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Our ref: ICAEW Rep 08/14

Balance of Competences Review –
Single Market: Financial Services and the Free Movement of Capital
HM Treasury
1 Horse Guards Road
Westminster
London SW1A 2HQ

Dear sirs

Balance of Competences Review
Single Market: Financial Services and the Free Movement of Capital

ICAEW is pleased to respond to your request for comments on *Balance of competences review Single Market: Financial services and the free movement of capital*.

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

Yours faithfully

Katerina Joannou
Manager, Capital Markets Policy



ICAEW REPRESENTATION

Balance of competences review - Single Market: Financial services and the free movement of capital

Memorandum of comment submitted in January 2014 (updated 7 March 2014) by ICAEW, in response to HM Treasury's call for evidence *Balance of competences review - Single Market: Financial Services and the Free Movement of Capital*, published in October 2013

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the call for evidence *Balance of competences review - Single Market: Financial Services and the Free Movement of Capital* published by HM Treasury on 21 October 2013, 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. This response reflects consultation with ICAEW's Corporate Finance Faculty and Business Law Committee. The Corporate Finance Faculty is responsible for ICAEW policy on corporate finance issues. Its membership is drawn from professional services groups, advisory firms, companies, banks, private equity, law firms, consultants, academics and brokers. The faculty provides a range of services to its members including a monthly magazine *Corporate Financier*. The ICAEW Business Law Committee 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.
5. 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).

MAIN POINTS

6. Activities which have an impact on, or are fundamental to, market and financial stability lend themselves to maximum harmonisation and detailed regulation made at EU level. In relation to Directives listed in Annex B, our view is that the balance of competence has generally been achieved with the Listing Directive, the Prospectus Directive and the Transparency Directive (see our response to Q3). On the other hand, despite a marked increase during the past decade, there are instances where single market objectives have not been advanced.
7. In the case of Directives such as the Market Abuse Directive and the Alternative Investment Fund Managers Directive, we believe harmonisation could be improved. Moreover, while not specifically included in Annex B, it is relevant to point out that without clarification to address various optionality provisions in the Takeovers Directive, these impede the creation of a level playing field for public M&A in Europe (see our response to Q3).
8. There is evidence of the EU policy-making process being slow to react to market developments (see our response to Q8) and, conversely, insufficient time has been devoted to consulting on some areas with an impact on market stability (see our response to Q12).
9. As illustrated in the consultation paper, despite the existence of controls related to national, security, defence and public policy issues, there continues to be broad scope for discretionary

action by individual Members States to obstruct changes in ownership and management even in sectors with no clear public policy, national security or defence justifications (see our response to Q3). There are also signs of protectionism outside the European Union and there may be potential to re-examine how responsibility for relevant legislation would best serve the national interest.

RESPONSES TO SPECIFIC QUESTIONS

Q1: How have EU rules on financial services affected you or your organisation? Are they proportionate in their focus and application? Do they respect the principle of subsidiarity? Do they go too far or not far enough?

10. Our members are involved in activities that are significantly influenced by several Directives within the scope of the consultation. On the whole we think that the principle of subsidiarity is respected with the UK having sufficient influence. It is important that the UK's influencing position is maintained and strengthened.

Q3: How have EU rules helped or made it harder to achieve objectives such as financial stability, growth, competitiveness and consumer protection?

11. In relation to Directives listed in Annex B, our view is that the balance of competence has generally been achieved with the Listing Directive, the Prospectus Directive and the Transparency Directive. We also support the recent removal of the requirement for interim management statements. The global emphasis on growth and competitiveness has provided many opportunities to explore the effectiveness of capital markets and we consider that the prospectus regime is not a hindrance to companies seeking to access capital on public markets. At the premium listing level the UK has a good reputation and effectively differentiates itself and is not adversely impacted by regulatory arbitrage.

12. We think there is scope for more harmonisation in the following Directives:

- **Market Abuse Directive:** A common regime needs to apply in Member States in terms of the scope of the offence and enforcement penalties. The recent proposal for criminal sanctions to tackle the abuse and manipulation of financial market is welcome but there continues to be a case for considering harmonisation of the enforcement approach and civil sanctions in this area.
- **Alternative Investment Fund Managers Directive:** Certain key concepts remain vague, such as 'marketing' and 'reverse solicitation', making implementation difficult and costly for applicants and providing increased scope for regulatory arbitrage.

13. While not specifically included in Annex B, it is relevant to highlight the Takeovers Directive as having had limited positive impact and having failed to create a level playing field in public M&A in Europe through both optionality provisions within the Directive and the absence of harmonisation in key areas of takeover activity such as the 'put up or shut up' regime which puts pressure on bidders. Moreover the consultation paper identifies the removal of golden share arrangements and control (paragraph 2.69) as potentially helpful to the UK economy; this has not been tackled effectively at EU level. There continues to be broad scope for discretionary action by individual Members States to obstruct changes in ownership and management even in sectors with no clear public policy, national security or defence justifications. We set out examples of these issues in the Annex to this response. While cross-border European mergers have been blocked there are examples of foreign investment review and protectionism across the globe and there may be potential to re-examine where responsibility for relevant legislation should rest to best serve the national interest.

Q8: Does the UK have an appropriate level of influence on EU legislation in financial services? How different would rules be if the UK was solely responsible for them?

