

OPINION OF THE EUROPEAN MONETARY INSTITUTE

on a consultation from the Council of the European Communities under Article 109f (6) of the Treaty establishing the European Community (the “Treaty”) and Article 5.3 of the Statute of the EMI;

on an amended Commission proposal for a European Parliament and Council Directive on investor compensation schemes.

CON/95/5

1. The present consultation was initiated on 16th February 1995 by the Council of the European Communities which, for this purpose, transmitted to the EMI the relevant documents concerning the Commission amended proposal COM 585 final.
2. The main objective of the proposal is to require that each member state has an investor compensation scheme providing at least a certain minimum level of compensation in the event that an investment firm is unable to meet its obligations to its investor clients. The schemes would cover investment services provided by non-bank investment firms and investment services provided by credit institutions, to the extent that the latter are not covered by a deposit guarantee scheme which complies with the requirements of the Deposit Guarantee Directive (94/19/EC). The schemes would also be aimed, primarily, at retail investors and small and medium sized enterprises and may exclude from cover other categories of investors.
3. The EMI’s competence to deliver an opinion in this consultation is based on Article 109f (2) and (6), first paragraph, of the Treaty as some of the provisions of the proposal have the potential to affect the stability of the financial markets.
4. The EMI is aware that a case is pending before the European Court of Justice in relation to the Deposit Guarantee Directive (94/19/EC). The EMI notes that the proposal for a directive on investor compensation schemes shares many of the features of 94/19/EC, and indeed the amended proposal currently before the EMI for consultation has been modified to ensure that its mechanics follow closely the mechanics of 94/19/EC. Thus, the result of the case relating to the Deposit Guarantee Directive might have implications for the current proposal. The EMI has not analysed the legal issues put forward in the case pending before the European Court of Justice. Its opinion is strictly limited to issues

relating to its field of competence and should in no way be understood as an opinion on the legal questions raised or which may be raised in that case.

5. The EMI considers that a comprehensive regime of investor compensation schemes for smaller investors will enhance investor confidence within the retail investor market. Consequently, the stability of this important sector of the financial markets is likely to improve, particularly during times when, otherwise, investor confidence would be adversely impacted, for example due to the failure of an individual investment firm. The EMI therefore believes that the proposed directive is a valuable measure for fostering the stability of the financial system and supports the basic structure of the proposal. In particular, the EMI agrees that this proposal should be aligned with and mutually coherent with Directive 94/19/EC on deposit guarantee schemes.

Comments which are made by the EMI on the amended proposal are therefore aimed at ensuring that the cover provided for investors will, when combined with arrangements put in place to implement Directive 94/19/EC, be comprehensive within the apparent intended scope of the proposal. The comments made are, therefore, relatively detailed in nature.

6. Article 1 (2) of the proposal defines “Investment business” by reference to Article 1 (1) of the Investment Services Directive (93/22/EC) together with the service referred to in point 1 of Section C of the Annex to the Investment Services Directive (“safe keeping and administration in relation to one or more of the instruments listed in Section B”). The EMI would make one specific observation relating to this definition.

To fall within the scope of the Investment Services Directive, and therefore within the intended scope of this proposal, foreign exchange services within item 7 of Section C of the Annex must be supplied in connection with services provided under Section A of the Annex. Therefore sums which an investment firm holds in connection with the provision of these linked foreign exchange services should, logically, be classed as “...money owed to investors or belonging to investors...” and therefore fall within the terms of the proposal by virtue of Article 2 (2), second paragraph.

The EMI assumes that it is the intention of the proposal that sums held in connection with the provision of those linked foreign exchange services will be included within the scope of the proposed directive, and welcomes this objective.

7. The EMI notes with approval the intention to make the directive on investor compensation contiguous with Directive 94/19/EC. The EMI also notes that the manner in which claims are to be attributed between schemes under this Directive and those under Directive

94/14/EC shall be a matter for determination by the relevant member state (Article 2 (3)). It is assumed that the provisions in Articles 9 and 10, requiring sufficient information to be made available to investors to allow claims to be pursued, would cover these attribution arrangements and, again, the EMI would support such an intent.

8. The EMI notes that the Council reached political agreement on this proposal on 22nd May 1995 and that a Common position is expected within the course of the next few months.
9. A dissenting opinion of the Deutsche Bundesbank is attached as an Annex to this opinion.

28th July 1995

ANNEX

DISSENTING OPINION ATTACHED TO THE EMI OPINION ON THE COMMISSION PROPOSAL FOR A EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE ON INVESTOR COMPENSATION SCHEMES

Dissenting opinion of the Deutsche Bundesbank

The Deutsche Bundesbank considers that the question as to whether stability of the financial system will be improved by the Directive on Investor Compensation Schemes cannot be answered without considering the principles which have been incorporated into the proposal from the Directive on Deposit Guarantee Schemes (94/19/EC), which is currently the subject of proceedings before the European Court of Justice. The Deutsche Bundesbank therefore considers that making any substantive comment on the proposal for a Directive on Investor Compensation Schemes would inevitably involve making statements on the legal issues raised in those court proceedings. Therefore the Deutsche Bundesbank wishes only to state that it welcomes the harmonisation towards which the Directive on Deposit Guarantee Schemes (94/19/EC) strives. It also considers that, as any amendment of Directive 94/19/EC resulting from the judgement of the European Court of Justice will require to be incorporated into the Directive on Investor Compensation Schemes, the formal adoption of a common position on this Directive should be postponed until the European Court of Justice has reached a decision in the proceedings relating to Directive 94/19/EC.