

# COMMENTS ON THE GREEN PAPER ON THE INTERCONNECTION OF BUSINESS REGISTERS

## **INTRODUCTION: LEGAL STANDING AND INTEREST**

Through the Green Paper on the Interconnection of Business Registers dated 4 November 2009 in Brussels, the European Commission launched a consultation to enable interested parties to give their opinion on the possibilities for enhancing cooperation among business registers, with two objectives:

- First, to achieve easier access to cross-border information about companies;
- And second, to tighten the cooperation among registers themselves in certain processes, such as cross-border mergers or seat transfers, and in the updating of the information branches must furnish through the register for their seat.

The Association of Property, Mercantile and Personal Property Registrars of Spain, whose seat is at calle Diego de León número 21, 28006 Madrid, is a party interested in participating in this public consultation as an organisation and as a public authority.

The Association is the corporation organised under public law and recognised by the State to coordinate registrars' activity. It has legal personality and full capability, and its members are all the property, mercantile and personal property registrars of Spain. The Association's membership therefore includes the functionaries in charge of executive and daily management of the mercantile registries (business registers) of Spain.

Spanish mercantile registrars are the persons in charge of the executive and daily management of Spanish business registers. Their function consists in examining the documents submitted for registration for due legal form prior to registration per se. The registrars draw the data that must be stored in the database from these documents and register the data, maintain the data by eliminating anything that is incorrect and furnish the professionally processed information to users, in full observance of data protection legislation.

Moreover the Association of Registrars of Spain has belonged to the EBR (European Business Register) since 2002 and has been one of the members of the BRITE consortium since its creation.

On the basis of its capacity as an interested party, the Association responds to the consultation as follows:

## **ACCESS TO INFORMATION**

### **FIRST QUESTION:**

*Whether an improved network of the business registers of the Member States is necessary.*

The answer is clearly yes.

The objective of facilitating cross-border access to company information stated in paragraph (7) of the preamble to Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009<sup>1</sup> must overcome the obstacles currently posed by on-line access to the different registers, which is possible under article 3.4 of the said Directive. Said obstacles, such as difficulty searching or locating the register one needs, the differences in structure of registers' databases and the diversity of languages, in some cases prevent access to information and in other cases prevent clear understanding of the information obtained.

The solution, in our opinion, should be based on the following points:

- a) A mandatory interconnection network to which all the business registers of the States in the Union belong should be established.
- b) The information accessible through such a network must obey the following principles:
  - Be updated: The information contained in business registers is a dynamic database, not a static one, as it is constantly being modified.

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<sup>1</sup> This directive, published in the Official Journal of the European Union on 1/10/2009, repeals Directive 68/151/EEC and amendments thereof, including the amendment introduced by Directive 2003/58/EC, to which the Green Paper refers.

- Be relevant: The data contained in business registers differ depending on the respective internal laws of countries. Users are generally interested in certain relevant data.
- Be reliable: Even though the effects of disclosure depend on the national legislation of each State, the information obtainable must be guaranteed to be accurate. The principles in article 3.4 of Directive 2009/101/EC should be held to be applicable on this point.<sup>2</sup>
- Be intelligible: The information must be available in any requested official language of the EU.
- Be standardised: Usually applicants for information are interested in a series of basic data that must necessarily be recorded in all business registers under Directive 2009/101/EC (existence of the company, company seat or registered office, company purpose, company term, representatives or persons with the power to make binding undertakings on the company's behalf, etc.). Standardised information plus linguistic plurality make the information easier to understand. Apart from this, each register may facilitate other information it holds on record in its files or databases if requested to do so.

LEGISLATIVE VEHICLE: Achieving such objectives requires a legislative basis that makes it mandatory for all business registers to be connected to the network, likewise a minimum outline of the information content to be facilitated and the way that is to be done (data, language, authenticity, etc.). The best means of achieving this seems to be through Directive 2009/101/EC, by means of a revision of the Directive with a prudent deadline for its transposition.

## SECOND QUESTION:

*Whether the details of such cooperation could be determined by a “governance agreement” between the representatives of the Member States and the business registries.*

Having established the mandatory nature of connecting to the network and the basic rules for the network's operation, the introduction and management of the network should rest on a contractual foundation.

The Green Paper seems to lean toward a governance agreement; and if, by that, we mean an agreement made between the parties involved, the governments or organisations to

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<sup>2</sup> This Directive anticipates that information facilitated by electronic means may be certified as “true copies” on request, which is perfectly possible with the use of the electronic signature.

which register management is entrusted in each State, then that seems to us the best solution.

Said agreement ought to begin by establishing a single point of access to information. The Green Paper appears to advocate using the **e-justice portal** for that purpose and managing the service through the **EBR**.

**E-justice** is the point of access to legal and administrative institutions, services providing information on national and Community legislation, registers, databases and other services that help citizens, legal experts, judicial experts, professionals and companies speed up and facilitate their daily tasks. And it already has, inter alia, the job of linking the bankruptcy, property and business registers.

The 2009-2013 Action Plan already envisages two phases for the integration of the EBR in the e-justice portal, first by providing a link to the EBR and later by partial integration.

And as for the specific aspects of network management, we feel that it would be a good idea to take advantage of the experience of the **EBR**. The EBR is a structure that is already in operation, and it has proved its usefulness and reliability. It gives citizens and companies easy access to information in their own language about companies and directors, annual accounts, etc. The experience gained from the EBR should be taken into account, for otherwise we would be repeating work that has already been accomplished and tested.

