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European Commission  
Internal Market and Services DG  
Unit G3  
Securities Market

Via e-mail: [markt-g3@ec.europa.eu](mailto:markt-g3@ec.europa.eu)

**Subject: Call for evidence on Investor-Compensation Schemes Directive  
(Directive 1997/9/EC)**

Assoreti – National association of Companies (mainly, banks and investment firms) that provide outside the premises of the investment firm financial instruments and investment services through financial promoters – welcomes the opportunity given by the European Commission to comment the Call for evidence on Investor-Compensation Schemes Directive (Directive 1997/9/EC, hereinafter “ICSD”).

Preliminary to our comments, we would like to explain the idea that, according to the industry, should guide the regulation of investor compensation scheme.

In our view, the *ratio* underlying the scope of ICSD should be the same underlying the system of consortium (hereinafter we will refer to “mutuality *ratio*”). According to this *ratio*, the scope of ICSD should be limited to those intermediaries whose insolvency or default give rise to investors’ right to claim compensation. In this way the risk of insolvency would be spread among the companies against which the risk might occur.

Then, it follows that investors’ right to claim compensation should be limited to those cases in which the investment service is lawfully provided by an entity authorised by the system. Making a comparison, as the insurance does not cover damage caused by the fraudulent conduct of the insured, so the ICSD should not cover damages caused in the exercise of an no-authorised investment service or when the service isn’t provided within the limits of the authorisation.

On the light of above, Assoreti deems appropriate that the European Commission clearly defines, by means of binding rules, the situations likely to give rise to investors’ right to claim compensation. This, in the belief that the ICSD should harmonise the area of the risks covered by the System, as to avoid that, different



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national rules jeopardize fair competition at EU level; distortion that would increasingly worsen in the case of cross-border provision of investment services.

On the basis of these premises will therefore make the following considerations.

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### **I. Scope - Investment services covered by the ICSD and loss events (Article 1, point. 2 and Article 2 (2) of the ICSD)**

*1) Should the operation of multilateral trading facilities be excluded from the scope of the ICSD?*

Yes, the operation of MTFs should be excluded from the scope of the Directive. The operation of these systems does not imply direct contractual relationships between the entity managing MTF and retail investors that may give rise to a restitutory claim against the scheme. Therefore, as mentioned by the European Commission, Assoreti believes that: a) entity managing MTF does not have to participate to investor compensation scheme; b) as a consequence, the system of compensation should not intervene in the event of the insolvency of the entity managing MTF.

*2) Would it be appropriate to include in the scope of the ICSD all investment firms seeking authorisation to the provision of investment services, although their authorisation would not allow holding clients' assets?*

No, it is not appropriate to include in the scope of the Directive, investment firms authorised to provide investment services when such authorization does not allow holding clients' asset. When the investment firm's authorisation to provide investment services does not allow holding clients' asset (and this restriction is objectively perceived by the investors), investor's right to claim restitution against the scheme may not arise, with the following effects: a) the investment firm, that is not allowed holding clients' asset, should not participate to the investor compensation scheme, b) as a consequence, the investor compensation scheme should not intervene in the event of insolvency or winding up of such investment firm. On the contrary, an investment firm with the legal capacity to hold clients' asset should participate to the scheme, although in fact it doesn't hold these assets. The only fact that the firm could hold the asset (in the sense that it has the legal capacity) justifies the participation at the system, with the consequent subjection to its financial burden.



3) *Would it be appropriate to include in the scope of the ICSD all investment firms seeking authorisation to the provision of investment services, although they provide their services only to non-retail clients?*

No, it is not appropriate to include in the scope of the Directive investment firms authorized to provide services only to non-retail clients, provided that these clients are excluded from the cover granted by the compensation scheme. Therefore in this case (as for the aforementioned "mutuality ratio") the investment firm should not be required to participate to the investor compensation scheme. Furthermore, as already stated with regard to the question 2, this conclusion assumes that the delimitation of the provision of investment services only to non-retail clients (who are not entitled to be covered by the scheme) derives from a regulatory ban objectively perceivable (*i.e.* authorisation obtained by the competent authority). On the contrary, a firm should participate to the scheme when, according to the authorisation obtained by the competent authority, it can provide investment services to retail clients, even though it decides to provide them only to non-retail clients.

4a) *Should investors be able to claim compensation in the case of default of the third party where their assets had been deposited?*

No, investors should not be entitled to compensation provided by the Directive in the event of insolvency of the third party. According to the "mutuality *ratio*" (that should permeate the law of investor compensation scheme) the scheme should intervene only to compensate investors having a restitutory claim directly against another member of the system. Moreover, it is important to underline that the investment firm that deposits clients' asset at a third party is liable towards its clients as to the proper choice of such depository. Therefore, investor may claim damages against the investment firm for *culpa in eligendo* and/or *culpa in vigilando*; the scheme will intervene only in the event of insolvency or winding up of the investment firm.

