

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(83) 278 final

Brussels, 20 May 1983

COUNCIL DECISION

concerning the reciprocal obligations of export credit insurance organizations of the Member States acting on behalf of the State or with its support, or of public departments acting in place of such organizations, in the case of joint guarantees for a contract involving one or more subcontracts in one or more Member States of the European Communities

(submitted to the Council by the Commission)

EXPLANATORY MEMORANDUM

BACKGROUND

1. Since 1963 an agreement between credit insurers acting on behalf of the State or with its support has regulated their reciprocal obligations in cases where they are involved in joint insurance relating to the same export contract. The agreement is not a Community legal act but a private agreement deposited with the Council Secretariat.

It includes an arbitration clause, which gives the President of the Court of Justice of the European Communities the power to appoint one of the three arbitrators provided for in the clause. The text at present in force dates from 20 February 1974. The provisions annexed to this proposal for a Decision constitute an updating of the 1974 agreement. The existing legal form of the agreement between credit insurers is no longer considered suitable for the purposes of implementing the Decision.

ECONOMIC IMPORTANCE OF JOINT INSURANCE

2. The increased interdependence of the economies of the Member States has resulted in the growth of export operations undertaken jointly by a number of firms in different Member States. Subcontracting involving other countries occupies a considerable place in such operations.

3. Insurance and finance offered with the backing of public authorities are commonly - and more and more frequently - a very significant factor in the competitiveness of exports. In the case of joint export operations involving a number of Member States, the provision of cover and finance for the export transaction requires that the various national export guarantee and finance systems work smoothly together. Differences between the national systems sometimes make this difficult.

4. Subcontracting is divided into two categories, according to whether the subcontractor participates in the risk assumed by the principle contractor in relation to the buyer. Community subcontracts without provision for participation in this risk must be included in the credit insurance granted to the principal contractor, pursuant to Council Decision 82/854/EEC¹. In the case of subcontracts with provision for participation in the risk, joint insurance is the only means of providing credit insurance cover (and hence finance) for the portion subcontracted in another Member State. Joint insurance is, therefore, essential in order to prevent such cases of subcontracting being discriminated against by comparison with national subcontracting.

5. By allowing greater cooperation between firms in different Member States, the smooth operation of joint insurance affects the competitiveness of Community exports on the markets of non-member countries in ways which, though not easy to quantify, are positive. The principal contractor normally seeks cooperation for reasons of economic efficiency. Hence joint insurance helps improve the quality of Community firms' offers.

NEED FOR A COMMUNITY ACT

6. The agreement among credit insurers was last revised in 1974. Consequently, it pre-dates the opinion delivered by the Court of Justice in 1975 establishing the Community's exclusive power with regard to export credits. The agreement regulates the arrangements for measures taken by the authorities in a field covered by Article 113 of the EEC Treaty, as does Decision 82/854/EEC. The agreement should therefore be based on a Community act.

¹OJ L 357, 18.12.1982, pages 20-22.

7. Apart from this basic legal consideration and in view of the economic importance of joint insurance, as described above, a number of practical advantages can be expected to flow from a Council Decision:

- (a) Joint insurance will be applicable throughout the territory of the Community. At present, not all Community credit insurers participate in the existing agreement.
- (b) A Council Decision on joint insurance will form a definitive part of the Community acquis and in consequence no amendment or new negotiations will be needed in the event of a future enlargement of the Community.
- (c) It has proved very difficult in practice to adjust the credit insurers' agreement in the light of developments. Joint insurance evolves almost continually as practical difficulties arising from its use are overcome. It is very important to be able to adjust the new text as frequently as required. To this end the Commission will present a report after two years or at any time a Member State should so request. The discussions following the presentation of the report will give each Member State an opportunity to share its experience with other Member States and the Commission, which will, if necessary, make a proposal to the Council for amendment of the text.
- (d) Adoption by the Council of a Decision in the field under consideration would constitute a significant step towards improving cooperation between Member States. Although joint insurance is already in use on the basis of the abovementioned agreement between credit insurance organizations, the adoption of a formal decision would confirm the Community's will to strengthen this form of cooperation and would cause it to be used more extensively.

AIM OF REGULATING JOINT INSURANCE

8. The purpose of the provisions annexed to this proposal for a Council Decision is to establish the general conditions necessary to place such cooperation between credit insurers on an operational footing. The responsible credit insurers or national authorities must, however, be left to determine freely whether to apply joint insurance in a specific case. The rules proposed here constitute, therefore, a framework to be complied with where two or more credit insurers are willing to cooperate in joint insurance.

Recommendation for a

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the Recommendation from the Commission,

Whereas export insurance and finance for export strongly influence international trade flows and as such constitute a particularly powerful instrument of commercial policy;

Whereas the increasing interdependence of the Member States' economies results in a trend towards the growth of export operations undertaken on a cooperative basis by a number of firms in different Member States;

Whereas such cooperation is a major, or even decisive, factor in the competitiveness of Community exports on third country markets;

Whereas accordingly such cooperation should be encouraged, particularly in the field of subcontracting;

Whereas differences between the export guarantee and finance systems at present in force in the Member States may give rise to difficulties in the undertaking of such export operations;

Whereas joint insurance is a form of cooperation between credit insurers of different Member States which allows firms in those Member States to cooperate in export operations;

Whereas in consequence it is important to establish and extend the smooth operation of this form of cooperation between credit insurers,

HAS ADOPTED THIS DECISION:

ARTICLE 1

1. Member States shall ensure that their export credit insurance organizations acting on behalf of the State or with its support, or the public departments acting in place of such organizations, comply with the provisions annexed hereto as regards their reciprocal obligations when deciding to grant, jointly with an organization or public department of another Member State, guarantees relating to a contract involving one or more subcontracts in one or more Member States.

