



PACER Plus **Chapter Summary 2021**

Chapter 7: Trade in Services



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Introduction

What does this summary cover and who is it for?

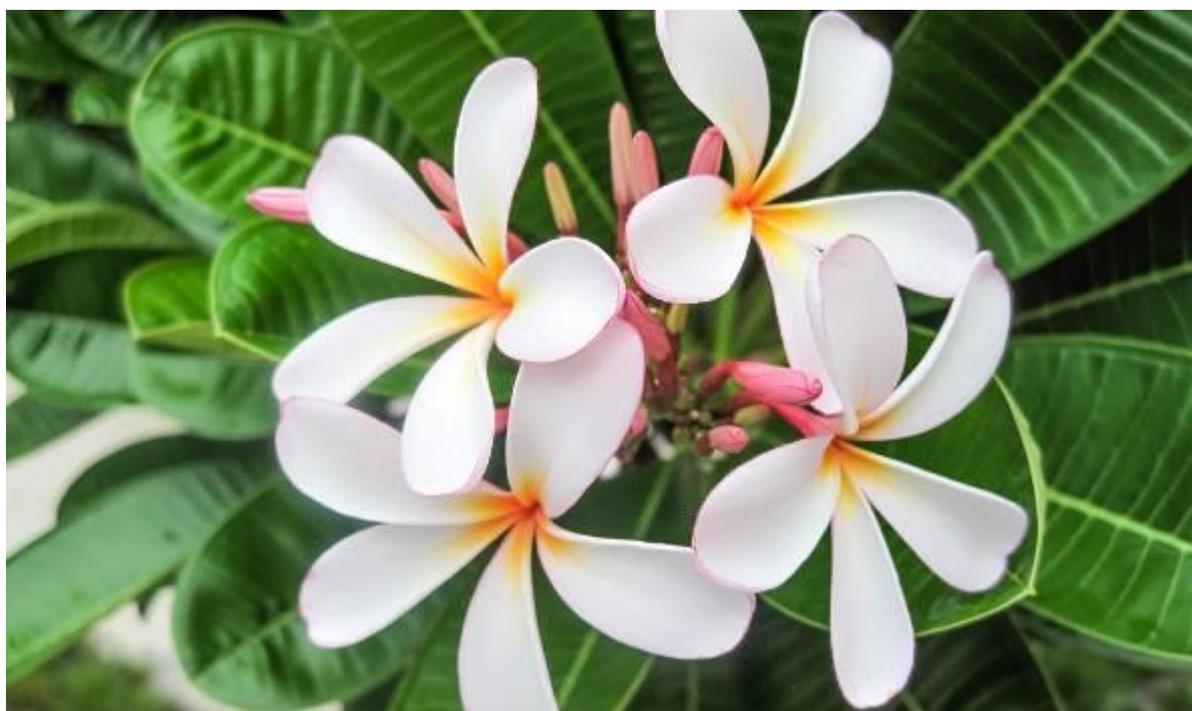
This summary describes the obligations in PACER Plus that apply to services. It is intended for anyone who wants an overview of the PACER Plus obligations.

This summary does not cover every obligation in the Services Chapter. Instead, it focuses on those obligations that are most relevant to the day-to-day activities of officials. In particular, it does not cover the following obligations:

- Increasing the participation of Forum Island Countries (Article 4)
- Modification of Schedules (Article 9)
- Monopolies and exclusive service suppliers (Article 13)
- Emergency safeguards (Article 14)
- Subsidies (Article 15)
- Review of commitments (Article 18)

What does the PACER Plus Services Chapter do?

The obligations in the Services Chapter make it easier for people and businesses from PACER Plus countries to provide services to customers in each other's countries.





What are 'services'?

Services are activities which are part of a country's economy, but are not concerned with producing or manufacturing goods. Examples include, tourism (e.g. hotels, tours), banking, providing public utilities, transport and distribution services, and retail.

Services can be provided by a business from one PACER Plus country in another PACER Plus country in several ways as shown in the table.

Way of providing services	Example	How PACER Plus (and other trade agreements) refer to this way of providing services	Comment
A business in country A can provide services to a customer in country B but without entering country B themselves	A consultant in New Zealand provides services to a customer in Samoa via email	"Cross border" (known in trade jargon as "Mode 1")	
A consumer traveling from country A and consuming services in country B	A New Zealand consultant travels to Tonga and stays at a hotel and eats in restaurants – in this case Tonga is the country of export because the consumer has come to Tonga	"Consumption abroad" (known in trade jargon as "Mode 2")	
A business from country A sets up a presence inside country B	A New Zealand company sets up a business running a hotel or restaurant in the Cook Islands	"Commercial presence" (known in trade jargon as "Mode 3")	This is a type of investment, and is covered in both the Investment and Services chapters in PACER Plus
A business person or a worker travels to another country to work	A person from Kiribati comes to work in a restaurant in Kiribati, or a consultant from New Zealand comes to visit Niue to see customers	"Movement of natural persons" (known in trade jargon as "Mode 4")	Covered in the Movement of Natural Persons Chapter in PACER Plus

What agencies is the Services Chapter relevant to?

