



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 6 April 2011**

**8174/11**

---

**Interinstitutional File:  
2010/0199 (COD)**

---

**EF 38  
ECOFIN 163  
CODEC 502**

**NOTE**

---

From: General Secretariat of the Council  
To: Delegations  
No. prev. doc.: 7659/11 EF 28 ECOFIN 134 CODEC 403  
No. Cion prop.: 12346/10 EF 81 ECOFIN 458 CODEC 708  
Subject: 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  
- Presidency Compromise

---

Delegations will find attached a Presidency compromise proposal following discussions in the last working party meeting that took place on 18 March 2011.

New changes compared to the last compromise text are denoted by **bold underlining**.

Previous changes to the Commission proposal text are **underlined**,

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directive 97/9/EC on investor-compensation schemes**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national **parliaments**,

**Having regard to the opinion of the European Central Bank,**

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

---

<sup>1</sup> OJ C , , p. .

- (1) At the request of the Commission, a report published on 25 February 2009 by a high-level group of experts chaired by J. de Larosière concluded that the supervisory framework needed to be strengthened to reduce the risk and severity of future financial crisis and recommended far-reaching reforms to the structure of supervision of the financial sector in Europe, including the creation of a European System of Financial Supervisors, comprising three European Supervisory Authorities, one for the securities sector, one for the insurance and occupational pensions sector and one for the banking sector, and the creation of a European Systemic Risk Board. The Commission Communication of 4 March 2009, "Driving European Recovery", proposed to strengthen the Union's regulatory framework for financial services, in particular to enhance investor protection. The Commission proposed in September 2009 the legislative package for the creation of the new authorities, including the European **Supervisory Authority (European Securities and Markets Authority)** (ESMA) to, in particular, contribute to a consistent application of Union legislation and to contribute to the establishment of high quality common regulatory and supervisory standards and practices.
- (2) It is necessary to amend Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes<sup>1</sup> in order to maintain confidence in the financial system and to better protect investors in view of the developments in the legal framework of the Union, the evolution in the financial markets and the problems experienced in the application of that Directive in Member States in cases of inability of investment firms to return assets held on behalf of clients.

---

<sup>1</sup> OJ L 84, 26.3.1997, p. 22.

- (3) At the time of its adoption, Directive 97/9/EC complemented Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field<sup>1</sup> to ensure that each Member State would set up an investor-compensation system to guarantee a harmonized minimum level of protection, at least for small investors, in the event of an investment firm being unable to meet its obligations to its clients. When Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>2</sup> repealed Directive 93/22/EEC, it introduced a new list of investment services and activities in order to encompass the full range of investor-oriented activities and to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Union. Therefore, it is necessary to align Directive 97/9/EC with Directive 2004/39/EC in order to ensure that the provision of all investment services and activities continue to be adequately covered under schemes.
- (4) At the time of its adoption, Directive 97/9/EC took into account the coverage and the functioning of deposit-guarantee schemes as regulated under Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes<sup>3</sup>. Consequently, it is appropriate to continue taking into account any modifications of Directive 94/19/EC.
- (5) Investors may not be aware of any limits of investment firms' authorisations, thus it is necessary to protect them in situations in which investment firms act in breach of their authorisation notably by holding client assets or providing services to a particular type of client contrary to the conditions of their authorisation. Therefore, schemes should cover clients' assets which are de facto held by investment firms in connection with any investment business.

---

<sup>1</sup> OJ L 141, 11.6.1993, p. 27.

<sup>2</sup> OJ L 145, 30.4.2004, p. 1.

<sup>3</sup> OJ L 135, 31.5.1994, p. 5.

