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DG MARKT Unit F2
European Commission
B-1049 Brussels

By Email: markt-consultation-se@ec.europa.eu

Dear Sir or Madam

EC consultation on the operation and the impact of the Statute for a European Company (SE)

The Institute of Chartered Accountants in England and Wales (ICAEW) is pleased to respond to your request for comments on the *Consultation on the results of the study on the Operation and the Impact of the Statute for a European Company* published by the European Commission in March 2010. 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 faithfully

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ICAEW REPRESENTATION

EC CONSULTATION ON THE OPERATION AND THE IMPACT OF THE STATUTE FOR A EUROPEAN COMPANY (SE)

Memorandum of comment submitted in January 2010 by the ICAEW, in response to the *Consultation on the results of the study on the Operation and the Impact of the Statute for a European Company* published by the European Commission in March 2010. The ICAEW has registered with the Commission's Interest Representative Register and our ID number is 7719382720-34

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INTRODUCTION

1. The ICAEW welcomes the opportunity to comment on the *Consultation on the results of the study on the Operation and the Impact of the Statute for a European Company (SE)* published by the European Commission in March 2010.

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide. The ICAEW is listed in the European Commission's Interest Representative Register (ID number: 7719382720-34).
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

GENERAL COMMENTS

4. 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. We agree with the key reasons for this, which we emphasise in responses to specific questions below. However, we see 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, its cross-border merger regime needs to be brought in line with that of the 10th Directive, which is superior. More fundamentally, the SE needs overall to become less administratively burdensome and more flexible, and to succeed it needs a compelling advantage over the most successful national corporate forms.

RESPONSES TO SPECIFIC QUESTIONS

Q1 Do you agree with the findings of the study about the positive and negative drivers for setting up an SE and their importance? Please explain your answer.

5. In principle we are in agreement with the key conclusions of the consultation and on the positive and negative drivers for the use of the SE in the UK; ie, the positive drivers being the ability to transfer the registered office, the European image of the SE and corporate simplification; and the negative drivers being the cost, complexity and uncertainty of these and the requirement for negotiations regarding future employee involvement. We also agree:
 - (i) that the cross-border merger regime is no longer an incentive for adopting the SE now that the 10th Directive has been fully implemented; and
 - (ii) that in comparison with UK national corporate law the SE does not (with the exception of the ability to transfer the registered office) offer any additional flexibility over a national public company. Indeed there are several areas (see response to Q2 below) where the SE is less flexible.
6. We also note that the SE has proved attractive to those who wish for flexible and simplified corporate governance structures compared with what is otherwise available in their jurisdiction,

ie access to single tier structures and without employee involvement in governance. This may point to a more deep-seated need to reform structures to make them simplified and flexible.

7. Further, we note that it is possible that some organisations consider national “branding” to be an advantage particularly when dealing with national governments and their agents (for contract awards, grant applications etc). Thus whilst the European image of the SE appeals to some, it may be positively avoided by others.
8. To return to the report, it is, however, quite sceptical about the extent to which simplification of the group structure is a true incentive (1.1.1.4.1) and it is on this aspect we would like to comment.
9. We are beginning to see an emerging trend in which larger international businesses are starting to focus on the costs and risks of having an unduly complex corporate structure. There are potentially four reasons for this (i) cost reduction; (ii) improved corporate governance under which statutory boards reflect operational decision making processes; (iii) regulatory changes, especially in the financial services sectors and particularly over the next few years; and (iv) a need to address the unchecked growth of group structures over the pre-crisis years.
10. Corporate simplification projects of this kind are highly complex and can take a considerable time to implement; nevertheless in some cases there are indications that the transition costs and possible negatives of these types of programmes as indicated in 1.1.1.4.1 of Chapter 3 of the report are outweighed by the potential future benefits, in terms for example of the improved ability to access capital within the group, the elimination of intra-group transactions, reduction in audit fees etc. The benefits are particularly enhanced where operational changes are also proposed.
11. The reasons why these types of projects have not been more evident in the past may be as follows:-
 - (i) they are characterised by a long lead time during which they are highly confidential;
 - (ii) there is a natural reluctance to be the "first mover";
 - (iii) the tax regime which supports cross border mergers has only relatively recently come into force across Europe.
12. Corporate simplification is not of course a reason for specifically choosing the SE over other structures but it may become one option that is considered particularly because of its cross border mergers regime and also because of its "European" image. However, in comparison with the 10th Directive on cross-border mergers the SE merger provisions are now comparatively more complex and time consuming and for branch structures the 10th Directive would generally be preferable (in particular because of its employee participation negotiation requirements). However they are not mutually exclusive; the 10th Directive could be used for the cross border merger element and an SE brought into the group structure using one of its other formation methods.
13. It is therefore possible that over time the use of the SE form may become more frequent. However, to realise this the negative drivers would have to be addressed and it would have to have a compelling advantage over national corporate forms, particularly since the principle of freedom of establishment means that a national corporate form is not restricted to conducting activities in its member state of incorporation.
14. We agree that the transfer of seat provisions has been one of the key drivers for the use of the SE in the UK.

Q2 Do you agree with the study's assessment on the attractiveness/non-attractiveness of national legislation for setting up an SE? Do you think that other or additional issues in the national legislation should be taken into consideration for that assessment?

