

Milan, 08 April 2009  
Prot. 33/09

European Commission  
Directorate General  
Internal Market and Services  
Unit G3 - Securities Markets  
Brussels - Belgium

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

ASSOSIM<sup>1</sup> is grateful for the opportunity to express its views on the consultation hereof and appreciates the work that the European Commission is carrying out to set the ground for convergent implementation and application of the Investor-Compensation Schemes Directive (hereinafter, ‘**ICSD**’).

**Preliminary remarks**

Under Article 2, paragraph 2, of the ICSD Investor-Compensation Schemes have nature of restitutory remedies.<sup>2</sup> Accordingly, the participation in a compensation scheme should be restricted to firms the insolvency of which may require a restitutory remedy.

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<sup>1</sup> ASSOSIM (*Associazione Italiana Intermediari Mobiliari*) is the Italian Association of Financial Intermediaries, which represents the majority of financial intermediaries acting in the Italian Markets. ASSOSIM has nearly 80 members represented by banks, investment firms, branches of foreign brokerage houses, active in the Investment Services Industry, mostly in primary and secondary markets of equities, bonds and derivatives, for some 82% of the total trading volume.

<sup>2</sup> As a matter of fact, Article 2, paragraph 2, of ICSD stipulates that “A scheme shall provide cover for investors in accordance with Article 4 where either:

- the competent authorities have determined that in their view an investment firm appears, for the time being, for reasons directly related to its financial circumstances, to be unable to meet its obligations arising out of investors' claims and has no early prospect of being able to do so [...]

Cover shall be provided for claims arising out of an investment firm's inability to:

- repay money owed to or belonging to investors and held on their behalf in connection with investment business or

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Moreover, we strongly support a high level harmonization of the relevant provisions at EU level for reasons of both the protection of investors who are provided services on a cross-border services and leveling the playing field for participating entities.

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

YES, the operation of multilateral trading facilities should be excluded from the scope of ICSD for the following reasons:

- a) Retail investors cannot be members of an MTF. No right to compensation can thus arise;
- b) The operation of an MTF does not entail, per se, the holding of any asset belonging to a market operator; and
- c) Article 5, paragraph 2, of Directive 39/2004/EC (hereinafter ‘MiFID’) states that, in the case of MTFs operated by market operators, the membership to a investor compensation scheme is not required.

## **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, we do not reckon as appropriate to include in the scope of the ICSD all investment firms which do not hold clients’ assets. Indeed, should the firm be lacking the legal capacity to hold clients’ assets, no investor’s right to restitution would arise. On the contrary, where a firm does not hold any assets but has the legal capacity to do so, it should be required to join an investor compensation scheme.

## **No. 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 they provide their services only to non-retail clients?**

NO. Indeed, as at present there is no statutory limitation as to the nature of clients to whom an investment firm can offer its services.

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

No. However due to the fact that investment firms other than credit institution are normally required under national provisions to sub-deposit with a credit institution the funds belonging to its clients, we invite the Commission to consider the possibility of

- 
- *return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business, in accordance with the legal and contractual conditions applicable”.*

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amending the Deposit Guarantee Schemes Directive (94/19/EC) so as to include within its scope such funds. In particular, we believe it should be made clear that in the event of default of a credit institution, the Deposit Guarantee Schemes Directive should provide protection to the funds deposited by authorized intermediaries on behalf of their respective clients.

Moreover, the Deposit Guarantee Schemes Directive should also take into account that as a matter of practice such funds are generally deposited within omnibus accounts opened at the intermediary's name. Accordingly, the amount of the compensation to be paid by the Scheme should be related to the number of clients on whose behalf the intermediary has deposited the funds. More to the point, the maximum amount of funds to be compensated by the fund should be multiplied by the actual number of those clients.

**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, fail to perform its duty?**

NO, this issue has to be discussed as an amendment to the DGSD. (Please note answer 4a).

**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, as we stated in our preliminary remarks, the Investor-Compensation Schemes are to be considered restitutory in nature rather than compensatory.

**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.

**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, we believe that harmonization is essential for the effectiveness of scheme management, but not for the funding systems of the schemes. Indeed, the latter can vary in presence of other mechanisms of investors' protection which differ among Member States.

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**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 mechanisms?**

NO, the Italian legislation does not provide for any mechanism aimed at limiting compensation schemes' obligations over time. In this regard, we would like to suggest that Member States adopt similar regime in order to ensure an effective investor protection and a level playing field.

**No. 8b) Should this kind of mechanisms be prohibited?**

YES.

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

In order to properly answer to question no. 9a, it would be better to conduct a comparative survey among the regimes in force within the Member States.

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

NO, because should the summary assessment not be confirmed, the investor might be required to return the partial compensation meanwhile received. And where an investor does not spontaneously comply with such a request, the Compensation scheme will need to proceed against him/her.

**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. We believe that loss sharing agreements work more efficiently.

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

NO, we believe that it would be more appropriate to tackle the issues raised by such funds together with the measures to be considered to address the present financial turmoil, as it was the case in the USA.

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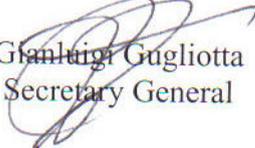
**No. 11) Based on the concrete application of the ICSD do you see further issues other than the ones mentioned in the present document that might be of relevance to this analysis?**

NO, we do not intend to submit any further issues other than the ones mentioned hereof.

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We remain at your disposal for any further information and clarification.

Yours sincerely,

  
Gianluigi Gugliotta  
Secretary General