



Recommendation of the Council
concerning Member Country
Exceptions to National
Treatment and National
Treatment related Measures
concerning Investment by
Established
Foreign-Controlled
Enterprises

**OECD Legal
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Background Information

The Recommendation concerning Member Country Exceptions to National Treatment and National Treatment related Measures concerning Investment by Established Foreign-Controlled Enterprises was adopted by the OECD Council on 10 July 1987 on the proposal of the Committee on International Investment and Multinational Enterprises (succeeded by today's Investment Committee). The Recommendation is one of five OECD instruments that sought to encourage the levy of restrictions on national treatment in specific areas where a wider use of exceptions had been diagnosed at the time. In addition to stating general principles, the instrument contains country-specific recommendations to lift certain exceptions.

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Declaration on International Investment and Multinational Enterprises of the Governments of OECD Member countries of 21 June 1976;

HAVING REGARD to the 1984 Report on the Second Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises of 1984 [C/MIN(84)5(Final)];

HAVING REGARD to the Second Revised Decision of the Council on National Treatment [C(84)91] and in particular its paragraph 4;

HAVING REGARD to the Recommendation of the Council [C(86)55(Final)] on Member country measures concerning National Treatment of Foreign-Controlled Enterprises in OECD Member Countries and based on Considerations of Public Order and Essential Security Interests;

HAVING REGARD to the importance of the area and breadth of activities covered by exceptions to National Treatment and National Treatment related measures concerning investment by established foreign-controlled enterprises, in that these represent the largest category of exceptions to National Treatment and National Treatment related measures maintained by Member countries, and also represent the category of measures which the Business and Industry Advisory Committee to the OECD (BIAC) has always emphasized as presenting the most serious obstacles to and difficulties for business;

HAVING REGARD to the fact that a number of Member countries have in recent years taken measures which have led to significant extensions of the application of National Treatment for investment by established foreign-controlled enterprises, and that a number of Member countries are in the process of doing so;

HAVING REGARD to the fact that while some countries may have reported few or no such exceptions to National Treatment or National Treatment related measures concerning particular sectors or subsectors, there may nevertheless be areas covered by measures motivated by public order and essential security interests and/or areas covered by public monopolies which prevent or restrict investment by established foreign-controlled enterprises in those sectors or subsectors;

HAVING REGARD to the fact that, in light of the concern and the considerable efforts and progress, among OECD Member countries and elsewhere, towards liberalisation of restrictions in the services sector, a large number of exceptions to National Treatment and National Treatment related measures concerning investment by established foreign-controlled enterprises reported by Member countries apply to the services sector;

HAVING REGARD to the importance attached by the Organisation to the principle of National Treatment in this area, in view of the number of exceptions to National Treatment and National Treatment related measures addressed in this examination concerning acquisitions, and in the light of recent trends and possible emerging policy responses by Member countries in this respect;

HAVING REGARD to the fact that while this examination has contributed to an improved transparency of measures related to investment by established foreign-controlled enterprises, there is still need for further improvement in this regard, particularly with respect to both the motivations for exceptions to National Treatment and National Treatment related measures, and the exceptions to National Treatment and National Treatment related measures concerning inter alia the telecommunications sector;

HAVING REGARD to the fact that, in this respect, there is a general need for greater clarity and predictability of the scope and application of Member country measures related to National Treatment and concerning investment by established foreign-controlled enterprises;

HAVING REGARD to the fact that the specific measures referred to below may have differing degrees of restrictiveness in relation to National Treatment and thus that the number of measures maintained by a specific Member country may not, by itself, be an adequate indication of the degree of restrictiveness of that Member country's policies in the area of investment by established enterprises under foreign control;

On the proposal of the Committee on International Investment and Multinational Enterprises;

RECOMMENDS to Member countries:

a) To reconsider the totality of their exceptions to National Treatment and National Treatment related measures in the category examined, in particular exceptions thereto, and to examine the possibility of removing or relaxing exceptions to National Treatment and National Treatment related measures, possibly by adopting alternative means of achieving their objectives in a manner which would be consistent with the principle of National Treatment and, in particular, to limit the scope of application of exceptions to National Treatment and National Treatment related measures in the investment by established foreign-controlled enterprises category strictly to those areas of essential concern and interest; in so doing, Member countries should give priority attention to exceptions in areas where most Member countries do not find it necessary to maintain restrictions, and to exceptions to National Treatment concerning the services sector, ensuring that the application of such exceptions to National Treatment on grounds of prudential or consumer interests are restricted to those areas where these concerns predominate;

b) To examine general (i.e. trans-sectoral) exceptions to National Treatment restricting investment by established foreign-controlled enterprises, in order to assess the possibility of amending such general exceptions and replacing them, where relevant, with specific ones covering only the sectors or activities where the Member country concerns or interests predominate; this recommendation specifically concerns:

- Australia with respect to its measures requiring authorisation to acquire domestic firms with total assets of A\$ 5 million or more (A\$ 3 million for rural properties), and requiring authorisation for the establishment of new businesses with a total investment of A\$ 10 million or more;
- Belgium with respect to its measure requiring prior authorisation of public takeover bids of public companies by enterprises under non-EC control;
- Canada with respect to its measure requiring a review of the net benefit to Canada of all large acquisitions;
- Finland with respect to its measures requiring authorisation for the establishment of a company, ownership above 20 per cent in Finnish companies and leasing (over two years) of real estate;
- France with respect to its measure requiring notification of all investments, notification with the right to postpone for creations and acquisitions of participation under FF 10 million by French companies under non-EC control, and requiring authorisation of such investments (other than in real estate) exceeding FF 10 million by French companies under non-EC control;
- Luxembourg with respect to its measure requiring authorisation of public takeover bids of public companies by enterprises under non-EC control;
- New Zealand with respect to its measures requiring authorisation for all investments involving the creation of a new enterprise or expansion into unrelated areas, and the takeover of an existing enterprise above certain thresholds;
- Norway with respect to its measures requiring concessions for the lease or purchase of real estate, the acquisition of share capital over 10 per cent in a company owning certain lease contracts, and purchases of electricity above 5 000 kW;
- Portugal with respect to its measure requiring notification of all investments, and notification with the right to refuse for creations and for acquisitions of Portuguese

companies by companies under non-EC control (except, in principle, acquisitions where less than 20 per cent of the equity is held by foreign-controlled enterprises, these investments being subject to registration);

- Sweden with respect to its measure requiring approval to acquire interests in Swedish corporations and partnerships exceeding certain levels (10, 20, 40, 50 per cent);
- Turkey with respect to its measure requiring authorisation for investments above \$50 million; and
- the United States with respect to measures on the state level prohibiting or imposing limitations on the ownership of land;

c) To study, in areas where exceptions to National Treatment exclude, totally or substantially, established foreign-controlled enterprises from particular sectors or activities, the possibility of amending such exceptions to National Treatment in a manner that would allow such enterprises some or a greater degree of participation in those particular activities or operations; this recommendation specifically concerns:

- Austria with respect to its measure prohibiting foreign-owned banks from managing or participating in underwriting securities issues;
- Canada with respect to its measures disallowing direct acquisitions of existing Canadian firms in the book publishing and distribution industry and placing conditions on the indirect acquisition of such firms, imposing nationality or majority Canadian ownership conditions in licensing requirements for oil and gas production (Canada frontier lands only), uranium production, and mining (Northwest Territories only), and prohibiting majority ownership in Canadian-controlled and incorporated insurance, trust, loan, and investment companies, and securities brokerage (Ontario);
- Finland with respect to its measures prohibiting or severely restricting participation in energy production, mining, securities, accommodation, auditing firms, and generally limiting foreign ownership in Finnish commercial and mortgage banks and finance companies;
- Japan with respect to its measures restricting participation by foreign-controlled enterprises in particular in mining and oil;
- New Zealand, with respect to its measure requiring authorisation for investment for natural resource exploitation;
- Norway with respect to its measures restricting banking activities of foreign banks to wholly or partially owned subsidiaries, prohibiting foreign banks from issuing subordinated loans, and requiring majority domestic ownership of finance companies;
- Portugal, with respect to its measure restricting investment by enterprises with foreign participation in the cinema industry;
- Sweden with respect to its measure prohibiting acquisition of participations in locally-owned banks or shares in locally-owned finance or brokerage companies;
- Switzerland with respect to its measure restricting motion picture distribution to locally-owned companies;
- Turkey with respect to its measures requiring authorisation to found a bank, restricting the number of branches of foreign banks and prohibiting participation in retail trade;

d) To endeavour to ensure, where measures relating to investment by established foreign-controlled enterprises are applied at sub-national levels, that the application of the foregoing recommendations noted in subparagraphs a) to c) above extend to such levels.

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