



14 May 2012

Our ref: ICAEW Rep 72/12

EUROPEAN COMMISSION
Directorate General Internal Market and Services
[To be submitted electronically]

Dear Sirs

Consultation on the future of European Company Law

ICAEW is pleased to respond to your request for comments on *Consultation on the future of European Company Law*. 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

Liz Cole
Manager, Company Law, Insolvency & Pensions

T +44 (0)20 7920 8746

E liz.cole@icaew.com



ICAEW REPRESENTATION

CONSULTATION ON THE FUTURE OF EUROPEAN COMPANY LAW

Memorandum of comment submitted in May 2012 by ICAEW, in response to European Commission consultation paper The future of European Company Law published in February 2012

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *The future of European Company Law* published by European Commission on 20 February 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 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained. The ICAEW has registered with the Commission's Interest Representative Register and our ID number is 7719382720-34.
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. This response reflects consultation with the Financial Reporting Faculty and Corporate Finance Faculty, which are recognised as leading authorities in their fields. This response also reflects consultation with the ICAEW Corporate Governance Committee and the ICAEW Business Law Committee, which include representatives from public practice, the business community and investment communities. These Faculties and Committees are responsible for making submissions to legislators, regulators and other external bodies in their respective areas of expertise.

RESPONSES TO SPECIFIC QUESTIONS

Background information

Q1: Please indicate your role for the purpose of this consultation:

- ☐ Company (non-financial)
- ☐ Other financial services
- ☐ Other liberal profession
- ☐ Business federation
- ☐ Public authority
- ☒ Other: *Please specify. Professional accountancy body*

Q2. Please indicate the country where you are located:

- ☒ United Kingdom

Q3. Please provide your contact information (name, address and email-address)

Liz Cole (Manager, Company Law, Insolvency & Pensions).
ICAEW, Chartered Accountants' Hall,
Moorgate Place,
London, EC2R 6EA, United Kingdom.
liz.cole@icaew.com

Q4. Is your organisation registered in the Interest Representative Register? (Single choice)

- ☒ Yes.
- ☐ No.
- ☐ No opinion.

Objectives of European company law

Q5. What should be the objective(s) of EU company law?

5. A company is an indispensable ingredient for the carrying on of business on a large scale: it is an artificial legal person, its owners have limited liability and it has transferable ownership that is separate from management. In our view, EU company law should facilitate the carrying on of business, via companies, across the single market (thereby aiding its efficient operation). Accordingly, we believe that the 'objectives of EU company law' should be to facilitate cross-border business by facilitating cross-border mobility and restructuring for companies, and facilitating the cross-border ownership of companies and transfers of ownership. As with all company law, this needs to be done in a balanced way (ie, to avoid unnecessary/excessive burdens) and in our view the Commission should focus on initiatives that are supported by a strong business case for change. We set out our rationale in more detail in the Appendix below.
6. To achieve these objectives, we believe EU company law should provide for:
 - 6.1. minimum standards of disclosure to the benefit of creditors so that a prospective supplier in one Member State has sufficient information to enable it to make a decision about whether to do business with a company in another Member State. Such minimum standards should not prevent Member States from requiring additional disclosure if they feel this is desirable. In our view, however, the harmonisation of accounting standards around the IFRS model holds out better prospects for such minimum standards - see our further comments at paragraph 7 below;
 - 6.2. minimum standards of disclosure about companies with shares admitted to trading on markets, to the benefit of shareholders in other Member States. In the case of listed entities, such minimum standards would be determined by the needs of capital providers. Again, such minimum standards already exist including for listed entities, and we see no need for EU further action;
 - 6.3. the ability to restructure companies within a group – ie, changing the number of companies through which a group carries on its various lines of business - in order to facilitate the transfer of ownership. This will also facilitate the realisation of cost efficiencies on a cross-border basis. For example, a British group may want to acquire a French company from another group (transfer of ownership) and then merge that company into one of its own (cost efficiency). Conversely, a German group may want to divide off a Polish division into a separate company and sell it to another group (transfer of ownership). There are already EU measures in this area, although they do not cover cross-border divisions.
7. With regard to minimum standards for disclosure (as mentioned at paragraph 6.1 above), we believe that harmonisation could be better achieved by:
 - 7.1 paring back the Accounting Directives to form a framework with high level principles, with the detailed requirements removed. The Accounting Directives could continue to prescribe the format for accounts but the requirements should be simplified and made compatible with IFRSs (including IFRS for SMEs) to facilitate convergence. Most, if not all, of the requirements for notes disclosures could be removed.
 - 7.2 permitting the use of IFRS for SMEs, as this is a ready-made comprehensive framework. The standard setters would then set the detailed requirements (ie IFRS, and IFRS for SMEs) with input from the Commission, as the convergence of accounting standards is, over time, by far and away the most likely route to achieving harmonisation.

