Recent developments in and prospects for company law

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This Commission staff working document concerns the impact assessment on the impact assessment on the Directive on the cross-border transfer of registered office.

As the law stands in most Member States, moving a registered office would typically imply the winding-up of the company in Member State A and its re-incorporation in Member State B. Given the high costs involved, the time involved and the related administrative burden, with sometimes more than 35 procedural steps to overcome, this hardly ever occurs and European companies are, in practice, deprived of the possibility of moving their place of registration within the EU.

Some Community measures, in particular the European Company Statute and the European Cooperative Society, already grant the right of transfer of registered office, however, this possibility is available only to companies established as Societas Europea (SE) or a European Cooperative Society. The practice to date has shown that not many companies decide to transfer their registered office on the basis of the SE Statute.

This impact assessment reviews the nature and scope of the problems raised by the absence of cross-border transfers of companies' registered offices within the EU and identifies policy options to address the situation at EU level.

The twin objectives of any initiative on this matter should be to improve the efficiency and competitive position of European companies by providing them with the possibility of transferring their registered office more easily and, hence, choose a legal environment that best suits their business needs, while at the same time guaranteeing the effective protection of the interests of the main stakeholders in respect of the transfer.

The report looks at different options which could further the achievement of these objectives. Firstly, the 'no action' option is examined. In particular, the possible impact of existing legislation and legislation about to enter into force, notably Directive 2005/56/EC on cross-border mergers which will enter into force on 16 December 2007 and the possible European Private Company Statute, is assessed. The impact assessment focuses on whether the time, costs and procedures required to complete the transfer of registered office would be substantially different from those required to carry out such transfer through a cross-border merger operation under the existing cross-border merger directive. Possible developments in the Community case law are also examined, in particular the currently pending case which concerns a transfer of registered office and whose outcome might affect the scope and content of a possible EU measure.

‘No action’ option would involve proposing Community action to facilitate the transfer of the registered office.

As for the nature of the instrument, the assessment considers four main options which are also compared with the 'no action' option.

Option 1 considers action by the Member States, i.e. signature of the convention on mutual recognition of companies. **Option 2**: envisages a nonbinding and flexible instrument, i.e. a recommendation. The last two options concern the adoption of a binding Community instrument, a directive (**option 3**) or a regulation (**option 4**).

From the comparison of the different possible options the assessment concludes that 'no action' option or a directive would be suitable to achieve of the policy objectives. However, when the proportionality test is applied, it is not clear that adopting a directive would represent the least onerous way of achieving the objectives set. Since the practical effect of the existing legislation on cross-border mobility (i.e. the cross-border merger directive) is not yet known and that the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future, the assessment concludes that it might be more appropriate to wait until the impacts of those developments can be fully assessed and the need and scope for any EU action better defined.