**5a) The schemes should ensure coverage in all cases where an investment firm is unable to meet its obligations to return to investors instruments belonging to them, because of its financial circumstances or the financial circumstances of any third party with whom the financial instruments have been deposited. Where the problem lies with the financial circumstances of a third party, an assessment should be made of the investment firm's compliance with the relevant requirements set out in the Commission Directive 2006/73/EC EC of 10 August 2006 implementing Directive 2004/39/EC as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive<sup>1</sup>, related to the safeguarding of financial instruments and the deposit of client's financial instruments with third parties under Article 17 of that Directive. Where the investment firm did not comply with these requirements, the investment firm should be directly responsible to pay investors for the failure to return assets to the investors without the intervention of the investor compensation schemes. In case the investment firm itself becomes unable to meet its obligations towards investors because of its financial circumstances, the investor compensation scheme should intervene. In addition, investors should be entitled to compensation under this directive, where the conditions to trigger the compensation are fulfilled, also in the case where the investment firm has complied with the relevant requirements in the provision of investment business, in particular with the conditions regarding the safeguarding of financial instruments and the deposit of client financial instruments with third parties under Article 17 of Directive 2006/73/EC. In all cases, the investor compensation schemes should subrogate to any other rights of the investment firm or the investor towards the third party.**5b)**There is a need to eliminate the risk of moral hazard both by investors and investment firms in relying on third parties established in third countries, where the third parties are not subject to regulation and supervision. In this case coverage for investors should not be provided if the investment firm has complied with relevant requirements for the provision of investment business, in particular with the conditions regarding the safeguarding of financial instruments and the deposit of client financial instruments with third parties in a third country under Article 17 of Directive 2006/73/EC.**

<sup>1</sup> OJ L 241, 2.9.2006, p. 26.

- (6) Directive 2006/73/EC allows investment firms to deposit financial instruments held on behalf of clients into accounts opened with a third party. The third party is not necessarily subject to specific regulation and supervision. Notwithstanding compliance with the conditions under Directive 2006/73/EC, failure of the third party may affect investors' rights if that party is not able to return the financial instruments to the investment firm. In order to strengthen investor confidence, it is appropriate to extend compensation under Directive 97/9/EC, without prejudice to applicable national liability regimes, to the inability of an investment firm to return client financial instruments due to the failure of a third party where the financial instruments have been deposited by the investment firm or by its custodians.
- (7) Directive 2006/73/EC requires investment firms to place any client funds they receive into one or more accounts opened with a third party. The third party entities are limited to a central bank, a credit institution or a bank authorised in a third country or a qualifying money market fund. The strict regime ensured by Directive 2006/73/EC make it unnecessary to extend the schemes coverage to the failure of the third party where funds have been deposited.
- (8) As the compensation coverage under Directive 94/19/EC is now higher than the one under Directive 97/9/EC, it is necessary to provide the highest protection to investors in cases where both Directives 94/19/EC and 97/9/EC could cover assets held by banks . Therefore, in those cases, the investor should be compensated under Directive 94/19/EC.
- (9) In order to be able to recover the funds paid for compensation, schemes making payments to compensate investors for failure of a depositary or a third party should have the right of subrogation to the rights of the investor, investment firm in liquidation proceedings for amounts equal to their payments. This Directive should not be intended to diminish the responsibility of investment firms to recover assets from a depositary or custodian.

(10) (...)

- (11) Directive 97/9/EC already excludes from any compensation under investor-compensation schemes claims arising out of transactions where a criminal conviction has been obtained for money laundering within the meaning of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing<sup>1</sup>. It is also appropriate to exclude any claim for compensation where the assets concerned result from conduct prohibited under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>2</sup> in which the claimant has been involved.
- (12) The minimum level of compensation was established in 1997 and has not been modified since then. This level should be increased to EUR 30 000 in order to take into account developments in the financial markets and in the Union legislative framework. This amount takes into account the effects of inflation in the Union and the need to better align the level of compensation with the average value of investments held by retail clients in the Member States. In order to increase the protection provided to investors, it is necessary to remove the existing option for Member States to limit or exclude from cover funds in currencies other than those of the Member States.
- (13) In order to ensure investors receive the compensation provided for under Directive **97/9/EC** and a comparable level of investor protection across Member States, it is necessary to introduce common rules governing the funding of the schemes. The schemes should be financed in proportion to their liabilities. An appropriate level of pre-funding should be ensured and the schemes should have in place adequate arrangements to assess and reach their target funding level prior to the occurrence of any loss event relevant under Directive 97/9/EC. A common minimum target fund level should be reached within a ten-year period.

