August 10, 2023

OECD Modernisation of the Arrangement on Export Credits – Update

On July 14, 2023, the Organisation for Economic Co-operation and Development (the “OECD”) announced that the text implementing the landmark modernisation of the Arrangement on Officially Supported Export Credits (the “Arrangement”, and as modified in July 2023, the “Revised Arrangement”) had been agreed by the participating countries (Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland, Türkiye, the United Kingdom and the United States (the “Participants”)).[1] The Arrangement sets out financing terms and conditions (including repayment terms and minimum premium and interest rates) upon which export credit agencies (“ECAs”) from the Participants provide officially supported export credits and tied aid.

The modernisation of the Arrangement was previewed by a statement of the Participants in March 2023 (the “March Announcement”).[2] See also the S&C Memo “*Energy Transition Insights: OECD Modernisation of the Arrangement on Export Credits*”.[3]

The self-described “gentlemen’s agreement” was modified by the Participants to reflect market developments and answer calls for the ECAs to play a bigger role in supporting the energy transition and achievement of the UN Sustainable Development Goals.[4] In particular, the Revised Arrangement is intended to allow ECAs to support a wider range of climate-friendly and sustainable projects on more flexible terms than previously.

Key Aspects of the Revised Arrangement

The main changes are focused, as anticipated by the March Announcement, on (1) expanding the scope of “green projects” that benefit from more favourable terms; (2) extending repayment terms and introducing greater repayment flexibility; (3) simplifying the Arrangement; and (4) introducing a more robust transparency regime.

The following items may be of particular interest to industry participants globally (including sponsors, borrowers, investors and commercial banks):

- **Expansion of the scope of "green" projects eligible for longer repayment terms**. As previewed by the March Announcement, the scope of projects eligible for longer repayment terms (see bullet point below) under the Climate Change Sector Understanding (the "CCSU") has been significantly expanded.[5] Several new categories of eligible project classes have been added:

  (a) **CO_2 capture, storage and transportation**[6] – this new project class covers the construction and operation of facilities dedicated to (i) capturing CO_2 from emissions sources that would otherwise be released into the atmosphere or from the ambient air; (ii) preparing captured CO_2 for transportation; (iii) transporting captured CO_2 to the end use point; and/or (iv) permanently storing captured CO_2;

  (b) **transmission, distribution and storage of energy**[7] – this new project class covers transactions in connection with (i) energy management, transmission and distribution (*i.e.*, construction and/or expansion of grid-scale energy storage facilities); and (ii) battery production and recycling (*i.e.*, construction of facilities that manufacture rechargeable batteries, battery packs and battery cells with climate-mitigating end uses or recycling of end-of-life batteries);

  (c) **clean hydrogen and ammonia**[8] – this new project class covers (i) construction of facilities dedicated to clean hydrogen[9] production; (ii) construction of facilities dedicated to clean ammonia[10] production; and (iii) transmission, distribution and storage of hydrogen (*i.e.*, construction of facilities that are connected to clean hydrogen production plants or are expected to be connected to such plants within 5 years, the conversion of existing gas facilities into 100% hydrogen facilities, and the repurposing of gas networks to enable the integration of hydrogen);

  (d) **low emissions manufacturing**[11] – this new project class provides an illustrative list of the types of products which may be manufactured under this category, which includes ferrous and non-ferrous metals, cement, chemicals and pulp and paper. Until the Participants formally agree on the required standards for a project to qualify as "low emissions" manufacturing[12], the project must outline the greenhouse gas intensity of the production of the manufactured product in question, taking into account scope 1 and 2 emissions, and present a rationale for why the level in question qualifies as "low emissions". This project class will further be discontinued after June 30, 2024 unless the Participants agree otherwise[13];

  (e) **zero and low emissions transport**[14] – this new project class covers (i) zero emissions transport and enabling infrastructure; (ii) low emissions rail and enabling infrastructure (including bi-mode electro-diesel trains and hybrid locomotives); (iii) low emissions heavy-duty transport and enabling infrastructure (including plug-in hybrid vehicles for industrial or freight applications and associated infrastructure and hybrid electric vehicles for industrial or freight applications); and (iv) low emissions water transport;[15] and