8. In our opinion, accounting standards (such as UK GAAP or the IFRS for SMEs) offer a more appropriate mechanism for specifying disclosure requirements. Standards are developed through extensive due process in consultation with preparers, auditors and users of financial statements and therefore are effective in delivering required information while avoiding extraneous disclosure. The new accounting directive currently being developed in the European Parliament and Council makes a number of specific requirements regarding disclosure. Although generally this is not particularly problematic, the application of maximum harmonisation to small company disclosures, which would make non-mandatory many of the disclosures currently contained within national accounting standards, is of more concern. Investors and other providers of capital and credit to small businesses are likely to react negatively to a reduction in the information they are entitled to receive. It would be much better if decisions about the extent of disclosure were left to national law and accounting standards.
9. In relation to restructuring (as mentioned at paragraph 6.3 above), we consider that this is the main area for action at EU level and in our view the Commission should concentrate its efforts away from harmonising national laws towards facilitating cross border activities within the EU. We comment in further detail below (for example, see Q14 to Q18 below).
10. We appreciate that our above comments mean that there is relatively little for the EU to do. Whilst that may, at first sight, seem surprising, it is actually well that it is so. First of all, it means that the conduct of EU-wide business through companies is not at present being significantly held back (at least not by company law – other fields of law, such as employment or health and safety may be an entirely different question). So, for example, whilst we agree with a number of the multiple choice options as to the objectives of company law, it is only the first – mobility – that requires action. Second, this means that the action programme can be shorter and quicker – and with the current economic climate's forcing groups to consider the simplifications of their group structures as urgently needed cost efficiencies, this is all to the good.
11. Turning to other matters raised in the consultation question, in our view, employee protection is **not** an appropriate objective for company law. EU company law should not be a mechanism to deal with the relationship between companies and their employees, and should not be a vehicle for increasing employee protection in Member States. If further action on such matters were necessary at EU level (which we certainly do not advocate) then it would be a matter for law that is specifically directed at the activity that would be regulated – the employment of persons –, ie, employment law, not company law. The form of organisation of the employer – a company – is a complete irrelevance.
12. Regarding the multiple choice options in the consultation, we indicate our preference below:
 - ☒ Improve the environment in which European companies operate, and their mobility in the EU.
 - ☒ Facilitate the creation of companies in Europe.
 - ☒ Setting the right framework for regulatory competition allowing for a high level of flexibility and choice.
 - ☐ Better protect employees.
 - ☒ Better protect creditors, shareholders and members.
 - ☒ Other: *Please specify. (max 500 characters)*
 - ☐ No opinion.

Scope of European company law

Q6. Would you support that the EU's priority should be to improve the existing harmonised legal framework or, rather, to explore new areas for harmonisation?

13. A mixed approach is required. A few areas covered by existing directives need to be reconsidered. Some – a few – new areas merit action.
14. The EU's priorities should include improving existing harmonisation in respect of takeovers. The Takeovers Directive is a minimum standards directive which does not attempt to harmonise EU takeover law across Member States except in limited areas. We believe that the takeover regime would benefit from more uniformity so as to create a level playing field for bids in the EU. Areas where harmonisation would make a significant difference to the dynamics during a bid and to the relative position of both parties, bidder and target,) are set out below:
 - 14.1. Mandatory bid provisions (Article 5 of the Takeovers Directive) for when a person acquires a controlling right but where 'control' is not defined and the percentage of voting rights that confers control is determined at national level;
 - 14.2. Detail on rules regarding concert parties – who are deemed concert parties, who are not and the exemptions available;
 - 14.3. Triggers for making an announcement, putting a company into an offer period and the equivalent of the 'put up or shut up' regime;
 - 14.4. Disclosure rules during an offer period (of shareholding and dealings); and
 - 14.5. Article 9 of the Takeovers Directive, which contains the prohibition on target boards from taking defensive action to frustrate bids without prior shareholder approval. Member States can opt out of the prohibition in Article 9, which allows them to be protectionist. It would also be helpful if measures were brought in to prevent Member States from taking actions to protect national ownership of their companies. In this context the Commission could note the proposals for restructuring and simplifying the optionality set out in *The Takeover Directive as a Protectionist Tool?* (Davies, Paul L., Schuster, Edmund-Philipp and Van de Walle de Ghelcke, Emilie; February 17, 2010; ECGI - Law Working Paper No. 141/2010; available at SSRN: <http://ssrn.com/abstract=1554616> or <http://dx.doi.org/10.2139/ssrn.1554616>).
15. Regarding the Directives on the merger and divisions of public limited-liability companies, as we have stated previously in our response to the EC's *'Communication on a Simplified Business Environment for Companies in the areas of Company Law, Accounting and Auditing [COM (2007) 394]*, in our view these Directives should be repealed as they address mainly domestic rather than cross-border issues (see ICAEW Rep 113/07¹).
16. We explain at Q5 (paragraph 7) above how we consider the Directives on the disclosure of companies and their branches should be reformed. Branch registration is an additional area that we consider should be explored for further harmonisation under the Eleventh Directive, as it is currently a serious issue that needs to be addressed as the process for registration varies considerably by jurisdiction. For instance, branch registration can be so cumbersome in some Member States that it can cost £7-10k and can actually be more onerous than company registration.