---

<sup>1</sup> OJ L 309, 25.11.2005, p. 15.

<sup>2</sup> OJ L 96, 12.4.2003, p. 16.

- (14) Where necessary, exceptional call for contributions to the members of the scheme or access to borrowing sources, such as from commercial banks or public institutions on commercial grounds, should ensure a timely coverage of any needs which is not covered by the funds collected from members prior to the occurrence of loss events.
- (15) Since the functioning of the schemes is currently highly differentiated in Member States it is necessary to introduce further harmonisation while leaving some flexibility to Member States as to the detailed organisation of the schemes. The Commission should be empowered to adopt delegated acts on certain essential features of the functioning of schemes in accordance with Article 290 of the Treaty. In particular the delegated acts maybe adopted in respect of, the alternative funding arrangements that schemes must have in place to be able, where necessary, to obtain short term funding, and specific factors to be considered in assessing the ability of additional contributions to not jeopardise the stability of the financial system of a Member States. In order to determine the conditions of application of the provisions concerning the financing of the schemes, the ESMA should develop technical standards relative to the details to be made public by the schemes.
- 15a) In order to ensure investors confidence in financial markets and certainty about which entities should be members and contribute to the compensation schemes, all investment firms should contribute to the scheme, as defined in Article 11 of Directive 2004/39/EC, irrespective of whether they held clients' monies or assets and irrespective of their decision to deposit financial instruments held on behalf of clients into an account opened with third parties. However, investment firms not authorised to hold clients' monies or financial instruments should only contribute with an annual fixed contribution.

- (16) In order to ensure that investors receive compensation in due time a borrowing mechanism among national schemes in the Union may be established. The system may include the possibility for schemes to borrow funds from other schemes in the exceptional case they face a temporary lack of funding.
- (17) (...)
- (18) (...)
- (19) (...)
- (20) In order to accelerate the compensation process, the determination by a competent authority of the fact that an investment firm is not able to meet its obligations arising out of investors' claims should be made as soon as possible.
- (21) The procedures necessary to establish the eligibility and the amount of compensation claim, often depending on national administrative and insolvency laws, may cause long delays in the payments to investors. In order to make payment delays shorter, it is necessary to ensure that, in systems or situations where the eligibility and the amount of the claim depends on insolvency or judicial procedures regarding the entities failing to meet their obligations, the schemes should be able to participate in those procedures. In addition, the obligation to grant a partial compensation should be provided for in the case of delays longer than twelve months in order to allow investors to receive **the eligible part** of the compensation claimed. Mechanisms to return the money to the schemes in case it is established that the claim was not eligible should be envisaged.

- (22) Directive 97/9/EC allows Member States to exclude professional and institutional investors from cover but the relevant list is not aligned with the classification of clients of investment firms under Directive 2004/39/EC. In order to ensure consistency between Directives 97/9/EC and 2004/39/EC, to simplify the assessment for compensation schemes and to limit the possible exclusion, in the case of enterprises, only to large undertakings, Directive 97/9/EC should refer to investors who are considered as professional clients according to Directive 2004/39/EC.
- (23) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty. In particular, the delegated acts should be adopted in respect of the determination of the method to calculate the target fund level to be established by the schemes and to modify this target fund level, the percentage of the determined ceiling of the funds available for lending between national compensation schemes and the procedure to deal with investors' claims.
- (24) Directive 97/9/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

*Amendments to Directive 97/9/EC*

Directive 97/9/EC is **hereby** amended as follows:

(1) Article 1 is amended as follows:

(a0) Point 1 is replaced by the following:

**“1. ‘investment firm’ mean an investment firm as defined in Article 4 (1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments\***

