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Proposal for a

COUNCIL DECISION

establishing the position to be adopted on the Union's behalf in the written procedure by the Participants to the Arrangement on Officially Supported Export Credits in relation to the common line to grant tied aid eligibility to Ukraine

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a Council decision establishing the position to be taken on the European Union's behalf by the Commission in a written procedure by the participants to the arrangement on Officially Supported Export Credits (the 'Arrangement'). The written procedure aims at agreeing on a common line to grant tied aid eligibility to Ukraine.

2. CONTEXT OF THE PROPOSAL

2.1. The Arrangement on Officially Supported Export Credits

The Arrangement is a "gentlemen's agreement" which provides a framework for the orderly use of officially supported export credits and tied aid. In practice, this means it sets rules that work to eliminate subsidies and trade distortions related to officially supported export credits. These include provisions covering tied aid, i.e. aid which is, in law or in fact, tied to the procurement of goods and/or services from the donor country and/or a restricted number of countries. The Arrangement entered into force in April 1978 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, in order to take account of 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 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 Credits³.

2.3. Common line

A common line is an instrument under the Arrangement that allows the participants, on an exceptional basis, to diverge from the Arrangement's provisions either for a specific transaction or temporarily for a non-specific number of transactions. The procedures for reaching agreement on common lines are set out in Articles 54 to 59 of the Arrangement.

The Article 59 of the Arrangement states that "A Common Line, once agreed, shall be valid for a period of two years from its effective date". If the Participants need the temporary exceptions of the Arrangement provisions to be longer, they shall agree to several Common Lines.

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 Council Decision setting up a Policy Co-ordination Group for Credit Insurance, Credit Guarantees and Financial Credits, (OJ 66, 27.10.1960, p. 1339).

2.4. The envisaged act of the European Union

Article 32 a) of the Arrangement states: “There shall be no tied aid to countries whose per capita GNI, according to the World Bank data, is above the upper limit for lower middle income countries. The World Bank recalculates this threshold on an annual basis. A country will be reclassified only after its World Bank category has been unchanged for two consecutive years.” In June 2024, the World Bank classified Ukraine as an upper-middle income country for the first time. If the World Bank does so again in their next classification (due in June 2025), Ukraine will no longer be eligible to receive tied aid.

While Ukraine's economy was significantly impaired by the crisis resulting from Russia's war of aggression against Ukraine, real growth has been driven by construction activity (24.6%), reflecting a sizable increase in investment spending (52.9%) supporting Ukraine's reconstruction effort in the wake of ongoing destruction. Furthermore, the continued decline in population, which has fallen more than 15%, has a significant effect on the rise of per capita GNI.

In the context of Russia's war of aggression against Ukraine, several EU Member States have already used tied aid to support Ukraine or plan to do so in the near future (the envisaged time frame is the next four years).

As the change of classification is not directly linked to a real significant expansion of the Ukrainian economy, and the Ukrainian situation remains critical, it is crucial that the EU and other Participants maintain the possibility to use all tools that may be needed. It is prudent, in that case to propose and agree on a common line, not least as this situation is foreseen in the Arrangement.

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

The European Union should support common lines under Articles 54 to 59 of the Arrangement to provide for tied aid eligibility for Ukraine for the next four years, irrespective of its World Bank classification.

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’*⁴.

4.1.2. Application to the present case

The rules of an agreed common line supersede the rules of the Arrangement only for the transaction or in the circumstances specified in the common line. While common lines are soft

⁴ 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.

law for other Participants to the Arrangement, for the EU, common lines constitute acts having 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." As common lines are agreed by the Participants following the procedure set out in Articles 54 to 59 of the Arrangement involving the OECD Export Credit Secretariat, they also constitute acts adopted by an international body within the meaning of Article 218(9) TFEU. 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 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, TFEU in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the common line proposed to the participants will offer the possibility to make use of a derogation provided under 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.

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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 Arrangement on Officially Supported Export Credits (the 'Arrangement') was concluded by the European Community as a gentlemen's agreement negotiated within the framework of the OECD in 1978.
- (2) The guidelines contained in 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 Council⁵.
- (3) The Arrangement foresees in its Article 35 the possibility for a participant to propose a common line to extend the country eligibility rules. The Article 55 describes a specific procedure for adoption by written procedure of the Participants.
- (4) In line with the Union's unwavering commitment to provide support to Ukraine and its people for as long as it is needed, it is in the interest of the Union to continue to be able to grant tied aid to Ukraine.
- (5) The Arrangement states that Common Lines are valid for a period of two years. Yet, the exceptional support to Ukraine may be needed longer to be able to provide continued support. It is in the interest of the Union to be able to agree to several common lines in a next future.
- (6) It is appropriate to establish the position to be taken on the Union's behalf, 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,

⁵ 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 adopted on the Union's behalf in the context of the Arrangement on Officially Supported Export Credits shall be to accept the proposal for a common line to grant tied aid eligibility to Ukraine that is in line with the annex to this Decision.

Article 2

1. The position to be taken on the Union's behalf in context of the Arrangement on Officially Supported Export Credits as regards the renewal of this common line in two years' time shall be in line with the annex to this Decision.
2. To this effect, the Commission shall transmit to the Council a written document setting out the particulars of the envisaged renewal. The written document shall reach the Council with sufficient time in advance for discussion and endorsement of the details of the specification of the position to be expressed on the Union's behalf in order to determine the specification in time for the relevant meeting of the Specialised Committee or, as the case may be, the end of a written procedure of the Specialised Committee in which the Specialised Committee is to decide on an adjustment of the standard forms.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels,

*For the Council
The President*