The Services Chapter is relevant to any agency in a PACER Plus country that is involved in regulating a services sector. In most PACER Plus countries, this will cover a wide variety of agencies. Such agencies include those that regulate professionals (e.g. doctors, lawyers, teachers and accountants) and utilities (e.g. telecommunications, electricity and water).



Relationship between the Services Chapter and the Investment Chapter

The relationship between the Chapters in PACER Plus can be a confusing. Key points to be aware of from other Chapters that impact the Services Chapter are set out below. In particular, there is a close relationship between the Services and Investment Chapters, as some forms of investment (“Mode 3” services) are primarily covered in the Services Chapter.

Investment Chapter

What types of investment are covered by the Services Chapter?

- The Services Chapter applies to the type of investment that is made by a services supplier from one PACER Plus country when that supplier decides to establish a commercial presence in another PACER Plus country in order to supply services (in trade jargon, “Mode 3”).
 - For example, an Australian company that sets up an office in a PACER Plus country to supply car rental services is making an investment. It is not the supply of the services itself that is an investment, but the business being set up to provide the services.

What types of investment are covered by the Investment Chapter?

- The Investment Chapter applies to a broader range of investments than the Services Chapter. The term “investment” is defined as: “every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.
- An investment as defined in the Investment Chapter might include an investment in an enterprise as well as things like shares, stocks, intellectual property, licences and permits.

Do any of the obligations in the Investment Chapter also apply to investments covered by the Services Chapter?

- Yes. The following obligations in the Investment Chapter apply not only to the kinds of investments defined in the Investment Chapter, but also to *the supply of services through a commercial presence* (even if the services sector in question is not listed in a country’s Schedule of Commitments for Services):
 - Article 9 (International minimum standard of treatment)
 - Article 10 (Senior management and boards of directors)
 - Article 12 (Compensation in times of civil strife etc)
 - Article 13 (No expropriation without compensation)
 - Article 14 (Free transfer of funds)
 - Article 17 (Subrogation)

See the Investment Chapter Guidelines for details of these obligations.



Movement of Natural Persons (MNP) Chapter

The MNP Chapter addresses the temporary movement across borders of business people, semi-skilled, and skilled workers. This movement is essential to facilitate provision of services.

It can be difficult for a foreigner to **invest** in or provide a **service** to customers in another country unless, for example, they can visit to check up on their operations, and send senior managers to work in-country for a while. The Chapter therefore includes commitments to facilitate the temporary entry of business people.

The Chapter also has commitments on **semi-skilled and skilled workers** which allows receiving countries to fill gaps in their local labour markets, and sending countries to access work and incomes for their people.

In trade terminology, this Chapter is all about “**Mode 4**” **services** – Mode 4 involves the movement of people from one country to another on a temporary basis. For example, a person from Kiribati who comes to work in a restaurant in Tonga, or a consultant from New Zealand comes to visit Tonga to see customers.

Transparency Chapter

The Trade in Services Chapter has transparency obligations that require countries to **publish** certain information so that individuals and businesses from other PACER Plus countries can easily find out about it. These obligations are discussed in these guidelines.

PACER Plus also has a separate Transparency Chapter, which sets out general transparency requirements that apply to measures affecting trade, including trade in services.





What obligations apply in respect of which sectors – summary

Some of the obligations in the Services Chapter differ depending on whether or not the services are in a sector that is listed in a country's Schedule of Commitments.

Schedule of Commitments

Each PACER Plus country has a Schedule of Commitments that lists the services sectors it has committed. These commitments mean that for services in those sectors, the country has agreed to comply with certain obligations that don't apply to services in non-listed sectors. These obligations are shown in the **table** below.

For each services sector (or sub-sector) that a country has committed, it has also listed exceptions where these obligations will not apply or will only apply in a modified way.

The following table summarises what obligations apply in respect of which sectors.