¹ ICAEW Rep 113/07 can be accessed by copying and pasting this URL into your browser: <http://www.icaew.com/en/technical/legal-and-regulatory/modernising-uk-company-law/-/media/Files/Technical/icaew-representations/2007/icaew-rep-113-07-a-simplified-business-environment-the-european-commission.ashx>

17. Regarding a possible Directive on cross-border transfer of registered office, see our comments at Q14, Q15 and Q16 below.
18. Regarding reform of the Directive on cross-border mergers, see our comments at Q17 below.
19. Regarding a possible Directive on cross-border divisions, see our comments at Q18 below.
20. It is not clear to us what is meant by a 'Directive on cross-border conversion'. We have not indicated that this is an area for harmonisation on the basis that we believe this would be addressed by a Directive on 'cross-border transfer of registered office'.
21. Regarding a possible Directive on 'groups of companies', see our comments at Q19 below.
22. Regarding reform of the Directive on maintenance and alteration of the capital of public limited-liability companies, see our comments at Q20 below.
23. Regarding the multiple choice options in the consultation, we indicate our preference below:

☐ **Yes**, the following pieces of existing legislation harmonising company law could be modernised further (*Multiple choice*):

- ☐ The Directives on the disclosure of companies and their branches as well as the validity of their obligations and their nullity.
- ☐ The Directive on maintenance and alteration of the capital of public limited-liability companies.
- ☐ The Directives on the merger and divisions of public limited-liability companies.
- ☐ The Directive on single-member private limited-liability companies.
- ☐ The Directive on take-over bids.
- ☐ The Directive on cross-border mergers.
- ☐ The Directive on certain rights of shareholders of listed companies.

☐ **Yes**, new areas could be explored for further harmonisation, such as (*Multiple choice*):

- ☐ Cross-border transfer of registered office.
- ☐ Cross-border divisions.
- ☐ Groups of companies.
- ☐ Cross-border conversion.
- ☐ Other: *Please specify.*

☒ **Yes**, both approaches could be combined and further work could target (*Multiple choice*):

- ☒ The Directives on the disclosure of companies and their branches as well as the validity of their obligations and their nullity.
- ☒ The Directive on maintenance and alteration of the capital of public limited-liability companies.
- ☒ The Directives on the merger and divisions of public limited-liability companies.
- ☐ The Directive on single-member private limited-liability companies.
- ☒ The Directive on take-over bids.
- ☒ The Directive on cross-border mergers.
- ☐ The Directive on certain rights of shareholders of listed companies.
- ☒ Cross-border transfer of registered office.
- ☒ Cross-border divisions.
- ☐ Groups of companies.
- ☐ Cross-border conversion.
- ☒ Other: *Please specify. (max 500 characters)*

☐ **No**, further harmonisation is not needed, the approach should rather be based on: (*Multiple choice*)

- ☐ Soft-law instruments, like Recommendations.
- ☐ Increased administrative co-operation and exchange of good practices.

- ☐ Other: *Please specify.*
☐ No opinion.

Q7. Should the focus of EU company law move away from the distinction between public/private towards listed/unlisted in order to ensure adequate protection to shareholders?

24. Whilst we acknowledge that a distinction based on private/public could be viewed as outdated, the existence of a more rigorous regime for public companies (PLCs) may have some value. This is because some might transact with a PLC in the expectation that some more rigorous regime applies to it and some traders may choose to use the PLC form to capitalise on this higher level of confidence. Therefore, some would argue it is right that there is a higher administrative requirement for PLCs.
25. There is also a risk that such a change might provide an incentive for de-listing, at which point shareholders could lose certain protections; some private equity 'buy out' funds may even actively seek to acquire certain target companies with a view to de-listing.
26. We also note that, if there was to be a change to some form of quoted/unquoted distinction, there would need to be further clarity as to where to draw the line. For example, a test based on "admitted to trading on a regulated market" would not pick up AIM companies in the UK and similar (which are invariably public companies at the moment).
27. On balance, therefore, we would not support a move away from the current public/private distinction.
28. Regarding the multiple choice options in the consultation, we indicate our preference below:
- ☐ Yes, for all the legal instruments harmonising EU company law.
☐ Yes, but only for legal instruments related to (*Multiple choice*):
- ☐ Disclosure of companies and their branches as well as the validity of their obligations and their nullity.
 - ☐ Maintenance and alteration of the capital.
 - ☐ Mergers and divisions.
 - ☐ Single-member ownership.
 - ☐ Take-over bids.
 - ☐ Cross-border mergers.
 - ☐ Certain rights of shareholders of listed companies.
 - ☐ Other: *Please specify.*
- ☒ No
☐ No opinion.

User-friendly regulatory framework for European company law

Q8. Do you think that codifying existing EU company law Directives, thus reducing potential inconsistencies, overlaps or gaps, is an idea worth pursuing?

29. We do not support codification/consolidation of the company law Directives into one overarching directive, nor do we believe that Directives with a similar scope should be merged into fewer Directives. This is because the Directives require implementation by national legislation in each of the Member States. So in practical terms the audience for Directives is limited to relevant government officials within the Member States. Therefore, we do not see the benefit of committing resources to a complex and costly consolidation exercise (including because the Directives are effectively addressed only to 27 public servants and so any question of user-friendliness, of one large directive -vs- several smaller ones, is of extremely limited practical relevance). Furthermore, any slight variations in the codified EU legislation would need to be analysed by each Member State to determine whether they could require any consequential changes to domestic provisions. Not only would this unnecessarily take up the time of public servants, diverting them from other more

useful matters, but would in turn increase the costs to business of obtaining advice on those changes. Finally, we have a concern that such an exercise may run the risk of “mission creep”, whereby, and without setting out with this intention, unnecessary – and hence burdensome – legislation is created to ‘fill in’ apparent gaps.

30. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☐ Yes, a single EU company law instrument should replace all existing Directives.
- ☐ Yes, EU company law Directives with a similar scope should be merged.
- ☒ No, this is not an idea worth pursuing.
- ☐ No opinion.

EU company legal forms

Q9. What, if any, is the added value that EU company legal forms bring for European business?

31. EU company legal forms are used to overcome certain cross-border obstacles arising from the existing, perhaps permanent, differences in national law (eg, “real seat” vs incorporation doctrines). For example, in the absence of an EU-wide regime for transfers of seat (see Q14 below), the SE provides a “work around” to achieve the same end. The primary advantages of the SE were the ability to carry out cross border mergers, now largely assumed by the 10th Company Law Directive and – still current – the ability to transfer its registered seat from one jurisdiction to another. This is the “hard” advantage of the SE for business, which would fall away if the current issues associated with ‘transfer of registered office’ could be addressed directly. The SE also has the “soft” advantage of presenting an EU image/ credentials, which some view as supporting the development of a pan-European brand. Its other “soft” advantage is the case in which an acquired company (and its subsidiaries) are converted into branches of an SE holding company in order to mitigate the perception (albeit a perception that is contrary to the freedoms under the Treaty) of a “takeover” by a national entity.

32. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☒ The European image of those company law forms.
- ☒ Their European label (“SE”, “SCE”).
- ☐ Their full legal personality.
- ☐ Savings in costs of cross-border transactions.
- ☒ Ad hoc solution to cross-border related issues.
- ☐ Workable alternatives to existing national company law forms.
- ☐ The possibility not to be subject to compulsory national requirements (for example, the SE allow public limited-liability companies to choose between one-tier and two-tier management structure).
- ☒ The possibility to carry out operations, like cross-border transfer of seat.
- ☐ Tax reasons.
- ☐ Labour law reasons.
- ☒ Other: *Please specify. (max 500 characters)*
- ☐ No added value.
- ☐ No opinion.]

Q10. What, if any, are the main shortcomings of EU legislation introducing EU company legal forms?

33. In our view, the main shortcoming of introducing EU company forms is that, realistically, any EU Regulation introducing such forms would not address issues such as tax, labour, social security and criminal law (with the relevant European Company instead required to follow the relevant law of its place of incorporation), so in our view a European Company is a myth as a real ‘stand-alone’ entity (ie one where all applicable laws are harmonised). Further, we

consider that European Companies create a large amount of law and bureaucracy at the EU Commission and European Parliament, and then also at the Member State level, when in practice very few European Companies (SEs) have been formed and it is easy simply to establish a subsidiary in another Member State.

34. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☐ The complexity linked to frequent cross-references to relevant national legislation.
- ☐ The uncertainty linked to the application of different national legislations that are applied simultaneously.
- ☐ The differences in the way EU company law forms are understood and used at national level.
- ☐ The different degree of attractiveness across Member States.
- ☐ The limitations that derive from unanimity decision-making.
- ☒ Other: *Please specify. (max 500 characters)*
- ☐ No main shortcomings.
- ☐ No opinion.

Q11. Should existing EU company legal forms be reviewed?

35. It seems difficult to get away from the statistics that suggest that corporations have not been persuaded that the SE is an advantageous corporate form except in certain very specific situations. The SE needs overall to become less administratively burdensome and more flexible, and to become a more popular form it needs to provide a compelling advantage over the most successful national corporate forms. The SE equates to a public company which means that it is a less efficient vehicle than a UK private company. In general therefore a SE is only used if there is a specific additional commercial advantage in doing so. We have recently seen an emerging trend towards group simplification and could foresee that, if the SE is improved as a corporate form, it may become more useful and popular during a period of corporate restructuring and simplification by European groups. It is therefore apt that the Commission consider the lessons from the early years of the SE and effect changes. In particular:

- 35.1. the SE has a complex and time-consuming formation process, as a Special Negotiating Body (SNB) is required and it can in certain cases result in the upwards harmonisation of employment rights.
- 35.2. an SE is currently required to have its registered and head office in the same country. This is not an issue for certain jurisdictions which are "real seat" countries (see Q14) because, in those jurisdictions, national corporate forms have a similar requirement and this in essence means that if a company transferred its management to another country it would cease to be recognised as a company in the original jurisdiction and would be treated as dissolved. However, "incorporation theory" countries such as the UK do not have this requirement. Once a company is incorporated here its management can be located anywhere without loss of legal personality. The current requirement for an SE to have its registered and head offices in the same country is overly restrictive and a potential drawback from using the SE in "incorporation theory" countries such as the UK. It also leads to practical issues because there is no local body of case law to enable interpretation of what a "head office" is, as it is not a term which has any legal meaning. It would therefore seem sensible on this issue to allow the SE to accord with national forms of public company where the need for a head office in the country of registration is not a legal requirement.
- 35.3. the SE's cross-border merger process needs to be brought in line with that of the 10th Company Law Directive, which is superior (see our response to the Commission's 2010

“Consultation on the results of the study on the operation and the impacts of the statute for a European company” (ICAEW Rep 47/10)².

However, once the current issues associated with ‘transfer of registered office’ are addressed, we believe the main purpose/advantage of SEs is likely to diminish rapidly, meaning that further review of the SE would not be required (see also our comments at Q9 above).

