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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	24 February 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2022) 63 final
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 amending Annex IV

Delegations will find attached document COM(2022) 63 final.

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2022/0043 (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 amending Annex IV

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 an amendment to the OECD Arrangement on Officially Supported Export Credits limited to its Annex IV, the Sector Understanding on Export Credits for Renewable Energy, Climate Change Mitigation and Adaptation, and Water Projects. Annex IV is also referred to as Climate Change Sector Understanding, or CCSU.

The amendment under discussion at the level of the Participants to the Arrangement focuses more specifically on Appendix III of the CCSU, which is the appendix defining the eligibility criteria for climate change adaptation projects. It follows a proposal from the European Union seeking to make those criteria more efficient in identifying the relevant adaptation projects.

The European Union should continue demonstrating its strong ambitions for climate action, and prepare to take a position on a possible agreement that could be reached before the next meeting of the Participants in March 2022.

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 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].

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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).

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

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).

2.3. The envisaged act of the Participants to the CCSU

An update of the eligibility criteria contained in Appendix III of the CCSU is under discussion at the level of the Participants following a proposal from the European Union submitted on 16 November 2021.

The European Union, in its proposal, both proposed to make the adaptation section (Appendix III) a permanent part of the Arrangement, given the relevance of boosting climate finance, and to update the eligibility criteria for adaptation projects contained in Appendix III. The update proposed would move the criteria for identifying adaptation projects closer to some standards used by the development banks, as experience proves that current criteria – that require adaptation to be the principal objective of a project – are not fit for export credit transactions, that would usually also involve commercial activities to generate a cash flow. The proposed criteria would capture partial adaptation projects, with CCSU conditions then only applying to the adaptive share of a project.

The proposal to update Appendix III was discussed on 1 December 2021 in the 151th meeting of the Participants and received support. One Participant asked that new criteria would be agreed with a sunset clause allowing for a reassessment of their appropriateness in due time.

Given the support, the chairman proposed that the European Union would revise its proposal taking into consideration the drafting suggestions that other Participants would send by end 2021, with a view to launching a written procedure at the beginning of 2022 to adopt it.

As such, the envisaged act of the Participants is to decide on amending the eligibility criteria for adaptation projects in the CCSU by written procedure in the beginning of 2022.

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

The European Union proposal, which the Participants broadly supported, was first discussed and adopted in the Council Working Group on Export Credits.

The position to be taken on the Union’s behalf is annexed to this decision, and is based on the European Union proposal and the outcome of the discussion on 1 December 2021.

The proposed position consists in updating the criteria for adaptation projects in Appendix III of the CCSU, using as a source of inspiration the Common Principles for Climate Change Adaptation Finance Tracking developed by some multilateral development banks. As the new criteria also capture partial adaptation projects, the proposed update of Appendix III leads to some changes in some articles of the CCSU, to reflect this.

As the positive momentum at the OECD should be preserved, the European Union would seek agreement as soon as possible to make this relevant update to the CCSU.

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 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.

[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.

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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 207in 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') 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 9 of Annex IV of the Arrangement, the Participants shall undertake a review of its Appendix III by the end of 2020, with a view to assessing the international initiatives related to adaptation, market conditions, and the body of experience developed from the notification process to determine if the definitions, project criteria, terms and conditions should be continued and or amended.

(3) The participants are to decide by written procedure on an envisaged decision to amend Appendix III of Annex IV to the Arrangement.

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

(5) It is appropriate to establish the position to be taken on the Union's behalf regarding a written procedure of the Participants to the Arrangement, 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,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf regarding the adoption by the participants of a decision by written procedure amending Annex IV of the Arrangement on Officially Supported Export Credits is set out in the Annex.

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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').

Article 2

Minor modifications to the proposed amendments to Annex IV of the Arrangement on Officially Supported Export Credits set out in the Annex, may be agreed to by the representatives of the Union without further decision of the Council.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President