  (f) **clean energy minerals and ores**[16] – this new project class covers the construction of facilities involved in the land-based extraction, recycling, processing and/or refining (including metallisation) of ores or minerals where the product resulting from these processes forms part of the supply chain for eligible projects. Accordingly, the purpose of this project class is to promote materials in the supply chain for eligible projects that are key to achieving climate change mitigation.[17] A proposal under this project class must include a description demonstrating, among others, that a significant proportion of offtake from the facility will form part of the supply chain for eligible projects. The Revised Arrangement also provides an illustrative list of the types of minerals and ores which may be covered, including copper, cobalt, nickel, lithium, rare earth elements, chromium, zinc, platinum group metals and aluminium. The Revised Arrangement further notes that, unless otherwise agreed by the Participants, this project class will be discontinued after June 30, 2024.[18]

In addition, certain previously supported categories have been adjusted (including by relaxing the eligibility criteria and expanding the scope):

(g) **environmentally sustainable energy production**[19] – this category covers certain renewable energy sectors which were eligible under the prior version of the CCSU if they complied with the 2012 Recommendation of the Council on Common Approaches Officially Supported Export Credits and Environmental and Social Due Diligence (the "Recommendation").[20] Under the Revised Arrangement, the requirement to comply with the Recommendation to be eligible under the CCSU no longer applies. Separately, the project class was expanded to cover electricity production from clean hydrogen (*i.e.*, construction of electricity generation facilities that produce electricity using exclusively clean hydrogen, which is hydrogen meeting certain thresholds of well-to-gate emissions).[21] "Blue hydrogen" (*i.e.*, hydrogen produced from natural gas and supported by carbon capture and storage) is not expressly addressed. However, provided the well-to-gate emissions criteria are met, it appears that blue hydrogen could be covered;

(h) **remediation projects in fossil fuel plants, fossil fuel substitution**[22] – in the prior version of the Arrangement, this category only covered projects involving waste to energy units and hybrid power plants.[23] The project class was expanded to also include fossil fuel power plants with operational carbon capture and storage. It is not clear from the text of the Revised Arrangement whether this new project class covers (i) construction of new plants with operational carbon capture and storage; (ii) retro-fitting existing plants to add operational carbon capture and storage capabilities; or both (i) and (ii). Changes to this project class are anticipated, as the Participants indicate that they intend to review the category no later than March 2024; and

(i) **energy efficiency**[24] – finally, the energy efficiency project class was carried over from the prior version of the Arrangement with no alterations and includes the following types of projects: (i) combined heat & power projects; (ii) district heating and/or cooling networks; and (iii) smart grids. The Revised Arrangement notes that the Participants intend to review this project class by March 2024, signalling that changes to this category may be made in the future.

- **Extension of repayment terms**. The maximum repayment term for CCSU-eligible projects – which now includes the expanded list of "green" projects listed above – has been increased to 22 years (from 18 years).[25] For all other projects, the maximum repayment term has been increased to 15 years for the most part[26] (from 8.5-12 years).[27] In addition, the country categorisation differentiation for the purpose of determining standard maximum repayment terms has been removed.[28] Country categorisation differentiation had previously linked the maximum repayment term to whether or not a country was classified as "high income", based on *per capita* gross national income, with shorter repayment terms for such "high income" countries.[29]

- **Introduction of more flexible financing terms and conditions**. The Revised Arrangement introduces greater repayment flexibility relating to the frequency, size and pattern, and repayment of principal and interest. For instance, payments of principal may now be made on an annual basis, and interest may also be paid annually.[30] The Revised Arrangement reduces the minimum premium rates for transactions with non-investment grade obligors/higher credit-risk transactions.[31] This is combined with the introduction of a term adjustment factor for such higher credit risk transactions.[32] The term adjustment factor introduces a maximum 15% discount to the minimum premium for (i) obligors classified by a Participant in buyer-risk categories equivalent to speculative grade according to a concordance table in the Revised Arrangement; and (ii) for transactions where the horizon of risk (as calculated by the formula set out in the Revised Arrangement) is greater than 10 years.

