



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Legal Affairs

2010/0199(COD)

23.3.2011

OPINION

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council amending Directive 97/9/EC of the European Parliament and of the Council on investor-compensation schemes
(COM(2010)0371 – C7-0174/2010 – 2010/0199(COD))

Rapporteur: Sebastian Valentin Bodu

PA_Legam

SHORT JUSTIFICATION

Directive 97/9/EC on Investor-Compensation Schemes (ICSD) was adopted in 1997 to complement the Investment Services Directive (the last one was replaced later by the Markets in Financial Instruments Directive (MiFID)).

Ten years after the ICSD entered into force, and immediately after the financial crisis, it is the right time to review the functioning of the ICSD.

The review of this directive is a consequence of the fact that numerous complaints from investors about its application were submitted to the Commission, sometimes involving large losses suffered by them. Also, this review considers the objective set at G-20 level of addressing any loopholes in the regulatory and supervisory system and the objective of restoring investor confidence in the financial system.

The objectives of the proposal cannot be sufficiently fulfilled by the Member States. The current EU framework only provides for some minimum harmonisation principles leaving it up to Member States to develop it further. However, problems encountered in some Member States demonstrate that additional and notably more extensive harmonisation at EU level is necessary in order to ensure that the objectives of the Directive are fulfilled within the EU.

The proposal aims at improving the proper functioning of a single market for investment services, increasing investor protection and investor confidence in the EU. In particular, it aims at improving the practical functioning of the ICSD, at clarifying the scope of the ICSD taking into account the financial crisis and recent changes in the EU regulatory landscape, at reducing gaps in the regulatory system and disparities between the protection of clients of the brokerage firms and of banking depositors. In the light of the existing differences in the functioning of the schemes at national level, the proposal introduces common rules to ensure a degree of harmonisation in the funding of the schemes and in the day-to-day practice; this is also the basis for the provision of a borrowing mechanism among national schemes as a last resort tool to compensate any temporary needs from schemes, subject to a rigorous assessment carried out by the European Securities and Markets Authority and to the obligation to repay any loan within the maximum period of five years.

The proposal respects the principle of proportionality as all solutions have been assessed against its cost-efficiency and they respect the particularities of markets in Member States. The proposal does not go beyond what it is necessary to achieve the objectives pursued, in particular, it keeps minimum harmonisation principles where pertinent, for instance concerning the modalities according to which the members of the compensation schemes have to contribute to the scheme. The introduction of a borrowing system between the national schemes is consistent with the proportionality principle in that it does not impinge any fiscal responsibility of Member States, it is a last resort measure subject to the previous use of other funding mechanisms (ordinary and additional contributions from members), it only introduces a lending possibility subject to the payment of interests and to a repayment obligation from the borrowing scheme and it is limited in time and size.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment **1**

Proposal for a directive – amending act

Article 1 – point 1 – point a

Directive 97/9/EC

Article 1 – point 2

Text proposed by the Commission

2. 'investment business' shall mean investment services and activities as defined in Article 4(1)(2) of Directive 2004/39/EC and the ancillary service referred to in point 1 of Section B of the Annex I to Directive 2004/39/EC of the European Parliament and of the Council;

Amendment

2. 'investment business' shall mean **any of *the*** investment services and activities as defined in Article 4(1)(2) of Directive 2004/39/EC and the ancillary service referred to in point 1 of Section B of the Annex I to Directive 2004/39/EC of the European Parliament and of the Council;

Amendment 2

Proposal for a directive – amending act

Article 1 – point 1 – point a a (new)

Directive 97/9/EC

Article 1 – point 3

Text proposed by the Commission

Amendment

(aa) Point 3 is replaced by the following:

"3. 'instruments' shall mean the instruments listed in Section C of Annex I to Directive 2004/39/EC;"

Justification

The definition of the instruments should also be updated in accordance with MiFID.

Amendment 3

Proposal for a directive – amending act

Article 1 – point 2 – point b

Directive 97/9/EC

Article 2 – paragraph 2 – point b

Text proposed by the Commission

(b) a judicial authority has made a ruling, for reasons directly related to the financial circumstances of the investment firm or the financial circumstances of any third party with whom financial instruments have been deposited by the investment firm, which has the effect of suspending investors' ability to make claims against the firm or the firm's ability to make claims against the third party.

Amendment

(b) a judicial authority has made a ruling ***which is enforceable, in accordance with the Member State's legislation***, for reasons directly related to the financial circumstances of the investment firm or the financial circumstances of any third party with whom financial instruments have been deposited by the investment firm, which has the effect of suspending investors' ability to make claims against the firm or the firm's ability to make claims against the third party.

Justification

A court decision could, also, be subject to appeals or simply enforceable. This provision should refer only to enforceable ones.

Amendment 4

Proposal for a directive – amending act

Article 1 – point 4 – point d

Directive 97/9/EC

Article 4 – paragraph 4

Text proposed by the Commission

(d) Paragraph 4 is ***deleted***.