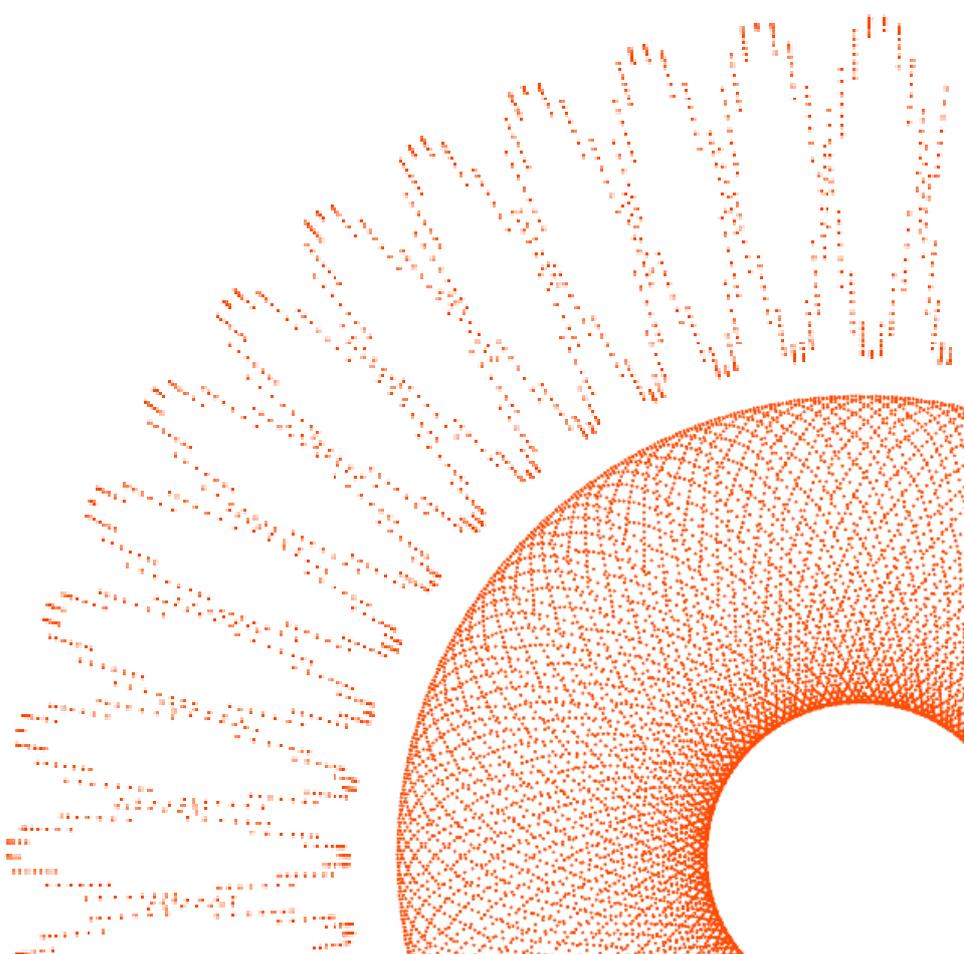
	Services in sectors listed in a country's schedule	Services sectors <u>not</u> listed in schedule	Services provided in the exercise of government authority, government procurement, subsidies or grants, most air transport services
Market access	✓	x	x
National treatment	✓	x	x
Most-favoured-nation (MFN)	✓	✓	x
Rules about how trade in services is administered	✓	x	x
Payments and transfers	✓	x	x
Licensing and qualification requirements	✓	x	x
Authorising service suppliers	✓	x	x
Verifying competence of professionals	✓	x	x
Monopolies	✓	✓	x
Recognising business names	✓	✓	x



	Services in sectors listed in a country's schedule	Services sectors <u>not</u> listed in schedule	Services provided in the exercise of government authority, government procurement, subsidies or grants, most air transport services
Contact Points	✓	✓	✗
Transparency	✓	✓	✗

The following pages include a description of all of the obligations listed in this table.

But before we describe the obligations, the next section explains situations in which a PACER Plus country is entitled not to comply with the obligations. In other words, situations when a PACER Plus country may “deny the benefits” of PACER Plus to service suppliers of other PACER Plus countries. The purpose of being able to deny benefits is to ensure that obligations are only owed in respect of service suppliers that are genuinely from the PACER Plus country they claim to be from.





Denial of benefits

When can a country deny benefits to service suppliers?

A PACER Plus country (Country A) may deny the benefits of the Chapter to a service supplier of another PACER Plus country (Country B) if:

- the service is being supplied by a business that is owned or controlled by persons of a country other than Country B and the business has no substantive business operations in any other PACER Plus country
 - e.g. where a business is registered in Australia but the shareholders and directors are from Europe and they do not have any business operations in another PACER Plus country.
- the service is being supplied by a business that is owned or controlled by people from Country A and the business has no **substantive business operations** in any other PACER Plus country
 - e.g. where a business that is registered in Australia invests in Samoa, but it is controlled by Samoan nationals and has no substantive business in any PACER Plus country other than Samoa.
- maritime transport services are involved and the service is supplied by a vessel registered under the laws of a non-PACER Plus country, and by a person who operates or uses the vessel in whole or in part but is of a non-party.

Substantive business operations means that a business actually does something concrete in a country rather than simply having an address there. For example, an Australian car rental company that rents cars to customers to Tonga has a substantive business operation in Tonga; an Australian car rental company that only has a registered office in Tonga but does nothing else there does not have a substantive business operation in Tonga.



Obligations applying only to sectors that are listed in a country's schedule

There are six key obligations that apply to services and service suppliers in the sectors listed in a country's schedule. These are:



Each of these obligations are discussed on the following pages.





Commitment to provide market access

In broad terms, the commitment to provide market access requires two things of PACER Plus countries:

- it requires that they do not impose **numerical restrictions** on services and service suppliers from other PACER Plus countries, and
- it requires that they do not require service suppliers from other PACER Plus countries **to use a particular legal form** if they want to establish a presence.

Numerical restrictions include the following:

- limits on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test,
- limits on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test,
- limits on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test, except measures of a Party which limit inputs for the supply of services,
- limits on the total number of natural persons who may be employed in a particular service sector or who a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service, in the form of numerical quotas or the requirement of an economic needs test; restrictions or requirements for specific types of legal entities or joint ventures through which a service supplier may supply a service, or
- limits the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or of the total value of individual or aggregate foreign investment.

Exceptions

The market access commitment, however, is not always absolute. For some sectors, a government may have negotiated limits on these rules meaning that their legislation might put a restriction on some particular services. As long as the restriction is listed in that country's schedule, then it is permitted under PACER Plus.

e.g. Country Z may have agreed to allow architects from other PACER Plus countries to provide architectural services in their country, but only so long as the architects have a place of business in Country A.