- **authorized in accordance with Article 5 of Directive 2004/39/EC, or**
- **authorized as a credit institution in accordance with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)\*\*, the authorisation of which covers one or more of the investment services listed in Section A of the Annex I to Directive 2004/39/EC, or**
- **management company authorized in accordance with Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)\*\*\*, the authorisation of which covers the services listed in Article 6(3) of that Directive;**

---

<sup>\*</sup> **OJ L 145, 30.4.2004, p. 1.**

<sup>\*\*</sup> **OJ L 177, 30.6.2006, p. 1.**

<sup>\*\*\*</sup> **OJ L 302, 17.11.2009, p. 32."**

(a) Point 2 is replaced by the following:

"2. 'investment business' 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 **that Directive;**"

(aa) Point 3 is replaced by the following:

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

(b) Point 4 is replaced by the following:

"4. 'investor' **mean**, in relation to investment business, any person who has entrusted money or instruments to an investment firm;"

(c) Point 7 is replaced by the following:

"7. 'competent authorities' **mean competent** authorities **as** defined in Article 4(1)(22) of Directive 2004/39/EC and in Article 2(1)(h) of Directive 2009/65/EC

Where this Directive refers to the Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)\* bodies which administer national investor-compensation schemes shall, for the purpose of this regulation, be considered competent authorities under the conditions of Article 4(3) of that Regulation;

---

\* OJ L 331, 15.12.2010, p. 84."

(d) The following points are added:

"8. (...)

9. (...)

10. 'third party' means, in relation to investment business, an institution with whom an investment firm has deposited financial instruments held by it on behalf of its clients as referred to in Article 17 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive\* or with whom such an institution has sub-deposited the financial instruments;

11. 'low-risk assets' means asset items falling into one of the categories set out in the first and second category of Table 1 under point 14 of Annex I to Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions\*\* but excluding asset items defined as qualifying items in point 15 of that Annex;

12. 'available financial means' means cash, deposits, low-risk assets and payment commitments;

13. 'payment commitments' means irrevocable and unconditional commitments undertaken by an investment firm which are:

**(a) backed by an unconditional guarantee from an insurance company or credit institution, under which the investment firm and the guarantee insurance company or credit institution commit to pay the guaranteed amount to the investor-compensation scheme, upon simple request, within 30 days from the request;**

**or**

**(b) duly backed by collateral consist of low risk assets unencumbered by any third party rights, at the free disposal, and earmarked for the exclusive use of the scheme which has the irrevocable right to claim these payments. The market value of the earmarked assets should be reported by the investment firms to the schemes on a quarterly basis. In case the market value of the earmarked assets decreases below the initial value of the collateral amount, investment firms shall be required to earmark additional assets to compensate for the difference.**

14. 'public institution' means any entity which, in whatever form, represents the public authority itself and which cannot, either judicially or administratively, be declared insolvent. This may either be a sovereign, i.e. an entity which represents the full faith and credit of the State, or any other subordinate public entity, such as regional, municipal or parastatal authorities or other institutions of similar nature.

---

\* **OJ L OJ L 241, 2.9.2006, p. 26.**

\*\* OJ L 177, 30.6.2006, p. 201."

(2) Article 2 is amended as follows:

(a) The first subparagraph of paragraph 1 is replaced by the following:

"1. Each Member State shall ensure that within its territory one or more investor-compensation schemes **(hereinafter referred to as the "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."

(b) Paragraph 2 is replaced by the following:

"2. A scheme shall provide coverage for investors in relation to investment business in accordance with Article 4 where one of the following conditions is met first:

- (a) the competent authorities have determined that an investment firm appears, for the time being, 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, to be unable to meet its obligations arising out of investors' claims and has no early prospect of being able to do so,
- (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.

Member States shall ensure that competent authorities make the determination referred to in point (a) of the first subparagraph as soon as possible and in any event within 3 months, after first becoming aware that an investment firm has failed to meet its obligations arising out of investors' claims."

**Coverage for investors shall not be provided when for reasons directly related to the financial circumstances of a third party established in a third country, with whom financial instruments have been deposited by the investment firm, the investment firm is unable to meet its obligations arising out of investors' claims and the following cumulative conditions are met:**

- a) the third party is not subject to specific regulation and supervision in the jurisdiction of that third country, and**
- b) the investment firm is not liable towards the investor** in accordance with the legal and contractual **obligations** applicable **to the investor's claim.**

**(c) The following paragraph is inserted:**

**"2a. The coverage referred to in paragraph 2 shall be provided, in accordance with the legal and contractual conditions applicable,** for claims arising out of an investment firm's inability to perform either of the following:

- (a) repay money owed to or belonging to investors and held on their behalf in connection with investment business; **or**
- (b) return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business,

Member States shall ensure that the schemes provide coverage where financial instruments or monies are held, administered or managed for or on behalf of an investor, irrespective of the type of investment business being carried on by the **investment** firm. **Any such financial instruments and monies shall be covered irrespective of whether or not the investment firm is acting in accordance with any restriction set out in its authorisation."**

(d) Paragraph 3 is replaced by the following:

"3. Any claim referred to in paragraph 2a on a credit institution which, in a given Member State, would be eligible both under this Directive and Directive 94/19/EC shall be dealt with under Directive 94/19/EC. No claim shall be eligible more than once under those **Directives**."

(3) Article 3 is replaced by the following:

*"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 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing<sup>\*</sup>, or arising out of conduct that is prohibited under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>\*\*</sup>, shall be excluded from any compensation under schemes.

---

\* OJ L 309, 25.11.2005, p. 15.

\*\* OJ L 96, 12.4.2003, p. 16."

(4) Article 4 is **replaced by the following:**

(a) Paragraph 1 is replaced by the following:

**"Article 4**

1. Member States shall ensure that schemes provide for coverage of not less than EUR 30 000 for each investor in respect of the claims referred to in Article 2(2a).

Member States who convert the amounts expressed in euro into their national currency shall initially use in the conversion the exchange rate prevailing on the date of entry into force of this Directive.

Member States may round off the amounts resulting from the conversion, provided that such rounding off does not exceed EUR 2500.

Without prejudice to the **third** subparagraph, Member States shall adjust the coverage levels converted into **their national** currency to the amount referred to in this paragraph every five years. Member States may make an earlier adjustment of coverage levels, after having consulted the Commission, following the occurrence of unforeseen events such as currency fluctuations.

1a. The Commission **every five years** may adjust by means of delegated acts the amount referred in paragraph 1, taking into account the following parameters:

(a) inflation in the Union, on the basis of changes in the harmonised index of consumer prices published by the Commission;

(b) **...**

(c) Paragraph 2 is replaced by the following:

"2. A Member State may provide that certain investors shall be excluded from coverage by schemes for claims referred to in Article 2(2a) or shall be granted a lower level of coverage. Those exclusions shall be as listed in Annex 1. "

(d) Paragraph 4 is deleted.

(5) The following Articles 4a and 4b are inserted:

*"Article 4a*

1. Member States shall ensure that schemes have in place adequate systems to determine their potential liabilities and that they are adequately financed in proportion to these liabilities.
2. Member States shall ensure that each scheme establishes a target fund level composed of available financial means of at least 0,5% of the value of the monies and of at least 0,05% of the value of the financial instruments held, administered or managed by the investment firms that are covered by the protection of the scheme. The value of the covered monies and financial instruments shall be calculated every year as at 31 December.

**Member States shall decide on the use of payment commitments. If the use of payment commitments is allowed, the share of payment commitments shall not exceed 50 % of the total available financial means.**

The Commission shall adopt, by means of delegated acts in accordance with Article 13a and subject to the conditions of Articles 13b and 13c, measures to determine the method to calculate the value of covered monies and financial instruments referred to in the first subparagraph in order to determine the target fund level to be established by the schemes and to modify the target fund level taking account of the developments in financial markets.

3. The target fund level shall be financed prior to and irrespective of the occurrence of any event relevant under Article 2(2). Member States shall ensure that the **target fund** level for each scheme is reached within a ten-year period after the entry into force of this Directive and that each scheme adopts and complies with an appropriate planning in order to fulfil this objective.

