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**UNICE'S CONTRIBUTION TO THE HEARING ON PROSPECTUS
ORGANIZED BY THE PARLIAMENTARY COMMITTEE ON
ECONOMIC AND MONETARY AFFAIRS**

2 OCTOBER 2002

1. Introduction

UNICE praises the European Parliament for its commitment to public consultation, due to the lack of consultation from the European Commission, on the Prospectus Directive for the second time.

UNICE participated in the European Parliament's first public hearing in the Prospectus Directive in October 2001. Unfortunately, UNICE has not been invited to speak in this 2nd Hearing but would like to contribute to the public debate by responding also the questions that EMAC has sent to the experts invited.

UNICE, as the representative of the users of financial markets, would like to reiterate that it supports the primary aim of the prospectus directive, which should be to reduce the cost of capital to companies by making it easier to raise capital on a single market with access to more customers, which would allow economies of scale.

The main concern for European business is how this aim can be effectively achieved. The cost of capital is a comparative issue and must be considered in relation to costs of capital outside Europe as well as within. Adopting a directive is not the same as achieving the stated aim, as the fact that previous prospectus directives have been passed has shown. What European business expects from the prospectus directive is better access to capital from deep and liquid secondary markets, as economies of scale become possible in the European markets. This should lead to greater economic growth with more investment, higher productivity and higher inflows of foreign capital. This in turn will lead to higher employment and taxation revenues. UNICE is therefore concerned that it appears that this aim has been forgotten as many of the proposals still seem to be of a prescriptive regulatory nature which would raise the cost of capital.

UNICE remains at the disposal of the Parliament to explain any of the comments below further.

2. Response to questions to experts

- ***Has the Commission taken on board sufficiently the concerns highlighted by the European Parliament's in its 1st Reading? Is the Parliament likely to be inhibited from pursuing any of its 1st Reading amendments if it now proceeds directly to a 2nd reading on the Common Position (rather than requesting another 1st reading)?***

UNICE welcomes the fact that many of the amendments of the European Parliament have been accepted by the Commission in its revised proposal dated August 2002. Nevertheless, there are still some key concerns for European business which have not been met and which we highlight below. **However, UNICE believes that these concerns can be addressed effectively by Parliament during a 2nd Reading opinion.** Issuers have had to wait for ten years to see the current regulatory framework revised in order to overcome present mutual recognition problems. Therefore UNICE is committed to ensuring that the Prospectus Directive properly addresses the current problems and effectively ensures a truly Single Passport for Issuers without distorting

currently efficient market practices. However, if the European Parliament requests another 1st reading, this proposed legislation will suffer unnecessary delays.

- ***To what extent have the concerns of SMEs, smaller investors and the specialised wholesale market generally been taken into account in the amended proposal? Is the balance right between lowering costs of capital for companies and the need for investor protection?***

UNICE welcomes the Commission's revised proposals allowing for recognition of the different activities and size of issuer, particularly SMEs (Article 7.1(e)), which meet some SME concerns. However, **UNICE is concerned that the Commission's Impact Assessment Form contradicts Article 7** by stating that "as far as the disclosure standards are concerned, the Commission... believes that there should not be any difference due to size of the issuers". In addition, **UNICE believes that the definition should be based on market capitalisation**, as proposed by the European Parliament at the 1st reading.

UNICE also welcomes the new definition of qualified investor, which is largely based on the definition of the European Parliament 1st Reading opinion and which should help to guarantee that private placements and sale of bonds to qualified investors continues under current market practices. The de-facto prohibition on qualified investors to resell to the public securities for which the prospectus was not published seems to be excessive. **UNICE wonders whether a prohibition limited in time for resale to qualified investors could not be envisaged.**

UNICE strongly disagrees with the Commission's impact assessment stating that the proposals will have a positive effect on job creation and on the competitiveness of business by lowering the cost of raising capital. UNICE believes that the Commission has not demonstrated how costs will be reduced and that its proposals will in reality not lower the cost of capital for companies but rather would increase them. This will in turn reduce Europe's chances of achieving the Lisbon aim of becoming the most dynamic world economy by 2010. The additional costs to companies are unlikely to add to investor protection; the balance is therefore wrong.

- ***Given the Commission proposes annual updating, what sort of information if any should be included in an updated prospectus that should not already have been announced to the market under on-going disclosure requirements? Please give examples. Could annual updating be made with reference to such announcements to avoid legal costs and encourage smaller companies to maintain their listings?***

The Commission's proposals would still mean mandatory annual updating (Article 10) and are therefore unlikely to achieve the aim of the directive, to reduce the costs of raising capital for companies, particularly for growth-enhancing medium-sized companies; rather the proposals will increase costs. **UNICE believes that the proposals for updating should be clearly optional, as proposed by CESR.**

Linking all the different directives together under Article 10 could lead to significantly increased costs with different disclosure requirements in the directives. The existing information requirements, following in particular from the transparency directive on regular reporting, should be sufficient to inform investors on an ongoing basis.

UNICE believes that updating under the prospectus directive should not add separate information requirements to existing ones or add to companies' liability.

- ***The Commission proposes that there should be a requirement to have the prospectus approved by the national authority of the Member State in which the company is registered. What are the likely implications of this proposal compared with the Parliament's suggestion of choice of registration or listing Member State?***

UNICE reiterates its view that the home state provisions would restrict companies' freedom of choice, add to companies' costs and be more likely to lead to market fragmentation than to

integration. Some authorities have devoted resources to developing specialities in certain products; all EU companies should be allowed to benefit from their greater expertise and resource, not just the companies restricted to that state.

Companies at present have the freedom to choose where they will issue their securities; there is no reason to change this. What is important to achieve a Single Passport for Pan-European offers is that issuers, once they have obtained the approval of a prospectus for an offer from one competent authority (e.g. in the main country where the public offer will take place, in the country of primary listing), can use that prospectus, without additional information, in other countries where the same offer will take place. **Issuers (EU or otherwise) should be free to apply to the Competent Authority of the Member State of their choice, provided there is a certain connection and should not be restricted to their country of incorporation.** Companies should only have to obtain the approval of one Competent Authority where the public offer is to take place and should not be faced with the extra regulatory burden and costs of obtaining approval from the authority of their country of registered office.

Home-state approval would not engender genuine cross-border market access and competition between providers of financial services or facilitate a wider provision of financial services and products for both investors and savers. The argument that allowing choice would lead to a race for the bottom ignores the fact that Europe has had choice for many years without such a result. This argument is a fallacy, since the directive will bring in harmonisation and common standards for prospectuses in a single market for securities. The argument is not one of investor protection, it is one of protectionism by national regulators. **UNICE calls on the European Parliament to insist on companies' ability to choose within the single market for both equity and non-equity securities.** The current Commission proposal of allowing choice for issuers of non-equity securities with a minimum denomination of €50,000 is unacceptable. This would leave more than 30% of the international bond market without choice plus all convertible bonds (considered as equity securities) and all warrants and certificates (which are not issued in denominations). Choice should be available to all.

- ***What use could national regulators make of the provisions in the Commission's proposal to pursue national objectives and avoid the integration of the market? What changes are necessary to avoid this?***

The insistence of some national regulators to oblige issuers to have the prospectus documentation approved in the country of registered office of the issuer proves that some regulators simply want to force markets to become national again. **Not allowing issuers choice** will mean a renationalisation of markets and a monopoly of national regulators, which can only damage investor protection and the competitiveness of European capital markets.

In addition, the Commission's definition of public offer of securities (Article 2.1(d)) is so wide as to undermine the whole directive since it is so unclear that the requirement to produce a prospectus could be triggered in unforeseen circumstances. **UNICE believes that companies need to know with certainty when they need to produce a prospectus: an offer should only be deemed to exist if an investor can conclude a binding contract to acquire securities.**

UNICE reminds the Parliament that there have been previous directives to ensure a single European prospectus which have not achieved that aim. UNICE fears that the Commission's text would have the same (non) effect, since the wording is too broad as to be unworkable and thus would yet again prevent the creation of a single European prospectus.

- ***Given that Enron, WorldCom, Global Crossing and the Republic of Argentina all issued prospectuses, what information should have been included if any that might have provided greater investor protection? Or are other methods of investor protection necessary?***

While not wishing to comment on the specific cases, UNICE would like to note that investor protection is best guaranteed by conduct of business rules, currently being harmonised at EU level

via the revision of the ISD, rather than lengthy prospectus documentation, not all of which may be read by retail investors anyway.

The prospectus directive should remain simple and focused on reducing the costs of raising capital in Europe. It should not and could not be used to prevent such failures. **UNICE would like to point out that the risks of fraud cannot be eliminated by any regulatory system, however optimal.** Rules and practices can limit risks and promote ethical behaviour; however, the best way to achieve this lies in the conduct of business rules, by proper oversight of audit and accounting firms by their professional bodies, and by good corporate governance of companies by management and the involvement of shareholders. In this context, UNICE welcomes the recent comparative study of EU corporate governance by the Commission and Weil Gotshal & Manges.

UNICE notes that a main failing of the US system was over-reliance on rules rather than on principles such as the obligation to give a true and fair view (*image fidèle*). UNICE would like to point out that compliance must be a state of mind based on personal responsibility, transparency and integrity rather than a set of rules and regulations. This is, however, a matter of accounting practice rather than of the preparation of prospectuses. UNICE notes, however, that such differences in accounting standards between countries may cause confusion among investors. **UNICE therefore welcomes the fact that the EU has now signed up to IAS (IFRS) and calls upon the EU to help persuade the USA to adopt its system thereby moving to global standards, which will ensure better comparisons and therefore transparency for investors.**

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