equal instalments every six months. Instead, the requirement would be that more than half of the principal is repaid once 60% of the time period for repayment has elapsed.
- Adjustment to the premium for longer repayment terms: ECAs must charge a premium to buyers when they provide official insurance cover for transactions. With longer repayment periods, the current formula for the premium leads to prohibitive prices. The moderate adjustment envisaged will facilitate e.g. the renewable energy projects which only become financially viable over longer periods.

- Floating interest rates: the introduction of a possibility to apply market-reflective minimum floating interest rates in export credit transactions under the Arrangement. Currently, regulated minimum fixed rates are the norm.

While these rules will make it possible to offer buyers and borrowers of goods and services in third countries financing terms that are responsive to sound markets practices, they safeguard against a "race to the bottom", including with the non-adherents to the Arrangement. This will help ensure a more level playing field for the EU export industry, particularly in key strategic infrastructure sectors.

Changes in the Arrangement rules will impact on the "sector understandings" that deviate from the standard rules to offer sector-specific terms and conditions. This is reflected in the Annex to this proposal which contains consequent amendments to relevant provisions of the the sector understandings. Most notably, two sector understandings, on project finance and rail, only existed to provide longer repayment terms than the current standard of 8-10 years and therefore become redundant as a result of the 20 year terms envisaged, and are therefore deleted. In the negotiations, some Participants wish to extend MRT also under the Arrangement's nuclear sector understanding, which currently offers 18 years, while the EU is opposed to it. As noted above, a separate decision making process is envisaged for the CCSU.

Detailed proposals for the reform of the Arrangement are in the Annex of the proposed Decision. As noted, negotiations may lead to some further modifications of the text but there is consensus on the core principles of the outcome. These changes would be reflected in the Annex before the adoption of the present decision by the Council by way of the procedure pursuant to Article 2 of the draft decision.

It is appropriate to establish the Union's proposal as the position to be taken on the Union's behalf in a body set up by an agreement, because the decision to amend the Arrangement will have legal effects in the EU as a matter of Union law (see in 2.1 above).

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

The proposed modernisation of the Arrangement rules would allow export credit agencies from the Participants' countries, including the European Union, to offer buyers and borrowers of exported goods and services in third countries financing terms and conditions that are aligned with sound market practices, thus enabling to address market failures and fill financing gaps without crowding out of commercial finance operators. By doing so, the modernized rules of the Arrangement would strengthen the global competitiveness of EU exporters, and therefore make a significant contribution to the economic growth and jobs in the Union.

Taken into account the purpose and expected positive effects of the modernised Arrangement on the export industry and economy of the Union, the position to be taken on the Union's behalf should be to support the draft proposal in Annex to this decision.

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'[3].

4.1.2. Application to the present case

The act, which the Participants will be called upon to adopt, constitutes an act having legal effects. The envisaged act has legal effects by virtue of Article 1 of 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, which states that "The guidelines contained in the Arrangement on Officially Supported Export Credits ('the Arrangement') shall apply in the Union. The text of the Arrangement is annexed to this Regulation."

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.

4.2.2. Application to the present case

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

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Participants will amend the Arrangement on Officially Supported Export Credits, it is appropriate to publish it in the Official Journal of the European Union after its adoption.

[3] 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.

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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 the first subparagraph of Article 207(4) in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Arrangement on Officially Supported Export Credits ('Arrangement') has been transposed, and hence made legally binding in the European Union by Regulation (EU) No 1233/2011 of the European Parliament and of the Council.[4]

(2) The Participants to the Arrangement ('Participants') are to decide on modernising the rules of the Arrangement, in particular in respect to provisions governing maximum repayment terms, repayment profile, minimum premium rates and introduction of a possibility to apply floating interest rates in export credit support transactions.

(3) It is appropriate to establish the position to be taken on the Union's behalf, because the decision to amend the Arrangement by the Participants will have legal effects in the Union as a matter of Union law by virtue of 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.

(4) The proposed amendments to the Arrangement would allow export credit agencies of the Participants' countries, including the European Union, to offer buyers and borrowers of exported goods and services in third countries financing terms and conditions that are aligned with sound market practices, thus enabling to address market failures and fill financing gaps without crowding out of commercial finance operators. By doing so, the modernised Arrangement would strengthen the global competitiveness of EU exporters, and therefore make a significant contribution to the economic growth and jobs in the Union.

[4] 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).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf regarding the adoption by the Participants to the Arrangement on Officially Supported Export Credits ('Arrangement') of a decision to modernise the rules of the Arrangement shall be based on the Annex to this decision.

Article 2

Where new proposals regarding the subject matter in Annex to this decision 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 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President