13 January 2014

Our ref: ICAEW Rep 07/14

By email only: balanceofcompetences@bis.gsi.gov.uk

Dear Sir/Madam

**Single Market: Free Movement of Services review**

ICAEW welcomes the opportunity to comment on the call for evidence *Single Market: Free Movement of Services review* published by Department for Business Innovation and Skills on 21 October 2013, a copy of which is available from this link.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

## Scope of response – company law

1. We are responding to this call for evidence in so far as it relates to company law only (paragraphs 31-36 of the call for evidence).

2. Company law is a potentially broad subject and we have focussed on areas which we regard as being core to company law rather than, for example, areas of overlap with the free movement of capital (such as laws regulating trading of shares). We have particularly focused on those areas where the EU has already had an impact or has sought to have an impact.

   This includes relevant areas covered by section 4 of the current EU Action Plan of December 2012[1] ('**2012 Action Plan'**) and the related consultation on the future of company law[2] ('**2012 Consultation'**), on which we commented in our response of May 2012[3] **('2012 Response**'). Much

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0740:FIN:EN:PDF
[2] http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/questionnaire_en.pdf
[3] http://www.icaew.com/~/media/Files/Technical/icaew-representations/2012/icaew-rep-72-12-eu-consultation-on-the-future-of-company-law.pdf

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of the 2012 Action Plan relates to transparency and corporate governance issues on which we do not comment.

3. The relevant laws or potential laws are generally based on freedom to provide services, in particular freedom of establishment. We are, therefore, commenting on these issues in response to this call for evidence and not the (HM Treasury) call for evidence on the single market for financial services and free movement of capital[4], even if there may be some overlap.

## Main points

4. In our view, EU company law should facilitate the efficient operation of the single market, but there needs to be a balance (ie, to avoid unnecessary/excessive burdens) and, therefore, we believe the objectives of EU company law should be to facilitate cross-border business, to facilitate cross-border mobility and restructuring for companies, and to facilitate the cross-border ownership of companies and transfers of ownership. Such a competence is what is necessary for the EU. Any further competence would not only be unnecessary but, as outlined further below, be inappropriate.

5. There continues to be a wide diversity of company law within Europe. This is not necessarily a bad thing, and can have positive consequences. It enables each individual member state to respond to local business demands and promotes innovation whilst leaving other member states free to adopt successful models (and disregard unsuccessful models). This is a dynamic model in contrast to a harmonised model where it can be a difficult and lengthy process to bring about change with results that can stifle business.

6. The differences between national laws are extensive and reflect different legal and political systems, historical development and sometimes other aspects of the national environment, such as tax law. A truly harmonised company law would therefore require major change in at least some member states or the creation of a separate, comprehensive self-contained regime. We do not see that the former is desirable or necessary for freedom to provide services. The practical difficulties regarding the latter are evident from the history of current EU forms (which are still reliant upon national laws in many respects and which have only very slight take-up) and some of the irreconcilable differences (eg, one vs two-tier boards and real-seat vs incorporation doctrines).

7. The focus of the Treaty on the Functioning of the European Union ('TFEU') on freedom of establishment in this context is well judged so as to promote freedom to provide services for business irrespective of this diversity. Company law harmonisation measures should be focused on this objective and not seek to harmonise national laws for the sake of harmonisation alone (or to introduce changes in other areas of competence, such as employment).

8. Freedom of establishment of companies is well established in Europe. This has in part been achieved through the Treaty provisions as applied by the Court of Justice. In some cases legislative measures have also been helpful although we believe that some measures have been unnecessary or ineffective.

9. The EU should focus on the limited areas where the work remains unfinished and business is tangibly impeded as a result. There are only a couple of areas where we believe further EU intervention is merited. We comment further on these matters in answer to Q11 below. On the other hand, certain of the EU's proposed initiatives should not be pursued, for instance, consolidation of directives (which are addressed to member states and so a matter of little, if any, direct interest to companies and their owners) or new corporate forms (for reasons outlined further below).

