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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union regarding the envisaged decision of the Participants to the Arrangement on Officially Supported Export Credits

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 Arrangement on Officially Supported Export Credits (the 'Arrangement') regarding an envisaged decision to amend the Arrangement's local cost provisions. These set the maximum percentage of a supported export contract's value that can consist of products and services sourced locally, i.e. in the destination country, as opposed to the exporting country or a third country. The envisaged decision would raise this maximum percentage, providing greater flexibility in line with market realities.

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 and Turkey, which aims to provide 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 Act¹.

The Arrangement is subject to regular updates, taking into account financial market and policy developments affecting the provision of officially supported export credits. Regulation (EU) No 1233/2011 of the European Parliament and of the Council² provides that the guidelines set out in the Arrangement shall apply in the Union, and hence, it has been made legally binding in the EU³. 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 (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 Credits⁴.

Article 62 of the Arrangement provides that "The Participants shall review regularly the functioning of the Arrangement. In the review the Participants shall examine, inter alia, notification procedures, implementation and operation of the Differentiated Discount Rate system, rules and procedures on tied aid, questions of matching, prior commitments and possibilities of wider participation in the Arrangement".

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, through Council Decisions earlier versions of the OECD Arrangement have been transposed into EU law.

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 Arrangement on Officially Supported Export Credits

At the 141st Meeting of the Participants to the Arrangement that took place in June 2019, the Participants discussed an EU draft proposal to increase official support for local costs. The draft proposal was well received with positive responses from other Participants, however, one delegation reserved its position and asked the EU to provide further background information and clarifications.

At the following meeting of the Participants to the Arrangement in November 2019, increasing official support for local costs was again discussed. The discussion concerned potential amendments to the draft proposal, inter alia ring fencing local cost coverage to specific sectors or countries. However, the Participants did not reach common ground and discussions were postponed to future meetings. At the 144th Meeting of the Participants to the Arrangement in June 2020 the delegation, which did not support the EU draft proposal, tabled a counterproposal on local cost support. This proposal did not win support from other Participants, but compromise solutions and amendments to resolve outstanding issues were offered and discussed.

The EU reviewed its draft proposal taking note of views expressed in previous meetings of the Participants to the Arrangement and tabled a draft compromise proposal at the 145th meeting of the Participants that took place on 17 November 2020. Some Participants suggested minor amendments to the draft compromise proposal. After some discussion, all Participants expressed support for the draft compromise proposal combined with the suggested amendments. The Participants to the Arrangement are to adopt a decision on the Union's draft compromise proposal by written procedure.

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

The main principles for official support for local costs are set out in Article 10 of the Arrangement. It stipulates that official support for local costs may not exceed 30 % of the export contract value (national content and third country supply). These provisions were introduced in 2006, when the maximum level of official support was increased from 15 % to 30 % of the export contract value. In the last decades, global trade and production patterns have evolved significantly. The emergence of global value chains has changed how exporters source supply: companies that used to have their primarily production in one country now optimise their sourcing on the basis of cost efficiency and geographical availability and a single finished product is often the result from manufacturing and assembly lines in multiple countries. The EU's export industry has long called for greater local cost flexibility. The current limitation on local cost support imposes a competitive disadvantage on EU exporters in relation to exporters in countries not bound by the Arrangement.

The envisaged decision on increasing official support for local costs would mean that the maximum level of local cost is raised to 40 % of the export contract value in high-income countries⁵ (country category I in the Arrangement) and to 50 % in middle- and low-income countries (country category II in the Arrangement). The local cost provisions in the sector understanding on export credits for renewable energy, climate change mitigation and adaptation, and water projects would be aligned with the local cost provisions in the main body of the Arrangement. Furthermore, a review clause, providing for a review to take place three years after the entry into force of the new local cost provisions, would be added to the Arrangement.

⁵ As defined by the World Bank, on an annual basis according to per capita GNI.

Therefore, it is recommended that the position of the Union is to approve the envisaged decision of the Participants to the Arrangement by written procedure to increase official support for local costs.

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’⁶.

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 Article 2 of this Regulation 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”.

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 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 the first subparagraph of Article 207(4) TFEU in conjunction with Article 218(9) TFEU.

⁶ 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.

5. PUBLICATION OF THE ENVISAGED ACT

As the envisaged decision of the Participants will amend the Arrangement, it is appropriate to publish it in the Official Journal of the European Union after its adoption.

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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 (the ‘Arrangement’) is legally binding in the EU in accordance with 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/EC⁷.
- (2) The participants (the ‘Participants’) to the Arrangement, in their 145th meeting on 17 November 2020, agreed to adopt through a written procedure a decision to modify the Arrangement to increase official support for export credits in the form of local costs.
- (3) It is appropriate to establish the position to be taken on the Union's behalf on the decision to be adopted by the Participants to the Arrangement by written procedure, as the envisaged decision will be capable of decisively influencing the content of Union law, by virtue of Article 2 of Regulation (EU) No 1233/2011.
- (4) The envisaged decision to increase official support for local costs should adapt the provisions on local cost support in the Arrangement to prevailing trade and production patterns. Global value chains have changed exporters’ sourcing decisions and most exporters now source supply from multiple countries and to an increasing extent from where the buyer is located. In order to offer EU exporters greater flexibility and to allow for optimal sourcing strategies the cap on official support for local costs should be raised from 30 % to 40 % of the export contract value in high-income countries and from 30 % to 50 % of the export contract value in middle- and low-income countries,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in a written procedure of the Participants to the Arrangement on Officially Supported Export Credits regarding the envisaged decision to increase official support for local costs is set out in the Annex to this Decision.

⁷ 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

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*