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CONTRIBUTION OF THE *ASSOCIACIÓ D'ESTUDIS JURÍDICS INTERNACIONALS* TO THE GREEN PAPER ON THE INTERCONNECTION OF BUSINESS REGISTERS

I. The *Associació d'Estudis Jurídics Internacionals* (hereinafter, AEJI) is an association which has its seat in Barcelona and brings together academics and practitioners from all the legal professions (both in the public and private sectors), who are particularly interested in the fields of Private International Law and Comparative Law.

The AEJI welcomes the proposal of the Commission, especially since some of the problems it envisages to deal with require legislative action which nowadays can only be taken at the EU level. A more than significant number of companies carry out their activities, to a greater or lesser extent, in a cross-border scenario, and thus EU measures are called for. Consequently, the AEJI agrees with the Commission in that there is a need for enhanced coordination and cooperation between business registers, as regards not only the access to information, but also the requirements for cross-border procedures.

However, as the Commission itself states, these two related aspects are nevertheless distinct issues. Each of them raises different questions and has to be dealt with in a considerably different way. On the one hand, because the problems to be faced differ significantly as regards each of these issues. And on the other hand, because the starting point in each case –especially in terms of the existing legal instruments– is rather diverse, and thus specific solutions should be adopted in consideration thereof. Consequently, the AEJI believes that the two main aspects addressed by the Commission in the Green Paper should be dealt with separately; indeed, the underlying difficulties in each of those areas require different methods. Therefore, in the AEJI's view, the correct approach should not be a global and unitary one, but rather a discrete and specific one for each of the general

questions: access to information (considered in section II) and cooperation in cross-border procedures (examined in section III).

II. As regards the issue of facilitating **access to information**, the AEJI agrees that it is necessary to move in the direction of creating a single access point for stakeholders to be able to obtain information on any company included in the business register of any Member State. The current situation, even considering the existence of electronic business registers in every Member State, constitutes a hindrance for a feasible access to relevant information: not only because of the need to search in at least 27 different registers, but also because of the fact that in general each register is only available in the language of the Member State where it has its seat. Consequently, creating a single access point (potentially taking advantage of the e-Justice portal) and enabling queries to be made and answers to be obtained in the language of the end user would mean a significant improvement of the interests of EU market participants.

Therefore, the AEJI considers that an EU-wide and mandatory interconnection system of the existing national or regional business registers should be put in place. To that end, it would be necessary to draw from the experience of the EBR, since it has proved to work quite efficiently. However, the Commission should previously make sure that it is politically and legally viable to create a mandatory system, especially considering that at present not all Member States allow their business registers to become members of the EBR, and that an even smaller number of States allow their registers to be parties to the EBR EEIG. Moreover, regard must be paid to the fact that the legal nature of business registers varies depending on the legislation of each Member State: for example, while in some countries the business register is attached to the Judiciary, in some others it is an administrative body, and in others it is run by private bodies such as Chambers of Commerce. Thus, the legal nature (public law or private law) of the envisaged system should be carefully examined in terms of feasibility, before deciding which steps should be taken: creating *ex novo* an EBR-like system for all the Member States, adapted from the existing one, or extending the reach of the EBR so as to include therein those business registers which currently are not integrated in it.

Moreover, when deciding whether a mandatory and more public-law oriented system can be created, regard should be paid to the fact that the software used for managing and

transmitting information belongs to the EBR. Extending it to non-EBR registers would therefore require some kind of agreement between the EU and the EBR.

Besides, an important question to be considered is the fact that the legal effects of the information provided by business registers vary depending on the legislation of each Member State. In some cases such information has no other effect than stating the content of the registered data, whereas in other Member States the information provided by a register has a public character, which allows for rebuttable or even non-rebuttable presumptions to be attached thereto. Such differences can raise some problems for the effective working of the envisaged system, and should hence be further considered. The Green Paper only refers to "official" and "reliable" information, but the pointed out diverging legal effects could eventually require some kind of action on the part of the EU institutions. If it were a legislative intervention, it could be envisaged to adopt a legislative technique as the one which was used in the Regulation 805/2004 creating a European Enforcement Order for Uncontested Claims or in the Regulation 1896/2006 creating a European Order for Payment Procedure, where it is allowed not to comply with the Regulation requirements. Therefore, those Member State which agree to comply could take advantage from the EU information-sharing system, whereas those which prefer not to abide by the Regulation requirements would stay outside such system. However, the AEJI is conscious that perhaps Member States are not prepared for such a radical legislative intervention. For that reason, at least, as an initial step, the Commission could envisage carrying out a comparative study so as to ascertain, *inter alia*, the main features of the different business register systems in the EU, their principal functions (e.g. mere registry, certification, legal validation and/or characterisation of documents, etc.), or the legal value of the information provided by these registers.