36. Regarding the multiple choice options in the consultation, we indicate our preference below:

☐ **Yes**, in particular concerning: *(multiple choice)*

☒ Simplification and rationalisation of existing procedures.

☐ Increased uniformity through reduction of cross-references to national legislation.

☐ Reduction of minimum capital required.

☐ Deletion of cross-border element requirement.

☒ Possibility to have the registered office and the headquarters in two Member States.

☐ Explicit solution to the issue of shelf companies.

☒ Other: *Please specify. (max 500 characters)*

☐ **No.**

☐ **No opinion.**

Q12. Could optional models such as the EMCA - or similar projects - be a suitable alternative to traditional harmonisation?

37. We note that the US equivalent of the EMCA was produced by the private sector, and, whilst it had no force of law, it was intended to encourage/increase state law harmonisation. However, the US state laws were more similar than those among Member States, aspects of which can differ greatly (eg unitary vs two tier boards, ‘real seat’ vs ‘incorporation’- see Q14) so an EU equivalent may be of little importance. Given there are more important things for the Commission to be addressing (eg branch registrations, see Q6 above), and that we do not see European company law as being in a state of widespread disarray (see Q5 above), on balance, we do not support this proposal.

38. Regarding the multiple choice options in the consultation, we indicate our preference below:

☐ **Yes.** *Please explain*

☒ **No.** *Please explain*

☐ **No opinion.**

The particular case of the *societas privata europaea* (SPE) statute

Q13. Should the Commission explore alternative means to support European SMEs engaged in cross-border activities?

39. As we have previously commented (in ICAEW REP 149/08³), the essential challenge in creating a new, competitive legal form at EU level is a dual one. First there is the very sound principle of creating as little regulation at EU level as possible in order to leave matters to Member States. The difficulty is that the more that is left to Member States, the more complex becomes the regime (in the manner of the SE). On the other hand, to do anything else requires a complete code of company law to be created at EC level. Such a complete code would raise fundamental policy issues to be debated with stakeholders and ultimately would lead to a very carefully thought through and drafted code, and potentially a lengthy one. The other part of the challenge is to be deregulatory. We were very concerned that the previous draft SPE Regulation failed to address these issues successfully, as it was

² ICAEW Rep 47/10 is available from: <http://www.icaew.com/en/about-icaew/what-we-do/consultations-and-representations/representations/2010-representations>.

³ ICAEW REP 149/08 is available from: <http://www.icaew.com/en/about-icaew/what-we-do/consultations-and-representations/representations/2008-representations>

a half-way house between leaving things to Member States vs a complete code, and in our view it is unlikely that agreement could ever be reached. In any event, the SPE may not be needed if other aspects of EU legislation were to be fixed (see Q9 above).

40. Regarding the multiple choice options in the consultation, we indicate our preference below:

☐ **Yes**, for example: *(Multiple choice)*

☐ The Commission could prepare a new legislative proposal aimed at promoting EU SMEs through the European labelling of existing national company law instruments that meet a number of pre-defined harmonised requirements.

☐ The 12th Company Law Directive could be reviewed in order to introduce a simplified company charter to facilitate the organisation of groups (i.e. single member private limited-liability companies would be exempted from certain harmonised rules, not indispensable for a single member company).

☐ The scope of application of the SE Statute could be modified to allow smaller EU companies to benefit from it on the basis of more flexible requirements.

☐ Other: *Please specify. (max 500 characters)*

☐ **No**, further efforts should be made to get an agreement on the current SPE statute proposal.

☒ **Other possibilities to explore?** *Please specify.*

☐ **No opinion.**

Cross-border transfer of a company's registered office

Q14. Should the EU act to facilitate the cross-border transfer of a company's registered office?

- 41.** Cross-border issues arise due to there being 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) whilst 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). This is best illustrated with a couple of examples, as follows.
- 42.** A company incorporated in the UK will always be considered to be a UK company, even if it 'migrates' its 'real seat' to another country eg Luxembourg. However, it would then, under Luxembourg law, be considered also to be a Luxembourg company and be subject to Luxembourg laws (in addition to UK company law). So, if it wishes to pay a dividend, it will be subject to two potentially different sets of rules.
- 43.** Problems also arise if a Luxembourg company moves its activities and decision making to the UK, as it would cease to be a Luxembourg company (and is effectively 'dissolved' so far as Luxembourg law is concerned), but would **not** become a UK company (and so would effectively not be subject to the laws of any jurisdiction).
- 44.** We do not believe that 'harmonisation' in this area is practicable, given the historical and intrinsic nature of these fundamentally different regimes within the two different types of Member State domestic law. However, the ability to effect a 'transfer of seat (or registered office)' could be a much better way of mitigating these issues than attempting to harmonise these two fundamentally different regimes at Member State level. We would therefore support the introduction of an EC 'seat transfer' regime, to enable the continuity of the migrating company with the proviso that any such new regime must include adequate safeguards for investors and creditors in order to prevent the abuse of the regime. We consider that such regime should be based on the SE regime for transfer of seat, so that, if a company registered in a Member State that has a two tier board structure transfers its seat to the UK, such company would be required to adopt a new constitution which complies with UK law as a condition of such transfer (ie, its two tier board would have to

become a unitary board under which all directors would be subject to the same duties and liabilities).

45. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☒ **Yes**, through a harmonizing Directive. *Please give further reasons for your opinion*
- ☐ **Yes**, through some other measure. *Please give further reasons for your opinion*
- ☐ **No**, as the existing EU framework (European Company Statute, cross-border mergers Directive) provides for sufficient tools for a cross-border transfer of registered office. *Please give further reasons for your opinion*
- ☐ **No**. *Please give further reasons for your opinion*
- ☐ **No opinion**.

Q15. What should be the conditions for a cross-border transfer of registered office?

46. In our experience the transfer of registered office of an SE has worked effectively and we therefore suggest that this is proposed as the basis for legislation in this area. In terms of the multiple choice questions we have ticked the possibility of a transfer of registered office being accepted by a Member State even when not accompanied by a transfer of headquarters or principal business although we believe that situations where a business would wish to do this will be rare.

47. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☒ A transfer should not be possible if proceedings for winding up, liquidation, insolvency, suspension of payments or similar proceedings have been brought against the company.
- ☐ Member States should be able to decide whether or not they require the transfer of the company's headquarters or principal place of business together with the transfer of the registered office.
- ☒ A transfer should be accepted by all Member States even when not accompanied by the transfer of the company's headquarters or principal place of business.
- ☐ A transfer should be allowed only if accompanied by the transfer of the company's headquarters or principal place of business.
- ☐ No opinion.

Q16. What should be the consequences of a cross-border transfer of registered office?

48. 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.

49. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☒ There should be no winding-up of the company in the home Member State.
- ☒ The company should not lose its legal personality.
- ☒ The transfer should be tax neutral following the approach of Directive 90/434 applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States
- ☐ A transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and employees of the company.
- ☐ No opinion.]

Cross-border mergers

Q17. Do you support further harmonized rules in the Directive?

50. We believe the Directive on cross-border mergers is overall a very successful piece of legislation, but there are still some defects in this regime which we believe should be

resolved. There is a case for further harmonising the process for implementing cross border mergers as there are differing national requirements which apply where the Directive itself is silent, for example:

- 50.1. some jurisdictions require that the audited accounts filed with the merger application must not be made up to a date more than a specified period beforehand. In our view the Directive should require a consistent approach across Member States;
 - 50.2. there are differing interpretations of the meaning of the "effective date" for accounting purposes. In our view, Member States should not be permitted to specify this in their domestic law, and it should instead be determined in accordance with the generally accepted accounting practice within the relevant Member State (whether this is set by the government or by an independent standard setter); and
 - 50.3. as outlined at paragraph 2.6.1 in the Reflection Group 2011 paper⁴, there are differing time limits and creditor protection waiting periods. In our view, these should be harmonised across Member States and we recommend that 4 weeks is an appropriate waiting period; and
 - 50.4. there are differing views among Member States on the valuation rules in respect of share exchange ratios. In our view, it should be the two bodies of shareholders of the merging entities who determine whether to approve the merger and associated share exchange ratio, and Member States should not be permitted to impose restrictions (such as requiring that the share exchange ratio is proportionate to the respective values of the merged companies).
51. Whilst we have no direct experience of the issues associated with a) the date of the start of the protection period regarding creditors' rights and b) the consequences of creditors' rights on the completion of a cross-border merger, we acknowledge the issues highlighted at paragraphs 2.6.1 and 2.6.2 of the Reflection Group report may warrant further consideration and we have therefore checked the relevant boxes below. It would also be useful to clarify that upstream mergers are permitted within the Directive, namely the ability of a subsidiary to absorb its wholly-owned parent. This 'upstream merger' does not sit well within the existing Directive, but should be possible under the existing regime provided there is an issue of shares to the shareholders of the former parent company (as mentioned above, the share exchange ratio should be determined/approved by the two sets of shareholders rather than being restricted by Member States). It would also be useful to address certain issues that can arise in these upstream merger transactions, for instance, the pre-merger assets of the parent will include the shares in the subsidiary, but the merged company may be restricted from holding its own shares.

52. Regarding the multiple choice options in the consultation, we indicate our preference below:

☒ **Yes.** Please specify which areas. (Multiple choice)

- ☒ Approval of the cross-border merger by the general meeting.
- ☒ The duration of the review by national authorities of cross-border mergers.
- ☐ The methods for valuation of assets in cross-border mergers.
- ☒ The date of the start of the protection period regarding creditors' rights.
- ☒ The duration of the protection period regarding creditors' rights.
- ☒ The consequences of creditors' rights on the completion of a cross-border merger.
- ☒ Other: Please specify. (max 500 characters)

☐ **No:** Please specify. (Multiple choice)

- ☐ There is no need for further harmonisation in the area of cross-border mergers.
- ☐ The division between EU regulation and national legislation does not pose a problem.

⁴ http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

- ☐ The areas currently not covered are better dealt with in national regulation.
- ☐ Other: *Please specify.*
- ☐ **No opinion.**

Cross-border divisions

Q18. Do you support introducing regulation regarding cross-border divisions at EU level?

