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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	26 August 2021
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 as regards the Common Line on the temporary decrease of the minimum down payment

Delegations will find attached document COM(2021) 498 final.

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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 as regards the Common Line on the temporary decrease of the minimum down payment

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in written procedure by the Participants to the Arrangement on Officially Supported Export Credits ('Arrangement') in connection with the envisaged Common Line on the temporary decrease of the minimum down payment.

2. CONTEXT OF THE PROPOSAL

2.1. The Arrangement on Officially Supported Export Credits

The Arrangement is a gentlemen's agreement 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 ('official support'). The Arrangement entered into force in April 1978 and it is of indefinite duration.

The Arrangement is administratively embedded in the OECD and receives support from the OECD Credit Secretariat. Nevertheless, it is not an OECD Act¹.

The European Union – and not the Member States – is a Participant to the Arrangement which has been transposed into the *acquis communautaire* by virtue of the Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011.² Therefore, the Arrangement is legally binding as a matter of Union law.

2.2. The Participants to the Arrangement

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

The Arrangement Participants may take decisions on modifications of the Arrangement and in particular, they can accept Common Lines in accordance with Chapter IV, Section 5 of the Arrangement. Decisions are taken by consensus, so that, if any Participant objects, the modification of the Arrangement or the Common Line cannot be adopted.

The European Commission represents the Union in the meetings of the Arrangement Participants, as well as in the written procedures for decision-making by the Arrangement Participants.

A Common Line is an instrument under the Arrangement, which allows the Participants, on an exceptional basis, to divert from the Arrangement provisions with regard to a specific transaction or temporarily for a non-specific number of transactions. The Common Lines may

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).

be accepted in written procedure by remaining silent, as a Participant remaining silent shall be deemed to have accepted the Common Line proposal. The same applies for a Participant which advises that it has no position. The responses to a Common Line proposal shall be made in principle within 20 calendar days, with a possible extension by eight calendar days (Articles 56 and 57 of the Arrangement). The OECD Export Credit Secretariat shall inform the Participants whether the Common Line was accepted and the agreed Common Line will take effect three calendar days after this announcement (Article 59 of the Arrangement).

2.3. The envisaged act of the Arrangement Participants

The envisaged measure is a proposal for a Common Line which would be submitted to the Arrangement Participants in accordance with Chapter IV, Section 5 of the Arrangement. The proposed Common Line would be an urgent and exceptional measure to react to the economic downturn resulting from the Covid-19 health crisis and reduce the severe impact of the crisis on the realisation of important projects in low and middle income countries by the EU's export industry (see in more detail in section 3 below). The proposed Common Line, if agreed, would temporarily amend the Arrangement provisions governing the down payment requirement and the maximum official support (Articles 11 a) and 11 c) of the Arrangement).

Considering the emergency nature of the measure, the proposal should be submitted as soon as possible, and, if agreed, the envisaged Common Line should become applicable for all Participants also as soon as possible. As result of the specific 28-day silence procedure stipulated in the Arrangement (see in 2.2 above), the Union proposal for the Common Line can be automatically agreed by the Participants as the final version of the Common Line, provided that no objection is raised, and should enter into effect three days after the end of the procedure.

In light of the above, it is appropriate to establish the position to be taken on the Union's behalf in a body set up by an agreement, because the proposed Common Line will be binding on the Union and it will affect Union law, by virtue of Article 1 of Regulation (EU) No 1233/2011, 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."

The Common Line procedure is expected to be initiated in July 2021.

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

The proposed Common Line is directly linked to Covid-19 health crisis.

The proposed Common Line would allow, public purchasers in low and middle income countries, that buy goods and services which are the subject of official export credit support, to make down payments of a minimum of 5% of the export contract value for a period of 12 months, instead of 15% as is currently required by Article 11 a) of the Arrangement. This would in turn mean temporarily increasing the limit for maximum official support that the Participants may provide for pursuant to Article 11 c) of the Arrangement, from a ceiling of 85% up to 95% of the export contract value, for the same time period.