10. As regards EU corporate forms, it is unclear on what basis new forms would be required if current obstacles to freedom of establishment were to be removed. A business would be free to select from

[4] https://www.gov.uk/government/consultations/balance-of-competences-review-single-market-financial-services-and-the-free-movement-of-capital

the numerous national forms already available in the EU and conduct business through freedom of services rights (whether through creating establishments/ branches or subsidiaries). Neither the EU private company (SPE) nor the EU single member company initiatives appear to have been justified by the relevant criteria. We have commented more fully on these issues in our responses to the relevant consultations[5]. The EU should focus on removing remaining obstacles rather than considering new corporate forms the purpose of which (in part) is to navigate those obstacles.

11. With a couple of exceptions, most notably establishments/ branches, we do not see evidence that conduct of EU-wide business through companies is at present being significantly held back by company law (as opposed to, for instance, employment or tax law). Further company law measures should, therefore, only be adopted if the case for change has been demonstrated in tangible terms.

### Paragraphs 31-36 of the call for evidence – EU powers and objectives of harmonisation

12. As noted in paragraph 31 of the call for evidence, the basis for company law legislation derives from the freedom of establishment provisions of the TFEU. There is a risk that the treaty provisions are relied upon selectively in support of harmonisation initiatives. In particular, Article 50(2)(a) requires the EU bodies to accord 'as a general rule, priority treatment to activities where freedom of establishment makes a **particularly valuable contribution to the development of production and trade**'; it is difficult to see that all proposed initiatives are consistent with this.

13. The provisions are also subject to the principle of subsidiarity[6], but company law initiatives do not always appear to have sufficient regard to this. For instance, as noted in the UK Government's report '25 Ideas for Simplifying EU Law'[7], it is unclear why capital maintenance rules require the degree of harmonisation imposed by the second company law directive or why the third and sixth company law directives (which concern largely domestic issues) are required at all.

14. Paragraph (3)(g) of Article 50 provides for coordination of 'safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms….with a view to making such safeguards equivalent throughout the Union', but only '***to the necessary extent.***'

15. Paragraph 32 of the call for evidence states that EU objectives for achieving agreements to proposals in the area of company law include:
(1) providing equivalent protection for shareholders and other parties concerned with companies;
(2) fostering efficiency and competitiveness of business;
(3) promoting cross-border cooperation between companies in different Member States;
(4) ensuring freedom of establishment for companies throughout the EU; and
(5) stimulating discussions between Member States on the modernisation of company law and corporate governance.

16. Some of these appear to be broader objectives than those stated in Article 50 and it is not clear to us on what legal basis they are founded as EU company law objectives. If they are taken to be general objectives of the EU, then care needs to be taken that the EU does not exceed its competences in the company law context. In particular, it is unclear in what respects company law might be changed in pursuit of objectives (2) (beyond the ability to carry on business through a company, which is already universally established), (3) or (5). Objective (1) needs to be tempered, as required by article 50, by the provisos 'to the extent necessary' and 'where [it] makes a particularly valuable contribution'. Without those, objective (1) becomes a mandate for harmonisation for harmonisation's sake, which we would not support; for example it would lead to

[5] http://www.icaew.com/~/media/Files/Technical/Legal-and-regulatory/legal-cons-reps-tech-releases-ect/icaew-rep-149-08.pdf and http://www.icaew.com/~/media/Files/Technical/icaew-representations/2013/icaew-rep-123-13-ec-single-member-limited-liability-companies.pdf.
[6] http://europa.eu/legislation_summaries/glossary/subsidiarity_en.htm
[7] http://www.administrative-burdens.com/filesystem/2008/07/25_ideas_for_simplifying_eu_law_517.pdf

harmonisation as to what duties a company might owe and to whom – this is the kind of thing that is in practice unachievable and unnecessary (we are not aware of tangible evidence that lack or harmonisation is holding back freedom of establishment). We consider that these broad issues should not be pursued through changes to EU company law.

17. Paragraph 36 notes the 2012 Action Plan. We comment on some of the specific topics covered by the plan (as well as relevant topics omitted) further in answer to Q11 below and have noted above some broad areas covered by the plan which are beyond the scope of our response.

