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Key principles of business registration

Note by the Secretariat

Addendum


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II. Core functions of a business registry

1. As previously noted, the core functions of business registries include the registration of new and existing businesses of all sizes; the maintenance and update of reliable and secure information on those businesses throughout their life cycle; and the provision of easy access to that information by public and private users of the registry. When establishing or streamlining a business registration system, States should consider several elements that will enable the registry to discharge these and other functions in a simple, time and cost efficient way, in keeping with the key objectives of an effective business registration system as outlined in paragraph 10 of A/CN.9/WG.I/WP.93. The following paragraphs discuss these elements and their implications.

A. Registering a business

1. Scope of examination by the registry

2. As has been observed in A/CN.9/WG.I/WP.93, the method through which a business is registered varies from State to State,¹ ranging from those that tend to regulate less and rely on the legal framework that governs business behaviour, to States that opt for ex ante screening of businesses before their registration is allowed.² In this regard, a jurisdiction aiming at reforming the registration system must first decide which approach it will take so as to determine the scope of the examination that will have to be carried out by the registry. The jurisdiction may thus choose to have a system where the registry only records facts or a system where the registry is required to perform legal verifications and decide whether the business meets the criteria to register.

3. Evidence shows that the approach taken in a jurisdiction may often be a result of the particular State's legal tradition. Jurisdictions opting for ex ante verification of legal requirements and authorization before businesses can register often have court-based registration systems in which the judiciary, notaries and lawyers perform a key role in the registration process.³ Other States structure their business registration as a declaratory system, in which no ex ante approval is required before business start-up and where registration is an administrative process. In such declaratory systems, verification of an event's legal status is made after it has taken place, and registration is under the oversight of the Government, which can choose whether to operate the system directly or to adopt other arrangements (see para. 24 of A/CN.9/WG.I/WP.93).⁴

4. Both the approval and the declaratory system have their advantages and disadvantages. Approval systems are usually said to help prevent errors or omissions prior to registration. Notaries and/or lawyers and courts exercise a formal

¹ See A/CN.9/WG.I/WP.85, para. 6.

² See World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 2.

³ See A/CN.9/WG.I/WP.85, para. 9 and Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, pages 25-26.

⁴ Ibid., and supra footnote 2, page 28.

review and, when appropriate, also a substantive review of the pre-requirements for the registration of business. By contrast, declaratory systems are said to be easier to manage and better-suited to deter corruption by avoiding opportunities for official decisions to be made with a view towards personal gain; furthermore, they seem to have lower maintenance costs.

2. Legal forms of entity registered and requirements to form a new entity

5. Not only must States decide on the scope of examination that should be conducted by a business registry, they must also define which commercial entities are required to register under the applicable law. As noted in paragraph 10 of A/CN.9/WG.I/WP.93, one of the key objectives of business registration is to permit businesses of all sizes and legal forms to be visible in the marketplace and to operate in the commercial environment. This objective is of particular importance in assisting MSMEs to participate effectively in the economy, and States may wish to consider requiring or permitting businesses of all sizes and legal forms to register in an appropriate business registry, or creating a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.

6. Laws requiring the registration of businesses vary greatly from State to State, but one common aspect is that they all require registration of a particular legal form of economic entity. The nature of the legal forms of economic entity that are required or permitted to register in a given jurisdiction is, of course, determined by the applicable law.⁵ In some legal traditions, it is common to require registration of all businesses, including sole proprietorships, professionals, and government bodies, since they are all said to constitute an economic entity;⁶ while in other legal traditions, only corporations and similar entities (with legal personality and limited liability) are required to register.⁷ This approach can exclude businesses like partnerships and sole proprietorships from mandatory registration, but variations on these regimes also exist, and some jurisdictions permit voluntary registration for businesses that would not otherwise be required to register, for example, because they are not economic entities or because they are not engaged in business activities.⁸

7. In several jurisdictions, when entrepreneurs decide to establish and to register their business, they tend to choose the simplest legal form available to them in order to minimize the regulatory and financial burden, as well as the expense, required to establish the business. A sole proprietorship or similar type of business with low legal and regulatory requirements is thus often the most popular business form. Some jurisdictions require that even simple business forms such as these be registered, and some jurisdictions have carried out reforms to facilitate the registration process for sole proprietorships or for simplified new types of limited liability entities.⁹

⁵ See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, *Entrepreneurship and Firm Formation Across Countries*, 2007, pages 6 ff.

⁶ See A/CN.9/825, para. 23.

⁷ See *supra* footnote 5.

⁸ *Ibid.*

⁹ See A/CN.9/WG.I/WP.85, para. 51.

(a) Registration requirements

8. As a general rule, businesses must meet certain requirements in order to be registered; those requirements are determined by the State based on its legal and economic framework. In addition, the registered information required may vary depending on the legal form of business being registered — i.e. sole proprietorships and simplified business entities may be required to submit relatively simple details in respect of their business, while businesses such as public and private limited liability companies will be required to provide more complex and detailed information. Although the requirements for registration of each legal form of business will vary according to the applicable law of the relevant jurisdiction, there are, however, some requirements that can be said to be common for all businesses in most States, both during the initial registration process and throughout the business life of the enterprise.¹⁰

9. General requirements for the registration of all legal forms of enterprise are likely to include the following:

- (a) Payment of any required fees to the registry; and
- (b) Providing information in respect of the business and its founders, such as:
 - (i) The name and address of the business;
 - (ii) The name(s) and address(es) of the person(s) registering the business; and
 - (iii) The legal form of business that is being registered.

10. Other information that may be required for registration, depending on the jurisdiction of the registry and the legal form of the business being registered, can include:

- (a) The names and addresses of the board of directors;
- (b) The rules governing the operation or management of the business; and
- (c) Information relating to the capitalization of the business.