- 53.** Given the success of the equivalent cross-border mergers regime, we would support a Directive on cross-border divisions, to address the current mismatch given the lack of a cross-border divisions regime.
- 54.** A key issue with a division is determination of how the liabilities of the respective businesses should be allocated. We do not believe that the liabilities should be joint, but that they should be split. (We assume that “shared” in the multiple choice questions refers to “split”.) After all, a key point about a division is that an entity is split. Joint liabilities would frustrate that purpose. The starting point for this split should be in proportion to the respective values of the businesses to be divided, we recommend the introduction of some flexibility in this area (provided that the interests of creditors can be protected) as it will be difficult to legislate for every eventuality. Ultimately the split will need to be agreed as part of the approval process.

55. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☒ **Yes. And these harmonised rules should aim at the following:** *(Multiple choice)*
- ☒ Building rules on cross-border divisions around the framework established in the Directive on cross-border mergers. *Please specify why. (Multiple choice)*
- ☒ The framework is well known by the relevant stakeholders.
- ☒ The framework has proven to be sustainable.
- ☒ The framework presents the best structure to deal with this type of cross-border activities.
- ☒ Other: *Please specify. (max 500 characters)*
- ☐ No opinion.
- ☒ Shared liability of the involved companies for claims existing at the time of the division.
- ☒ Should this shared liability be based on the distribution of assets in the division? *(Single choice)*
- ☐ Yes: *Please specify. (max 500 characters)*
- ☒ No: *Please specify. (max 500 characters)*
- ☐ No opinion.
- ☐ **No:** *Please specify why: (Multiple choice)*
- ☐ These areas are best dealt with at national level.
- ☐ The division between EU regulation and national legislation does not pose a problem.
- ☐ Other: *Please specify. (max 500 characters)*
- ☐ No opinion.
- ☐ **No opinion.**

Groups of companies

Q19. Do you see a need for EU intervention in this field?

- 56.** One of the fundamental concepts of company law is that it operates on an entity-by-entity basis, and a very strong case is needed in order to depart from this fundamental concept. The material on ‘Groups’ at pages 59-75 in the Reflection Group 2011 paper⁵ looks at certain business issues in high level terms, but does not consider in detail the implications of the different domestic laws within Member States. In our view, the Reflection Group

⁵ http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

report does not make a strong enough case for changes to be imposed at EU level and further work is needed to examine the extent of these differences between the domestic laws in Member States and their effect on businesses. Therefore, we do not support further intervention in respect of groups unless and until such further detailed analysis is carried out.

57. Regarding the multiple choice options in the consultation, we indicate our preference below:

- ☐ **Yes**, there should be an EU intervention (*Multiple choice*)
- ☐ The Commission should recommend the recognition of group interest.
 - ☐ The EU should require groups to provide information on their structure in a consolidated, investor-friendly and easy-to-read document.
 - ☐ Other: *Please specify.* (max 500 characters)
- ☒ **No**, there is no need for EU intervention.
- ☐ **No opinion.**

Capital regime

Q20. In your opinion, should the Second Company Law Directive be reviewed?

58. We believe that this project, to look at the future of EU company law, is a once-in-a-generation opportunity for the Commission to hold a public policy debate on the question of whether individual Member States should be given the freedom to decide, if they wish, to introduce for public companies a solvency-basis of distribution in lieu of the present historical capital system. For example, the Netherlands has recently introduced a solvency-based regime for Dutch BVs; the question that needs to be debated is whether Member States should be free to make similar changes for public companies.
59. We acknowledge that there are, or may be, different views about these two systems and that there may not be a consensus, if a snap poll were taken today, as to which is the most suitable. This points to the fact that debate is needed. Such a debate would not be about whether to impose a solvency basis on Member States, but just about whether to permit Member States to decide for themselves. On the other hand, in order to conclude, now, that the subject should remain closed to debate then one would have to be certain that both (i) the current system is fit for purpose and (ii) a solvency basis would have no merit whatsoever. In our view, as explained below, neither of those conditions applies, and accordingly the subject needs to be opened up to a public policy debate based on a full analysis of the advantages and disadvantages of the two systems.
60. The aim of the law in this area is to regulate the return of value, by a limited liability company, to its shareholders, so as to give appropriate protection to creditors. Both are important: if there could be no return for investors then in practice there would be no economic activity undertaken through companies at all; on the other hand, creditors have recourse only to the company and so a return to investors is potentially a risk that the company will be left unable to pay its debts to them, the creditors. Balance between the two is required. Historical capital and solvency are different ways of striking such a balance.
61. In terms of the current regime we note that it can be complex and costly, as highlighted in the UK Government's report ('25 Ideas for Simplifying EU Law'⁶), which listed reform of the Second Directive as the top simplification measure for removing burdens on business. Furthermore, it is open to question whether this is the most effective way of balancing the interests of shareholders and creditors as it is based, first, on historical amounts contributed by shareholders. Second, this buffer is adjusted by accounting losses, which are themselves a matter of choice of policies (whether a choice by a company from among allowed alternatives or a choice by a Member State in framing its national GAAP). This

⁶ Available at: <http://www.berr.gov.uk/files/file47148.pdf>

method certainly provides a buffer, but the question is whether that historically determined, accounting-linked buffer figure could result in under or over-protection of creditors.

62. On the other hand, we believe that a solvency-based regime for determining distributions is not without merit. This is because, under a solvency-based regime, the rules governing payment of dividends are linked to the ability to pay creditors and, as such, are more directly related to the aim of the law in this area. A solvency-based regime could therefore be more targeted to the needs of creditors, and so ought, *prima facie*, to leave them not materially disadvantaged, in some cases perhaps better protected, and strike the balance, between creditors and shareholders, in a more appropriate place.