National treatment

PACER Plus requires governments and officials to treat services and service suppliers from other PACER Plus countries in accordance with the national treatment obligation.

National treatment is a type of non-discrimination rule. It means that, in any given PACER Plus country, services and service suppliers from other PACER Plus countries are entitled to treatment that is:

no less favourable than the treatment a country provides, in like circumstances, **to its own domestic services and service suppliers** (e.g. Tonga must treat boat repairers from the Cook Islands **no less favourably** than its own boat repairers).

What is meant by 'no less favourably'?

The 'no less favourably' requirement means that a government must not take action that puts an investor or covered investment from a PACER Plus country at a detriment, or competitive disadvantage as compared to services or service suppliers from another country.

e.g. a government must not distinguish between a supplier of consulting services from another PACER Plus country versus a local consultant doing the same work in a manner that puts the foreign supplier in a worse position than the local business.

In the case of services provided through a commercial presence, the national treatment obligation applies both to policies that apply at the stage where a foreign services suppliers is establishing a "commercial presence" (which corresponds broadly to the concept of pre-establishment treatment for investment) and to those that apply once the services supplier is established and supplying services.

Exceptions

The national treatment obligation is not absolute. For some sectors, a government may have negotiated limits on the national treatment obligation to allow them to discriminate in some sectors. As long as this is listed in their schedule, then it is okay.

e.g. Country A may have agreed to allow businesses from other PACER countries to run hotels in Country A, but might have required them to be subject to approval first (which is discriminatory vis-à-vis local businesses that wouldn't be required to get approval).



Rules about how procedures relating to trade in services are administered

PACER Plus requires that, in respect of the sectors listed in its Schedule of Commitments, each PACER Plus country administers its procedures that apply generally to trade in services in a reasonable, objective and impartial manner.

Reasonable:

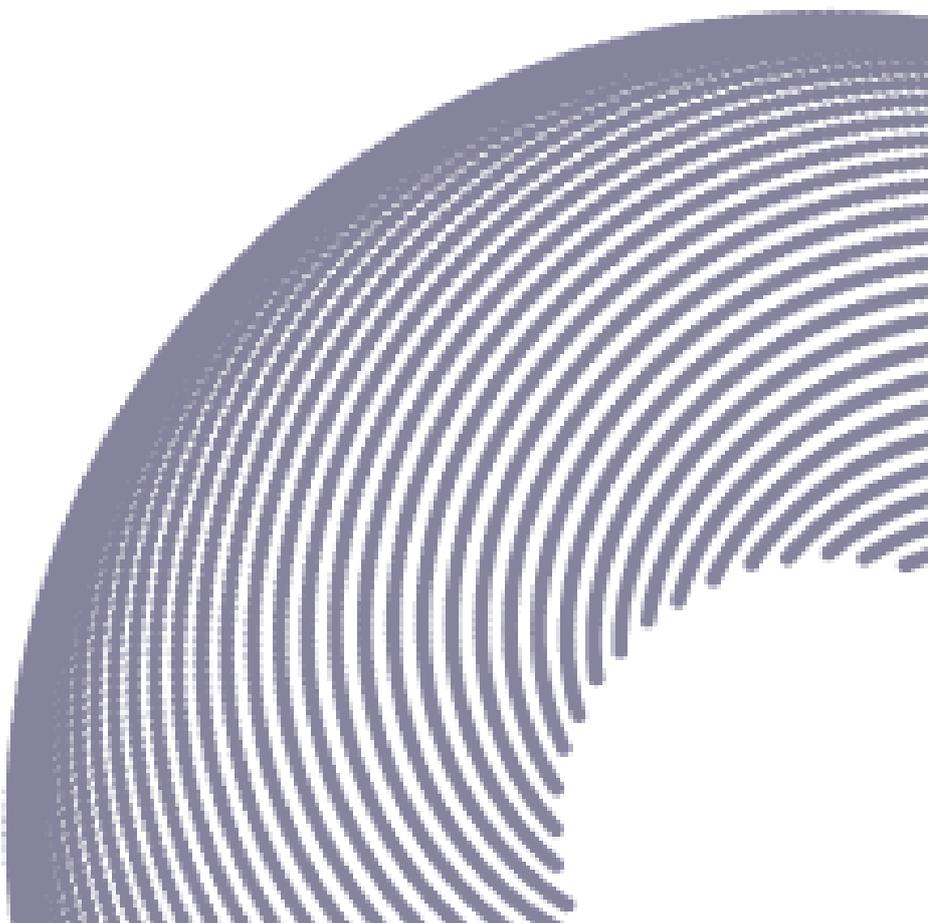
an action is in accordance with reason, is not irrational or absurd, is sensible, is not greatly less or more than might be thought likely or appropriate

Objective:

something is based on real facts, it is not influenced by personal beliefs or opinions, it is based on principles of good faith and fundamental fairness

Impartial:

the application or implementation of relevant laws or regulations is undertaken in a fair, unbiased and unprejudiced manner





Requirements for licensing, qualification, competence

What do the PACER Plus obligations require?

In sectors in which a PACER Plus country has made commitments (see **Appendix 1** for a list of the sectors), it must comply with the PACER Plus commitments that relate to licensing, qualification requirements, and verification of competence.

Licensing requirements: where a government requires people to hold a licence to pursue a particular profession or occupation (e.g. in most countries a person has to obtain a licence in order to practice as a doctor).

Qualification requirements: rules that set out what qualifications are required for someone to pursue a particular profession or occupation (e.g. a rule requiring a law degree to practice as a lawyer).

Verification of competence: if a professional (e.g. doctor, lawyer) from another PACER Plus country wants to provide services, their competency should be verified by reviewing their education or experience, and ensuring that they have the requisite licences or certifications of another country.

Licensing and qualification requirements

If there are qualification or licensing requirements that relate to the sectors listed in a country's schedule, then that country must ensure that:

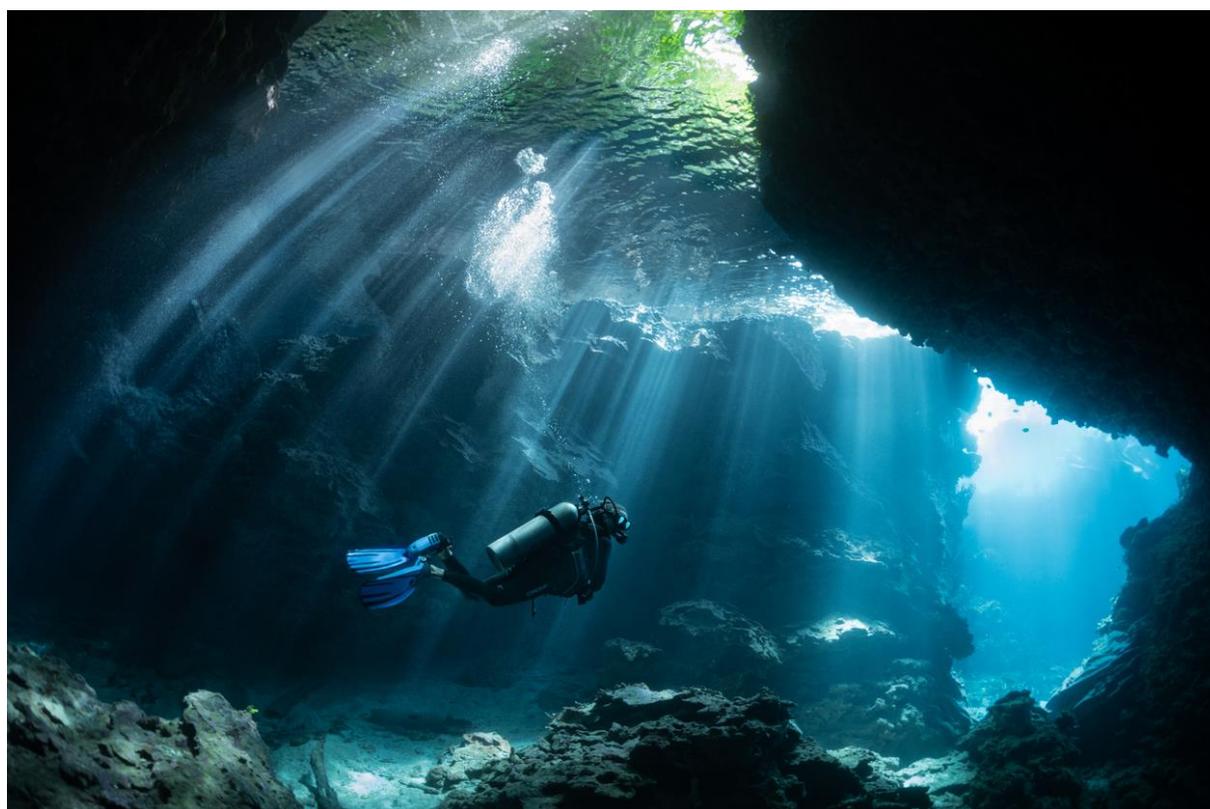
- the requirements are based on **objective and transparent criteria**. This rule means that the government must have published the requirements. It also means that a decision to grant a licence or recognise a qualification must not depend on the opinion of the person making the decision, but on whether or not the published criteria are met.
- the requirement is **not more burdensome than necessary** to ensure the quality of service. This rule means that the requirement should be proportionate to the service being provided (e.g. it would be more burdensome than necessary to require all lawyers to have a Masters degree when a Bachelor's degree is sufficient).
- in the case of licensing procedures, the requirements must **not be a restriction on the supply of a service**. This rule means that the requirements should not effectively prevent persons from another PACER Plus country from supplying the service. It should be possible for a service supplier to meet the licensing requirements if they follow the published process.
- the requirements **could reasonably have been expected for that country at the time PACER Plus was ratified**. This rule means that there should not have been a significant change since the date of ratification if that change could not have been reasonably expected.



Verification of competence

PACER Plus does not require countries to recognise a professional's education or experience, or licences or certifications from another PACER Plus country.

A country may, however, choose to provide for such recognition in their laws and regulations. If they do, then PACER Plus requires that the procedures put in place under those laws and regulations be followed.





Authorising service suppliers

PACER Plus allows countries to require official authorisation before services can be provided. For example, some countries require a licence to provide telecommunications services.

Can authorisation be required for the supply of services?

Yes. However, where there are authorisation requirements for provision of services in a sector listed in its schedule, those requirements need to be done in a way that still allows service suppliers to enter the country – i.e. they should not make it too difficult for service suppliers to enter the country.

The difference between licencing and authorisation requirements

Licensing is about determining whether someone has the correct qualifications to meet specified requirements. By contrast, an authorisation requirement does not hinge on whether someone has the appropriate qualifications, but rather authorisation depends on whether someone has legal or official approval to carry out an activity.

Authorisation requirements

PACER Plus requires certain procedural steps to be complied with when putting in place authorisation requirements. These include that there must be an application form, and applicants must be kept informed of the status and outcome of their application.



Payments and transfers

Governments have agreed not to restrict international transfers and payments for **current transactions** in economic sectors listed in their Schedules of Commitments on services. There is an exception to this where countries are in serious balance of payments and external financial difficulties (as described further in the Exceptions chapter of PACER Plus).

In addition, governments have agreed not to impose restrictions on any **capital transactions** in economic sectors listed in their Schedule of Commitments on services. There is an exception to this where a request has been made by the International Monetary Fund.

There are also relevant exceptions in the Exceptions Chapter of PACER Plus.

Exceptions Chapter

A country may take certain measures if it is in **serious balance of payments and external financial difficulties**, or facing the threat of this. Those measures might include restricting payments or transfers for transactions related to trade in services.

In addition, the Exceptions Chapter allows a country to take measures for **prudential reasons**, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.



Obligations applying to services in all sectors, including those not listed in a country's Schedule of Commitments

On the following pages we describe obligations that apply to services in all sectors, including those not listed in a country's Schedule of Commitments. The first of these is another non-discrimination obligation (most favoured nation) and the remainder deal with various issues related to service providers, as well as contact points and transparency.

Most favoured nation (MFN)

Monopolies

Recognising business names

Contact Points

Transparency



Most favoured nation (MFN)

PACER Plus requires governments – and officials – to treat all services and service suppliers from PACER Plus countries in accordance with the most favoured nation principle (**MFN**).

MFN is a type of non-discrimination obligation. It means that services and service suppliers from PACER Plus countries are entitled to treatment that is:

no less favourable than the treatment a country provides, in like circumstances, **to services and service suppliers from non-PACER Plus countries**

What does 'no less favourably' mean?

The 'no less favourably' requirement means that a government must not take action that puts a service or service supplier from a PACER Plus country at a detriment or competitive disadvantage as compared to a service or service supplier from a non-PACER Plus country.

e.g. if Tonga gives better treatment to the Cook Islands service or service provider, Tonga is **not** required to give that better treatment to service or service providers from other PACER Plus countries.

However, if Tonga gives better treatment to a non-PACER Plus country (like France) service or service provider, Tonga **is** required to give that better treatment to service or service providers from the PACER Plus countries.

Exceptions

The MFN obligation is not absolute. Countries have negotiated exceptions to allow them to discriminate between services or service suppliers from other PACER Plus countries in certain situations. As long as the type of discrimination is listed in a country's schedule, then it is allowed.

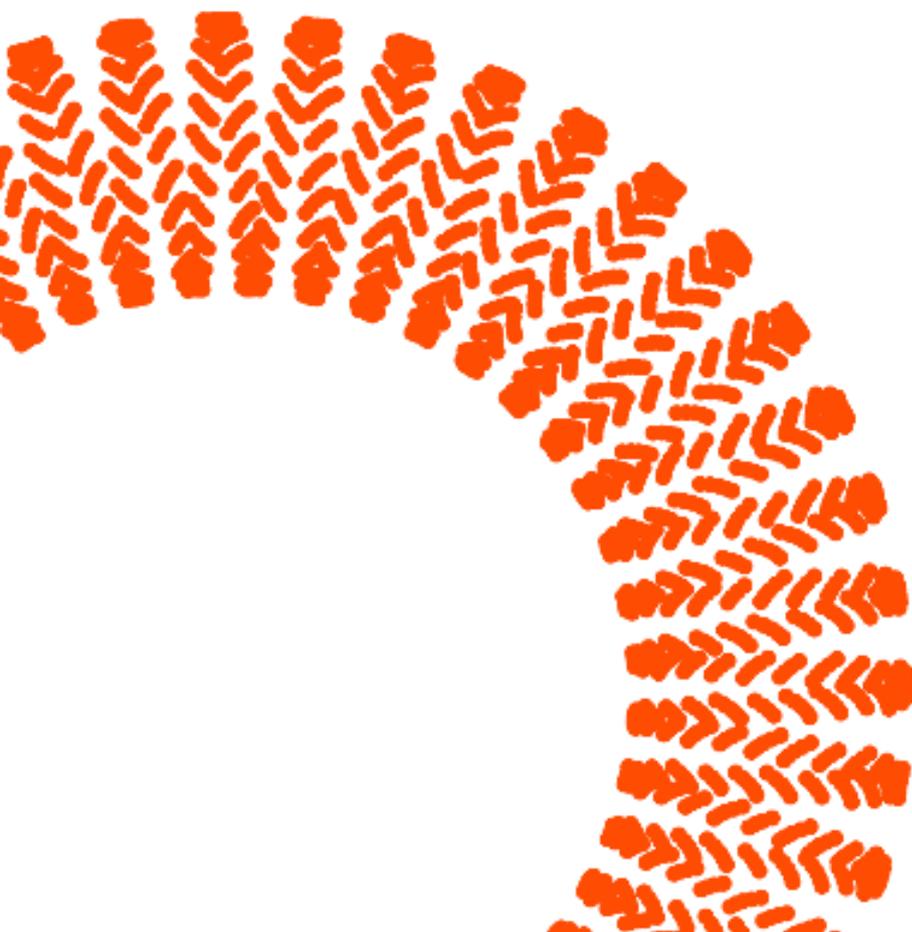


Monopolies

PACER Plus has obligations to ensure that monopoly suppliers of services do not abuse their positions in a manner that interferes with trade and investment.

Each PACER Plus country must ensure that any of its entities that are monopoly or exclusive service suppliers do not:

- treat services and service suppliers of one PACER Plus Party **less favourably** than they treat either their own services and services suppliers or those from any other PACER Plus Party;
- impose quantitative restrictions on service suppliers in sectors in which the country has made specific commitments;
- **in sectors in which a country has made specific commitments**, abuse their monopoly position so as to act in a manner inconsistent with those commitments in relation to the supply of services outside the scope of their monopoly.





Recognising business names

PACER Plus requires PACER Plus countries to permit service suppliers from other PACER Plus countries to use the business name that they ordinarily trade under. The use of business names must not be unduly restricted.

What do the obligations in respect of business names mean for officials?

Simply that a country's laws and regulations regarding business names must be followed.

If a service supplier from another PACER Plus country wants to use their usual business name in another PACER Plus country, then that country should confirm whether their laws and regulations allow that name to be used. If the laws and regulations allow the name to be used, then that service supplier can use their usual name.





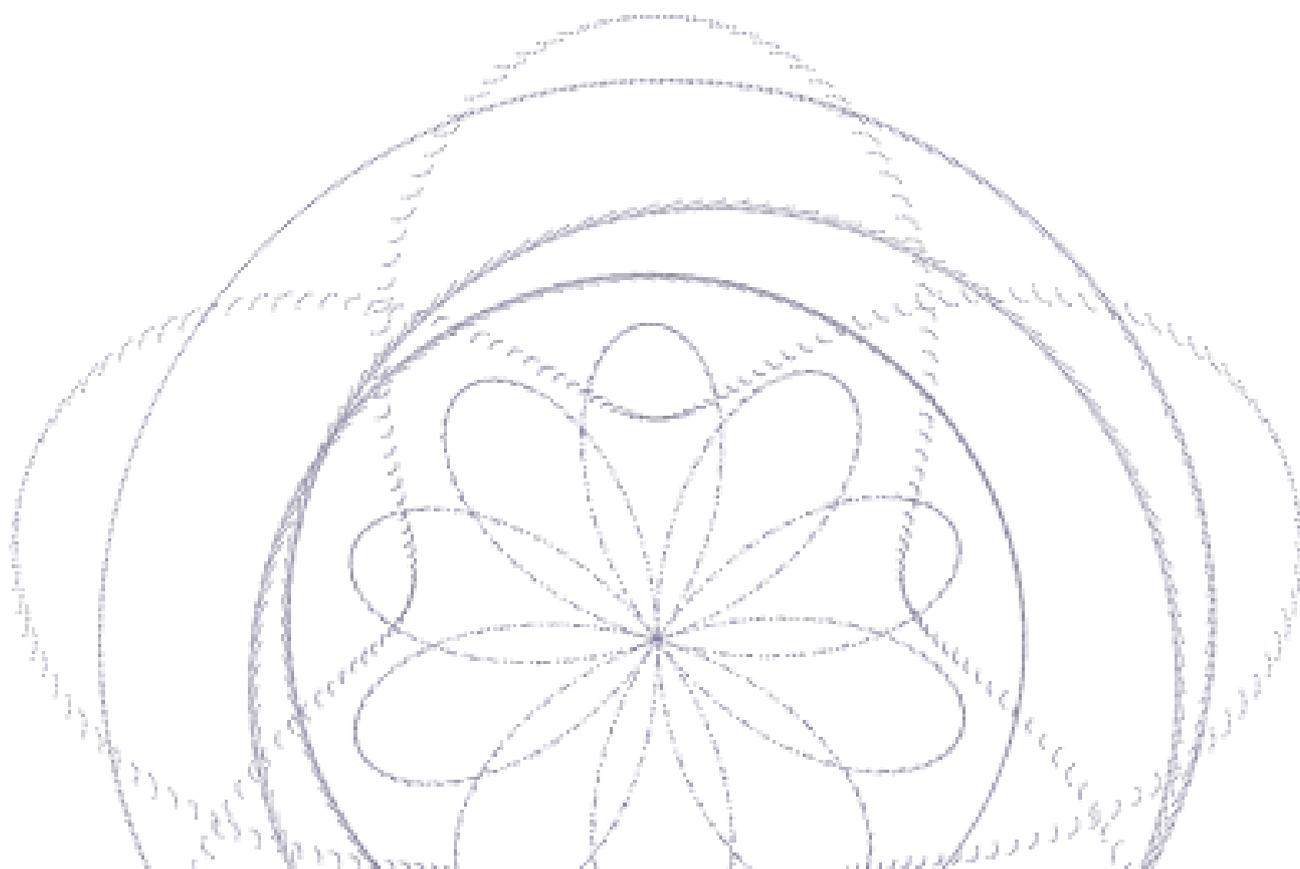
Contact Points

PACER Plus sets up systems to ensure that officials from one country can easily contact their counterpart in other countries, and obtain information about other countries' practices. Each country has to name a Contact Point who will be responsible for answering enquiries on matters related to services.

