DIRECTIVE 97/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 3 March 1997

on investor-compensation schemes

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 57 (2) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Having regard to the opinion of the European Monetary Institute (3),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (4) in the light of the joint text approved by the Conciliation Committee on 18 December 1996,

(1) Whereas on 10 May 1993 the Council adopted Directive 93/22/EEC on investment services in the securities field (5); whereas that Directive is an essential instrument for the achievement of the internal market for investment firms;

(2) Whereas Directive 93/22/EEC lays down prudential rules which investment firms must observe at all times, including rules the purpose of which is to protect as far as possible investor's rights in respect of money or instruments belonging to them;

(3) Whereas, however, no system of supervision can provide complete protection, particularly where acts of fraud are committed;

(4) Whereas the protection of investors and the maintenance of confidence in the financial system are an important aspect of the completion and proper functioning of the internal market in this area; whereas to that end it is therefore essential that each Member State should have an investor-compensation scheme that guarantees a harmonized minimum level of protection at least for the small investor in the event of an investment firm being unable to meet its obligations to its investor clients;

(5) Whereas small investors will therefore be able to purchase investment services from branches of Community investment firms or on the basis of the cross-border provision of services as confidently as from domestic investment firms, in the knowledge that a harmonized minimum level of protection would be available to them in the event of an investment firm being unable to meet its obligations to its investor clients;

(6) Whereas, in the absence of such minimum harmonization, a host Member State might consider itself justified, by considerations of investor protection, in requiring membership of its compensation scheme when a Community investment firm operating through a branch or under the freedom to provide services either belonged to no investor-compensation scheme in its home Member State or belonged to a scheme which was not regarded as offering equivalent protection; whereas such a requirement might prejudice the operation of the internal market;

(7) Whereas although most Member States currently have some investor-compensation arrangements those arrangements do not in general cover all investment firms that hold the single authorization provided for in Directive 93/22/EEC;

(8) Whereas, therefore, every Member State should be required to have an investor-compensation scheme or schemes to which every such investment firm would belong; whereas each scheme must cover money and instruments held by an investment firm in connection with an investor's investment operations which, where an investment firm is unable to meet its obligations to its investor clients, cannot be returned to the investor; whereas this is entirely without prejudice to the rules and procedures applicable in each Member State as regards the decisions to be taken in the event of the insolvency or winding-up of an investment firm;

(9) Whereas the definition of investment firm includes credit institutions which are authorized to provide investment services; whereas every such credit institution must also be required to belong to an investor-compensation scheme to cover its investment

(1) OJ No C 321, 27. 11. 1993, p. 15 and OJ No C 382, 31. 12. 1994, p. 27.
(2) OJ No C 127, 7. 5. 1994, p. 1.
(3) Opinion delivered on 28 July 1995.
(4) European Parliament opinion of 19 April 1994 (OJ No C 128, 9. 5. 1994, p. 85), Council common position of 23 October 1995 (OJ No C 320, 30. 11. 1995, p. 9) and European Parliament Decision of 12 March 1996 (OJ No C 96, 1. 4. 1996, p. 28). Decision of the Council of 17 February 1997 and Decision of the European Parliament of 19 February 1997 (OJ No C 85, 17. 3. 1997).
(5) OJ No L 141, 11. 6. 1993, p. 27.

business; whereas, however, it is not necessary to require such a credit institution to belong to two separate schemes where a single scheme meets the requirements both of this Directive and of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (1); whereas, however, in the case of investment firms which are credit institutions it may in certain cases be difficult to distinguish between deposits covered by Directive 94/19/EC and money held in connection with investment business; whereas Member States should be allowed to determine which Directive shall apply to such claims;

(10) Whereas Directive 94/19/EC allows a Member State to exempt a credit institution from the obligation to belong to a deposit-guarantee scheme where that credit institution belongs to a system which protects the credit institution itself and, in particular, ensures its solvency; whereas, where a credit institution belonging to such a system is also an investment firm, a Member State should also be allowed, subject to certain conditions, to exempt it from the obligation to belong to an investor-compensation scheme;