18. We consider that the explanations given by the EU on why it has decided to pursue, or not to pursue, a particular initiative are insufficiently reasoned or focused on the Treaty provisions cited above. In particular, there is little hard evidence provided as to what the tangible benefit to business would be for a given proposal, but this should (eg under Article 50(2)(a)) be the driver of these initiatives. The costs of pursuing initiatives (including the consultation elements of an initiative) are also often not adequately quantified.

19. The 2012 Action plan cites percentages of responses to the 2012 Consultation as evidence of support for proposals. For instance, it notes that 'more than 75% of respondents' asked for some form of consolidation of company law directives. Yet a numerical approach of this kind is by no means necessarily appropriate in gauging a genuine business need for any proposal. According to the Feedback Statement to the 2012 Consultation, only 5% of respondents were (non-financial) companies. Neither is the approach necessarily appropriate to gauge whether action is required at an EU level (as opposed to a national level). For instance, out of 496 responses, 115 were from a single country (Spain).

20. The 2012 Action plan also cites other sources to justify its approach, including the Commission's 'Europe 2020' Communication[8] and the European Parliament Resolution of June 2012.[9] Yet these documents make certain assertions (for instance, the Resolution provides that that 'conflict of law' issues need to be tackled and that an EU private company statute should be pursued) without providing evidence as to how the conclusion was reached in terms of EU competencies or even a clear idea of the scale of the apparent single-market problem to be overcome and how the initiative would achieve that (both in terms of effectiveness and at what price in additional burdens).

### Call for evidence - Specific questions

21. We comment below on those of the specific questions in the call for evidence which appear most relevant to company law.

**Q1.What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?**

22. We believe that, in principle, freedom of movement of services in the EU is in the national interest and if brought about in accordance with the principles outlined in this response, it is appropriate for the occasional necessary action to be taken by the EU. However, the EU should have due regard to international practices in taking action so as ensure that EU business is not unnecessarily burdened. Although the EU legislation on accounting standards is generally outside the scope of this response, we note that the adoption by the EU of global accounting standards is a good illustration of how EU can act in a way which is helpful to business by having due regard to

[8] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF
[9] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0259+0+DOC+XML+V0//EN.

international practices. Apart from this, we do not see a case for pursuing the internal market's freedom of establishment through global initiatives on company law.

**Q5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?**

23. We believe that there is considerable inconsistency in implementation and enforcement and that this is significant in the context of establishment of, and information concerning, establishments/branches.

24. In some cases EU legislation may permit flexibility in implementation and there is nothing inherently wrong with a degree of variance between member states (for instance, where there are options to accommodate different member state practices). However, some variances may result in obstacles to freedom to provide services, for example, as mentioned, rules relating to company establishments/branches vary considerably (and we comment further on that issue below).

25. As a purely domestic comment, the UK 'copy out' approach is one which may not operate to the advantage of UK business where (combined with the interpretative approach of UK courts) it results in the UK adopting a more onerous approach than is adopted by other member states.

**Q9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Members States, whilst maintaining the integrity of the Single Market?**

26. There are some decisions which should be taken by all member states and applied equally to all in order for the single market to operate as a single market. The relevant areas are identified in TFEU as noted above and should be applied with due regard to principles of subsidiarity.

27. Subject to that, there is rightly nothing to prevent member states developing their company laws as they wish. Similarly, it would be possible for groups of member states to pursue initiatives together, in the sense of in parallel to one another. That would, of course, need to be done in a way compliant with other EU laws (eg, the relevant laws should not discriminate against persons from other member states), and it would be easier where common legal doctrines apply (for instance, in respect of transfer of registered office, whether the 'head office' doctrine applies) in the relevant member states.

28. We consider in answer to Q11 below to what extent existing and proposed EU company law is required at an EU level or could properly be left to member states.

**Q11. What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?**

29. While TFEU envisages that directives will be required to attain freedom of establishment for particular activities (Article 50(1)), we note that the Court of Justice has also played a significant role in shaping laws on freedom of establishment and may be called on in future to help enforce the legislation in this area where there is uncertainty (for instance in relation to transfer of seat).