Contributions collected to reach the target fund level shall only be held in:

- cash
- deposits;
- low-risk assets , which can be liquidated within a time limit not exceeding one month;
- loans provided to another schemes set up in a Member State.

3b. Where the level of funding diminishes below the target fund level, Member States shall ensure that each scheme adopts and complies with an appropriate planning in order to reach the target fund level not later than in three years.

4. Member States shall ensure that the schemes may make additional calls for contribution to the members of the scheme in case the target fund level is insufficient to meet the **investors'** claims referred to in Article 9(2). Those additional contributions shall not exceed 0,1% of the covered monies and financial instruments as referred to in paragraph 2 of this Article. Those additional contributions shall not jeopardise the stability of the financial system of the Member State concerned and **shall** be based on affordability criteria.

5. Member States shall ensure that schemes have in place adequate alternative funding arrangements to enable them to obtain short term funding to meet claims against the scheme once the pre-funded amount has been exhausted. Those arrangements may include borrowing facilities from:
- a) credit institutions;
- b) public institutions provided that those facilities are based on commercial grounds and only in case the scheme demonstrates that its efforts to raise funds from credit institutions have failed or, alternatively, the borrowing conditions obtained are unfavourable to the degree that they endanger future financial stability of the scheme;
- c) other schemes set up in the **same** a Member State.
6. Member States shall ensure that the cost of **funding** schemes is ultimately borne in relation to investment business by the investment firms. Regular contributions by members of the scheme shall be collected annually.
- 6a. Contributions shall take into account the potential liabilities of the scheme for compensations of investors in accordance with this Directive that may result from the business activity of the contributor. Contributions shall consist of the following:
- annual fixed contribution,
- for investment firms, which hold client assets - annual variable contribution, based on a percentage of the monies and financial instruments held by the investment firm on behalf of the investors, which are covered by the protection of the scheme and.

- 6b. An investment firm may request the competent authority, in exceptional circumstances based on the investment firm's financial situation, to authorise the reduction of the annual contributions due by the investment firm or exempt the investment firm from payment. The exemption **shall be based on the assessment conducted by the competent authority and shall** not be granted for more than two consecutive years.
7. Member States shall annually inform the **European Supervisory Authority (European Securities and Markets Authority (ESMA)** of the target fund level and the **current** level of funding of the schemes **on their territory**. This information shall be confirmed by the competent authorities and shall, accompanied by this confirmation, be transmitted within 30 days from the end of each year to the ESMA.  
**The** information referred to in the first subparagraph **shall be** published on the web-site of the **schemes and** at least **annually updated**.
8. (...)
9. The Commission may adopt, by means of delegated acts in accordance with Article 13a and subject to the conditions of Articles 13b and 13c, measures to determine:
- (a) (...)
  - (b) the alternative funding arrangements as referred to in paragraph 5;
  - (c) **specific** factors to be considered in assessing the ability of additional contributions as referred to in paragraph 4 to not jeopardise the stability of the financial system of a Member State;
  - (d) (...)
10. In order to ensure uniform conditions of application of **the second** subparagraph of **paragraph 7**, ESMA shall develop draft **implementing** technical standards to specify the details of the information to be published by the schemes.

ESMA shall submit the draft **implementing** technical standards referred to in the first subparagraph to the Commission by 31 December 2012.

The Commission may adopt the draft **implementing** technical standards referred to in the first subparagraph in accordance with the procedure laid down in Article **15** of Regulation **(EU) No. 1095/2010**.

*Article 4b*

1. A scheme may borrow from other schemes set up in the Union under the following conditions:
  - (a) the borrowing scheme is not able to fulfil its obligations under Article 2 (2a) because of previous payments made to fulfil those obligations and due to a lack of funds as referred to in Article 4a(3);
  - (b) (...);
  - (c) the borrowing scheme has made recourse to any other additional financing means referred in Article 4a(4) and (5);
  - (d) the borrowing scheme undertakes the legal commitment that the borrowed funds will be used in order to pay claims under Article 2 (2a);
  - (e) (...)  
**(ea) the lending scheme has the express consent** to lend of the competent authority of that lending scheme;
  - (f) (...)

(g) (...)

A scheme that has not repaid a loan to other schemes under this Article shall neither borrow from nor lend to other schemes.

(...)

2. (...)

3. (...)

4. (...)

5. (...)

."

(6) Articles 5 and 6 are replaced by the following:

*"Article 5*

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

2. If the measures referred to in paragraph 1 fail to secure compliance on the part of the investment firm, 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 from membership of the scheme. The scheme shall continue to provide the coverage referred to in Article 2(2a) in respect of investment business carried on during that period. If, on expiry of the period of notice, the investment firm has not met its obligations, the scheme may, again having obtained the express consent of the competent authorities, exclude it.
3. (...)
4. The competent authority which issued the authorisation of the investment firm the exclusion of which is proposed under paragraph 2 shall, withdraw the authorization without delay.
5. (...)

## *Article 6*

After the withdrawal of an investment firm's authorization the coverage referred to in Article 2(2a) shall continue to be provided in respect of investment business carried on up to the time of that withdrawal."

- (7) Articles 8 and 9 are replaced by the following:

### *"Article 8*

1. The coverage provided for in Article 4(1) and (3) shall apply to the investor's aggregate claim on the same investment firm under this Directive irrespective of the number of accounts, the currency and location within the Union.
2. Each investor's share in joint investment business shall be taken into account in calculating the coverage provided for in Article 4 (1) (and (3)).

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

Member States may provide that claims relating to joint investment business to which two or more persons are entitled as members of a business partnership, association or grouping of a similar nature which has no legal personality may, for the purpose of calculating the limits provided for in Article 4(1) and (3), be aggregated and treated as if arising from an investment made by a single investor.

3. Where an investor is not entitled to the monies or financial 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 the first subparagraph of Article 2(2)

If two or more persons are entitled, the share of each under the arrangements subject to which the monies or financial instruments are managed shall be taken into account when the limits laid down in Article 4(1) and (3) are calculated.

*"Article 9*

1. The compensation scheme shall take appropriate measures to inform investors of a determination or ruling referred to in the first subparagraph of Article 2(2) and, if they are to be compensated, to compensate them as soon as possible. It may fix a period during which investors shall be required to submit their claims. That period may not be less than five months from the date of the determination or ruling referred to in the first subparagraph of Article 2(2) or from the date on which that determination or ruling is made public.

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.

2. The scheme shall be in a position to pay an investor's claim as soon as possible and at the latest within three months of the full or partial establishment of the eligibility and the amount of the claim

In exceptional circumstances a compensation scheme may apply to the competent authorities for an extension of the time limit set out in the first subparagraph. No such extension may exceed three months. Competent authorities shall inform immediately the ESMA of any extension granted under this subparagraph and of the circumstances justifying it.

Member States shall ensure that schemes may participate in insolvency or judicial procedures that may be relevant in establishing the eligibility and the amount of a claim.

Member States shall put in place a mechanism for the partial establishment of the eligibility of the claim taking into consideration the related to the different parts of the claim.

The third subparagraph shall be without prejudice to schemes being able to adopt other methods to determine the eligibility or amount of the full claim or a part of the claim.

If final payment on a claim has not been made and if such claim has not been rejected within nine months of the determination or ruling referred to in Article 2(2) , Member States shall ensure that the scheme provides, within the next three months , for a partial compensation of the claim based on an initial assessment of the eligibility of the different parts of the claim. Where the claim includes different financial instruments, the initial assessment shall be done instrument by instrument. When the claim includes monies and financial instruments, the initial assessment shall include a separate consideration of the eligibility of monies and of the different financial instruments claimed by the client.

