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Our ref: ICAEW Rep 63/13

European Commission  
SPA 2 02/97  
1000 Brussels  
Belgium

By email: [markt-consultation-ts@ec.europa.eu](mailto:markt-consultation-ts@ec.europa.eu)

Dear Sirs

**Cross-border transfers of registered offices of companies**

ICAEW is pleased to respond to your request for comments on *Cross-border transfers of registered offices of companies*. The ICAEW has registered with the Commission's Interest Representative Register and our ID number is 7719382720-34.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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## ICAEW REPRESENTATION

### CROSS-BORDER TRANSFERS OF REGISTERED OFFICES OF COMPANIES

**Memorandum of comment submitted in April 2013 by ICAEW, in response to European Commission consultation paper Cross-border transfers of registered offices of companies published in January 2013**

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## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Cross-border transfers of registered offices of companies* published by European Commission on 14 January 2012, a copy of which is available from this [link](#).

## WHO WE ARE

2. 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.
3. 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.
4. The ICAEW Europe Region is headquartered in Brussels and brings a pan-European perspective to ICAEW's work through regular interaction with professional bodies, firms, oversight authorities and market participants across Europe. It also engages with approximately 5,000 members in EU member states outside the UK. ICAEW is listed in the Commission's Interest Representative Register (ID number: 7719382720-34).
5. 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.

## GENERAL COMMENTS

6. We are supportive of the introduction of a Directive on cross-border transfers. However, this should be an enabling instrument, and should not include any requirement that a company must mandatorily transfer its registered office if it chooses to transfer its headquarters (see paragraph 11 below).
7. We are a professional body and therefore have not answered all the detailed questions aimed at companies that either have experience with transferring their head office or are proposing to do so (Sections II and III). We have also not answered some of the questions aimed at Member States in Section IV, but we have commented on the motivation and cost of transfers in Section IV, and the design of the instrument (Section V).

## RESPONSES TO SPECIFIC QUESTIONS/POINTS

What kind of entity are you?\*

- ☐ A company
- ☒ A business organisation, a trade union, a university, an individual, etc. (i.e. any kind of entity or person other than a company)

## Section I. Information about your company/organisation

### Q1. Size of the company/organisation and number of employees:\*

- ☐ micro (0-9)
- ☐ small (10-49)
- ☐ medium-sized (50-249)
- ☒ big (more than 250)

### Q2. Legal form

- ☐ sole trader
- ☐ private limited company
- ☐ public limited company
- ☐ European Company (SE)
- ☒ other (unlimited company, partnership, etc) Professional accountancy body

### Q3. Field of activity\*

- ☐ goods
- ☐ services
- ☒ other

#### Q3.1. - Please specify your sector of activity

8. Professional accountancy body.

### Q4. Country of your current registered office ?\*

- ☒ United Kingdom

### Q5. Is your business engaged already in cross-border trade in the EU?\*

- ☐ yes
- ☐ no
- ☒ not applicable

### Q6. Are you planning to be engaged in cross-border trade in the foreseeable future?\*

- ☐ yes
- ☐ no
- ☐ do not know
- ☒ not applicable

## Section IV. The current possibilities to transfer registered offices abroad

### Q5. Does the recent ECJ case-law (e.g. judgement in case VALE) provide an adequate solution for cross-border transfer of registered offices?\*

- ☐ yes
- ☒ no
- ☐ no opinion

#### Why:

9. The VALE Epitisi kft CJEU decision 12/7/12 (C-378/10) held that transferee Member States in the EU (or EEA) are in principle obliged to recognise companies from other Member States which under current domestic law are able to and wish to re-domicile to another EU (or EEA) Member State under the same terms and conditions as domestic companies. However, in many Member States there is no procedural mechanism for implementing such a transaction (and there is no harmonisation over the associated requirements), which means that in

practical terms transfers of registered offices involving those Member States would be very difficult to achieve – the legal mechanism for giving effect to the CJEU decision is unclear, imposing cost and uncertainty on the company.

