

**ABI's response to the European  
Commission's call for evidence  
on the review of Investor  
Compensation Scheme Directive  
97/9/EC**

8 April 2009

## Introduction

The Italian Banking Association is pleased to have the opportunity to contribute to the European Commission's consultation aimed at collecting information from market participants and other stakeholders with respect to the application of the Investor Compensation Scheme Directive (ICSD), no. 1997/9/EC, 10 years after it came into force.

## Observations on the consultation paper

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

**Question no. 1).** *Should the operation of multilateral trading facilities be excluded from the scope of the ICSD?*

Yes, we agree with the fact that MTFs should not fall within the scope of the Directive, since this activity itself does not entail undertaking those risks against which the Fund guarantees investors; this is because the operation of MTFs does not result in direct relationships with investors requiring the firm to hold customers' financial instruments and from which restitution claims may arise which are protected by the compensation scheme.

**Question no. 2).** *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, including investment firms authorized to provide investment services whose authorization does not allow holding customers' funds within the scope of the Directive is not deemed appropriate; therefore, should these firms become insolvent, the compensation scheme should not apply. On the other hand, firms authorized to provide investment services whose authorization allows holding customers' funds should participate in the Fund, even if in actual fact these funds are not held by choice.

**Question no. 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, including investment firms authorized to provide investment services exclusively to professional investors within the scope of the Directive is not deemed appropriate, except in the case where these firms have also been authorized to provide services to retail customers, even if they actually only provide services to the former category of customers.

**Question no. 4a).** *Should investors be able to claim compensation in the case of default of the third party where their assets had been deposited?*

No, because compensation schemes should, in accordance with the principle of mutual recognition, be operational only with respect to their member firms, i.e. in favor of those investors who have a right to claim restitution directly from firms that are members of the compensation scheme. Consequently, coverage should not be provided in case of default of a third party where customer assets were deposited. Nonetheless, investment firms should be held liable for selecting the third party to which they transfer customer assets; therefore, investors are protected as they have standing to file suit against investment firms in cases concerning non-contractual liability.

**Question no. 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 depositary or the institution which has been mandated to safe keep the assets, fails to perform its duty?*

No; investors, whether UCITS or UCITS unit holders, should not be able to claim compensation for loss of assets under the Directive in those cases where the UCITS depositary or the institution which has been mandated to safe keep the assets fails to perform its duty. This is in light of our response to question no. 4a) and also taking into account the fact that collective asset management is not an investment service and, therefore, does not fall within the scope of the Directive.

**Question no. 5).** *Should loss events include also any losses suffered by (retail) investors as a consequence of the violation of conduct of business rules?*

No, the regulatory framework concerning deposit guarantee schemes is aimed at protecting customers against losses resulting from the intermediary's insolvency or bankruptcy. Envisaging that investors should receive compensation for losses resulting from the violation of rules of conduct would result in an improper compensation scheme. In fact, the compensation scheme should be operational exclusively on the basis of restitution claims resulting from the legitimate provision of authorized investment services.

## **2. The amount of compensation (Article 4 of the ICSD)**

**Question no. 6).** *Do you agree with the idea that the amount covered by the ICSD should be adapted following the updating of the DGSD?*

No, because we believe that the different level of protection provided by the ICSD and the DGSD is justified. It must be noted that the amounts deposited in current accounts automatically become available to the bank to

disburse loans, while financial instruments held by intermediaries are kept separate from the assets of the investment firm that safe keeps them and from those of other customers and may therefore be used by the firm exclusively provided that the investor gives his/her express consent. Therefore, in our opinion, this justifies the fact that the minimum amount covered by the ICSD is lower than that covered by the DGSD.

Moreover, in Italy the amount currently covered (which is 20,000 euros) has proven to be an adequate level of protection over the past ten years of operation of the "Fondo Nazionale di Garanzia" (FNG).

The fact that, although the banking system has contributed to almost all interventions, to date the Fund has intervened only in cases concerning bankruptcy of non-banking securities firms and stock brokers should be taken into account. Moreover, the minimum amount currently covered has enabled the Fund to cover all requests for intervention.

### **3. Funding of the investor compensation schemes (Recital 23 of the ICSD)**

**Question no. 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, harmonization of funding mechanisms is deemed inappropriate, as different countries may require different features in their compensation schemes. In Italy, for example, ex-post funding has guaranteed the FNG's proper functioning, by reconciling the need for timely interventions with the need not to overly burden member firms if not absolutely necessary at that moment.

### **4. The restrictions on the carryover of unpaid reimbursement debts**

**Question no. 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 mechanism?*

No, the Italian legislation does not envisage any measures aimed at limiting compensation schemes' obligations over time.

**Question no. 8b).** *Should this kind of mechanism be prohibited?*

Yes, these measures should be prohibited, because this would eliminate a factor potentially able to change the level playing field resulting from Member States' different legislations.

### **5. The reduction of payout delay (Article 9 (2) of the ICSD)**

**Question no. 9a).** *Should the process of recognizing the eligibility of the claim be regulated for the purposes of the ICSD?*

**Question no. 9b).** *Should, at least, a mechanism be introduced providing for provisional partial compensation based on a summary assessment of clients' positions?*

**Question no. 9c).** *Irrespective of the harmonization of their funding systems, should compensation schemes ensure that they have minimum reserve funds in order to comply rapidly with any immediate needs?*

No, because such provisions would have implications, also in terms of procedural law, on which, in our opinion, Member States should be able to make an autonomous decision; moreover, we believe that the lack of harmonization does not impact the existing level playing field among the different Member States' investment firms.

## **6. Investment risk**

**Question no. 10).** *Do you think special attention should be given to money market funds?*

No, because the Fund must not intervene in any way to cover mere losses of value of the financial instruments hold by investors.

## **7. Other issues**

**Question no. 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, there are no other issues to report.