11. Once a business has been registered, in order for it to remain validly registered, certain information is typically required by the registry throughout the course of the business life of the entity. Information required in this regard usually includes:

- (a) (i) Changes in the name, address or legal form of the business;
- (ii) Changes in the name(s) and address(es) of the person(s) founding the business;
- (iii) The submission of financial information in respect of the business, depending on its legal form; and

¹⁰ It should be noted that information required for the registration of a simplified business entity is likely to be a less comprehensive list, and that this portion of the materials should be made consistent with what the Working Group agrees in respect of the simplified business entity.

(iv) Changes in any of the information that was initially required for the registration of the business;¹¹ and

(b) In some jurisdictions, information concerning insolvency proceedings, liquidation or mergers (see paras. 18-19 below) must also be registered.

12. Depending on the legal form of the business being registered, other details may be required in order to finalize the registration process. In some jurisdictions, proof of the share capital, the name of the chairperson, the identity of the person(s) or entity(ies) who may legally bind the business, information on the type of business engaged in by the entity, and agreements in respect of non-cash property constitute information that may also be required by registries in respect of certain legal forms of business.¹² In addition, in several jurisdictions, registration of shareholder details and any changes therein may be required; in a few cases, registration of shareholder details is carried out by a different authority.¹³ In some other jurisdictions, it is now practice to register beneficial ownership details and changes in those details,¹⁴ although the business registry is not always the authority entrusted with this task.¹⁵ Transparency in the beneficial ownership of businesses can help prevent the misuse of corporate vehicles, including MSMEs, for illicit purposes.

13. The requirements enumerated above may be applicable to all businesses, regardless of their size. As previously noted, in order to facilitate MSME registration, States should consider including a range of possible legal forms in their business registry systems, and should adapt their registration requirements according to the level required by the complexity of each legal form. The goal should be for States to provide simplified registration procedures and only the minimum necessary requirements for MSMEs and simplified legal forms of business. The draft legislative text on simplified business entities that is currently being discussed by this Working Group will assist States in identifying such minimum necessary requirements (see A/CN.9/WG.I/WP.83, A/CN.9/WG.I/WP.86 and A/CN.9/WG.I/WP.89).

(b) Enforcement mechanisms

14. Requiring businesses to submit certain data is, however, not sufficient to ensure an efficient registration system. The State should have the ability to enforce proper compliance with initial and ongoing registration requirements. States with

¹¹ See supra footnote 5, page 7.

¹² See The International Business Registers Report 2015, pages 26 ff. The Report was prepared by the following registry organizations: Association of Registrars of Latin America and the Caribbean (ASORLAC); Corporate Registers Forum (CRF); European Commerce Registers' Forum (ECRF); and International Association of Commercial Administrators (IACA).

¹³ European Commerce Registers' Forum, International Business Registers Report 2014, page 26.

¹⁴ See supra footnote 12, page 37.

¹⁵ A "beneficial owner" is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. These vehicles may include not only corporations, trusts, foundations, and limited partnerships, but also simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership. See also, A/CN.9/825, paras. 47-55. The Working Group may wish to consider whether further details on this topic should be included in these materials, possibly as an annex.

high quality registration systems usually possess enforcement mechanisms in respect of the information that the business is required to file throughout its life cycle as well as additional required reporting.¹⁶ In some jurisdictions, for instance, law establishes sanctions on businesses that fail to submit timely or complete and accurate information (see also paras. 24-27 below).¹⁷

3. Registration of branches

15. Most States require the registration of national branches of a foreign company in order to permit those branches to operate in their jurisdiction and to ensure the protection of domestic creditors, businesses and other interested parties that deal with those branches. Registration of a company branch might not appear to be immediately relevant for micro- and very small entrepreneurs, whose main concern is more likely to be to consolidate their business without exceeding their human and financial capacity. However, this issue is relevant for those slightly larger business entities that, being of a certain size and having progressed to a certain volume of business, look to expand beyond their local or domestic market. In addition, even micro- and very small businesses may be highly successful and may wish to expand their operations. For such businesses, establishing branches abroad may be both an attractive goal and a realistic option. Although it may seem to be a daunting prospect, in fact, when a business expands to another State, it may find that setting up a foreign branch is cheaper and requires fewer formalities than establishing a local subsidiary.¹⁸

16. There may be considerable differences among those jurisdictions that register foreign company branches in terms of what triggers the obligation of those companies to register their branches. Some approaches are based on a wide interpretation of the concept of foreign establishment, for example, those which include not only a branch, but also any establishments with a certain degree of permanence or recognizability, such as a place of business in the foreign State.¹⁹ Other approaches define more precisely the elements that constitute a branch which needs to be registered. They may include the presence of some sort of management, the maintenance of an independent bank account, the relation between the branch and the parent company, or the requirement that the parent company has its main office registered abroad.²⁰ Not all States define the notion of branch in their legislation, or state under what circumstances a foreign establishment in the State should be registered: laws may simply refer to the existence of a foreign branch. In these cases, registries may fill the gap by issuing guidelines that clarify the conditions under which such a registration should be carried out.²¹ When this occurs, the guidelines should not be seen as an attempt to legislate by providing their own definition of branch, but rather as a tool to explain the features required by a branch of a foreign business in order to be registered.

¹⁶ See *supra* footnote 5, page 8.

¹⁷ See Ireland, in D. Christow, J. Olaisen, *Business Registration Reform Case Studies*, Ireland, 2009, pages 15 ff.

¹⁸ See K. E. Sørensen, *Branches of companies in the EU: balancing the Eleventh Company Law Directive, national company law and the right of establishment*, 2013, page 9.

¹⁹ *Ibid.*, page 12.

²⁰ *Ibid.*

²¹ *Ibid.*, page 13.

17. When simplifying or establishing their business registration system, States should consider enacting provisions governing the registration of branches of foreign companies. Those provisions should address, at minimum, issues such as timing of registration, disclosure requirements, information on the persons who can legally represent the branch and the language in which the registration documents should be submitted.²²

4. Status of the business and deregistration

18. One important aspect that States should take into account when establishing a business registration system is whether the registry should also be required to record certain procedures that affect the status of the business, for example bankruptcy, merger, winding up, or liquidation. The approach to such changes in status appears to vary from State to State.