Against the background of the Covid-19 economic downturn, third countries importing goods, services and projects (e.g. healthcare and education but also other sectors) from the EU companies are under severe financial pressure. The bulk of the projects concerned are carried

out with sovereign/public buyers in developing countries. Under normal economic circumstances, the banks financing the loans would usually obtain insurance cover for the down payment portion of the loan on the private market. Due to the Covid-19 crisis, however, the private market is reluctant or even unwilling to provide this cover for developing countries. Without that cover, the banks refuse to finance the down payment portion of a project in developing countries – which are most in need of such projects – and this means that these projects cannot be realised. This market failure has to be addressed urgently.

The proposed Common Line would benefit both importers and exporters: it would provide an immediate financial relief for the buyer country's government and increase its ability to continue with investment projects. At the same time, it would provide exporters with the opportunity to offer flexible solutions in difficult times and stay in business.

Based on the above, it is proposed to lower the requirement for a down payment by public buyers from 15% to 5 % of the export contract value. However, there would be two important limitations to this measure, emphasizing its development objectives and exceptional nature. Firstly, the proposed measure would only apply to public buyers in low and middle-income countries (the so-called Category II countries pursuant to Article 11 of the Arrangement and in accordance with the definition of the World Bank). Secondly, the measure would be limited in time for the anticipated duration of the economic consequences of the pandemic. Therefore, it would benefit only transactions in respect of which the application for export credit support was received within 12 months from the start of the validity period of the Common Line, provided that the negotiations about the terms of the transaction were concluded within 18 months following the end of the validity period of this Common Line (as confirmed by the final commitment made by the export credit agency). Finally, in the context of the Arrangement rules, it is also important to note that the proposed measure would support exports not only from the EU countries but it would apply equally to official support in all countries participating in the Arrangement.

Taking into account that the purpose of the proposed Common Line is to reduce the severe impact of the Covid-19 health crisis on the realisation of important projects in developing countries by the EU's export industry, and that the Union envisages to make the proposal for this Common Line, the position to be taken on the Union's behalf should be to make and support the draft proposal in the Annex to this Decision.

3.1. Procedural legal basis

3.1.1. 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.

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.

3.1.2. Application to the present case

The proposed Common Line, which the Participants to the Arrangement will be called upon to adopt by written procedure, 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.

3.2. Substantive legal basis

3.2.1. 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.

3.2.2. 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.

3.3. Conclusion

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

4. PUBLICATION OF THE ENVISAGED ACT

As the act of the Participants to the Arrangement will amend the Arrangement on Officially Supported Export Credits which forms Annex II to the Regulation (EU) No 1233/2011, it is appropriate to publish it in the Official Journal of the European Union after its acceptance.

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 as regards the Common Line on the temporary decrease of the minimum down payment

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 ('Arrangement') has been transposed, and hence been made legally binding in the European Union by Regulation (EU) No 1233/2011 of the European Parliament and of the Council⁴.
- (2) The Participants to the Arrangement ('Participants') are to decide, in a written procedure, on the European Union's proposal for a Common Line in accordance with Chapter IV, Section 5 of the Arrangement to allow a temporary decrease of the minimum down payment required pursuant to Article 11 a) of the Arrangement (the 'proposed Common Line'), in the light of the current Covid-19 economic downturn.
- (3) The proposed Common Line would allow public purchasers in low and middle income countries, that buy goods and services which are the subject of official export credit support, to make down payments of a minimum of 5% of the export contract value for a period of 12 months, instead of 15% as required by Article 11 a) of the Arrangement. This would in turn mean increasing the limit for maximum official support that the Participants may provide pursuant to Article 11 c) of the Arrangement, from a ceiling of 85% up to 95% of the export contract value, for the same time period.
- (4) This exceptional measure is necessary to react to the economic downturn resulting from the Covid-19 sanitary crisis and reduce the severe impact of the crisis on realisation of important projects in the low and middle income countries by the EU industry.
- (5) It is appropriate to establish the position to be taken on the Union's behalf regarding the proposed Common Line in the written procedure by the Participants, as the

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).

proposed Common Line, once agreed, will be capable of decisively influencing the content 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.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the written procedure by the Participants to the Arrangement on Officially Supported Export Credits as regards the proposal for a Common Line on the temporary decrease of the minimum down payment shall be based on the Annex to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*