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

**SELECTED FINANCIAL SERVICES ISSUES**

**(Note by the Chairman)**

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### **I. INTRODUCTION**

1. The Negotiating Group is invited to consider the treatment of financial services matters in the MAI on the basis of the Report by Expert Group No.5 [DAFFE/MAI/EG5(97)4/REV1].
2. On many issues, EG5 has prepared text which the Negotiating Group is invited to adopt. In some of these cases, EG5 notes that the issues at stake may be of general application. Accordingly, the Negotiating Group is also invited to consider adopting the recommended text for the MAI as a whole, subject to review by DG3 to determine whether the text would need adaptation for that purpose.
3. The Negotiating Group may also wish to provide guidance in light of the broader context of the MAI as to how to make progress on certain financial services issues which have not been resolved within EG5.

### **II. MATTERS WHERE TEXT IS RECOMMENDED FOR ADOPTION**

4. For each of the following issues, the financial experts have prepared specific provisions designed to respond to the needs of the financial sector (see Annex). In some cases, the main purpose is to ensure that the responsible financial authorities retain sufficient freedom of action to ensure the safety and soundness of the financial system and the protection of confidential financial information. In most cases, however, the proposed text would supplement the disciplines of the MAI in the interests of promoting higher standards of treatment for investors and their investments in the financial services sector.

#### **a. Prudential Measures**

5. EG5 recommends the adoption of provisions carving out prudential measures with respect to financial services, subject to an anti-abuse clause. EG5 noted that the proposed carve-out was of paramount importance to financial services.

#### **b. Recognition arrangements**

6. EG5 considers that the treatment of arrangements for recognition by a Contracting Party of prudential measures of another Contracting Party is an important issue for financial services. These arrangements facilitate the removal of barriers to investment in financial services, but could be challenged as denials of the MFN obligation of the MAI unless specific text provides otherwise. The text proposed would permit such recognition arrangements under certain conditions. In particular, other Contracting Parties would have to be accorded an opportunity to negotiate similar arrangements or, in the case of

unilateral recognition, to demonstrate that the necessary circumstances exist in their country to merit the benefit of unilateral recognition. This issue may also be of interest to other sectors under the MAI.

**c. Authorisation procedures**

7. Most delegations recommended adoption of text aimed at ensuring transparency and avoiding undue delay in the processing of applications for authorisation in the financial services sector. It was also suggested that the text might be of general application to all sectors. A few delegations considered that the provisions would not add to the basic obligations of the Agreement and were therefore unnecessary.

**d. Transparency**

8. EG5 recommends that the general Transparency provisions of the MAI [DAFFE/MAI(97)7, page 11] should apply to financial services. In addition, specific text for financial services is recommended to ensure that certain financial information will not be revealed because it relates to individual customers or because its revelation would be prejudicial to law enforcement or the public interest.

**e. Information transfer and data processing**

9. Limitations on the ability of investors to transfer and process financial information abroad can impede the activities of financial services enterprises and should be disciplined in the MAI. Accordingly, EG5 recommends adoption of text on this issue for the financial services sector. It may also be of interest to other sectors as well.

**f. Membership of self-regulatory bodies and associations**

10. EG5 considers that National Treatment should be ensured where membership in stock exchanges, other securities markets, self-regulatory bodies or similar organisations is required in order for foreign financial services enterprises to conduct a financial services business on an equal basis with domestic enterprises. The text of this matter was agreed by EG5, except that the treatment to be accorded to branches of foreign financial service enterprises remains to be settled. This matter may also be of interest to other sectors as well.

**g. Transfers Article (paragraph 4.6)**

11. At the request of the Negotiating Group, EG5 reviewed the square-bracketed text for paragraph 4.6 of the MAI Article on Transfers contained in the Consolidated Texts [DAFFE/MAI(97)1, page 42]. It considers that such provisions, which are of general application, are particularly important for financial services. The revised text of paragraph 4.6, which most EG5 delegations recommend for adoption, would allow Contracting Parties to derogate from the free transfer rules where necessary in connection with criminal offenses, administrative or adjudicatory proceedings, to protect creditors or to ensure compliance with securities laws and regulations. This paragraph can however only be invoked in the equitable, non-discriminatory and good faith application of such measures, and is subject to an anti-abuse clause to ensure that it cannot be used to avoid the obligations of the MAI.

12. The revised paragraph 4.6 is considered particularly important for financial services, but is intended to be of general application.

#### **h. Definition of Financial Services**

13. To clarify the scope of the prudential carve-out, and for the purpose of other provisions on financial services, EG5 also recommends adoption of a definition of financial services similar to that used in the GATS.