The scheme should establish and maintain adequate arrangements and procedures for the collection and the evaluation of all relevant documents concerning the claim, provided by the investor or otherwise available in the context of the insolvency or judicial proceeding that may be relevant to establish the eligibility and the amount of the claim. Provisional compensation shall not be paid when there is reasonable ground to believe that the claim is not eligible. The balance shall be paid out within the time limit set out in the first subparagraph of this paragraph after the eligibility and the amount of the claim are finally established. Member States shall ensure that the scheme has the means to recover amounts provisionally paid out if it is established that the claim was not eligible.

The Commission shall adopt, by means of delegated acts in accordance with Article 13a and subject to the conditions of Articles 13b and 13c, measures to determine the procedure to deal with investors' claims.

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."

(8) In Article 10, paragraph 1 is replaced by the following:

"1. Member States shall ensure that each investment firm takes appropriate measures to make available to actual and intending investors the information necessary for the identification of the scheme of which the investment firm and its branches within the Union are members or any alternative arrangement provided for under the second subparagraph of Article 2 (1). Investors shall be informed of the provisions of the scheme or any alternative arrangement applicable, including the amount and scope of the coverage offered by the scheme and any rules laid down by the Member States pursuant to Article 2(3). That information shall be made available in a readily comprehensible manner.

Information shall also be given on request concerning the conditions governing compensation and the formalities which must be completed to obtain compensation.

The information provided shall be fair, clear and not misleading and in particular shall explain the situations and claims covered by the relevant scheme and how it applies in cross border situations. The information provided should also give examples of situations and claims not covered under the scheme. . Where the financial instrument is deposited with a third party in a third country in which jurisdiction the third party is not subject to specific regulation and supervision, investment firms shall clearly inform the investor that this situation is not covered under the relevant compensation scheme."

(9) Article 12 is replaced by the following:

*"Article 12*

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.
2. In the case of a loss due to the financial circumstances of a third party that holds financial instruments belonging to an investor in relation to investment business, as referred to in Article 2(2), schemes which make payments in order to compensate investors shall have the right of subrogation to the rights of the investor or investment firm in liquidation proceedings for amounts equal to their payments.
3. If the third party that holds financial instruments belonging to an investor in relation to investment business or located in a third country in which the judiciary system does not allow the scheme to subrogate to the rights of the investment firm, Member States shall ensure that the investment firm returns to the scheme amounts equal to their payments in case they receive any amount in the liquidation proceedings."

(10) The following Articles 13a, 13b and 13c are inserted:

*"Article 13a*

1. The powers to adopt the delegated acts referred to in Article 4a(2), , Article 4a(9) and Article 9(2) shall be conferred on the Commission for an indeterminate period of time.
2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles 13b and 13c.

*Article 13b*

1. The delegation of power referred to in Article 4a(2), Article 4a (9) and Article 9(2) may be revoked at any time by the European Parliament or by the Council.
2. The institution which has commenced an internal procedure for deciding whether to revoke a delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, stating the delegated powers which could be subject to revocation.
3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

*Article 13c*

1. The European Parliament or the Council may object to a delegated act within a period of three months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by one month.
2. If, on expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the *Official Journal of the European Union* and shall enter into force on the date stated therein.

The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to the delegated act, within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 of the Treaty, the institution which objects shall state the reasons for objecting to the delegated act.

- (11) The following Article 14a is inserted:

*"Article 14a*

The Member States may conclude cooperation agreements on exchange of information with the competent authorities of third countries in accordance with Article 63 of Directive 2004/39/EC ."

- (12) Annex I is amended as follows:

- (a) Point 1 is replaced by the following:

"1. Professional investors referred to in points 1 to 4 of section I of Annex II of Directive 2004/39/EC on markets in financial instruments."

- (b) Points 2, 3 and 8 are deleted.

*Article 2*  
*Transposition*

1. Member States shall adopt and publish, by *twelve months after the entry into force of this Directive* at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions *by eighteen months after the entry into force of this Directive* except for provisions transposing Article 4b that shall be applied from 31 December 2013.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 3*

*Entry into force*

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

*Article 4*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*