19. Evidence suggests that registering bankruptcy, mergers, winding-up and liquidation may be performed by some registries, although this is subject to considerable regional variation. For instance, in some more developed States, registries are often also entrusted with the registration of bankruptcy cases. In developing States or economies in transition, registries tend not to perform this function. In certain jurisdictions, registries are also given the task of registering mergers as well as the winding-up and liquidation of businesses.²³

20. In addition, States should consider the role of the registry in deregistering a business. In most jurisdictions, deregistration of a business is included as one of the core functions of the registry. It appears to be less common, however, to entrust the registry with the decision whether or not a business should be deregistered.²⁴ In jurisdictions where this function is included, statutory provisions determine the cause of the deregistration and the procedures to follow. In order to deregister a business, registries are generally required to have reasonable cause to believe that a registered enterprise has not carried out business or that it has not been in operation for a certain period of time. Such a situation may arise, for example, when a business has failed to submit its annual statutory filings within a certain period following the filing deadline. In several States, before commencing deregistration procedures, the registry must inform the business in writing of its intended deregistration and allow time for the business to reply. Only if the registry receives a reply that the business is no longer active or if no reply is received within the time prescribed by the law, will the business be struck from the registry. A common requirement for a deregistration to become effective is that notice of it be published (see also para. 34 below).²⁵

²² The Working Group may wish to consider whether further details on this topic should be included in a future annex to these materials.

²³ See *supra* footnote 13, pages 33 ff.

²⁴ *Ibid.* and see *supra* footnote 12, pages 40 ff.

²⁵ See Lexis PSL Corporate, Striking off and dissolution — overview, www.lexisnexis.com/uk/lexispsl/corporate/document/391387/55YB-2GD1-F186-H4MP-00000-00/Strikingoffanddissolutionoverview. See also T. F. MacLaren, in Eckstrom's Licensing in Foreign and Domestic Operations: Joint Ventures, 2015 [as it appears in Westlaw], page 30.

B. Maintaining the information contained in the business registry

21. Maintaining high quality, current and reliable information is imperative for the business registry in order to make the information useful for the registry users and to establish users' confidence in business registry services. This applies not only to the information provided when applying to register a business, but also to the information that the entrepreneur submits during the lifetime of the business. Moreover, in several States, the information deposited in the registry, or part of that information, has third party effectiveness, that is by virtue of registration, all parties dealing with a business are deemed to have had notice of such information. In such States the applicable law or regulation usually prescribes that the information provided to the registry must be accurate and correct. However, even in those States where the registry does not validate the veracity of the information provided by the registrant, it is important that the information meets certain requirements in the way it is submitted to the registry and then made available to searchers. For these reasons, States should devise provisions that allow the registry to operate according to principles of transparency and efficiency in the way information is collected, maintained and released.

1. General considerations concerning the registration of the business and any subsequent changes

22. As mentioned in paragraphs 2 to 3 above, a series of checks and control procedures are required to ensure that the necessary information and documentation is provided in order to register the business; however, the extent of such controls vary according to the jurisdiction. In those legal regimes where the registry performs simple control procedures, if all the basic legal and administrative requirements established by the domestic legal and regulatory framework are met, the registry must accept the information as filed and record it. When the legal regime requires a more thorough verification of the information filed, registries may have to check whether any mandatory provisions of the law are infringed by the content of the application and documentation submitted, or any changes thereto. Whatever approach is chosen, States should define in their legislative or regulatory framework which requirements the information and documentation to be submitted to the registry should meet. In certain jurisdictions, the registrar is given the authority to impose requirements as to the form, authentication and manner of delivery of documents to be submitted to the registry.²⁶ In keeping with the discussion of Working Group I on the legal questions surrounding the simplification of incorporation,²⁷ it would be advisable, when registration concerns an MSME, that such requirements should be kept at a minimum in order to facilitate the registration process of MSMEs. This will reduce administrative hurdles and help in promoting business registration among such businesses.

23. Registration of MSMEs would also be facilitated if the registry is granted the power to accept and register documents that do not fully comply with the requirements for proper submission and to rectify clerical mistakes in order to bring the entry in the register into conformity with the documents submitted by the registrant. This will avoid imposing the potentially costly and time-consuming

²⁶ See, for instance, Section 1068, UK Companies Act 2006.

²⁷ See A/CN.9/WG.I/WP.83, A/CN.9/WG.I/WP.86 and A/CN.9/WG.I/WP.89.

burden of requiring the registrant to resubmit documents. When the registry is entrusted with these responsibilities, however, the law or the regulation should also determine under which conditions the responsibilities should be discharged. When the information provided is not sufficient to comply with the requirements for registration, the registry should be granted the authority to request from the business additional information in order to finalize the registration process.

24. States should provide that registries may reject the registration of an application if it does not meet the requirements prescribed by the legislative and/or regulatory framework for registration. This approach is implemented in several jurisdictions regardless of their legal tradition. In order to prevent any arbitrary use of such power, however, the registry must provide, in writing, a notice of the rejection of an application and the reasons for which it was rejected, and the registrant must be allowed time to appeal against that decision.

25. In cases where the application is submitted in paper form and the reason for its rejection is that the application was incomplete or illegible, there might be some delay between the time of receipt of the application by the registry and the time of communication of its rejection, and the reasons therefor, to the registrant. In a registry system that allows registrants to electronically submit applications and the relevant documents directly to the registry, the system should be designed, when permitted by the State's technological infrastructure, so as to automatically reject the submission of incomplete or illegible applications and to display the reasons for the rejection on the registrant's screen.

26. In order to ensure that reliable information is always submitted to the registry, States should also adopt provisions that establish the responsibility of the registrant for any misleading, false or deceptive information that the registrant has knowingly, or recklessly, submitted to the registry. Adoption of similar provisions might be particularly relevant in States that chose business registration systems in which the registry only records facts and does not perform any ex ante legal verification.