  The amendments to the financial structure introduce further flexibility for transactions with an imbalance between the timing of cash flow generation and a standard repayment profile.[33] Such projects may be structured with a tailored repayment profile, provided that:

  (a) no single repayment of principal within a six-month period may exceed 30% of the principal sum of the credit;

(b) the first repayment of principal must be made no later than 24 months after the starting point of credit[34]; and

(c) the maximum weighted average life of the repayment period is the greater of 65% of the repayment term of the transaction or 6 years.[35]

- **Simplification of structure**. The modernisation package resulted in significant streamlining of the structure of the Revised Arrangement. For instance, the special constraints applicable to limited recourse project finance transactions (previously located in Annex VI) were removed. The general terms and rules on financial structuring under the Revised Arrangement therefore apply to such project finance transactions. The prior Sector Understanding on Export Credits for Rail Infrastructure was also removed.
- **Introduction of reporting requirements**. The Revised Arrangement has modified certain of the reporting requirements to enhance transparency in the provision of export credits.[36] For instance, for all transactions supported which have been the subject of prior notification[37], information related to the actual repayment term and repayment profile (including the frequency of interest payments and the percentage of principal repaid by the mid-point of the credit) must be provided after the fact.[38] For transactions that apply a non-standard repayment profile and which were not prior-notified, certain information must nevertheless be reported after the fact, such as an explanation of the reasons why there is an imbalance between the timing of funds available to the obligor and the standard debt service profile.[39]
- **Commitment to future work**. As part of the Revised Arrangement, the Participants have also set out the areas on which they agree to commit future examination to, including:

(a) Net zero energy buildings;

(b) Fuel cell projects;

(c) Clean gaseous and liquid fuels;

(d) Review and inclusion of future international standards for low emissions manufacturing.[40]

This signals important recognition from the Participants regarding changes in technology which may require future changes in the provision of export credit.

Participant ECAs Implement the Revised Arrangement

On July 12, 2023, the Export-Import Bank of the United States[41] announced that it would be offering longer repayment terms and additional flexibilities in line with the Revised Arrangement, effective July 15, 2023. Likewise, the ECA of the United Kingdom[42] announced that it would be making certain changes to its policies and conditions for providing aid to implement the Revised Arrangement. Similar announcements from the ECAs of the other Participants are expected in the near future.

* * *

ENDNOTES

1 *See Trade and Agriculture Directorate Participants to the Arrangement on Officially Supported Export Credits,* OECD (Jul. 17, 2023) [hereinafter *Revised Arrangement*], https://one.oecd.org/document/TAD/PG(2023)7/en/pdf.

2 *See Participants' Statement*, OECD (Mar. 31, 2023), https://www.oecd.org/trade/topics/export-credits/documents/Participants%20Statement%20(3%20April%202023).pdf.

3 SULLIVAN & CROMWELL LLP (Apr. 19, 2023), https://www.sullcrom.com/insights/memo/2023/April/OECD-Modernisation-of-the-Arrangement-on-Export-Credits.

4 *See Joint Business Position on the Modernization of the OECD Arrangement*, OECD, EUR. BANKING FED'N & INT'L CHAMBER OF COM. (Nov. 2019), https://www.ebf.eu/wp-content/uploads/2019/11/Final-version-Joint-business-position-on-Future-of-OECD-Arrangement.pdf. *See also Export Finance Updates*, SULLIVAN & CROMWELL LLP (Mar. 25, 2022), https://www.sullcrom.com/insights/memo/2022/March/Export-Finance-Updates.

5 Revised Arrangement, *supra* note 1, Annex I.

6 *Id*. at 45.

7 *Id*. at 46.

8 *Id*. at 47.

9 *Supra* note 8.

10 Clean ammonia is ammonia produced from clean hydrogen according to the standards defined in the CCSU or that is recovered from wastewater. *See* Revised Arrangement, *supra* note 1, Annex I. at 47.

11 Revised Arrangement, *supra* note 1, Annex I. at 48.

12 This is one of the areas identified for future work needed by the Participants, pursuant to Chapter IV.

13 However, the Revised Arrangement notes that, at the same time, the Participants will review international standards developed by June 30, 2024, and decide they will incorporate them in this project class. *See* Revised Arrangement, *supra* note 1, at 48.