Amendment

(d) Paragraph 4 is ***replaced by the following***:

"4. A Member State may limit the cover provided for in *this Directive* to a specified percentage of an investor's claim. The percentage covered *shall*, however, be equal to or exceed 80 % of the claim as long as the amount to be paid under the *compensation* scheme is lower than *that provided for in this*

Directive."

Justification

Considering that funding the compensation scheme is made out of the members contributions, which pose a serious financial burden on them, it is equitable that part of the potential loss to be borne also by the investors (as in good insurance). 20% should be a fair percentage.

Amendment 5

Proposal for a directive – amending act

Article 1 – point 5

Directive 97/9/EC

Article 4 b – paragraph 1 – point b

Text proposed by the Commission

(b) the situation referred to in point (a) of this subparagraph is due to **a lack** of funds as referred to in Article 4a(3);

Amendment

(b) the situation referred to in point (a) of this subparagraph is due to **the fact that the target level** of funds as referred to in Article 4a(3) **has not been reached**;

Justification

For a better clarification.

Amendment 6

Proposal for a directive – amending act

Article 1 – point 5

Directive 97/9/EC

Article 4 b – paragraph 3 – subparagraph 2

Text proposed by the Commission

ESMA shall transmit its confirmation together with the information referred to in paragraph (g) to the lending Schemes. They shall receive this confirmation and information within 15 working days. The lending schemes shall, without delay but at the latest within further **15 working days** after reception effect payment of the loan to the borrowing scheme.

Amendment

ESMA shall transmit its confirmation together with the information referred to in paragraph (g) to the lending Schemes. They shall receive this confirmation and information within 15 working days. The lending schemes shall, without delay but at the latest within further **30 working days** after reception effect payment of the loan to the borrowing scheme.

Justification

30 days is more realistic term.

Amendment 7

Proposal for a directive – amending act

Article 1 – point 5

Directive 97/9/EC

Article 4 b – paragraph 4 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

All other claims shall be subordinate to that of the compensation scheme which granted the loan. The scheme shall be considered to be a privileged creditor and shall have first rank of preference.

Justification

Because a loan from another compensation scheme is a measure of last resort and an exceptional one, and because this compensation scheme is a foreign party, this loan should be repaid first.

Amendment 8

Proposal for a directive – amending act

Article 1 – point 5

Directive 97/9/EC

Article 4 b – paragraph 4 – subparagraph 1 b (new)

Text proposed by the Commission

Amendment

Without prejudice to the second subparagraph, Member States may establish other priorities in preference between different categories of creditors.

Justification

See the justification to AM 7.

Amendment 9

Proposal for a directive – amending act

Article 1 – point 5

Directive 97/9/EC

Article 4 b – paragraph 5 – subparagraph 1

Text proposed by the Commission

5. In order to facilitate an effective cooperation between investor-compensation schemes, the schemes, or, where appropriate, the competent authorities, shall **have** written cooperation agreements **in place**. Such agreements shall take into account the requirements set out in Directive 95/46/EC of the European Parliament and of the Council.

Amendment

5. In order to facilitate an effective cooperation between investor-compensation schemes, the schemes, or, where appropriate, the competent authorities, shall **conclude** written cooperation agreements. Such agreements shall take into account the requirements set out in Directive 95/46/EC of the European Parliament and of the Council **of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data**.

Justification

It should be clear that the cooperation agreements between the schemes are mandatory and not optional.

Amendment 10

Proposal for a directive – amending act

Article 1 – point 6

Directive 97/9/EC

Article 5 – paragraph 2

Text proposed by the Commission

2. If the measures referred to in paragraph 1 fail to secure compliance on the part of the investment firm, UCITS, depositary or third party, the scheme may, with the express consent of the competent authorities, give not less than **12 months'** notice of its intention of excluding the investment firm, UCITS, depositary or third party from membership of the scheme. The scheme shall continue to

Amendment

2. If the measures referred to in paragraph 1 fail to secure compliance on the part of the investment firm, UCITS, depositary or third party, the scheme may, with the express consent of the competent authorities, give not less than **six months'** notice of its intention of excluding the investment firm, UCITS, depositary or third party from membership of the scheme. The scheme shall continue to

provide the coverage referred to in Article 2(2a) and (2c) in respect of investment business or UCITS activities carried on during that period. If, on expiry of the period of notice, the investment firm, UCITS, depositary or third party has not met its obligations, the compensation scheme may, again having obtained the express consent of the competent authorities, exclude it.

provide the coverage referred to in Article 2(2a) and (2c) in respect of investment business or UCITS activities carried on during that period. If, on expiry of the period of notice, the investment firm, UCITS, depositary or third party has not met its obligations, the compensation scheme may, again having obtained the express consent of the competent authorities, exclude it.

Justification

6 months is a more appropriate term for this extreme situation.