(11) Whereas a harmonized minimum level of compensation of ECU 20 000 for each investor should be sufficient to protect the interests of the small investor where an investment firm is unable to meet its obligations to its investor clients; whereas it would therefore appear reasonable to set the harmonized minimum level of compensation at ECU 20 000; whereas, as in Directive 94/19/EC, limited transitional provisions might be required to enable compensation schemes to comply with that figure since this applies equally to Member States which, when this Directive is adopted, do not have any such scheme;

(12) Whereas the same figure was adopted in Directive 94/19/EC;

(13) Whereas in order to encourage investors to take due care in their choice of investment firms it is reasonable to allow Member States to require investors to bear a proportion of any loss; whereas, however, an investor must be covered for at least 90 % of any loss as long as the compensation paid is less than the Community minimum;

(14) Whereas certain Member States' schemes offer levels of cover higher than the harmonized minimum level of protection under this Directive; whereas, however, it does not seem desirable to require any change in those schemes in that respect;

(15) Whereas the retention in the Community of schemes providing levels of cover higher than the harmonized minimum may, within the same territory, lead to disparities in compensation and unequal conditions of competition between national investment firms and branches of firms from other Member States; whereas, in order to counteract those disadvantages, branches should be authorized to join their host countries' schemes so that they may offer their investors the same cover as is provided by the schemes of the countries in which they are located; whereas it is appropriate that, in its report on the application of this Directive, the Commission should indicate the extent to which branches have exercised that option and any difficulties which they or the investor-compensation schemes may have encountered in implementing those provisions; whereas the possibility that home Member States' schemes should themselves offer such supplementary cover, subject to the conditions such schemes may lay down, is not ruled out;

(16) Whereas market disturbances could be caused by branches of investment firms established in Member States other than their Member States of origin which offer levels of cover higher than those offered by investment firms authorized in their host Member States; whereas it is not appropriate that the level or scope of cover offered by compensation schemes should become an instrument of competition; whereas it is therefore necessary, at least during an initial period, to stipulate that neither the level nor the scope of cover offered by a home Member State's scheme to investors at branches located in another Member State should exceed the maximum level or scope offered by the corresponding scheme in the host Member State; whereas any market disturbances should be reviewed at an early date, on the basis of the experience acquired and in the light of developments in the financial sector;

(17) Whereas a Member State must be able to exclude certain categories of specifically listed investments or investors, if it does not consider that they need special protection, from the cover afforded by investor-compensation schemes;

(18) Whereas some Member States have investor-compensation schemes under the responsibility of professional organizations; whereas in other Member States there are schemes that have been set up and

(1) OJ No L 135, 31. 5. 1994, p. 5.

are regulated on a statutory basis; whereas that diversity of status poses a problem only with regard to compulsory membership of and exclusion from schemes; whereas it is therefore necessary to take steps to limit the powers of schemes in that area;

(19) Whereas the investor must be compensated without excessive delay once the validity of his claim has been established; whereas the compensation scheme itself must be able to fix a reasonable period for the presentation of claims; whereas, however, the fact that such a period has expired may not be invoked against an investor who for good reason has not been able to present his claim within the time allowed;

(20) Whereas informing investors of compensation arrangements is an essential element of investor protection; whereas Article 12 of Directive 93/22/EEC required investment firms to inform investors, before doing business with them, of the possible application of a compensation scheme; whereas, therefore, this Directive should lay down rules on informing such intending investors regarding the compensation schemes covering their investment business;

(21) Whereas, however, the unregulated use in advertising of references to the amount and scope of a compensation scheme could affect the stability of the financial system or investor confidence; whereas Member States should therefore lay down rules to limit such references;

(22) Whereas in principle this Directive requires every investment firm to join an investor-compensation scheme; whereas the Directives governing the admission of any investment firm the head office of which is in a non-member country, and in particular Directive 93/22/EEC, allow Member States to decide whether and subject to what conditions to permit branches of such investment firms to operate within their territories; whereas such branches will not enjoy the freedom to provide services under the second paragraph of Article 59 of the Treaty, or the right of establishment in Member States other than those in which they are established; whereas, accordingly, a Member State admitting such branches must decide how to apply the principles of this Directive to such branches in accordance with Article 5 of Directive 93/22/EEC and with the need to protect investors and maintain the integrity of the financial system; whereas it is essential that investors at such branches should be fully aware of the compensation arrangements applicable to them;

(23) Whereas it is not indispensable in this Directive to harmonize the ways in which investor-compensation schemes are to be financed given, on the one hand, that the cost of financing such schemes must, in principle, be borne by investment firms themselves and, on the other hand, that the financing capacities of such schemes must be in proportion to their liabilities; whereas that must not, however, jeopardize the stability of the financial system of the Member State concerned;

(24) Whereas this Directive may not result in the Member States or their competent authorities being made liable in respect of investors if they have ensured that one or more schemes for the compensation or protection of investors under the conditions prescribed in this Directive have been introduced and officially recognized;

(25) Whereas, in conclusion, a minimum degree of harmonization of investor-compensation arrangements is necessary for the completion of the internal market for investment firms since it will make it possible for investors to do business with such firms with greater confidence, especially firms from other Member States, and make it possible to avoid any difficulties caused by host Member States applying national investor-protection rules that are not coordinated at Community level; whereas a binding Community Directive is the only appropriate instrument for the achievement of the desired objective in the general absence of investor-compensation arrangements corresponding to the coverage of Directive 93/22/EEC; whereas this Directive effects only the minimum harmonization required, allows Member States to prescribe wider or higher coverage if they desire and gives Member States the necessary latitude as regards the organization and financing of investor-compensation schemes,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive:

1. 'investment firm' shall mean an investment firm as defined in Article 1 (2) of Directive 93/22/EEC

   — authorized in accordance with Article 3 of Directive 93/22/EEC,

   or

— authorized as a credit institution in accordance with Council Directive 77/780/EEC (1) and Council Directive 89/646/EEC (2), the authorization of which covers one or more of the investment services listed in Section A of the Annex to Directive 93/22/EEC;

2. 'investment business' shall mean any investment service as defined in Article 1 (1) of Directive 93/22/EEC and the service referred to in point 1 of Section C of the Annex to that Directive,

3. 'instruments' shall mean the instruments listed in Section B of the Annex to Directive 93/22/EEC;

4. 'investor' shall mean any person who has entrusted money or instruments to an investment firm in connection with investment business;

5. 'branch' shall mean a place of business which is a part of an investment firm, which has no legal personality and which provides investment services for which the investment firm has been authorized; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State shall be regarded as a single branch;

6. 'joint investment business' shall mean investment business carried out for the account of two or more persons or over which two or more persons have rights that may be exercised by means of the signature of one or more of those persons;

7. 'competent authorities' shall mean the authorities defined in Article 22 of Directive 93/22/EEC; those authorities may, if appropriate, be those defined in Article 1 of Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis (3).

Article 2

1. Each Member State shall ensure that within its territory one or more investor-compensation schemes are introduced and officially recognized. Except in the circumstances envisaged in the second subparagraph and in Article 5 (3), no investment firm authorized in that Member State may carry on investment business unless it belongs to such a scheme.

A Member State may, however, exempt a credit institution to which this Directive applies from the obligation to belong to an investor-compensation scheme where that credit institution is already exempt under Article 3 (1) of Directive 94/19/EC from the obligation to belong to a desposit-guarantee scheme, provided that the protection and information given to depositors are also given to investors on the same terms and investors thus enjoy protection at least equivalent to that afforded by an investor-compensation scheme.

Any Member State that avails itself of that option shall inform the Commission accordingly; it shall, in particular, disclose the characteristics of the protective systems in question and the credit institutions covered by them for the purposes of this Directive, as well as any subsequent changes to the information supplied. The Commission shall inform the Council thereof.

2. A scheme shall provide cover for investors in accordance with Article 4 where either:

— the competent authorities have determined that in their view an instrument 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,

or

— a judicial authority has made a ruling, for reasons directly related to an investment firm's financial circumstances, which has the effect of suspending investors' ability to make claims against it,

whichever is the earlier.