As regards linguistic issues, the AEJI considers that requiring all the information regarding European companies to be translated into all the EU official languages would result in time delays and increased economic costs, as well as in the risk of losing reliability as a consequence of potential incorrect translations. The standard template system currently used by the EBR could solve some of these risks. Nevertheless, the AEJI believes that another option should be considered, even if it could pose some problems from a political point of view: namely, requiring the relevant information of any company to be registered not only in the official language of the business register but also, additionally, in English.

This should not be interpreted as a requirement of translating into English all the information which has to be registered according to the legislation of each Member State, but only those specific data which must be available when conducting a cross-border search, which should be pre-determined at EU level.

From the perspective of personal data protection requirements, it should be clearly established which legal system would apply in case of cross-border queries. The Green Paper refers this question to "national law"; however, it should be established more precisely whether this is to be interpreted as the law of the Member State where the company's information has been registered or the law of the Member State from which the cross-border search is carried out. Notwithstanding the harmonisation resulting from the provisions of Directive 95/46/EC, the level of protection of personal data varies substantially between Member States.

Finally, the AEJI considers that it would be important to highlight that the fees paid by the end user in order to be granted access to the business registers information should not constitute an obstacle to the effectiveness of the system.

III. Concerning the **cooperation of business registers in cross-border procedures**, the AEJI takes the view that the wide-ranging, across-the-board reform approach taken by the Commission should not prevail. In the first place, this second main topic of the Green Paper consultation should not be linked to the first topic, i.e., the enhancement of the system of access to information. The latter requires mainly technological –although admittedly also legal– developments and adaptations, so as to achieve the interconnection between already existing national or regional databases. Quite differently, the former entails strictly legal reforms, as it requires the creation of specific procedures for the cooperation between business registers. The existence of an EU-wide centralised system of interconnection of business registers does not necessarily imply the possibility of mechanisms of active collaboration between registers, as required by the Directive on cross-border mergers and the Regulations on the SE, the SCE and, in the future, the SPE. Moreover, the more delicate question of updating the information regarding the disclosure requirements for foreign branches calls for an even more sophisticated system of constant coordination between business registers.

Therefore, the AEJI considers that a case-by-case approach is preferable. Rather than creating a uniform procedure which should then be applied to a variety of diverging situations, it would be simpler and more efficient to lay down a specific procedure for each one of the relevant legal instruments and for each one of the cases in which the cooperation between business registers is in order. This would therefore require partial amendments of each one of the instruments cited by the Commission (the Directive on cross-border mergers, the Eleventh Company law Directive, the Regulations on the SE and the SCE…) in order to establish detailed procedures for the direct communication between registers, laying down questions like the specific purpose and object of the cooperation in each case, the authorities or institutions entrusted with such cooperation in each Member State, the specific methods of transmission of information, updating requirements, etc. To that end, it would be advisable to create –once again separately for each one of the relevant Directives and Regulations– a standardized form or certificate in order to ease and quicken these procedures, as well as a list of competent authorities for each Member State. In the field of Private International Law, the EU instruments on procedural issues and judicial cooperation have resorted to such standardized forms or certificates and lists of authorities as a means of facilitating a smooth yet reliable cooperation between the authorities of different Member States: see e.g. Annexes II to VI of Regulation 44/2001; Annexes I to IV of Regulation 2201/2003; or Forms A to J of Regulation 1206/2001. Drawing from this experience, it would be relatively easy to establish appropriate *ad hoc* procedures for each of the specific situations in which the collaboration and cooperation between registers is required by EU legislation. Needless to say, this same approach should be extended from now on every time that a new legislative instrument foresees a requirement of cooperation between business registers: for example, in case the Regulation on the SPE is finally adopted.