Amendment 11

Proposal for a directive – amending act

Article 1 – point 7

Directive 97/9/EC

Article 8 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

In the absence of special provisions, claims shall be divided equally amongst investors.

deleted

Amendment 12

Proposal for a directive – amending act

Article 1 – point 7

Directive 97/9/EC

Article 8 – paragraph 2 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

In the event that an investor's claim cannot be fully covered, that investor shall benefit from the same rate of coverage for the aggregate claim.

Justification

The pro-rata principle should be written in an unequivocal way.

Amendment 13

Proposal for a directive – amending act

Article 1 – point 7

Directive 97/9/EC

Article 8 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Where an investor is not entitled to the sums or *securities* held, the person who is entitled shall receive the compensation, provided that that person has been or can be identified before the date of the determination or ruling referred to in Article 2(2) and (2b).

Amendment

Where an investor is not entitled to the sums or *instruments* held, the person who is entitled shall receive the compensation, provided that that person has been or can be identified before the date of the determination or ruling referred to in Article 2(2) and (2b).

Amendment 14

Proposal for a directive – amending act

Article 1 – point 7

Directive 97/9/EC

Article 9 – paragraph 1 – subparagraph 2

Text proposed by the Commission

The fact that that period has expired may not be invoked by the scheme to deny coverage to an investor who has been unable to assert his right to compensation in time.

Amendment

The fact that that period has expired may not be invoked by the scheme to deny coverage to an investor who has been unable to assert his right to compensation in time, *save in the situation of negligence on the part of the investor.*

Amendment 15

Proposal for a directive – amending act

Article 1 – point 7

Directive 97/9/EC

Article 9 – paragraph 1 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

Investment firms and UCITS shall disclose on their websites, or make available in writing, all information concerning the terms and conditions

regarding access to the compensation scheme and the procedure for obtaining payment thereunder.

Amendment 16

Proposal for a directive – amending act

Article 1 – point 7

Directive 97/9/EC

Article 9 – paragraph 3

Text proposed by the Commission

3. Notwithstanding the time limit laid down in the first subparagraph of paragraph 2, where an investor or any other person entitled to or having an interest in investment business has been charged with an offence arising out of or in relation to money laundering as defined in Article 1 of Directive 2005/60/EC or is the subject of action for contravention of Directive 2003/6/EC, the compensation scheme may suspend any payment pending the judgment of the court or determination of a competent authority.

Amendment

3. Notwithstanding the time limit laid down in the first subparagraph of paragraph 2, where an investor or any other person entitled to or having an interest in investment business has been charged with an offence arising out of or in relation to money laundering as defined in Article 1 of Directive 2005/60/EC *in relation to money that is the subject of this Directive*, or is the subject of action for contravention of Directive 2003/6/EC, the compensation scheme may suspend any payment pending the judgment of the court or determination of a competent authority.

Justification

It is clearly stated that not any compensation is rejected but that compensation that is subject to the money laundry.

Amendment 17

Proposal for a directive – amending act

Article 1 – point 9

Directive 97/9/EC

Article 12 – paragraph 1

Text proposed by the Commission

1. Without prejudice to any other rights which they may have under national law, schemes which make payments in order to compensate investors shall have the right

Amendment

1. Without prejudice to any other rights which they may have under national law, schemes which make payments in order to compensate investors shall have the right

of subrogation to the rights of those *investors* in liquidation proceedings for amounts equal to their payments.

of subrogation to the rights of those in liquidation proceedings for amounts equal to their payments.

Justification

Those being in the liquidation procedure are the investment firms, the depositary or the third party, and not the investors.

Amendment 18

**Proposal for a directive – amending act
Article 2 – paragraph 2 a (new)**

Text proposed by the Commission

Amendment

2a. By derogation from paragraphs 1 and 2, Member States that benefit under the Accession Treaties from transitional periods regarding the transposition of Article 4 of Directive 97/9/EC shall comply with paragraphs 1 and 2 from the date when their respective transitional periods expire.

Justification

It is necessary that the amendments to this directive to consider the situation of the Member States which benefit of transitional periods, due to the fact that such periods are mentioned in the Accession Treaties.

PROCEDURE

Title	Amendment of Directive 97/9/EC of the European Parliament and of the Council on investor-compensation schemes
References	COM(2010)0371 – C7-0174/2010 – 2010/0199(COD)
Committee responsible	ECON
Opinion by Date announced in plenary	JURI 7.9.2010
Rapporteur Date appointed	Sebastian Valentin Bodu 27.10.2010
Discussed in committee	2.12.2010 27.1.2011
Date adopted	22.3.2011
Result of final vote	+: 12 -: 10 0: 0
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Jiří Maštálka, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Dimitar Stoyanov, Alexandra Thein, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Jan Philipp Albrecht, Luis de Grandes Pascual, Sajjad Karim, Kurt Lechner, Eva Lichtenberger, Angelika Niebler