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

— 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.

(1) First Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ No L 322, 17. 12. 1977, p. 30). Directive as last amended by Directive 89/646/EEC (OJ No L 386, 30. 12. 1989, p. 1).

(2) Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ No L 386, 30. 12. 1989, p. 1). Directive as last amended by Directive 92/30/EEC (OJ No L 110, 28. 4. 1992, p. 52).

(3) OJ No L 110, 28. 4. 1992, p. 52.

3. Any claim under paragraph 2 on a credit institution which, in a given Member State, would be subject both to this Directive and to Directive 94/19/EC shall be directed by that Member State to a scheme under one or other of those Directives as that Member State shall consider appropriate. No claim shall be eligible for compensation more than once under those Directives.

4. The amount of an investor's claim shall be calculated in accordance with the legal and contractual conditions, in particular those concerning set off and counterclaims, that are applicable to the assessment, on the date of the determination or ruling referred to in paragraph 2, of the amount of the money or the value, determined where possible by reference to the market value, of the instruments belonging to the investor which the investment firm is unable to repay or return.

Article 3

Claims arising out of transactions in connection with which a criminal conviction has been obtained for money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (1), shall be excluded from any compensation under investor-compensation schemes.

Article 4

1. Member States shall ensure that schemes provide for cover of not less than ECU 20 000 for each investor in respect of the claims referred to in Article 2 (2).

Until 31 December 1999 Member States in which, when this Directive is adopted, cover is less than ECU 20 000 may retain that lower level of cover, provided it is not less than ECU 15 000. That option shall also be available to Member States to which the transitional provisions of the second subparagraph of Article 7 (1) of Directive 94/19/EC apply.

2. A Member State may provide that certain investors shall be excluded from cover by schemes or shall be granted a lower level of cover. Those exclusions shall be as listed in Annex I.

3. This Article shall not preclude the retention or adoption of provisions which afford greater or more comprehensive cover to investors.

4. A Member State may limit the cover provided for in paragraph 1 or that referred to in paragraph 3 to a specified percentage of an investor's claim. The percentage covered must, however, be equal to or exceed 90 % of the claim as long as the amount to be paid under the scheme is less than ECU 20 000.

Article 5

1. If an investment firm required by Article 2 (1) to belong to a scheme does not meet the obligations incumbent on it as a member of that scheme, the competent authorities which issued its authorization shall be notified and, in cooperation with the compensation scheme, shall take all measures appropriate, including the imposition of penalties, to ensure that the investment firm meets its obligations.

2. If those measures fail to secure compliance on the part of the investment firm, the scheme may, where national law permits the exclusion of a member, with the express consent of the competent authorities, give not less than 12 months' notice of its intention of excluding the investment firm from membership of the scheme. The scheme shall continue to provide cover under the second subparagraph of Article 2 (2) in respect of investment business transacted during that period. If, on expiry of the period of notice, the investment firm has not met its obligations, the compensation scheme may, again having obtained the express consent of the competent authorities, exclude it.

3. Where national law permits, and with the express consent of the competent authorities which issued its authorization, an investment firm excluded from an investor-compensation scheme may continue to provide investment services if, before its exclusion, it made alternative compensation arrangements which ensure that investors will enjoy cover that is at least equivalent to that offered by the officially recognized scheme and has characteristics equivalent to those of that scheme.

4. If an investment firm the exclusion of which is proposed under paragraph 2 is unable to make alternative arrangements which comply with the conditions imposed in paragraph 3, the competent authorities which issued its authorization shall withdraw it forthwith.

Article 6

After the withdrawal of an investment firm's authorization, cover under the second subparagraph of Article 2 (2) shall continue to be provided in respect of investment business transacted up to the time of that withdrawal.

Article 7

1. Investor-compensation schemes introduced and officially recognized in a Member State in accordance with Article 2 (1) shall also cover investors at branches set up by investment firms in other Member States.

(1) OJ No L 166, 28. 6. 1991, p. 77.