27. Once the information is collected and properly recorded, it is imperative that it be kept current in order to be of value to its users. It would thus be advisable for States to have in place provisions that enable the registration system to achieve this purpose. Evidence shows that different methods can be adopted. One approach (also see para. 78 below) is for the State to require that the business re-register at regular intervals. Another similar approach is to require the business to file at regular intervals, for example once a year, an updating declaration stating that certain core information contained in the register concerning the business is accurate or, as applicable, stating what changes should be made. Although these approaches may be valuable as a means of identifying dormant companies that may be struck off the registry and may not necessarily be burdensome for larger business with sufficient human resources, they could be quite demanding for less generously staffed MSMEs, in particular if there is a cost associated with making such submissions. A third approach, which seems preferable as it better takes into account the needs of MSMEs, is for the State to update the information in the registry only when a change in any piece of the registered information occurs. The risk of this approach, which is largely dependent on the registrant complying with the rules, may be that the filing of changes is delayed or does not occur. To prevent this, States could adopt a system pursuant to which regular prompts are sent (electronically, in the best case scenario) to businesses to request updated

information. Such an approach might be preferable for dealing with less experienced MSMEs than the alternative, through which States could adopt provisions declaring the liability of the registrant on conviction to a fine if the change is not filed within the time prescribed by the law or the regulation. In addition, enhancing the interconnectivity and the exchange of information between business registries and other public registries would help mitigate any potential deterioration of the information collected in the business registry.

28. Regardless of the approach chosen to maintain an updated information record, it would be advisable that the formalities for updating MSME records be as simple as possible. This could involve extending the period for such businesses to declare a change; harmonizing the information needed when the same information is required in various declarations; or exempting MSMEs from certain obligations in specific cases.

2. Period of effectiveness of registration

29. States may adopt one of two approaches in terms of determining the period of effectiveness of the registration of a business. Under the first approach, the registration of the business is subject to a maximum period of duration established by law. It follows that unless the registration is renewed, the registration of the business will expire on the date stated in the certificate of registration or upon the termination of the business.²⁸ As seen in paragraph 27 above, while this approach provides certainty as to the existence of the business and the reliability of the information provided, it however imposes a burden on the registrant to regularly re-register or risk termination of the business. This danger could be particularly onerous for MSMEs, that often operate with limited staff and knowledge of the applicable rules. In addition, if more information or documentation is required and not furnished by the applicant, renewal of the registration could also be refused, thus further threatening the existence of the business.

30. Under the second approach, no maximum period of validity is established for the registered business and the registration is effective until the business ceases to operate and is deregistered. While this approach may provide less certainty in terms of the currency of the information in the registry, it simplifies the intake process and both encourages and reduces the burden of registration on businesses, in particular on MSMEs.

3. Time of effectiveness of registration and of changes to the registered information

31. In the interests of transparency and predictability of a business registration system, States should determine the time when the registration of a business or any later change to the information recorded is effective. It would be advisable for the registration to become effective when the information contained in the application or in the notification of changes is entered into the registry record rather than when the information is received by the registry. In addition, the effective time of

²⁸ It should be noted that the general law of the enacting State for calculating time periods will apply to the calculation of the period of effectiveness, unless the applicable law or regulation provides otherwise. For example, if the general law of the enacting State provides that, if the applicable period is expressed in whole years from the day of registration, the year runs from the beginning of that day.

registration of an application or a later change should be indicated in the registry record relating to the relevant business entity.

32. As mentioned in paragraphs 29 to 30 of A/CN.9/WG.I/WP.93, States are advised to adopt registries supported by the use of ICT. If the registry is designed to enable users to electronically submit information, whether an application or a change, without the intervention of registry staff and to use online payment methods for the registration, the registry software should ensure that the information becomes effective immediately or nearly immediately after it is transmitted. As a result, any delay between the electronic transmission of the information and the effective time of registration will be eliminated.

33. In registry systems that permit or require registration information to be submitted to the registry using a paper form, registry staff must enter the information on the paper form into the registry record on behalf of registrants. In these systems, there will inevitably be some delay between the time when the paper form is received in the registry office and the time when the information set out on the form is entered into the registry record. In these cases, the domestic legislative or regulatory framework should provide that the registry must enter the information received into the registry record as soon as practicable and possibly set a deadline by which the application or the changes should be registered. In a hybrid registry system which permits information to be submitted in both paper and electronic form, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of registration.

4. Time of effectiveness of business deregistration

34. Transparency is equally required with regard to the deregistration of a business. The time of effectiveness of the cancellation should be established in a law or regulation, which should distinguish between deregistration on registrar's initiative and deregistration at the request of the registrant. While the requirements of these two types would vary, in both cases it would be advisable that the notice of deregistration issued by the registry states the date of effect of the deregistration, in addition to the reasons therefor. Moreover, in cases where deregistration is decided by the registrar, the registrant should be given sufficient time to oppose that decision. As in the case of the application for registration or a subsequent change, the effective date and time of registration of a notice of deregistration should be indicated on the registry record relating to that deregistration. If the notice of the deregistration is submitted electronically, the time between receipt of that notice and amendment of the information on the registry record will be very short. If notice of deregistration is submitted in paper form, there will be a greater time lag.

5. Preservation of records

35. Those States with paper-based or hybrid registration systems, should adopt rules that specify a minimum period of time for which documents submitted in hard copy should be kept in the registry. The length of the preservation period would be influenced by the way the registry operates, i.e. if it is an ICT supported registry or whether the system is paper-based or is a hybrid system.

36. In the case of ICT supported registries, original documents submitted in hard copies could be kept for a short period (for example, not over 5 years after they

were received by the registry) providing that the information contained in such documents has been recorded in the registry.

37. In the case of a paper-based registry which cannot convert the documents received into an electronic form or other non-paper forms (for instance, microfilm) that allow transmission, storage, reading, and printing of the documents, the records will have to be preserved until the business is deregistered and for an appropriate period of time after deregistration has occurred. It will be for the State to decide the length of such an appropriate period. States may also decide to apply their general rules on preservation of public documents.

6. Preserving the integrity and security of the registry record

38. As already noted, a registry can be organized in several ways, including delegating the day-to-day operation of the registry to a private entity. However, for the purposes of establishing public trust in the registry, the State should always retain the responsibility of monitoring the operation of the registry, the ownership of the registry record and, if necessary, of the registry infrastructure (see para. 44 of A/CN.9/WG.I/WP.93).

39. Other steps to ensure the integrity and security of the registry record include: (a) requiring the registry to request and maintain the identity of the registrant; (b) obligating the registry to promptly notify the applicant business about the registration; and (c) eliminating any discretion on the part of registry staff to reject users' access to registry services. With regard to (b), however, it can be noted that, in order to improve the efficiency of the business registries, some States have introduced "silence is consent" rules pursuant to which when a business does not receive a decision on its registration application within a certain time limit (established by law or regulation), it is considered to be registered.²⁹

40. States may also consider adopting additional measures in order to ensure that the integrity of the registry record is preserved. A short account is provided in the paragraphs below.

41. First, by way of law or regulation, it should be established that registry staff may not alter or remove registered information, except as specified in the law or the regulation and that any change can be made only in accordance with the law or the regulation. As seen in paragraph 23 above, however, to ensure the smooth functioning of the registry, in particular when registrants submit registration information using paper forms, it would be advisable that the registry be authorized to correct clerical errors made in the forms submitted. This would, of course, include any errors made by registry staff in entering the registration information on the paper forms into the registry record. If this approach is adopted, notice of the correction should promptly be sent to the registrant (and a notification of the nature of the correction and the date it was effected should be added to the public registry record linked to the relevant business). Alternatively, the State could require the registry to notify the registrant of its error and that person could then submit an amendment free of charge.

42. Second, to protect the registry record against the risk of physical damage or destruction, the State should maintain back-up copies of the registry record. Any

²⁹ See A/CN.9/WG.I/WP.85, para. 50.

rules governing the security of other public records in the enacting State might be applicable in this context.

43. Third, the potential for registry staff corruption should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any registered information entered by a registrant; (b) instituting financial controls that strictly monitor staff access to cash payments of fees and to the financial information submitted by clients who use other modes of payment; and (c) designing the registry infrastructure so as to ensure that it can preserve the information and the documents concerning the cancelled business for as long as prescribed by the law or the regulation.

44. Fourth, it should be made clear to registry staff and registry users, *inter alia*, that registry staff are not allowed to give legal advice on the legal requirements for effective registration and searching, or on the legal effects of registrations and searches, nor should staff make recommendations on which intermediary (if any) the entrepreneur should choose to perform its registration or any amendments thereto. However, registry staff should be able to give practical advice with respect to the registration and search processes. In States that opt for a judiciary-based registry system, this measure should of course not be applicable to the judges, notaries and lawyers entrusted with the registration procedures.

45. Finally, as already discussed, the registry should be designed, if possible, to enable registrants and searchers to directly submit information for registration and search requests electronically as an alternative to using paper forms and having registry staff enter the registration or conduct a search on their behalf. Under this approach, users bear the sole responsibility for any errors or omissions they make in the registration or search process and carry the burden of making the necessary corrections or amendments. Consequently, the potential for corruption or misconduct on the part of registry staff is greatly minimized, since their duties are essentially limited to managing and facilitating electronic access by users, processing fees, overseeing the operation and maintenance of the registry system and gathering statistical data.

7. Liability of the registry

46. The State, by way of law or regulation, should provide for the allocation of responsibility for loss or damage caused by an error or negligence in the administration or operation of the registration and searching system.³⁰

47. As noted above, the registrants or users bear responsibility for any errors or omissions in the information contained in an application or search request they submit to the registry, and carry the burden of making the necessary corrections or amendments. If applications and search requests are directly submitted by users electronically without the intervention of registry staff, the potential liability of the enacting State should, therefore, be limited to system malfunction, since any other error would be attributable to the users. However, if application forms or search

³⁰ In Norway, for instance, the registrar is liable if it supplies incorrect information in transcripts, certificates or public notices, which causes damage to persons who relied on the incorrect information. See The Business Enterprise Registration Act (Act of 15 June 2001, No. 59 and Act of 19 December 2003, No. 120), § 10-3, available at www.brreg.no.

requests are submitted using a paper form, the State will need to address the existence or the extent of its potential liability for the refusal or failure of the registry to correctly enter information contained in the application into the registry record or to correctly carry out search requests.

48. While it should be made clear that registry staff are not allowed to give legal advice (subject to the type of registration system chosen), the State will also need to address whether and to what extent it should be liable if registry staff nonetheless provide incorrect or misleading information on the requirements for effective registration and searching or on the legal effects of registration.

49. If States accept legal responsibility for loss or damage caused by system malfunction or error or misconduct by registry staff, they may consider whether to allocate part of the registration and search fees collected by the registry to a compensation fund to cover possible claims, or whether the claims should be paid out of general revenue. States might also decide to set a maximum limit on the monetary compensation payable in respect of each claim.

8. Confidentiality

50. To maintain the integrity and reputation of the registry as a trusted collector of information that has public relevance and, in some States, legal effect, and while access to the registries should be granted to all interested entities and to the public at large (see section C below), access to sensitive data should be controlled to avoid any breach of confidentiality. States should thus put in place proper disclosure procedures. They can do so by adopting provisions that list which information is not available for public disclosure or they can follow the opposite approach and adopt provisions that list the information that is publicly accessible and at the same time state that information that is not listed cannot be disclosed.

9. Language of the documents to be submitted

51. When entering information, one important issue for the State to consider is the language in which the required documents or electronic records must be submitted. Language can be a barrier and can cause delays in registration if documents need to be translated into the language of the registry.³¹ On the other hand, a business can be registered only if the content of the documents or electronic records can be verified by the registry staff. For this reason, it is not common for jurisdictions to allow documents or electronic records to be submitted in a foreign language. States, however, can consider whether such documents can be accepted. There are some States which allow all or some documents to be submitted in a foreign language. Should States opt for this approach, it would be advisable to establish that the documents or electronic records must be accompanied by a sworn-in court interpreter's translation into the registry's national language(s) or any other form of authenticating the documents or electronic records that is used in the State.³²

52. Another issue is whether the documents submitted to the registry include information, such as names and addresses, which uses a set of characters different from the characters used in the language of the registry. In this case, the State

³¹ See supra footnote 13, page 23.

³² Ibid., page 24.

should provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry.

53. A number of States have more than one official language. In these States, registration systems are usually designed to accommodate registration in all official languages. To ensure that information on businesses operating in the State is available to all registrants and searchers, different approaches can be adopted. States may require parties to make their registration in all official languages; or they may permit filing in one language only, but then require the registry to prepare and register duplicate copies in all official languages. Both these approaches, however, may be quite costly and invite error. A more efficient way of dealing with multiple official languages, any one of which may be used to register, would be to allow registrants to carry out registration in only one of those official languages. Such a language could be that of the province or the region where the registry office or the registry branch is located and where the registrant has its place of business. This approach would also take into account the financial constraints of MSMEs and, according to circumstances, possible literacy issues, as entrepreneurs may not be equally fluent in all official languages spoken in a State. When such an approach is chosen, however, States should ensure that the registration and search interface on the website are available in all official languages of the registry. Whatever approach is taken, however, States will have to consider ways to address this matter so as to ensure that the registration and any subsequent change can be carried out in a cost effective way for both the registrant and the registry and, at the same time, ensure that information can be understood by the registry's users.

C. Making information available

54. In order for the business registries to facilitate trade and interactions between business partners, the public and the State, easy access to business services should be provided both to businesses that want to register and to interested stakeholders who want to search registered information.

1. Information to register a business

55. For business wanting to register, surveys often show that many microbusinesses operating in the extra-legal sector are not aware of the process of registering or of its costs: often they overestimate time and cost, even after efforts to simplify the registration process.³³ Easily retrievable information on the registration process and the relevant fees can reduce compliance costs, and make the outcome of the application more predictable, thus encouraging entrepreneurs to register. Restricted access to such information, on the contrary, might require meetings with registry officials in order to be apprised of the registration requirements, or the involvement of intermediaries to facilitate the registration process.

56. In jurisdictions with developed ICT infrastructures, information on the registration process and documentation requirements should be available on the registry website or the website of the government agency overseeing the process. As already discussed, States should consider whether the information included on the

³³ M. Bruhm, D. McKenzie, *Entry Regulation and Formalization of Microenterprises in Developing Countries*, 2013, pages 7-8.

website should be offered in a foreign language in addition to official and local languages. States with more than one official language should make the information available in all such languages (see para. 53 above).

57. Lack of new technology, however, should not prevent access to information that could be ensured through other means, such as the posting of communication notes at the relevant agency or dissemination through public notices. In some jurisdictions, for instance, it is required to have large signs in front of business registry offices stating their processes, time requirements and fees.³⁴ In any event, information for businesses that want to register should be made available at no cost.

2. Operating hours

58. The approach to the operating days and hours of the registry depends on whether the registry is designed to permit direct electronic registration and searching by users or whether it requires their physical presence at an office of the registry. In the former case, electronic access should be available continuously except for brief periods to undertake scheduled maintenance; in the latter case, the registry offices should operate during reliable and consistent hours that are compatible with the needs of potential registry users. In view of the importance of ensuring ease of access to registry services for users, these recommendations should be incorporated in the law or regulation governing business registration or in administrative guidelines published by the registry, and the registry should ensure that its operating days and hours are widely publicized.

59. If the registry provides services through a physical office, the minimum operating days and hours should be the normal business days and hours of the public offices in the State. To the extent that the registry requires or permits the registration of paper-based submissions, the registry should be aimed at ensuring that the paper-based information is entered into the registry record and made available to searchers as soon as practicable, but preferably on the same business day that the information is received by the registry. Search requests submitted in paper form should likewise be processed on the same day they are received. To achieve this goal, the deadline for submitting paper based information or search requests may be set independently from the business hours.³⁵ Alternatively, the registry office could continue to receive paper forms (regardless if they are applications or changes) and search requests throughout its business hours, but set a “cut off” time after which information received may not be entered into the registry record, or searches performed, until the next business day. A third approach would be for the registry to undertake that information will be entered into the registry record and a search will be performed within a stated number of business hours after receipt of the application or search request.

60. The law, regulation or administrative guidelines of the registry could also enumerate, in either an exhaustive or an indicative way, the circumstances under

³⁴ See Bangladesh and Guinea cited in A/CN.9/WG.I/WP.85, para. 31.

³⁵ For example, the law, regulation or administrative guidelines of the registry could stipulate that, while the registry office is open between, for example, 9 a.m. and 5 p.m., all applications, changes and search requests must be received by an earlier time (for example, by 4 p.m.) so as to ensure that the registry staff has sufficient time to enter the information included in the application into the registry record or conduct the searches.

which access to the registry services may temporarily be suspended. An exhaustive list would provide more certainty, but there is a risk that it might not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of registry services would include any event that makes it impossible or impractical to provide those services (such as force majeure, for example, fire, flood, earthquake or war, or if the registry provides users with direct electronic access, a breakdown in the Internet or network connection).