4b) *Should investors (such as UCITS or a UCITS unit holder) be able to claim compensation for loss of assets under the ICSD in those cases where the UCITS depository or the institution which has been mandated to safe keep the assets, fail to perform its duty?*

No, investors (UCITS or UCITS unit holder) should not be entitled to claim protection under the ICSD in cases where the UCITS depository or the institution which has been mandated to safe keep the assets, fails to perform its duty. Referring to the answer sub question 4a), it has also to be noted that a different solution would extend the protection of the scheme also in those cases where the depository fails to perform collective portfolio management activity, activity that *per se* is outside the scope of the Directive.



5) *Should loss events include also any losses suffered by (retail) investors as a consequence of the violation of conduct of business rules?*

No, losses suffered by (retail) investors as a consequence of the violation of conduct of business rules should not be covered by the scheme. Recalling the introduction, the guarantee of the scheme should operate in relation to restitutory claims arising from the lawful provision of investment services authorized by the competent authority. A different solution would go beyond the aim of the Directive, and would burden the investment firm participating to a compensation scheme with an unjustified cost linked to damages caused by the unlawful conduct of other competitors, even beyond the standards of fairness and good faith that should characterize the “mutuality *ratio*”.

6) *Do you agree with the idea that the amount covered by the ICSD should be adapted following the updating of the DGSD?*

No, the amount covered by the ICSD should not be adapted following the updating of the Directive on deposit guarantee schemes (DGSD), as these two situations may not be compared. Actually the risk that a credit institution fails to repay deposits is higher than the risk that an investment firm fails to return assets belonging to investors; on the one hand, the credit institution has the availability of clients’ asset, on the other hand, the investment firm should separate clients’ asset for all intents and purposes from those of such firm and those of other clients. It has also to be considered that while deposit is *per se* risk-free, investment in financial instruments implies *alea*: this seems to justify the lower amount covered by the ICSD.

7) *The ICSD does not harmonize the funding systems of the schemes. Should the ICSD provide for some general principles concerning the funding of the schemes?*

No, the ICSD shouldn’t provide for general principles concerning the funding of the schemes. As mentioned above, Assoreti believes that criteria of compensation schemes’ intervention has to be harmonised; whilst the funding system of the scheme may vary from State to State, taking into account the existence of other mechanisms for investors’ protection.

8a) *Does the legislation of the Member State you know the best provide mechanisms aimed at limiting compensation schemes' obligations over time? If yes, how many clients saw their compensation unpaid as a result of such mechanisms?*

No, Italian legislation does not provide mechanisms aimed at limiting compensation schemes obligations over time.



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*8b) Should this kind of mechanisms be prohibited?*

Yes, this kind of mechanisms should be prohibited, because such measures could affect the “level playing field” (that, in turn, is the premise of fair cross-border competition).

*9a) Should the process of recognizing the eligibility of the claim be regulated for the purposes of the ICSD?*

No, the process of recognizing the eligibility of the claim should not be regulated at European level. Since this process does not affect “level playing field”, each Member States should define it autonomously, as to guarantee the necessary coordination with national insolvency law.

*9b) Should, at least, a mechanism be introduced providing for provisional partial compensation based on a summary assessment of clients' positions?*

No, a mechanism providing for provisional partial compensation based on a summary assessment of clients' positions should not be introduced. Again, these issue need to be coordinated with national insolvency law, that each Member States should define autonomously.

*9c) Irrespective of the harmonisation of their funding systems, should compensation schemes ensure that they have minimum reserve funds in order to comply rapidly with any immediate needs?*

No, irrespective of the harmonisation of funding systems, compensation schemes should not ensure that they have minimum reserve funds in order to comply rapidly with any immediate needs. Also this question involves measures (e.g. insolvency law) that should be regulated at national level.

## **II. Other issues to be discussed: money market funds**

*10) Do you think special attention should be given to money market funds?*

No, there is no need to give particular attention to money market funds. Investor compensation scheme does not - and should not - protect investor against the risk that fund investment loses value.



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*11) Based on the concrete application of the ICSD do you see further issues other than the ones mentioned in the present document that might be of relevance to this analysis?*

No, based on the concrete application of the Directive, Assoreti does not see further issues other than the ones mentioned in the present document that might be of relevance to this analysis.

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Thank you in advance for your kind attention on the above-mentioned considerations.

Yours sincerely,

Marco Tofanelli