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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**Drafting Group No.3 on Definition, Treatment and Protection of Investors and Investments**

**SELECTED ISSUES**

**(Note by the Chairman)**

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### **(Note by the Chair)**

1. At the April meeting of the Negotiating Group, the Chairman concluded that there was considerable interest in having DG3 consider certain texts developed by Expert Group N° 5 in its March report [DAFFE/MAI/EG5(97)4/REV1], with a view to determining:
  - 1) whether the principles expressed in the EG5 texts should be applied more widely than financial services, and if so, whether there should be any limitations (e.g. sectoral) to such application; and
  - 2) whether the text generated for the financial services sector needs adaptation for the purpose of broader application.
2. DG3 is invited to consider the texts reproduced in an annex to this note which deal with four subjects:
  - a) Information transfers and data processing
  - b) Membership of self-regulatory bodies and associations
  - c) Recognition arrangements
  - d) Authorisation procedures.
3. The purpose of DG3's consideration of these issues is not to review the value of these texts for the purposes of financial services which is now in the hands of the Negotiating Group. Rather, DG3 is invited to review each text in the Annex to this note with a view to responding to the questions in paragraph 1 above. The results of DG3's consideration will need to be reported to the Negotiating Group at its June meeting.

## Annex

### RECOMMENDED TEXT ON FINANCIAL SERVICES<sup>1</sup>

The following texts are those proposed by EG5 for the purposes of financial services. The placement of these provisions in the MAI will need to be considered and in some cases specific terms may need to be defined. In some cases, commentary has been added to clarify the status of the text as prepared by EG5.

#### A. Information transfer and data processing

1. No Contracting Party shall take measures that prevent transfers of information or the processing of financial information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of financial information is:
  - a) necessary for the conduct of the ordinary business of a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party; or
  - b) in connection with the purchase or sale by a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of:
    - i) financial data processing services; or
    - ii) financial information, including information provided to or by third parties.
2. Nothing in paragraph 1:
  - a) affects the financial service enterprise's obligation to comply with any record keeping and reporting requirements; or
  - b) restricts the right of a Contracting Party to protect privacy, including the protection of personal data and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

#### Commentary :

Some EG5 delegations wanted to review paragraph 2 b) of the text further. One delegation reserved its position on this text.

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<sup>1</sup> This annex reproduces text submitted to the Negotiating Group in April 1997 [DAFFE/MAI(97)25].

## **B. Membership of self-regulatory bodies and associations**

When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organisation or association is required by a Contracting Party in order for investments of investors of any other Contracting Party in a financial services enterprise established in the territory of the Contracting Party to provide financial services on an equal basis with financial services enterprises of the Contracting Party, or when the Contracting Party provides directly or indirectly such entities, privileges or advantages in providing financial services, the Contracting Party shall ensure that such entities accord national treatment to such investments.

### Commentary:

1. EG5's understanding is that these provisions do not prevent self-regulatory bodies and associations, including deposit insurance institutions, from applying the requirements of the relevant rules and regulations for access to membership as long these requirements are consistent with the provisions of this Agreement.
2. Most EG5 delegations supported the following interpretative note proposed by one delegation:  
  
"Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned."
3. A few EG5 delegations wanted to review further the proposed interpretative note because they considered that it would impose a lesser standard than in the WTO. One delegation suggested adding to the interpretative note: "provided that such access provides equal opportunities".

## **C. Recognition arrangements**

1. A Contracting Party may recognise prudential measures of any other Contracting Party or non-Contracting Party in determining how the Contracting Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the other Contracting Party or non-Contracting Party concerned or may be accorded autonomously.
2. A Contracting Party that is a party to such an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for other interested Contracting Parties to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Contracting Party accords recognition autonomously, it shall afford adequate opportunity for any other Contracting Party to demonstrate that such circumstances exist.

**D. Authorisation procedures<sup>1</sup>**

1. Each Contracting Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to an investment in, or the operations of, a financial services enterprise.
2. On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.
3. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial services enterprise or a financial services enterprise that is an investment of an investor of another Contracting Party within [120][180] days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until [all relevant hearings are held and] all necessary information is received. Where it is not practicable for a decision to be made within [120][180] days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.

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<sup>1</sup> Most delegations recommended adoption of this text. A few delegations felt that no such provisions are necessary.