14 Revised Arrangement, *supra* note 1, at 49-50.

15 Note that the transactions falling under this project class remain subject to the terms and conditions of Chapter II of the Revised Arrangement pending the outcome of further discussions by the Participants regarding the specific criteria, standards and definitions to be applied.

16 Revised Arrangement, *supra* note 1, Annex I. at 51.

17 *Id*. at 50.

18 Participants may continue to submit proposals under the project class up until June 30, 2025, provided that they have notified the other Participants by June 30, 2024 that they are preparing to bring forward a specific proposal.

19 *Id*. at 41.

20 *See Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*, OECD (Jul. 28, 2012), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0393.

21 Revised Arrangement, *supra* note 1, Annex I. at 41 and 47. "Tier 1" clean hydrogen projects are those with well-to-gate emissions (from feedstock production until hydrogen shipment) that are less than 3 kg CO_2e per 1 kg of H2, and are eligible for a maximum repayment term of 22 years. "Tier

ENDNOTES (CONTINUED)

2" clean hydrogen projects are those with well-to-gate emissions (from feedstock production until hydrogen shipment) that are less than 4 kg CO_2e per 1 kg of H2, and are eligible for a maximum repayment term of 18 years.

22 Revised Arrangement, *supra* note 1, at 42.

23 In addition, this project class has been renamed in the Revised Arrangement: it used to be known as "fossil fuel substitution". The new name reflects the fact that the project class has been expanded to cover projects beyond just fossil fuel substitution.

24 Revised Arrangement, *supra* note 1, Annex I. at 43-44.

25 *Id*. art. 12(a).

26 The maximum repayment term was modified to up to 12 years for non-nuclear power plants, *see* Revised Arrangement, *supra* note 1, art. 12(c).

27 Revised Arrangement, *supra* note 1, art. 12.

28 *Id*. art. 12.

29 The maximum repayment term for Category I "high income" countries had previously been 8.5 years, and for Category II countries (all those not classified as Category I) had been 10 years. *See Trade and Agriculture Directorate Participants to the Arrangement on Officially Supported Export Credits,* OECD (Jan. 10, 2022), https://one.oecd.org/document/TAD/PG(2022)1/en/pdf#:~:text=SUPPORTED%20EXPORT%20CREDITS-,January%202022,effective%20as%20of%20January%202022.

30 Revised Arrangement, *supra* note 1. art. 13(c).

31 *Id*. Annex VI.

32 *Id*. art. 21 and Annex VI.

33 *Id*. art. 13(e).

34 *Id*. Annex VIII. The starting point of credit depends on the goods or type of components and services involved. For instance, for parts or components, the starting point of credit is not later than the actual date of acceptance of the goods or the weighted mean date of acceptance of the goods by the buyer. Alternatively, for complete plants or factories, the latest starting point of credit is the date when buyer takes physical possession of the entire equipment (excluding spare parts) supplied under the contract.

35 *Id*.

36 *Id*. arts. 40-44 and Annex V.

37 *Id*. arts. 43-44.

38 *Id*. art. 40(c)(1).

39 *Id*. art. 40(c)(2).

40 *Id*. Annex I.

41 *See EXIM Announces Longer Repayment Terms, Flexibilities for Climate Projects*, US-EXIM (Jul. 12, 2023), https://www.exim.gov/news/exim-announces-longer-repayment-terms-flexibilities-for-climate-projects.

42 *See UKEF to provide improved terms and conditions for climate-friendly exporters*, UK EXPORT FINANCE (Jul. 19, 2023), https://www.gov.uk/government/news/ukef-to-provide-improved-terms-and-conditions-for-climate-friendly-exporters#:~:text=Participants%20to%20the%20OECD%20Arrangement,climate%2Dfriendly%20and%20green%20transactions.

Questions regarding the matters discussed in this publication may be directed to Stewart Robertson, Inosi Nyatta, Jon Hannah, Silvia Brünjes or any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. Additional S&C resources about energy transition matters may be found here. This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice.