

DBO/JPC/nd/ 22.6/21/1
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17 January 2002

MEPs

Dear Sir,

RE: PROPOSED DIRECTIVE ON INSIDER DEALING AND MARKET MANIPULATION, AND PROPOSED DIRECTIVE ON PROSPECTUS

In view of the discussion and vote to take place in the coming days in the EMAC Committee, UNICE would like to reiterate its main points of concern on the two above-mentioned instruments.

The Lamfalussy proposals and Financial Services Action Plan (FSAP) are an essential part of the Lisbon agenda, and should remain a priority. EU institutions should ensure that the targets for implementation of the FSAP are not missed due to insufficient political determination.

Raising finance can still be a major obstacle for many European enterprises, particularly for SMEs which are a major engine of employment in the Union. In this context, it is important that the proposed directives avoid creating tougher conditions for small business entrepreneurs.

UNICE is concerned that because of a lack of consultation the proposed directives raise serious questions for corporate issuers and practitioners in capital markets. UNICE believes that unless substantial amendments are made to the text of both directives, the result is likely to be a loss of necessary flexibility and added cost for issuers, especially SMEs, contrary to the objective of the proposal.

There is no explanation as to the intended impact of the proposed prospectus directive on the regulatory framework. The current proposal introduces ambiguities and could undermine secondary markets. The proposed directive should clearly state guiding principles and objectives at the start. These should include: to facilitate the efficient raising of capital, to attract investors (EU citizens and others) to EU markets, and to ensure that EU markets can compete globally.

It is important that the processes that are prescribed in this directive, the links to other directives, and the wording and structure of the directive should be predictable and clear. In particular, the definitions agreed for this directive should not be the subject of consequential amendment as a result of amendments to other directives. One example is that the definitions in the Investment Services Directive will define how the Prospectus directive will work in practice.

UNICE also regrets that the draft directive treats an issuer's country of incorporation as its "home state" in perpetuity. This will restrict companies' freedom of choice and add to companies' costs. This is more likely to lead to market fragmentation than to integration. We believe in freedom of choice for issuers.

UNICE is pleased to note that the report and amendments tabled by *Mr Huhne* intend to respond to our concerns and clarify considerably the scope of the proposal. We would therefore like to ask you to support his report.

In addition, specific comments on the report and amendments tabled by *Mr Goebbels* on market abuse are attached.

The full text of our position papers on these two issues are available on UNICE's website¹.

Our experts remain at your disposal should you wish to discuss further any aspect of our comments.

Yours sincerely,

(original signed by)
Philippe de Buck
Secretary General

¹ [UNICE's position paper on the proposed directive on insider dealing and market manipulation](#)
[UNICE's position paper on the proposed directive on prospectus](#)

**REPORT BY MR ROBERT GOEBBELS ON THE PROPOSED
DIRECTIVE ON INSIDER DEALING AND MARKET MANIPULATION**

UNICE COMMENTS

UNICE would like to support in particular the following amendments proposed by Mr Goebbels' draft report:

Amendments 3 and 37 (Recital 17 and Article 11): that authorities should formally consult a committee of representatives of the financial services providers and consumers, noting that companies are also consumers of these markets.

Amendment 21 (Article 2): that there should be an exemption from the provisions of the directive for pre-existing contractual obligations.

Amendment 33 (Article 6): that the obligation on firms should be to notify the authority rather than to refuse to execute a transaction in line with obligations for money laundering.

Amendment 36 (Article 10): that there should be a clear connection between the territory and the regulated market in order to limit misunderstandings. Indeed we would welcome further clarification of responsibility of the competent authorities to confer certainty, avoid administrative overlap and contradiction and bring the directive in line with other legislation. The member state where the person is located should have responsibility for acting, with other authorities assisting.

Amendment 43 (Article 14): that the directive should be limited to administrative sanctions only.

Nevertheless, there are still aspects of the proposed directive which, in our view, need to be amended in order not to impose over burdensome requirements on companies.

Different markets

Article 1.1: The directive should distinguish between the different markets – the markets for equity, debt, and commodities operate differently and the same rules may not be applicable in all circumstances.

While it is right that the provisions on market manipulation should apply to commodities trading, the provisions on insider dealing should not. This is because there is no such concept within commodities markets – insider dealing refers to trading ahead of information which the markets would expect to receive, but commodities trading does not relate to specific information which the markets (which are almost exclusively professional) would expect. There is no issuer for such products as there is for equities. In fact, such information can often be determined by the application of research and analysis from different sources of information. What the markets should allow companies to do is to risk manage their exposure sensibly; there is a legitimate role for such risk management in the commodities markets, which can increase market efficiency and liquidity and ensure security of supply. **We would therefore like to see commodity derivatives excluded from the provisions of the directive on insider dealing.**

Safe harbours

Article 8: UNICE would also like to see existing practices such as Chinese walls to be exempt from the provisions of the directive. We would welcome a specific recital on this point and would wish to see an amendment to Article 8 to exclude Chinese walls from the prohibition of the directive. We would suggest the following wording “arrangements which require or enable information held by a person in the course of carrying on one part of its business [on one side of a Chinese wall] to be withheld from, or not to be used for, persons with or for whom the person acts in the course of carrying on another part of its business [on the other side of the Chinese wall]”.

Intent

Article 1: UNICE also believes that the definition of the offences of insider dealing and market manipulation in Article 1 should require intent to mislead or to create unfair advantages, regardless of the occupation of the person. ***The effect on the market should not be the sole test. Instead, there should be an additional requirement for actual knowledge that the information was false or misleading or for constructive knowledge, where the person should reasonably have known this.***

Disclosure obligations

UNICE also believes it premature to deal with disclosure obligations for market abuse purposes without waiting for the outcome of the consultation on transparency obligations since the two issues are closely related. Finally, UNICE believes that greater attention should be paid to ensure that definitions and principles on the three above subjects are consistent with each other.