3. Modes of access to the registry

61. Working Paper A/CN.9/WG.I/WP.93 and this Addendum have highlighted in several paragraphs the benefits of an ICT based registration system over a paper-based one. Most obviously, one of the advantages of the use of modern technologies is that they simplify access to the registry, whether this means filing an application, submitting information on a change or performing a search. This is especially true when the systems authorize direct electronic submission of registrations and the electronic submission and retrieval of search requests and search results by clients and stakeholders. Direct access significantly reduces the costs of operation and maintenance of the system and also enhances the efficiency of the registration process by putting direct control over the timing of the business registration into the hands of the registrant. Direct electronic access eliminates any time lags between submission of information to the registry and the actual entry into the database of that information. In some States,³⁶ for instance, electronic access (either from a client's premises or from a branch office of the registry) is the only available mode of access for both registration and searching. As the data to be registered is submitted in electronic form, no paper record is ever generated. A fully electronic system of this kind places the responsibility for accurate data entry directly on registrants. As a result, staffing and operational costs of the registry are minimized and the risk of registry personnel making an error in transcribing documents is eliminated (see paras. 46-49 above).

62. Other States provide for electronic registration and searches but also give clients the option of submitting a registration or search request in other forms. The information is distributed through other channels that can complement the use of the Internet or that may even represent the main method of distribution if an online registration system is not yet fully developed. The following means of sharing information are also used in some States:

- (a) Telephone services to provide information on registered businesses and product ordering;
- (b) Subscription services to inform subscribers about events pertaining to specified businesses;
- (c) Ordering services to enable access to various products, most often using an Internet browser; and
- (d) Delivery services to convey various products, such as transcripts of registered information on a business, paper lists, or electronic files with selected data.

³⁶ See A/CN.9/WG.I/WP.85, para. 44.

63. However, in many States, electronic submission is by far the most prevalent mode of data submission and it is used in practice for the vast majority of registrations. It is thus recommended that, to the extent possible, States should establish a business registry that is computerized and that permits direct electronic access by registry clientele. Nonetheless, given the practical considerations involved in establishing an electronic registry, multiple modes of access should be made available to registry clientele at least in the early stages of implementation in order to reassure users who are unfamiliar with the system. Finally, to facilitate use, the registry should be organized to provide for multiple points of access for both electronic and paper submissions and search requests. However, even where States continue to use paper-based registries, the overall objective is the same: that is, to make the registration and searching process as simple, transparent, efficient, inexpensive and accessible as possible.

4. Access to search services

64. In keeping up with its functions as a collector and disseminator of business-related information, the registry should make publicly available all information on a registered business that is relevant for those that interact with the business (whether they be public authorities or private entities) to be fully aware of the business identity and status of that enterprise. This will allow interested users to make informed decisions about who they wish to do business with, and for organizations and other stakeholders to gather business intelligence. This function of a business registry is demonstrably valuable to the economy of a State. Moreover, in several States the information deposited in the registry, or part of that information, is of a legal nature and has third-party effectiveness, so that searchers of the registry can rely upon the information as it appears on the registry, and assert that information against third parties.

65. While providing public disclosure of the registered information is an approach followed in most States, the way in which stakeholders access information, the format in which the information is presented and the type of information available, varies greatly from State to State. This variation is not only a function of the technological advances of a State, but of an efficient accessing framework, including that provided by national legislation.³⁷ For instance, an aspect on which States may differ concerns the criteria that may be used to search the registry.

66. This Working Paper takes the view that in order to achieve the objectives of a business registration system, a registry must facilitate access to the registered information by the general users, which enhances certainty of and transparency in the way the registry operates. Because of its importance, this principle of public access to the information deposited in the registry should be stated in the law or the regulation governing business registration.

67. Further, in order to facilitate dissemination of information, information should be made available at no cost or for a low cost. This approach may be greatly facilitated, as seen in paragraph 45 above, by the development of ICT supported registries that allow users to submit applications or make searches electronically without the need to rely on intermediation by registry personnel. Such an approach is also much cheaper for the registry. Where registration systems are paper-based,

³⁷ See supra footnote 5, page 8.

customers must either visit the registry office and conduct the research on site (whether manually or using ICT facilities that are available) or the information is sent to them on paper. In both cases, registry staff may need to assist the customer to locate the information and prepare it for disclosure. As previously noted, this is associated with higher costs, delay and the potential of error and liability for the registry. Making registered data available electronically would also allow for the provision of regularly updated information, as compared with paper-based information which can sometimes be outdated by the time it reaches the intended user.

(a) Entitlement to search the registry

68. Evidence shows that in most States public access to search the registry is generally unqualified. Permitting full public access does not compromise the confidentiality of information, which can be protected by allowing users to search only certain types of information. This approach avoids any unnecessary cost and delay in initiating a search.

69. It is not recommended that States restrict access to search the business registry or that searchers be required to demonstrate a reason to request access. Such a policy could seriously compromise the core function of the registry to publish and disseminate information on registered entities. Moreover, if a discretionary element is injected into granting an information request, equal public access to the information in the registry could be impeded, and some potential searchers might not have access to information that was available to others.

70. For these reasons, it is recommended that the registry should be fully accessible to the public, subject only to necessary confidentiality restrictions in respect of certain information.

71. The applicable business registration law or regulation can however make access to the registry subject to certain procedural requirements, such as requiring that users submit the search request in the prescribed form and pay, or make arrangements to pay, any prescribed fee. If a searcher does not use the prescribed registry form or pay the necessary fee, the searcher may be refused access to the search services of the registry. As in the case of refusing access to registration services, the registry should be obliged to give the specific reason for refusing access to search services as soon as practicable so that the searcher can remedy the problem.

72. Unlike the approach adopted for registrants, the registry should not request and maintain evidence of the identity of a searcher as a precondition to obtaining access to the search services of the registry since a searcher is merely retrieving information contained in registered information from the public registry record. Accordingly, identification evidence should be requested of searchers only if it is necessary for the purposes of collecting search fees, if any.

