



Brussels, 9 November 2007  
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## Opinion

**Title**                      **Impact Assessment on the Commission Recommendation on the proportionality between capital and control in EU companies**

**(draft version of 10 October 2007)**

**Lead DG**                      **DG MARKT**

### **1) Impact Assessment Board Opinion**

#### **(A) Context**

Shareholders who control a proportion of total voting rights much larger than their ownership rights have an incentive to extract value from the company at the expense of non-controlling shareholders. On this background the Report of the High Level Group of Company Law Experts of 2002 took the view that proportionality between ultimate economic risk and control means that share capital which has an unlimited right to participate in the profits of the company, should normally carry control rights, in proportion to the risk carried. In its subsequent Action Plan for Modernising Company Law and enhancing Corporate Governance in the European Union the Commission observed that any initiative to give effect to the principle of proportionality between capital and control advocated by the High Level Group would require prior study. With the present IA report the Commission presents the available evidence around the issue of proportionality between capital and control and explores the impact of available policy options.

#### **(B) Positive aspects**

The IA report provides a good overview of the relevant corporate governance legislation and an executive summary, which concisely summarises the assessment presented in the main report. Intensive consultation has taken place over the last few years.

#### **(C) Main recommendations for improvements**

*The recommendations below are listed in order of descending importance. Some more technical comments have been transmitted to the author DG.*

**General recommendations: The IA report can be improved in a number of aspects.**

**The key problems arising from the separation of ownership and control should be presented in a clearer and more rigorous way and more coherently linked with the identified objectives. The identified options should be assessed against a thoroughly developed baseline scenario. These recommendations were largely accepted by DG MARKT in the course of the meeting with the Board.**

**(1) The IA report should be more specific on the key problems arising from the separation of ownership and control** and present them in a clearer and more rigorous way. Firstly, the question of the extraction of private benefits (section 2.3.1) should be analysed by differentiating more clearly the theoretical arguments supporting the case from the analysis of the available empirical evidence. Secondly, the IA report should assess more thoroughly to what degree control enhancing mechanisms (CEMs) are unfair; facilitate fraud/misuse of powers; inhibit or hinder prosecution of certain behaviour which is in general seen as criminal. If possible the IA report should be clearer as to the extent that CEMs lead to expropriation of value at the expense of non-controlling shareholders. Thirdly, the IA report should better identify which concrete transparency issues in relation to the use of control enhancing mechanisms can be considered as relevant problem causes and – in the light of the various existing and planned transparency measures (e.g. transparency directive; 4<sup>th</sup> and 7<sup>th</sup> company law directive) – make clear which residual transparency problems will remain within the time horizon of the baseline scenario.

**(2) The identified objectives should be presented more coherently and better linked to the underlying problem causes.** The IA report should present the identified objectives in a more coherent and hierarchical way in particular with respect to the core objective defined on page 5 and the more specific objectives as presented in section 3. It should also be better demonstrated to which specific problem causes these objectives relate.

**(3) The identified options should be compared against a thoroughly developed baseline scenario.** From a methodological as well as a presentational point of view, the IA report should examine first the 'no change' policy option. This would have the advantage that the baseline scenario could be fully developed from the outset while currently a lot of the relevant information (for example on the impact of existing or planned legislation) is presented at different places in the text. This should significantly facilitate the comparison with the two identified options for change. The IA report should also compare the identified options on the basis of more explicitly defined criteria (effectiveness, efficiency, proportionality, consistency).

#### **(D) Procedure and presentation**

The IA report should explicitly state whether the Commission's minimum standards for consultations have been respected and should provide information about the inter service steering group, together with a list of the services involved.

## **2) IAB scrutiny process**

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Author DG	DG MARKT – F – 2
External expertise used	No
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