2. The annexed provisions shall not preclude the adoption by the organizations or departments referred to above of additional provisions not affecting the scope of the provisions annexed hereto, when applying the latter to any specific operation.

ARTICLE 2

Member States shall take the measures necessary to ensure compliance with the provisions annexed hereto.

ARTICLE 3

Member States intending to conclude a framework agreement on joint insurance with a third country shall inform the other Member States and the Commission.

ARTICLE 4

Two years after this Decision takes effect, the Commission shall present a report on the experience gained from the application of the provisions annexed hereto.

Proposals to modify these provisions may be presented by the Commission at any time considered appropriate.

ARTICLE 5

This Decision shall apply as from the expiry of two months after the day of its publication in the Official Journal of the European Communities.

ARTICLE 6

This Decision is addressed to the Member States.

Done at

For the Council

Article 1

OBJECT OF THE AGREEMENT

The object of this Agreement is to regulate the reciprocal obligations of EEC export credit insurers of the European Economic Community in cases where:

- an enterprise (hereinafter called "the main contractor") sub-contracts to one or more enterprises (hereinafter called "the sub-contractors") of one or more countries of the European Economic Community an export contract of which the main contractor is the sole holder, and which it has concluded with an enterprise (hereinafter called "the buyer") situated:
 - = either in a third country not belonging to the European Economic community;
 - = or in a country of the European Economic Community other than those in which the main contractor and the sub-contractor(s) are situated;
- the main contractor has undertaken to remit to the sub-contractor(s) the portion due to the latter out of the sums paid by the buyer to the main contractor, and to complete any formalities which may be necessary to transfer that portion of the payments made by the buyer which is due to the sub-contractor(s);
- there are no legal ties between the sub-contractor(s) and the buyer;

.../

- the main contractor's credit insurer (hereinafter called "the principal insurer") and the credit-insurer(s) of the sub-contractor(s) (hereinafter called "the joint insurer(s)") are prepared to guarantee, each according to the usual terms of his policy, the portion of the transaction carried out in their respective countries against the risks defined by them in each individual agreement.

The agreements which the signatories hereto shall conclude by an exchange of letters in each individual case relating to the issue of joint guarantees to a main contractor and to one or more sub-contractors shall be governed by the general provisions set out in the Articles below.

Article 2

OBLIGATIONS OF THE PRINCIPAL INSURER

The principal insurer, being the sole manager of the risk including the sub-contracted element. shall undertake:

- (a) to guarantee the main contractor, in respect only of his part of the contract, against the risks defined by him in each individual agreement;
- (b) not to accept any modification to any of the terms of performance of the contract (amount, delivery, payment, etc.) or to the contract between the main contractor and the sub-contractor(s) for the performance of that contract, unless mutually agreed with the joint insurer(s);

.../...

- (c) not to disclaim liability under the provisions of the policy issued to the main contractor in consequence of any default on the latter's part, without notifying the joint insurer(s) thereof;
- (d) not to declare that the policy has lapsed without notifying the joint insurer(s) thereof;
- (e) to notify to the joint insurer(s) any fact which comes to his knowledge and which might alter the nature or extent of the risk or lead to a loss;
- (f) in the event of loss or threat of loss, to consult the joint insurer(s) on the measures to be taken; decisions to acknowledge a loss shall, so far as possible, be taken by mutual agreement, the amount of the indemnity and the method of payment being fixed in accordance with the provisions of each policy;
- (g) in the event of a loss, to take the necessary steps or require the main contractor to take the necessary steps to recover amounts unpaid and to pay back to the joint insurer the portion owed to the latter out of the sums recovered and to complete any necessary formalities for transferring such portion. The costs incurred in recovery by the principal insurer shall be divided between the two insurers in proportion to the share of the contract covered;
- (h) in the event of cancellation of the guarantee by the principal insurer, to use his best endeavours to meet the obligations set out in this Article.

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Article 3

OBLIGATIONS OF EACH OF THE JOINT INSURERS

Each of the joint insurers shall, for his part, undertake:

- (a) to guarantee the sub-contractor in his country, in respect only of his part of the transaction, against the risks defined by him in each individual agreement;
- (b) not to accept any modification to the contract concluded between the main contractor and the sub-contractor(s) for the performance of the contract concluded with the buyer, except by mutual agreement with the principal insurer;
- (c) not to disclaim liability under the provisions of the policy issued to the sub-contractor in consequence of any default on the latter's part, without notifying the principal insurer thereof;
- (d) not to declare that the policy has lapsed without notifying the principal insurer thereof;
- (e) to notify the principal insurer of any fact which comes to his knowledge and which might alter the nature or extent of the risk or lead to a loss;
- (f) in the event of cancellation of the guarantee by the joint insurer, to use his best endeavours to comply with the obligations set out in this Article.

.../...

Article 4

CONSOLIDATION

In the event of agreement to consolidate the debt of the buyer country, the principal insurer and the joint insurer shall hold consultations on ways and means of resolving the specific problems raised by the consolidation agreement.

Article 5

BUYER CREDIT TRANSACTIONS

Where, with the agreement of the credit insurers concerned, a single buyer credit is proposed for the whole of a contract, the provisions of the preceding Articles of this Agreement shall apply by analogy.

Article 6

ARBITRATION

Any dispute arising out of this Agreement which cannot be settled amicably shall be brought before an arbitration board composed of three arbitrators. Each of the parties involved shall appoint one arbitrator. The third arbitrator shall be appointed by the President of the Court of Justice of the European Communities; he shall act as Chairman of the Arbitration Board. The proceedings shall be governed by the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

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