What does the Contact Point have to do?

The Contact Point has the following responsibilities:

- to facilitate communications between the PACER Plus Parties on any matter covered by the Services Chapter
- to facilitate access of service suppliers to information related to the market in relation to commercial and technical aspects of the supply of services, registration, recognition, obtaining professional qualifications, and the availability of technology.





Transparency

The **transparency** obligations in the Services Chapter require countries to publish their laws, regulations and procedures so that individuals and businesses from other PACER Plus countries can easily find out about them.

The obligations make it easier to do business because people can easily find the information they need.

There are also obligations to appoint Contact Points.

What information are countries required to publish?

PACER Plus requires that documents related to domestic rules and requirements be published so that people from other PACER Plus countries can easily access the information they need to help them provide services in that country.

The table below lists all the information that must be published about services.

Countries must keep the information up to date as and when anything changes.

Item	Information to be published
International Agreements	A list of all international agreements that the country is a party to and that relate to trade in services (e.g. international civil aviation agreements)
Licensing requirements	<ul style="list-style-type: none"> • Application requirements • Criteria for application and renewal • Procedure for application and renewal • Applicable fees • An established timeframe for the processing of an application • Appeal or review process for decisions made • Procedures for monitoring or enforcing compliance with the terms and conditions of licenses
Qualification requirements	<ul style="list-style-type: none"> • Application requirements • Criteria for application and renewal • Procedure for application and renewal • Procedure for verifying and assessing qualifications • Applicable fees • An established timeframe for the processing of an application • Appeal or review process for decisions made
Authorisation requirements	<ul style="list-style-type: none"> • Application requirements • Any periodic renewal requirements • Generally applicable terms and conditions of such authorisation • Appeal or review process for decisions made



Exceptions to services obligations

Overview

PACER Plus has a number of exceptions that allow countries to justify actions that would otherwise be a breach of the obligations in the Services Chapter. The exceptions are set out in Chapter 11 (General Provisions and Exceptions).

The description of the exceptions below is very general, and **advice should be sought on the application of the exceptions in any given situation.**

General exceptions

A number of exceptions (often referred to as the “general exceptions”) are copied over from WTO rules, and include measures:

- necessary to protect **public morals or maintain public order**
- necessary to protect **human, animal or plant life or health**
- necessary to secure **compliance with laws or regulations** that themselves are consistent with the obligations, such as those relating to the prevention of deceptive and fraudulent practices
- necessary to protect **national works or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value** (including protection of “creative arts of national value” such as dance and music, indigenous traditional practice, and contemporary cultural expression)
- relating to the conservation of living or non-living **exhaustible natural resources**
- that breach the national treatment obligation but are aimed at the equitable or effective collection or imposition of direct taxes in respect of services or service suppliers from other PACER Plus countries
- that breach the MFN obligation, provided that the difference in treatment is a result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in another international agreement.

For measures taken for these reasons, the exception can only be relied upon so long as the measure is not applied in a manner that would constitute:

- **unjustifiable or arbitrary discrimination**, or
- a **disguised restriction** on international trade.

Unjustifiable or arbitrary discrimination will occur where the discrimination is not rationally related to the measure’s policy objective.

A **disguised restriction** on international trade could include a measure that unjustifiably or arbitrarily discriminates, or any other type of measure that abuses the exceptions or is an illegitimate use of them.



National security

PACER Plus does not require any country to provide information if it considers that to do so would be contrary to its **essential security interests**.

Also, PACER Plus does not prevent any country from taking:

- a measure that it considers necessary to protect its **essential security interests**, or
- actions in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Essential security interests are those:

- relating to fissionable and fusionable materials or the materials from which they are derived,
- relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment
- taken so as to protect critical public infrastructures including communications, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructures, or
- taken in time of war or other emergency in international relations.

Measures to safeguard the balance of payments

PACER Plus countries are entitled to adopt or maintain restrictions on trade in services for which they have made commitments (including payments or transfers for transactions related to those commitments) if they find themselves in **serious balance of payments and external financial difficulties**, or at threat of such difficulties. This must be done consistently with WTO rules and meet the other conditions set out in Chapter 11, including being consistent with the IMF Articles of Agreement.

Prudential measures

PACER Plus does not prevent countries from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. While prudential measures may be taken, they can't be used as a means of avoiding a country's PACER Plus commitments or obligations.



Taxation

The obligations in PACER Plus have limited application to taxation measures. In the case of trade in services, obligations will apply, for example, to indirect taxes on services.

Treaty of Waitangi (only applicable to New Zealand)

New Zealand may adopt any measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by PACER Plus, including in fulfilment of its obligations under the Treaty of Waitangi. Such measures may not be used as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade.



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