30. As regards existing company law directives, we believe that some provisions have afforded benefits proportionate to costs. In particular, the cross-border mergers directive has facilitated cross-border corporate transactions and mobility of companies in the EU which could not

efficiently have been achieved by other means, and the first company law directive and (to a limited extent) the eleventh company law directives have been useful in requiring basic information on companies and establishments (respectively) to be made publicly available to the benefit of those wishing to trade with them.

31. However, a number of existing provisions are not, in our view, necessary and costs will have been incurred in implementing them which could have been avoided. For instance, the third company law directive on mergers of public companies concerns mainly domestic issues and the accounting directive is, in our view, unnecessarily prescriptive.

32. As regards future European rules, we have the following comments on the proposals in section 4 of the 2012 Action Plan:

- **Transfer of Seat** – we agree both that there is a potential concern in this area and also that, as always, the case for change needs to be substantiated and we therefore welcome the Commission's proposal to consult further.
- **Cross-border merger regulation** – we agree with the Commission both that this has been a useful initiative and that it could usefully be updated to reflect practical experience to date and welcome the proposals to consider further.
- **Cross-border divisions** – we support the Commission proposal to consider this further but whether or not the benefits of introducing new legislation would merit the costs requires a costs/benefits analysis.
- **Smart legal forms for European SMEs** – it is not clear to us why the EU wishes to keep this on the agenda, notwithstanding lack of approval for an SPE by the Council and its discontinuance of the proposal for an EU single member company. Most importantly, no hard evidence has been provided to date that the absence of EU forms materially impedes freedom to provide services. While it might be considered that there is no harm in offering another alternative to business, it would be a vast undertaking, and a cost to EU taxpayers, to set up a stand-alone, comprehensive pan-European company law; there are inevitably costs for would-be companies and their owners in considering yet more alternatives; and we believe that those resources could be better directed elsewhere.
- **Promoting and improving awareness of the SE and SCE** – again, the Commission quotes a percentage (61%) of respondents to the 2012 Consultation as offering support for 'revising' EU legal forms in general, but this is an inadequate explanation, for the reasons noted above. We agree with the Commission that resource should not be spent on revision of existing forms. However, we do not agree that resource should be spent promoting the EU forms. In our view, the priority of the Commission should be to address any outstanding impediments to freedom of establishment in relation to existing national forms, and resource should be used to meet that objective or, failing that, to more pressing reforms outside of the field of company law.
- **Groups of companies** – we do not think that there is a need for this and do not see that any benefit in introducing a 'comprehensive legal EU framework covering groups of companies' would justify the costs involved. We therefore welcome the fact that the Commission appears disinclined to pursue that initiative. Even the more limited initiative now under consideration would need to be justified on a cost/benefits basis.
- **Codification of EU company law** – this will inevitably result in costs (both EU functionaries and member state governments and business through advisors and advisory bodies), including to ensure that the exercise is nothing more than a 'consolidation'. We do not believe these costs are merited for something that has no direct impact on business. If the exercise were to be accompanied by a deregulatory initiative to repeal unnecessary provisions, that might be worthwhile, but that does not appear to be in contemplation.

33. An important area where freedom of establishment could be improved and which is not covered by the 2012 Action Plan relates to the freedom of a company in one member state to open an establishment (or branch) in another. The eleventh directive covers disclosure requirements, but in practice the process for creating establishments varies greatly between member states and it can be easier to establish a subsidiary than an establishment/branch in some member states. In practice, the availability of information on establishments also varies between member states. If this issue were to be addressed fully (whether through better enforcement or further harmonisation – perhaps a maximum harmonisation directive in order to prevent members states from imposing too many layers of requirements – or both), business would have an easy and cost effective way to operate on a cross-border basis without the need for reforms in other areas (such as new EU forms). There is also direct TFEU authority for the Commission to pursue this - paragraph (f) of Article 50(2) requires '….the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches…..'

34. We comment in more detail on many the issues raised in the 2012 Action Plan (and other potential EU proposals) in our 2012 Response.

Yours sincerely

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