#### **i. Cross-border Supply of Services**

14. EG5's common understanding of the scope of the Agreement is that the supply to the territory of a Contracting Party of services by non-resident (non-established) service providers is not intended to be covered by MAI provisions of National Treatment and MFN. This matter is considered of great importance to financial services, and EG5 requested that it be clarified in the text of the Agreement, possibly through an Interpretative Note.

### **III. OTHER FINANCIAL SERVICES MATTERS**

15. EG5 also considered proposals on "new financial services", "right of initial establishment" and "equality of competitive opportunity" to bring into the MAI additional disciplines such as those developed in the GATS Understanding on Financial Services, and with respect to "restrictions based on dotation capital of branches of financial services enterprises".

16. While EG5 agreed that the MAI should be a high standard investment agreement, no agreement could be reached on these issues. Three delegations wished to include in the MAI, at minimum, the GATS standards on market access and national treatment. They considered that failure to do so would give undue benefits to countries that might accede to the MAI without having accepted the disciplines of the GATS Understanding and could undermine upcoming negotiations on financial services in the WTO. Some delegations were of the view that market access issues were being discussed more broadly in the MAI negotiations and further consideration of these issues should await the outcome of those discussions. Other delegations, however, considered that it would not be appropriate to extend the disciplines of the MAI to these additional market access obligations. These delegations considered that it was not necessary to repeat the GATS obligations in the MAI and that to do so would automatically, by virtue of the MFN principle in GATS, give undue benefits to countries that had not accepted the disciplines of the GATS Understanding.

#### **Questions:**

- 1. Do delegations agree that the proposed provisions for prudential measures [Text A] and the proposed definition of financial services [Text H] should be adopted in the MAI?***
- 2. Regarding proposed Texts B to F:***
  - a) Do delegations consider that provisions recommended by EG5 should be adopted for financial services in the MAI?***

- b) Do delegations consider that any of these provisions (especially Texts B, C, E and F) should apply to (all) other sectors as well? If so, does the Negotiating Group consider that DG3 should be asked to examine whether text needs adaptation for this purpose?*
- 3. Do delegations consider that provisions recommended by EG5 [Text G] should be adopted for paragraph 4.6 of the Transfers Article of the MAI?*
- 4. Do delegations consider that the MAI's coverage of cross-border services should be clarified in the text of the Agreement or by an Interpretative Note?*
- 5. Would Delegations wish to comment, in light of the broader context of the MAI, on how to make progress on market access issues concerning financial services issues which have not been possible to resolve within EG5?*

## **Annex**

### **RECOMMENDED TEXT ON FINANCIAL SERVICES**

The following texts are those proposed by EG5. 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. Prudential Measures**

1. Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system.
2. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

#### **B. 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.

**C. 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.

**D. Transparency**

Nothing in this Agreement requires a Contracting Party to furnish or allow access to:

- a) information related to the financial affairs and accounts of individual customers of financial services enterprises; or
- b) any confidential or proprietary information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.

**E. 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.

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

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.

**F. 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”.

**G. Transfers Article (paragraph 4.6)<sup>2</sup>**

4.6. Notwithstanding Articles 4.1 to 4.5, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of measures to protect the rights of creditors, relating to or ensuring compliance with laws and regulations on the issuing, trading and dealing in securities, futures and derivatives, reports or records of transfers, or in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

**H. Definition of financial services**

Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

*Insurance and insurance-related services*

- (i) Direct insurance (including co-insurance):
  - (A) life
  - (B) non-life
- (ii) Reinsurance and retrocession;
- (iii) Insurance intermediation, such as brokerage and agency;
- (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

*Banking and other financial services (excluding insurance)*

- (v) Acceptance of deposits and other repayable funds from the public;
- (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
- (vii) Financial leasing;
- (viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
- (ix) Guarantees and commitments;
- (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - (A) money market instruments (including cheques, bills, certificates of deposits);

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<sup>2</sup> Most delegations recommended adoption of this text. A few delegations questioned the need for such a provision.

- (B) foreign exchange;
  - (C) derivative products including, but not limited to, futures and options;
  - (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (E) transferable securities;
  - (F) other negotiable instruments and financial assets, including bullion.
- (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (xii) Money broking;
- (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

#### Commentary

1. This definition is the same as that used in the GATS.
2. One delegation asked whether transfer of credit risks (for instance, credit swaps) and the provision of stored value cards were considered as financial services. The Group understood the proposed list of financial services as an open-ended one. Therefore, it was considered that, unless otherwise specified, the services in question should be regarded as financial services.