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**Response from the Professional Association of Financial Service Provider in Austria  
to  
Directive 1997/9/EC on Investor-Compensations Schemes  
Call for Evidence**

Dear Ladies and Gentlemen!

The Professional Association of Financial Service Providers represents all 150 investment firms in Austria. We are thankful for the opportunity given to respond to Directive 1997/9/EC on Investor-Compensations Schemes (ICSD).

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

Yes, for the following two main reasons:

Experience with the stock exchange has shown that there is no reason for an investor compensation scheme for multilateral trading facilities. Until now no failure form multilateral trading facilities has been recorded

Second, multilateral trading facilities do not necessarily include holding of clients assets. In fact the description of multilateral trading facilities reads as:

*"Multilateral trading facility (MTF)" means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments - in the system and in accordance with non-discretionary rules - in a way that results in a contract in accordance with the provisions of Title II;*

We cannot think of any reasonable concept were a multilateral trading facility could not return clients money. Therefore we feel there is no need to include multilateral trading facilities in the Scope of the ICSD.

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

No, any existing investor compensation scheme is limited to risks pertaining to that economic sector. Anyone who is allowed to hold client's assets or money bears the special risk that they cannot return clients assets or money. This special risk calls for an investor compensation scheme. It is necessary to ensure clients trust in certain services (i.e. holding clients assets or money). As shown through the current world economic crisis trust is vitally important to the financial market. Clients need to be able to trust institutions who are allowed to hold their assets or money. Institutions who are not allowed to hold clients money do not bear this trust. In fact anyone who is not allowed to hold clients money poses the same risk for the client (not only investment firms bear this risk but all companies). Therefore it is irrelevant if a company without authority or a company with the right to provide financial services but no right to hold clients money cannot return clients assets or money. This is especially true for countries in the European Union where only credit institutions are allowed to hold clients money or assets (as it is in Austria).

We agree that the existence of an authorization to hold clients money might justify the coverage under the directive. But there are two major limits to this argumentation.

**First:** Some countries in the European Union choose, that the option to hold clients money is limited to credit institutions. In those countries (Austria is one example), no one expects investment firms to hold money. Therefore this argument is irrelevant for those countries. In the name of a balanced internal market it is vitally important to ensure fair principles and a level playing field. As long as national countries are allowed to limit the service of holding clients money or assets to credit institutions there must be a possibility to exclude investment firms from the ICSD. This ensures that every member state has the possibility to transact this directive within the limits of the directive but without off-balancing in regard of a level playing field between investment firms in the European Union.

As most investment firms are smaller businesses than credit institutions this measure leads to another off-balance situation between large businesses and small businesses and would therefore lead to a breach against the Small Business Act.

**Second:** An investor compensation scheme is the biggest direct intervention in the rights of investment firms obliged to financially support the investor compensation scheme. Paying for the fraud of failure of any other market entrant needs clear justification. This justification is put in question if there is another effective solution as for example disclosure that the company may not hold clients assets or money. Even though the directive does not explicitly regulate that other market participants must finance the investor compensation scheme we know of no scheme that does not do so.

**Our Recommendation:**

- 1) Investment firms without the authorization for holding clients assets need not to comply with the ICSD. This needs to be clearly stated in the directive.

- 2) Any investment firm without authorization for holding clients assets needs to disclose this fact before any contract is made with the client.

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

**No**, if the investment firm did not mislead the client's money or assets the investor compensation scheme should not apply. Claims should only be legal, if the investment firm itself deposited the money. Any other regulation leads to an excessive liability of this compensation scheme.

If the third party has its own compensation scheme this should be made liable. If the third party has no compensation scheme but holds clients money new compensation schemes for that third parties should be considered. If the third party holds clients money illegally then liable is whoever is responsible for depositing money there. An investor compensation scheme should not be made liable in such a case.

We therefore recommend forming a compensation scheme for OGAW. The Case "Amis" in Austria has shown that OGAW contain major risks for retail investors.

Conclusion: Investment firms and the compensation scheme should not be held accountable for risks fulfilled by other firms.

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

**No**, this is totally impossible. This kind of event clearly is beyond the current scope of the ICSD. Enhancing the scope of the ICSD in this direction would off-balance not only the ICSD but also MiFID. As written above an investor compensation scheme is the biggest direct intervention in the rights of the contributing investment firms possible. There is no justification for an investor compensation scheme to include coverage of violations of conduct of business rules. If some countries enhance the scope of the ICSD because of some national needs they are free to do so.

**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 funding system should not be harmonized, but some general principles would be helpful. We experienced difficulties in the translation of the ICSD in terms of funding. ICSD recommends that the funding should be done by the investment firms. What if the investment firms could not afford to pay the claims? Until this month the national law in Austria would have lead all investment firms to bankruptcy.

We therefore recommend that investment firms may not be endangered because of payment to the compensation scheme. To accomplish this goal the ICSD should provide a limit to compensation.

**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?**

In Austria are no limits to the compensation scheme. Until now no client in Austria saw his/her compensation unpaid as a result of such mechanisms.

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

No, in our opinion mechanisms to limit compensation schemes because of special circumstances should not be forbidden. As the financial crisis has shown, anything can happen. What if the investment firms or any other funding institutions cannot afford to pay? This may happen if, there are too many companies unable to pay back clients money at the same time or one company's liabilities to clients after ICSD are too expensive for the compensation scheme to remunerate. In such a situation the financial system should be protected from dissolving.

Conclusion: Even though we would not recommend unpaid compensation on regular basis it should not be forbidden in special situations.

**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?**

As written above a compensation scheme for OGAW should be evaluated.

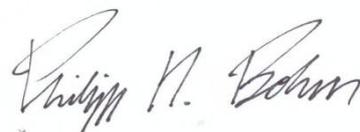
If there are any questions or statements to this response to directive 1997/9/EC please feel free to contact us.

WITH BEST REGARDS

PROFESSIONAL ASSOCIATION OF FINANCIAL SERVICE PROVIDER IN AUSTRIA



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