73. The applicable law or regulation should also provide that the registry may reject a search request if the searcher does not enter a search criterion in a legible manner in the designated field and must provide the grounds for a rejection as soon as practicable. In registry systems that permit registrants to electronically submit search requests to the registry, the software should be designed to automatically prevent the submission of search requests that do not include a legible search

criterion in the designated field and to display the reason for the refusal on the electronic screen.

(b) Type of information provided

74. Information can be of particular value to stakeholders if it is available to the public, although the type of registered information that is available will depend on the legal form of the business being searched. Information available from the business registry that may be of value includes: the company profile and company officers (directors, auditors); annual accounts (in both e-format and paper format); a list of the company's business divisions or places of business; the certificate of registration or incorporation; the publication of companies' memorandums, articles of association, or other rules governing the operation or management of the business; existing company names; company history; insolvency-related information; information on the company's registration process; company share capital; related laws and regulations; certified copies of registry documents; information on registry fees; notifications of events (late filing of annual accounts, newly submitted documents, etc.).³⁸ According to a recent survey, information on company data, annual accounts and annual returns, as well as information about fees, are the most popular pieces of information and the most requested by the public.³⁹

75. If the State is one where shareholder details are registered, access to such information would also be advisable. Most States that register shareholder details make the relevant information available to the public.⁴⁰ A similar approach can be recommended with regard to information on beneficial ownership, although, as previously noted, to date, not many jurisdictions collect information on beneficial ownership. A State may also consider making information on beneficial ownership available to the public in order to allay concerns over the potential misuse of business entities. However, the sensitive nature of the information on beneficial ownership may require the State to exercise caution before opting for disclosure of beneficial ownership without any limitation.

(c) Bulk information

76. In addition to making individual information available, business registries in some jurisdictions also offer the possibility of obtaining "bulk" information,⁴¹ i.e. a compilation of data on selected, or all, registered businesses. Such information can be requested for commercial or non-commercial purposes and is often used by public agencies as well as private organizations (such as banks) that deal with businesses and perform frequent data processing on them. Distribution of bulk information varies according to the needs and capability of the receiving entity. In performing this function, one approach would be for the registry to ensure the electronic transfer of selected data on all registered entities, combined with the transfer of data about all new registrations, amendments, and deregistrations during a specified period. Another option for the registry would be to make use of

³⁸ See, for instance, *supra* footnote 13, pages 77 ff.

³⁹ See *supra* footnote 12, page 131.

⁴⁰ See *supra* footnote 13, pages 30 ff.

⁴¹ See *supra* footnote 3, page 14.

web-based or similar services for system-to-system integration that provides both direct access to selected data on specific entities and name searches. Direct access avoids unnecessary and redundant storage of information by the receiving organization and States where such services are not yet available should consider it as a viable option when streamlining their business registration system.⁴² Distribution of bulk information can represent a practicable approach for the registry to derive self-generated funds (see also para. 76 in A/CN.9/WG.I/WP.93/Add.2).

(d) Actual use of the information

77. Simply because information is made available for use does not necessarily equate to that information being used. It would be useful for the State to devise effective means that encourage customers to actually use the information services of the registry. As previously mentioned, adoption of ICT supported registries that permit direct and continuous access to stakeholders (except for periods of scheduled maintenance) will promote the actual use of the information. Communication campaigns on the services available at the registry will also contribute to the active take-up of registry services by its potential users (see para. 42 of A/CN.9/WG.I/WP.93).

(e) Quality and reliable information

78. Another aspect that will contribute to making business registry services valuable for the public is ensuring that the information maintained in the registry is of good quality and that it is reliable. The registry can implement certain actions in order to improve the quality of the information provided, such as taking action to prevent corporate identity theft (see para. 30 of A/CN.9/WG.I/WP.93/Add.2) through the use of monitoring systems, checks by an intermediary, or establishing access through the use of passwords. Another way to ensure that the data kept in the registry is reliable would be the adoption of identity verification methods for those who deliver information to the business register and the secure signature requirements for the provision of that information (such as through the use of electronic signatures or electronic certificates). Paragraphs 27 to 30 of A/CN.9/WG.I/WP.93/Add.2 discuss these two topics extensively. A third approach that would contribute to the quality of the information deposited in the registry may be to require businesses to reregister at certain intervals, which would provide a means of confirming whether the information in the register is up to date.⁴³ However, adoption of such an approach could impose a considerable burden on businesses and on MSMEs in particular, as already discussed (see para. 27 above). A fourth method to protect the reliability and quality of the information would be through attention paid to the interval with which the registry is updated. Updating the registry in real time would be the preferable approach, or where this is not possible, daily updates of the registry should be ensured.⁴⁴

⁴² Ibid.

⁴³ See supra footnote 12, page 134.

⁴⁴ Ibid., pages 119 ff.

(f) Accessibility

79. Finally, the registry needs to ensure that searchable information is easily accessible. Even though the information is available, it does not always mean that it is easy for stakeholders to access. There are often different barriers to accessing the information, such as the format in which the information is presented: if special software is required to read the information, or if it is only available in one particular format, it cannot be said to be accessible. In several States, some information is made available in paper and electronic formats; however, information available only on paper likely entails reduced accessibility. Other barriers that may make information less accessible are charging fees for it, requiring users to register prior to providing access to the information, and if there is a fee connected to the user registration. States should find the most appropriate solutions according to their needs, their conditions and their legal framework.

80. One often overlooked barrier to accessing information, whether in order to perform a search or to register a business, is a lack of knowledge of the official language(s). Providing forms and instructions in other languages is likely to make the registry more accessible to users. However, recent evidence shows that, with the exception of Europe, business registries seldom offer services in languages additional to the official language(s).⁴⁵ Although making all information available in additional languages may incur some expense for the registry, a more modest approach may be to consider making information on only core aspects of registration, for instance instructions or forms, available in a foreign language(s). In deciding which foreign language would be most appropriate, the registry may wish to base its decision on historical ties, the economic interests of the jurisdiction and the geographic area in which the jurisdiction is situated.

⁴⁵ *Ibid.*, page 141.