- 14.** The EU has shown it can be slow to react to market developments, for example when capturing derivatives and other instruments within transparency regulations. Recently, ESMA issued a public statement on shareholder cooperation, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive*, in order to clarify the concept of 'acting in concert' - eight years after implementation of the Takeovers Directive. This may not have been the case if the UK was solely responsible for rules.
- 15.** Furthermore, ambiguity can be found in certain elements of definitions within EU legislation. An example is the 'acting in concert' concept. This concept and/or similar terms is used in a number of Directives (Acquisitions Directive, Prospectus Directive, Transparency Directive and Takeovers Directive) but this varies (as illustrated in Appendix C of the ESMA public statement referred to in Q8) and this leads to different interpretation and application by Member States (again, as illustrated in Appendix D of the ESMA statement). The risk of ambiguity across elements of legislation may not be eliminated if the UK were solely responsible for rules but the problem of differing interpretation and application would probably not be as acute. It should be noted that the ESMA statement has provided a helpful common platform and the UK's Panel was involved in this process. It is vital that the UK maintains a key role in the development of practice in this area.

Q12: Do you have any further comments about issues in addition to those mentioned above?

- 16.** Insufficient time has been devoted to consulting on proposals which have an impact on market stability. Marked examples concerned Derivatives and Market Infrastructures and Short Selling as well as the Review of the Market Abuse Directive, all of which had consultation periods of less than one month. This is not a feature exclusive to EU legislation - there are similar UK examples - and it is important for policymakers to understand the importance of genuine public consultation and to recognise the significant efforts and time required for consideration and debate of proposals by interested parties and to crafting concise and evidence-based submissions. Short consultation periods in some cases and slow reaction in others (see our response to Q8) are extreme timetables, neither of which is suitable for policymaking.

ANNEX

1. In our response to Q3 we highlighted the Takeovers Directive as having had limited positive impact and having failed to create a level playing field in public M&A in Europe. Examples suggestive of economic protectionism have been conducted by way
 - discretionary action by individual Members States to obstruct changes in ownership and management, even in sectors with no clear public policy, national security or defence justifications; or
 - controls exercised by golden shares held by governments in particular companies.
2. In 2005 Pepsico made an abortive bid for Danone of France, perhaps the best-known effort to protect a 'national champion'. The 2004 Sanofi-Synthelabo bid for Aventis was favoured over a potential merger of the latter from Switzerland's Novartis¹.
3. In 2006, several governments attempted to block Mittal Steel's bid for Arcelor (France, Spain, Luxembourg). Also in 2006, the Italian utility ENEL decided against making an offer for Belgian energy group Suez and the Spanish conglomerate Abertis' bid for Autostrade of Italy was successfully discouraged. In 2007, the German utility E.ON dropped its bid for Endessa as did the Spanish utility company Enel which bid for Suez (France).
4. In 2012 Yahoo's bid for a majority stake in Dailymotion, a video-sharing website owned by Orange, in which French government has a stake was blocked². Also in 2012 the proposed merger between EADS and BAE Systems was called off due to the fact that the 'interests of the parties' government stakeholders cannot be adequately reconciled with each other or with the objectives that BAE Systems and EADS established for the merger³.
5. The European Commission has taken legal action to challenge Member States' handling of foreign takeover bids (selected case law on golden share arrangements is available at http://ec.europa.eu/internal_market/capital/framework/court/index_en.htm). Of the cases on golden shares, two alone have not resulted in condemning judgements by the European Court of Justice: the Belgian government's opposition to the sale of energy channelling by two national companies (2002)⁴ and the German government's rules that exceptionally give Lower Saxony a blocking minority on major Volkswagen decisions with its 20 per cent voting stake in the company (Case C-95/12, October 2013)⁵.
6. Signs of protectionism are also apparent outside the European Union⁶. Some see a global trend for protectionist thinking⁷ while another assessment is that 'in spite of the apparent promise of open capital markets offered by globalisation ... protectionism is on the rise internationally and takeovers play a central role in this evolving story'⁸.

¹ <http://www.nytimes.com/2004/01/26/world/sanofi-is-ready-to-announce-aventis-bid.html>

² <http://www.reuters.com/article/2014/02/25/us-orange-dailymotion-idUSBREA100MA20140225>

³ http://www.airbus-group.com/airbusgroup/int/en/news/press.20121010_eads_bae.html and <http://otp.investis.com/clients/uk/bae-systems1/rns/regulatory-story.aspx?cid=288&newsid=277213>

⁴ Noelle Lenoir lecture at Yale Law School 'Is the new Europe anti-competitive'? 2007, transcript at http://www.law.yale.edu/documents/pdf/News_&_Events/NoelleLenoir_07.pdf

⁵ <http://www.ft.com/cms/s/0/e99d23e8-3b06-11e3-87fa-00144feab7de.html#axzz2v0SPuxkE> and <http://online.wsj.com/news/articles/SB10001424052702304402104579150943608439928>

⁶ <http://www.ft.com/cms/s/0/1fb37926-3dea-11dc-8f6a-0000779fd2ac.html?siteedition=uk#axzz2v0SPuxkE>

⁷ See article by north American law firm Davies, <http://www.dwpv.com/en/Resources/Publications/2011/Protectionism-Implications-for-Hostile-and-Friendly-Change-of-Control-Transactions>

⁸ See Jennifer G Hill's, 'Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance', November 2010 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704745&rec=1&srcabs=1657953

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