

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(91) 442 final - SYN 367

Brussels, 18 November 1991

OECD - National treatment instrument

Approval by the Council of the outcome of the negotiations  
conducted by the Commission within the OECD  
on the national treatment instrument

(Commission communication to the Council)

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Proposal for a - SYN 367

COUNCIL DECISION

on participation by the Community in the third revised OECD  
decision concerning national treatment

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(presented by the Commission)

## I. INTRODUCTION

On the Commission's recommendation, on 28 May 1990 the Council authorized the Commission to negotiate a decision on national treatment within the OECD. To this end joint guidelines were established.

On 16 September 1991 the CIME - the OECD's Committee on International Investment and Multinational Enterprises, which had been conducting the negotiations - approved a report to be transmitted to the OECD Council for adoption at its meeting of 14 November. This Commission communication reviews the outcome of the negotiations and contains an accompanying proposal for a Council Decision marking the Community's acceptance of the results of the negotiations.

## II. HISTORICAL BACKGROUND AND ASSESSMENT OF THE RESULTS

1. On 21 June 1976 the governments of the OECD member countries adopted a declaration on international investment and multinational enterprises. Section II of the declaration, which concerns national treatment, includes an undertaking given by the OECD member countries to grant the same treatment as given to their own nationals to companies under foreign control<sup>1</sup> operating in their territory. National treatment means that the firms must not be discriminated against under the laws, regulations and administrative practices in force in the OECD member country concerned by comparison with firms controlled by nationals of that country.

In its decision of 17 May 1984, adopted pursuant to Article 5 of the OECD Convention, the OECD Council laid down legally binding notification and review procedures for measures retained in the OECD member countries in derogation from the national treatment principle.

2. At their May 1988 meeting the ministers of the OECD member countries called on the CIME to examine possible means of strengthening the national treatment instrument.

In its present form the national treatment instrument is composed of two parts:

- the revised section on national treatment contained in the 1976 declaration on international investment and multinational enterprises, defining the policy undertakings given by the member states in respect of national treatment and liberalization;

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1 These are firms controlled by nationals of other OECD member countries.

- the second revised decision on national treatment containing legally binding obligations concerning notification and review of exceptions and derogations and setting out the procedures for the settlement of disputes.

3. From the beginning the Committee decided to aim at a binding instrument, modelled on the Codes of Liberalization of capital movements and current invisible operations. In practice, this involved the adoption of an OECD decision pursuant to Article 5 of the OECD Convention.

4. The joint guidelines adopted by the Council of the Communities on 28 May 1990 contained the following elements:

- the decision to be negotiated must be consistent with the Community's internal legislative process and with obligations arising from other international instruments in existence or in the process of being negotiated;
- specific provisions must be worded in such a way as to cover all situations for which Community legislation contains provisions limiting national treatment for third-country nationals;
- the national treatment instrument will have to provide for an equivalent degree of commitment by the various OECD member countries, whatever their internal organizational structure.

5. A relatively speedy solution was found to the problems arising from the measures adopted with a view to completing the single market. In particular, consensus was quickly arrived at on the idea of the Community's becoming party to the decision, in view of the external implications of the single market and the existence of derogations from national treatment which could only be notified at Community level. Provisions were also adopted to take into account the outcome of current Uruguay Round negotiations in the field of services.

6. However, negotiations to arrive at a binding instrument stumbled on two major obstacles and this eventually led the ministers of the OECD member countries meeting on 5 June this year to settle for a less ambitious objective.

In accordance with the joint guidelines, the Commission and the delegates of the Member States strove to obtain from all OECD members a comparable degree of commitment, whatever their internal organization. A number of

member countries with a federal structure (United States, Canada, Australia) refused to accept any binding commitment involving their territorial subdivisions for reasons of jurisdiction or political expediency. In the case of the United States in particular, the government took the view that the field covered by the draft decision on national treatment was too "narrow"; in the circumstances it preferred not to submit the draft national treatment instrument to Congress so as to preserve the "political capital" needed to obtain Congress' approval once an agreement on an international instrument covering all investment fields was reached.

Accordingly the parties came to the conclusion that it was impossible to reach a balanced agreement on the objective that the Committee had set itself at the outset.

An attempt was made to arrive at a strengthened instrument which would preserve the twin structure - policy declaration and decision on procedures - but would incorporate the progress achieved through the Committee's efforts. It failed in the end because the United States and Canada did not succeed in finding common ground on the exceptions concerning the protection of cultural identity - the second obstacle that the working party had been unable to overcome.

7. To safeguard the progress made in respect of procedures, the ministers decided nevertheless to adopt a third revised decision. It should be noted in particular that, unlike the previous decision, this revised version will apply to all members in respect of measures taken both centrally and at territorial subdivision level. This is a first positive step, if a modest one, towards full integration of territorial subdivisions in undertakings concerning national treatment. Further progress may be possible in future if the preliminary work on a general instrument covering investment in all its aspects should lead to specific proposals. Progress might also be made at the Uruguay Round negotiations.

In agreement with the Member States it was decided to confirm the resolve of the Community as such to be party to the national treatment instrument.

More specifically, this implies a twofold approach when the Committee's report is formally adopted by the OECD Council:

- (i) the Community should endorse the 1976 declaration on national treatment. This being a policy declaration, it will not require the adoption of any legal provision at Community level. The Commission will inform the OECD member countries of the Community's intention to comply with the undertakings contained in the declaration;

- (ii) the Community should notify the Secretary General of the OECD of its acceptance of the third revised OECD Council decision on national treatment.

The measures involved concern the conditions in which firms under foreign control operate on the territory of OECD member countries and are therefore linked with the growth of trade in goods and services between OECD countries. They are also relevant to the completion of the internal market. These considerations are of capital importance when choosing a legal basis.

In view of the fact that the Community has jurisdiction in this field, the Member States will be able to commit themselves to being party to the decision once the relevant Community formalities have been completed. This will call for implementation of the procedure agreed in 1988 in respect of OECD instruments.

In accordance with Article 1 of the third revised decision of the OECD Council on national treatment, the Commission will notify the OECD of any measures derogating from national treatment.

#### CONCLUSION

The Commission calls on the Council:

- (i) to authorize it to declare on behalf of the Community that the Community endorses the principles contained in the declaration on international investment and multinational undertakings adopted by the governments of the member states of the OECD on 21 June 1976;
- (ii) to declare, in accordance with the procedure agreed with the OECD, that the Community intends to be party to the third revised OECD Council decision after completion of the internal procedures;
- (iii) to adopt the annexed decision.

COUNCIL DECISION  
on participation by the Community in the third revised OECD  
decision concerning national treatment

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Whereas the OECD member countries adopted on 21 June 1976 a declaration on international investment and multinational enterprises;

Whereas the OECD Council adopted 18 May 1984 a second revised decision on national treatment modifying the procedures laid down to examine the laws, regulations and administrative practices representing a departure from national treatment; whereas that decision together with the declaration on international investment and multinational enterprises make up the national treatment instrument;

Whereas at the OECD Council meeting of 19 May 1988 the member countries decided to strengthen the national treatment instrument and opened negotiations to this end;

Whereas the European Community took part in these negotiations in accordance with its powers;

Whereas the European Community, in view of the outcome of the negotiations, has endorsed the declaration on international investment;

Whereas the Community should become party to the third revised decision on national treatment and any further amending decisions in accordance with Article 7 of that decision,

HAS DECIDED AS FOLLOWS:

Article 1

The text of the third revised OECD decision on national treatment is hereby approved.

The text is annexed to this Decision.

Article 2

The Commission shall give notification of the Community's participation in the third revised OECD decision on the national treatment instrument in accordance with the procedures provided for therein.

It shall also notify the OECD of all Community legislative provisions which represent a departure from national treatment, and any other measure affecting national treatment, in accordance with the provisions of the decision referred to above.

Done at Brussels

For the Council  
The President

Annex 2

THIRD REVISED DECISION OF THE COUNCIL ON NATIONAL TREATMENT

THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960 and, in particular, to Articles 2 c), 2 d), 3 and 5 a) thereof;

Having regard to the Resolution of the Council of 13th December 1984 on the Terms of Reference of the Committee on International Investment and Multinational Enterprises [C(84)171(Final)];

Having regard to the Section on National Treatment of the Declaration by Governments of OECD Member countries of 21st June 1976 on International Investment and Multinational Enterprises [hereinafter called "the Declaration"];

Having regard to the Second Revised Decision of the Council of 17th May 1984 on National Treatment [C(84)91];

Having regard to the report on the National Treatment Instrument by the Committee on International Investment and Multinational Enterprises [C/MIN(91)7/ANN2];

Considering it appropriate to strengthen the procedures established within the Organisation for reviewing laws, regulations and administrative practices (hereinafter called "measures") which depart from National Treatment, as defined in the Declaration (hereinafter called "National Treatment");

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

DECIDES:

The Second Revised Decision of the Council of 17th May 1984 on National Treatment [C(84)91] is repealed and replaced by the following:



## Article 1

## NOTIFICATION

a. Members (1) shall notify the Organisation, of all measures constituting exceptions to National Treatment within 60 days of their adoption and of any other measures which have a bearing on National Treatment. All exceptions shall be set out in Annex A to this Decision.

b. Members shall notify the Organisation within 60 days of their introduction of any modifications of the measures covered in paragraph (a).

c. The Organisation shall consider the notifications submitted to it in accordance with the provisions of paragraphs (a) and (b) with a view to determining whether each Member is meeting its commitments under the Declaration.

## Article 2

## EXAMINATION

a. The Organisation shall examine each exception lodged by a Member and other measures notified under Article 1 at intervals to be determined by the Organisation. These intervals shall, however, be not more than three years, unless the Council decides otherwise.

b. Each Member shall notify the Organisation prior to the periodic examination called for in paragraph (a), whether it desires to maintain any exception lodged by it under Article 1 and if so, state its reasons therefore.

c. The examinations provided for in paragraph (a) shall be directed at making suitable proposals designed to assist Members to withdraw their exceptions.

d. The examinations provided for in paragraph (a) shall be country reviews in which all of the exceptions lodged by a Member are covered in the same examination.

e. Notwithstanding paragraph (d), the examinations provided for in paragraph (a) may focus on specific types or groups of measures of particular concern, as and when determined by the Organisation.

(1) For the purposes of this Decision, "Members" means all parties to the Decision.

Article 3

REFERENCE TO THE ORGANISATION

a. If a Member considers that another Member has, contrary to its undertakings with regard to National Treatment, retained, introduced or reintroduced measures and if it considers itself to be prejudiced thereby, it may refer to the Organisation.

b. The fact that the case is under consideration by the Organisation shall not preclude the Member which has referred to the Organisation from entering into bilateral discussion on the matter with the other Member concerned.

## Article 4

COMMITTEE ON INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES: GENERAL TASKS

- a. The Committee on International Investment and Multinational Enterprises (hereinafter called "the Committee") shall consider all questions concerning the interpretation or implementation of the provisions of the Declaration or of Acts of the Council relating to National Treatment and shall report its conclusions thereon to the Council.
- b. The Committee shall submit to the Council any appropriate proposals in connection with its tasks as defined in paragraph (a) and, in particular, with the abolishing of measures constituting exceptions to National Treatment.

## Article 5

COMMITTEE ON INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES: SPECIAL TASKS

- a. The Committee shall:
- i) consider, in conformity with paragraphs (a) and (b) of Article 2, each exception notified to the Organisation and make, where appropriate, suitable proposals to assist Members to withdraw their exceptions;
  - ii) consider, in accordance with Article 1, the notifications submitted to the Organisation;
  - iii) consider references submitted to the Organisation in accordance with the provisions of Article 3;
  - iv) act as a forum for consultations, at the request of a Member, in respect of any matter related to the Declaration and its implementation.
- b. The Committee may periodically invite the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC) to express their views on matters related to National Treatment and shall take account of such views in its reports to the Council.

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Article 6

REVIEW OF THE DECISION

This Decision shall be reviewed within three years.

Article 7

PARTICIPATION BY THE EUROPEAN ECONOMIC COMMUNITY

The present Decision, as well as any further Decision amending it, shall be open for accession by the European Economic Community. Such accession shall be notified to the Secretary-General of the Organisation.

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# DOCUMENTS

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