63. We therefore believe that the current capital maintenance and distributions regime in the Second Directive should be reviewed by way of a consultation at EU level regarding whether to permit the evolution of alternative, solvency-based systems within Member States.

64. Regarding the multiple choice options in the consultation, we indicate our preference below:

☒ **Yes:** *Please indicate what should be the aim of the review 8 (Multiple choice)*

- ☐ Abolition or change of the minimum capital requirement.
- ☐ Replacement of the balance sheet test by a solvency test.
- ☐ Cumulative use of the balance sheet test and of the solvency test.
- ☐ Alternative use of the balance sheet test and of the solvency test.
- ☐ Use of International Financial Reporting Standards for the determination of distribution of dividends.
- ☐ Clarifying the regime of abstention vote.
- ☒ Other: *Please specify. (max 500 characters)*
- ☐ No opinion.

☐ **No:** *Please give your reasons (Multiple choice):*

- ☐ Current rules are flexible and leave a significant margin of manoeuvre to Member States.
- ☐ Current rules have stood the test of time.
- ☐ Compliance costs for companies are not excessive.
- ☐ Other: *Please specify. (max 500 characters)*
- ☐ No opinion.

☐ **No opinion.**

Additional Comments

21. Do you wish to upload a document with additional comments?

☒ **Yes**

65. This letter has been uploaded to the online questionnaire at Q21.

E liz.cole@icaew.com

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Appendix

Reasoning behind response to Q5 above regarding the objectives of EU company law

National company law – its object, features and related matters

- A1 The objective of national company law is to facilitate business on a large scale. To achieve this end, a company is an artificial legal person, its owners have limited liability and it has (transferable) ownership that is separate from management. In order to effect this it is necessary to legislate for the incorporation and dissolution of a company; to regulate the relationship between owners and managers; to regulate the relationship between owners and creditors; and to regulate other consequential matters. (The regulation of such relationships is a matter of balance of the competing interests and also of the benefits for some versus the costs for others.) Whilst these fields may be easily enumerated, they are each very wide, eg: any limits on a company's capacity, directors' transactions with the company, directors' duties, directors' disqualification, accounts and audit for shareholders, shareholders' meetings and proceedings, derivative actions, transfers of cash or other assets to or from shareholders, public availability of accounts and other information about the company (who owns its, who directs etc), investigations into company failures, when and how insolvency is dealt with, striking off, disposition of assets of struck-off companies. It is hardly to be wondered at that some Member States have a significant body of company law.
- A2 Moreover, each Member State has around 150 years of historical development of its company law. The result is that such company laws are extensive, to a certain degree the product of the local legal environment (eg, laws on directors being developed from much older trust law) and often a foundation of other elements of national law, eg, taxation.
- A3 Company law is also the foundation for law concerned with the market in companies' shares. Whilst such markets are important for delivering the full benefits of the company – the transferability of ownership – they trade in the shares of companies of many jurisdictions and are more concerned with the trading of shares, as financial assets, as opposed to the ownership of the company. There is a grey boundary between financial markets law and company law. For example, takeovers involve not only a classic company law agency issue – whether some other persons would do a better job as stewards (directors) of the company's assets – but also a pricing issue for a market transaction. Other examples include major shareholding notifications (is this more about counterparties knowing who owns the entity with which they deal, or with the market in shares) or dematerialisation of shares (membership need to be evidenced, but this manner enables market transactions). This results in further rules being implemented for listed or traded-on-regulated-markets companies.
- A4 On the whole, national company laws have been very successful in achieving their aims. Improvements are made, of course, from time to time. These tend to be incremental, often in response to the developing business or financing context, or in response to a constant challenge to ensure that the law appropriately balances the costs and benefits for all affected parties.
- A5 In terms of the use of companies, the particular example of taxation explains the popularity of the company for carrying on what would otherwise be the business of a sole trader. In addition, the company has proved popular as a subsidiary company. Groups are able to organise themselves using subsidiaries. This makes it easier to sell a business (sell a subsidiary) or to buy one. This greatly facilitates the change in ownership of "component" businesses. In addition, the limited liability nature of a subsidiary company is an attraction, such that a problem in one risky venture will not necessarily bring down the whole of the entrepreneurial activity of the whole group. For any group this is a balancing act – having enough separate legal entities to achieve appropriate ring fencing but not too many so as to

have an unnecessarily large number of subsidiaries. At the present time many groups have concluded that they are imbalanced towards the latter.

EU company law

- A6 What then should be the role of the EU in the field of company law? At the present time there are three elements to this law:
- case law making clear that parties in one Member State may form a company in another Member State;
 - directives and regulations achieving minimum harmonisation of certain matters; and
 - a 28th, or pan-EU, company law regime – the SE.
- A7 Notwithstanding the small scale of these measures, there has been no notable adverse effect on the effectiveness of companies throughout the EU – ie, there is no apparent want of intervention. Indeed, it is notable that the largest effect on EU companies comes not from the field of company law itself but from the simple existence of the single market – ie, that companies, as legal persons, are entitled to do business throughout the EU.
- A8 At Q5 above we have therefore stated that, in our view, EU company law should facilitate the efficient operation of the single market, but there needs to be a balance (i.e. 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.