**Q6. What is the main motivation for companies to transfer their registered office abroad?**

**(you can choose more than one answer)\***

- ☒ favourable company law regime
- ☐ favourable insolvency law regime
- ☒ favourable "business climate"
- ☒ favourable taxation regime
- ☐ tax mitigation
- ☒ favourable social law regime
- ☒ stable legal framework
- ☐ others
- ☐ do not know

**Please specify**

**10.** We have no further comments.

**Q7. How much does the average cross-border transfer of registered office through the merger cost?\***

- ☐ less than 10,000 euro
- ☐ between 10,000 – 50,000 euro
- ☒ between 50,000 – 100, 000 euro
- ☐ more than 100, 000 euro
- ☐ do not know

**Q8. How much could an average company save in terms of costs, if a specific EU instrument on the direct cross-border transfer of registered offices were available (in comparison to the transfer of the registered office by a cross-border merger)?\***

- ☐ less than 5,000 euro
- ☐ between 5,000 – 10,000 euro
- ☐ between 10,000 - 50,000 euro
- ☒ more than 50,000 euro
- ☐ do not know

**Section V. The design of an instrument - What should an EU instrument on the direct transfer of registered offices of companies look like?**

**Q1. Should the transfer of a registered office be compulsory along with the transfer of the headquarters (main office)?\***

- ☐ yes
- ☒ no
- ☐ do not know

**Why?**

**11.** We do not agree that a company should be forced to transfer its registered office if it chooses to transfer its headquarters. There are two fundamentally different regimes in Member States for determining a company's 'nationality'. Some jurisdictions have a 'country of incorporation' approach (under which the company continues to be considered a 'native' of its country of incorporation, and thus subject to its laws and regulations, irrespective of where its decisions

are made) while other jurisdictions have a 'real seat' basis (under which the company's 'nationality' is determined by where the company's decisions or its activities are undertaken). Given the historical and intrinsic nature of these fundamentally different regimes within the two different types of Member State domestic law, we would strongly object to any proposal to mandate a transfer of registered office where there is a transfer of headquarters as this would be imposing the 'real seat' doctrine onto Member States that adopt an 'incorporation' approach.

12. Companies should also be able to transfer their registered office without being required under the EU instrument to also transfer their head office, although we acknowledge at Q2 below that it may be appropriate for companies to be required to follow the domestic rules within the new host Member State. Subject to any such rules in the relevant Member States, companies should be free to establish their head office wherever they choose, for example, taking account of commercial or tax considerations.

**Q2. Would the choice left to the Member State whether the transfer of the registered office has to be followed or not by the transfer of the headquarters (main office) be workable?\***

- ☒ yes  
☐ no  
☐ do not know

**Why?**

13. In our view, allowing the individual Member States to determine whether the transfer of registered office to their jurisdiction must be accompanied by a transfer of headquarters would be the most pragmatic solution and in line with Cartesio principles.
14. However, we note that there is inconsistency among member States as to the meaning of 'headquarters' or 'head office', which could usefully be clarified.

**Q3. How should the question of employee participation be optimally solved in the case of a transfer of a registered office? By applying the same rules on the employee participation as in:\***

- ☐ Cross-Border Merger Directive  
☒ SE Statute  
☐ other

**Please specify**

15. We consider that the question of employee participation should be determined in a similar way to the transfer of seat of an SE under SE Statute, which has no requirement for a Special Negotiating Body or for employee consultation above that required under the national law of the Member State from which the company is transferring.

**Q4. Are there any issues to consider with regard to the design of such an instrument?**

16. We believe the EU cross-border transfers regime should be implemented by way of a Directive rather than by Regulation, so that each Member State can implement the provisions in such a way as to be compatible with their domestic company law regime.
17. We would also like to reiterate our comments from ICAEW REP 72/12 that, in our view, the transfer should not result in the winding-up of the company in the home Member State, the company should not lose its legal personality and the transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and any party contracting with the company.

## Additional comments

**Do you have additional comments concerning any of the questions?**

**18.** We have no further comments.

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