

Brussels, 15.04.2011
C/2011/2671

Dear President,

In reference to the Opinion of the Italian Senate concerning the Commission's proposal on investor compensation schemes (ICSD) – {COM(2010) 371}, the Commission would like to thank the Italian Senate for its support for the general objectives of the proposal to strengthen investor protection and ensure that schemes have a greater capacity to intervene.

The Commission considers that the proposal takes into account and complies with the subsidiarity principle. As set out in paragraph 4.2 of the explanatory memorandum accompanying the Commission's proposal, and as recognised in the Opinion of the Italian Senate, there is a need to introduce common rules to ensure a degree of harmonisation in the functioning of the schemes and their funding.

The main observations of the Italian Senate concern the scope of the proposal [coverage of firms providing all investment services and activities and UCITS (Undertakings for Collective Investment in Transferable Securities)], the funding system of the schemes and the borrowing system among national compensation schemes.

The Senate would consider it appropriate to exclude from coverage investment firms that only provide investment advice or operate multilateral trading facilities, since these do not hold funds from investors. However, and as expressed in the proposal (paragraph 4.3.1 of the explanatory memorandum and recital 5), the Commission considers that all investment services and activities should be subject to the ICSD. Investors may not be aware of technical limitations in investment firms' authorisations and should be able to trust all authorised and supervised investment firms. If an investment firm holds de facto client assets (irrespective of restrictions following from its authorisation or the nature of the investment services provided), clients should be covered by the ICSD.

The Senate also raises some questions concerning the protection of investors in UCITS. As far as this important matter is concerned, the Commission's proposal provides for protection of UCITS unit holders when losses are suffered due to the failure of a UCITS depositary or sub-custodian (i.e. where the assets held by the UCITS depositary or sub-depositary cannot be returned to the UCITS fund as a result of fraud, administrative malpractice or operational errors). The Commission's proposal acknowledges that the current regulatory framework for UCITS already includes measures aimed at ensuring an adequate level of investor protection (cf. Recital 10). This is also the case for investment services, where the sectoral legislation (Directive 2004/39/EC) includes

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conduct of business and organisational requirements aiming at the protection of clients. Consequently, the Commission considers that, similarly to investment services, protection of investors under the ICSD should include the case in which a UCITS depositary or one of its sub-custodians defaults and is unable to return the financial instruments held in custody.

Moreover, the Senate refers to the funding system of the schemes as envisaged in the proposal, and notably to the target fund level to be reached by the schemes. It considers that the funding system is inspired by the Commission's proposal relating to Deposit Guarantee Schemes, without taking into account the differences between the two systems. I would like to emphasise that the explanatory memorandum recognises the different underlying objectives of the ICSD and the Deposit Guarantee Schemes Directive and explicitly states that the proposal preserves the specificities of the relevant sectoral legislation (paragraph 4.2 of the explanatory memorandum). Concerning the target fund level, the Deposit Guarantee Schemes would be required to have 1.5% of eligible deposits covered, whereas the level in the ICSD proposal has been set at 0.5% of covered assets.

Finally, the Senate questions the proposed borrowing system among national compensation schemes. This borrowing mechanism has been introduced as a last resort tool, to be used in case everything else has failed and without prejudging the responsibilities and liabilities of the different parties involved, as also explained in Recital 17.

In the proposal, mutual borrowing is subject to the following rigorous conditions:

- compensation schemes have to collect their contributions, on an ex-ante basis, from market participants. When in concrete cases the funds collected ex-ante are not sufficient to cover the liabilities of a scheme, additional calls for contributions from entities covered under the scheme should be ensured. Only if these funding sources have been exhausted, may the scheme have recourse to borrowing from other compensation schemes;*
- on the side of the lending schemes, only a fraction of the ex-ante funding collected from market participants in each compensation scheme has to be available for lending to the others (10%¹);*
- loans should be repaid to the lending schemes at the latest 5 years after the request, and interest should accrue on the loans²;*
- in order to avoid that the funds available for lending at EU level are rapidly exhausted, a limit of 20% of the part set aside for lending may be used for each case³.*

Furthermore, where schemes have made payments to investors, they have the right of subrogation, for amounts equal to their payments, to the rights of those investors in liquidation proceedings⁴.

¹ Article 4a(8).

² Article 4b(2)(b)

³ Article 4b(2), last sub-paragraph.

⁴ Article 12

The proposal is now under negotiation in the ordinary legislative procedure in the European Parliament and the Council.

The European Commission thanks the Italian Senate for its contribution and constructive approach to this issue and hopes that these explanations satisfy its expectations as expressed in the above mentioned Opinion.

Yours faithfully,

/-/ Maroš Šefčovič