



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

**THREE FURTHER ISSUES: CROSS-BORDER SERVICES, TRANSFERS
AND TRANSPARENCY**

(Note by the Chairman)

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1. At its April meeting, the Negotiating Group noted that seven issues discussed in the Report by the Expert Group No.5 DAFFE/MAI/EG5(97)4/REV1 deserve further consideration by DG3.
2. Four of these issues were discussed by DG3 at its May meeting. They are the subject of a draft report DAFFE/MAI/DG3(97)10.
3. The three further issues not yet considered by DG3 are the following:
 - A. the treatment of cross-border services;
 - B. transfers (paragraph 4.6); and
 - C. transparency.

DG3 is invited to discuss these issues and to prepare a report to the Negotiating Group on the results of its discussions.

A. The treatment of cross-border services

4. In its report to the Negotiating Group [DAFFE/MAI/EG5(97)4/REV1], EG5 expressed its understanding 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 the MAI provisions on National Treatment and MFN. (EG5 recognised that of course, the MAI would require a Contracting Party to provide MFN and National Treatment to the operations of an establishment on its territory, including its consumption and provision of services.) EG5 considers that this matter is of great importance to financial services and should be clarified in the text of the Agreement, possibly through an Interpretative Note.
5. At the April meeting of the Negotiating Group, Delegations agreed that the MAI is not intended to cover the supply of services on a cross-border basis (i.e. without establishment in the country where the service is to be supplied), but not all delegations favoured the inclusion of an explicit interpretative note on the matter.
6. DG3 is invited to consider the matter further, including whether it has further suggestions with respect to an Interpretative Note or other approaches to clarify the scope or the objectives of the Agreement.

B. Transfers Article (paragraph 4.6)

7. A text for paragraph 4.6 of the MAI Article on Transfers developed by Drafting Group No.1 on "Selected topics concerning investment protection" reads as follows:

“[4.6. Notwithstanding Articles 4.1 to 4.5, a Contracting Party may require reports of transfers of currency or other monetary instruments and ensure the satisfaction of judgements in civil, administrative and criminal proceedings through the equitable, non-discriminatory, and good faith application of its laws and regulations. Such requirements shall not unreasonably impair or derogate from the free and undelayed transfer ensured by this Agreement.]”

8. At the invitation of the Negotiating Group, EG5 reviewed the matter and subsequently developed the following text (changes with respect to DG1 text are in bold):

“[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.]”**

9. This text was developed to allow Contracting Parties to derogate from the free transfer rules where necessary in connection with criminal offences, administrative or adjudicatory proceedings, to protect creditors or to ensure compliance with securities laws and regulations. This paragraph could, 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.

10. EG5 considered that such provisions are particularly important for financial services. Most EG5 delegations recommended adoption of such provisions for the MAI as a whole, for paragraph 4.6 of the Article on Transfers. A few EG5 delegations felt that no such provisions are necessary.

11. DG3 is invited to review this matter in light of the Negotiating Group’s discussions and, if possible, to develop an agreed text.

C. Transparency

12. EG5 recommended that, in addition to the general Transparency provisions of the MAI [see Consolidated Text and Commentary DAF/E/MAI(97)1/REV2, p. 14], the following text be adopted:

“1. 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.”

13. Such additional specific text for financial services has been 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.

14. DG3 is invited to determine:

- 1) Whether the principles expressed in the EG5 proposed text 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.

15. The purpose of DG3's consideration of this matter is not to review the value of the EG5 text from the perspective of financial services, which is in the hands of the Negotiating Group.