The drawback involved in the incorporation of new members (partners, actually, in an Economic Interest Grouping) could be settled in the governance agreement on the management of the future network. Another of the drawbacks that the EBR has had to deal with –the difficulties of some of its members or potential members in coping with the expenses of system management– would be overcome by legislation making it mandatory to connect to the system and the freedom of each Member State to set its own price policy for the information provided (although under the principles of non-discrimination), whose earnings could be used to defray the management expenses.

The governance agreement on the network would be what would regulate the establishment, maintenance and financing of the central server, whose objective should be limited to maintaining a permanently updated index of the companies registered in the different registers, directing information requests to the different registers and forwarding the responses, managing collections and payments through a clearing system, settling or providing arbitration in litigation between parties, establishing a minimum data protection policy notwithstanding each register's application of the legislation in force in its own State in these matters, etc.

**THIRD QUESTION:**

*Whether they see any added value in connecting, in the long term, the network of business registers to the electronic network set up under the Transparency Directive storing regulated information on listed companies.*

The answer is yes.

The information on issuers whose securities are admitted to trading on a regulated market that has to be facilitated under Directive 2004/109/EC refers to aspects that coincide only partly with the aspects of the information offered by business registers under the company law directives, but they refer mostly to the same data subjects.

The possibility in future of gaining access by the same channel to the information on file in both sources would simplify the possibility of obtaining both bodies of information. But that must not involve any confusion between the two databases, whose objects and scope are different by law: Investor information and certainty for one, and certainty in legal relations to which companies are a party for the other.

It would be enough to have a link at the access portal that leads from one database to the other.

**FOURTH QUESTION:**

*Costs*

The costs of this initiative stem from:

- The incorporation of Member States that do not yet belong to the EBR network
- Reforms of internal technological systems in each Member State

The benefits:

- Market transparency
- Facilitated procedures, by reducing administrative burdens
- Lower transaction costs

## **COOPERATION OF BUSINESS REGISTERS IN CROSS-BORDER MERGERS AND SEAT TRANSFERS**

### **FIRST QUESTION:**

*Which solution or a combination of those solutions they favour to facilitate communication between business registers in the cases of cross-border mergers and seat transfers.*

If the objective of cooperation between registers is restricted to cross-border mergers and seat transfers, no very complex solution is required, and the IMI system of communications could satisfy the current communications demands imposed by the legislation in force.<sup>3</sup>

But if what is wanted is to lay the foundations for a possible cooperation to be enlarged in future to cover new fields, it does not seem advisable to reject the solutions developed in the BRITE project.

For such a future, it seems a good idea to establish a stronger, more efficient framework in the cooperation among business registers for the smoother operation of the market and an appreciable reduction of costs. Similarly, administrative burdens would be reduced and processes would become swifter.

Possible cooperation such as this has the following main obstacles at present:

- The variety of languages
- The clear identification of the register and the competent authority in the respective country
- The diversity of systems for identifying companies
- The lack of fast, efficient channels and procedures for communication
- The differences between the internal legislation of different States.

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<sup>3</sup> The only communications imposed ex officio between registers are communications concerning registration at the register for the new registered office of a company that has transferred its seat to another State (art. 8.11 of Regulation (EC) No 2157/2001 of the Council of 8 October 2001 on the Statute for a European Company) and communications concerning the registration of the company resulting from a cross-border merger (article 13 of Directive 2005/56/EC of the European Council and of the Council of 26 October 2005 on cross-border mergers of limited liability companies).

And possible solutions to such problems in order to reach the indicated objective could be:

- Business registers must be clearly identifiable and have pre-established secure channels available for intercommunication.
- Company identification by a uniform system. The REID (Registered Entity Identification) proposal is regarded as constituting an appropriate numbering structure and system.
- Establishment of a central location index.
- Definition of the messages that registers are to exchange and the contents of those messages.
- Definition and unification of terminology.

It is necessary to use the foundation of the work already done by the EBR and the results of the BRITE Project. If alternative systems are chosen, a network with the same characteristics will be used and reproduced, supporting the same data, with the same members and the same entities.

The problems posed by this solution are similar to those that would arise if the EBR structure were utilised, so the solutions could be the same: make the legislative reform requiring register interconnection for disclosure purposes extend to the field of cooperation as well; and introduce in the governance agreement about the business register interconnection network those points that are necessary to carry out such cooperation or such points as may be established in future.

## **SECOND QUESTION:**

*Whether they support the proposed solution on the disclosure of branches.*

The Eleventh Company Law Directive<sup>4</sup> does not establish any legal obligations that require the cooperation of the business registers involved in this situation. However, the establishment of such an obligation would be very useful. It would enable the information to be updated, simplifying procedures and saving costs for companies.

In this matter, cooperation and information exchange cannot rest on a system that acts on the base of impulses such as the IMI, but it could be done using the network of interconnection among registers.

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<sup>4</sup> Directive 89/666/EEC of the Council of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.

Some of the data that at present have to be recorded in the register for the branch, especially those that article 2.2 of the Directive envisions as optional at the choice of the legislators of the State where the company was incorporated (instruments of constitution, memorandum and articles of association, attestation from the register relating to the existence of the company) may be consulted or obtained through the interconnection network.

But it is in the matter of the updating of data, especially changes of address, company register, identity of the persons empowered to make binding undertakings on the company's behalf or to represent the company, and especially the opening of liquidation proceedings, appointment of liquidators and closure due to liquidation, likewise bankruptcy and similar procedures, where this cooperation and information can prove the most effective.

It would be sufficient for the register for the company to contain identification of those other registers where the company has opened branches and for the former to be obligated to notify the latter ex officio of any of the modifications referred to above.

Indubitably starting up this initiative would require a revision of the Eleventh Directive.