15. Yes we are in agreement with the conclusions set out in 4.1.25 on page 170 of the report, in that (whilst we are not in a position to express a view as to the intentions of the UK government in adopting or not any of the options) we believe the lack of take-up in the UK is a result of inherent complexities in the SE concept and the simplicity and flexibility of national corporate forms.
16. In the UK an SE is still a less flexible vehicle than a national public company principally for the following reasons:-
- (i) the need to have its head office in the place of registration (and related concern of the meaning of " head office " in the context of UK company law);
 - (ii) the need for a relatively high initial share capital;
 - (iii) certain mandatory provisions in relation to the one tier system e.g. Article 44 (the requirement to meet at least once every three months), Article 46 (the maximum period of six years for appointments of members of the company's organs). Article 48 (categories of transactions which require the approval of the management organ), Article 49 (non- disclosure, which to some extent overlaps with the UK's existing laws on the codification of directors duties); and
 - (iv) the complexity of the legislation.
17. In addition as a result of changes to national company law with the Companies Act 2006 a private company is now a very flexible entity when compared with a public company; as a result private companies are in general the preferred form of group entity at subsidiary level. Therefore, there have to be good reasons for having a public company as a subsidiary and the drivers for an SE have to be even more compelling. It is principally for these reasons we believe that relatively few SEs have been registered in the UK.

Q3 What are in your view the most important regulatory issues to consider for a company when assessing in which country to place its registered office and/or head office (both at the moment of formation and during the life of a company – taking into account the possibility to transfer the registered office).

18. There will be a range of different considerations relevant to any start up in a particular jurisdiction. In relation to the SE however, the national employment law regime will be a key driver in determining where it is registered. In addition, to be competitive the SE should be made as flexible as normal corporate vehicles available in a particular Member State.

Q4 Do you agree with the study that the main reasons for the current distribution of SEs across the EU/EEA Member States are connected to the employee participation system and corporate governance system of the individual Member State? Please explain your answer.

19. See Q5 below.

Q5 Do you agree with the possible explanations for the current distribution of SEs in the EU/EEA presented in the study? If you think there are other possible explanations please list them.

20. We cannot comment on issues outside the UK and we have indicated the reasons why we believe that there are not more SEs in the UK.

Q6 What are in your view the main advantages for a company to buy a ready-made shelf SE compared to setting up an SE directly?

21. The main advantage of buying a company off the shelf is the ability to acquire a company quickly. However, at least some changes to the constitution are usually needed to adapt a shelf company to a particular use. In the UK the cost/time savings therefore can be quite small, albeit that they are enough to ensure a thriving business for formation agents who form and sell shelf companies.
22. In the case of an SE we believe that most are specially formed for a particular purpose and that therefore there would be no particular advantages in buying a ready made SE. However, we cannot see any reason of principle why shelf SE's should be discouraged or prohibited.

Q7 Please provide examples of practical problems you have encountered in the course of setting up or running an SE (please focus only on company law related problems).

23. As there have been relatively few SEs registered in the UK there is little evidence of practical problems.

Q8 Do you agree with the study's recommendations for possible amendments of the SE Regulation? Which recommendations are the most important in your view? Do you have any other suggestions for amendments of the SE Regulation that would increase its attractiveness for businesses (e.g. for SMEs, groups operating across borders)?

24. Unless otherwise mentioned we agree with the amendments proposed subject to the following comments:-

Article 2- formation by conversion. We support the proposed amendment under which a company may convert into an SE as long as it has a subsidiary or branch in another jurisdiction. For businesses which already have or which are moving to a branch structure this would be a welcome amendment as it would avoid the need to retain a subsidiary solely for that purpose.

Article 4- An amendment to enable SEs to have non Euro denominated share capital should be considered together with a reduction of the minimum amount of share capital.

Article 7-An amendment to define "head office" should be considered; as this is not a concept which has legal meaning in UK national law. This creates uncertainty particularly in view of the sanctions in article 64 and also adds to the professional costs of establishing an SE. Our preference, however, would be to make the requirement to have the head office in the country of registration an option. This would then enable countries to make the SE consistent with national entities.

Article 8- Consideration should be given to an amendment to enable the shareholders of an SE which has no employees or other creditors to shorten the statutory periods.

Article 32- Consideration should be given to an amendment under which the shareholders of two solvent companies could unanimously agree to dispense with the need for an experts report and in 6 to have the ability to approve the draft terms by whatever means is permitted under the national laws of the companies concerned. In the UK decisions of the shareholders of private companies can be made by written resolution without the need for a general meeting.

Article 66- As mentioned elsewhere there is some reluctance to opt for an SE as it is relatively untested compared to a national public company vehicle. Whilst we note the concerns in the response we suggest that consideration be given to shortening the two year period to give businesses the option to convert back to a public company if the SE turns out to be no longer

suitable e.g. a business might dispose of its European operations and decide to concentrate on a single national market or if on reflection the company wishes to revert to a more tested vehicle.

25. More generally the process for a cross-border merger to form an SE is more onerous than a cross-border merger under the 10th Directive and consideration should be given to bringing the SE regime in line with the 10th Directive. As previously mentioned, when the SE was introduced its cross-border merger facility was a comparative advantage. After the 10th Directive it is now a comparative disadvantage.
26. As mentioned in the response to Q2 the SE is still a comparatively less flexible corporate vehicle than a public company in the UK because of certain of its mandatory elements.

Any Other Comments

27. In the context of corporate simplification projects which involve the conversion of subsidiaries into branches there are still some instances where additional national requirements are imposed which require branches to prepare and file audited branch accounts notwithstanding the application of the Eleventh Company Law Directive (89/666/EEC). This means that some of the benefits of moving to a branch structure are reduced.

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