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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 interest rate provisions. These provisions set the minimum Commercial Interest Reference Rates ('CIRRs') that apply to official financing support for export credits. The envisaged decision would harmonise practices among adherents to the Arrangement and ensure terms and conditions that reflect those of private financial markets.

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. 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 (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 63, point (a), of the Arrangement provides that "The Participants shall periodically review the system for setting CIRRs in order to ensure that the notified rates reflect current market conditions and meet the aims underlying the establishment of the rates in operation. Such reviews shall also cover the margin to be added when these rates are applied".

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

A review of the CIRR system has been ongoing since the beginning of 2014. The CIRRs are fixed minimum interest rates that may be offered as part of a government-backed export finance contract. CIRRs are fixed for each currency of the Participants to the Arrangement. In the 127th meeting of the Participants, held in June 2014, the Participants tasked the Technical Experts to the Participants (‘TEP’) with reviewing the disciplines in the Arrangement on CIRRs.

The CIRR reform would constitute a comprehensive reform covering operational aspects (e.g. modalities such as holding and fixing the interest rates), as well as structural aspects (e.g. base rates, margins and surcharges). The aim of the CIRR reform is to harmonise lending practices among Participants and bring the CIRRs closer to market rates. The envisaged provisions on CIRRs would be applicable to all transactions, except transactions covered by the Sector Understanding for Ships and the Sector Understanding for Civil Aircraft.

At the 141st Participants’ Meeting held in June 2019, the Chair of TEP presented a draft Chair’s proposal on the CIRR reform that seeks to strike a balance between divergent interests and standpoints expressed in the course of the technical work. The Chair’s draft proposal received broad general support by the Participants, while a number of minor issues, still had to be resolved. In the November Participants’ meeting of last year, the views of the Participants converged. The Participants to the Arrangement are to adopt a decision on the draft compromise proposal by written procedure.

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

The WTO Agreement on Subsidies and Countervailing Measures (‘ASCM’) provides a carve out for the Arrangement in the illustrative list of export subsidies, providing that an export credit practice which is in conformity with the provisions of the Arrangement is not considered a prohibited export subsidy prohibited by the ASCM. This means that if a WTO member is a party to the Arrangement and its export credit practice is in conformity with the Arrangement or if in practice a WTO Member applies interest rate practices in conformity with the provisions of the Arrangement, the export credit practice is not considered an export subsidy. This gives the provisions in the Arrangement on interest rates particular significance.

The provisions on the CIRRs have remain unchanged for a long time and are in need of comprehensive reform. Trade finance has become increasingly decisive in sourcing decisions in global trade and this has led to a wide range of financial products and contract structures being offered in private financial markets. To ensure conformity, the interest rates provisions of the Arrangement periodically need to be adapted to evolving market practices. The Arrangement merely outlines the general principles when providing government-backed lending at fixed interest rates and focuses on structural aspects. Since Member States provide CIRRs to a greater extent than most other Participants do and in order to converge practices within the EU, Member States have informally agreed to a set of rules that covers operational aspects of the CIRR system, as a complement to the provisions in the Arrangement. In addition to the Arrangement and the informal EU guidelines, most Member States have adopted national CIRR regulations.

The envisaged decision on the CIRR reform would provide for more detailed and comprehensive update of ANNEX XVI of the Arrangement. These would cover both the costs incurred by the lender before an export contract has been signed by a buyer (e.g. rules on minimum fees charged for offering and fixing the interest rate), as well as rules on how to calculate the interest rate, which corresponds to the yield on a government bond plus a margin

covering other funding costs. By incorporating components that affect the funding costs, the CIRR reform aims to render greater coherence in the terms and the conditions offered by ECAs and thereby ensure a level playing field among Participants to the Arrangement. By doing so, the reform would narrow the scope for EU Member States to adapt the provisions of the CIRRs at national level to the specific needs of domestic industry. A transition period of two years is envisaged to allow time for export credit agencies offering direct lending to adapt to the new guidelines.

In sum, the envisaged decision on the CIRR reform involves rules on both operational and structural aspects that would provide greater policy coherence and enhance the level playing field among Participants. 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 adopt new guidelines on CIRRs.

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 by virtue 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”.

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.

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.

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 Exported Export Credits (the ‘Arrangement’) have been transposed, and hence been made legally binding in the EU by virtue of Regulation (EU) No 1233/2011 of the European Parliament and of the Council⁶.
- (2) In accordance with Article 63 of the Arrangement, the participants to the Arrangement (the ‘Participants’) should periodically review the system for setting Commercial Interest Reference Rates (‘CIRRs’) in order to ensure that the notified rates reflect current market conditions and meet the aims underlying the establishment of the rates in operation. Such reviews should also cover the margin to be added when these rates are applied.
- (3) The Participants are to decide by written procedure on an envisaged decision to amend the provisions in the Arrangement on CIRRs.
- (4) The envisaged decision to reform the provisions on the CIRRs should provide greater policy coherence and harmonise lending practices, thereby enhancing the level playing field among Participants. Furthermore, it should bring the fixed interest rates offered in officially supported export credit transactions closer to market rates and ensure they are better adapted to the terms and conditions offered in the private financial market. A transition period of two years should allow the export credit agencies time to adopt and communicate the new guidelines.
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the written procedure of the Participants to the Arrangement, 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,

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 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 amend the provisions on the CIRRs 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*