Brussels, 20 DEC. 2010
C/2010/9200

Dear Mr Westerberg,

I refer to the submission of the reasoned opinion from the Swedish Parliament, in which the Parliament has expressed the view that the Commission proposal on investor compensation schemes {COM(2010) 371} would breach the principle of subsidiarity in the part concerning the introduction of a mutual borrowing mechanism among national compensation schemes. The Swedish Parliament considers that the provision of a mandatory borrowing mechanism between the schemes may create the risk of moral hazard and that, in a situation of general crisis where many Member States may be hit simultaneously, compensation schemes in different Member States may have difficulties in meeting their commitments.

The Commission would like to thank the Swedish Parliament for the general appreciation of the proposal and its underlying objectives to strengthen the protection of investors across the Union and their confidence in firms providing different services.

The Commission considers that the proposal already takes into account the concerns expressed by the Swedish Parliament. As stated in paragraph 4.2 on subsidiarity and proportionality of the explanatory memorandum of the Commission proposal, 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 common rules introduced by the proposal aim to ensure such degree of harmonisation in the funding of the schemes in light of the existing differences at national level. The provision of a borrowing mechanism among national schemes forms part of these common rules and has been introduced as a last resort tool. Recital 17 of the proposal further stresses that "[t]he borrowing mechanism should not impinge any fiscal responsibility of the Member States. The borrowing schemes should be able to make recourse to the borrowing possibility provided for in this directive after exhausting the funds collected to reach the target fund level and the additional calls for contribution to their members (...). To that end, the European Securities and Markets Authority (ESMA) should confirm that the conditions of borrowing between investor-compensation schemes laid down in this Directive are fulfilled (...)." Mutual borrowing is indeed subject to strict requirements. In particular, it is subject to the following rigorous conditions:

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- 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 once these funding sources have been exhausted, may the scheme have recourse to borrowing from other compensation schemes;

- on the side of lending schemes, only a portion of ex-ante funding collected from market participants in each compensation scheme has to be available for lending to the others (10%[1]);

- the European Securities and Markets Authority (ESMA) should receive any borrowing request, assess whether the relevant requirements are met and, if this is the case, transmit it to the other schemes[2];

- loans should be repaid to the lending schemes at the latest 5 years after the request, and interest should accrue on the loans[3];

- in order to avoid that the funds available for lending at EU level are rapidly exhausted, a limit of 20% of the portion set aside for lending may be used for each case[4].

The Commission believes that the proposal already considers and addresses the risk of moral hazard since it introduces common principles for the funding of national schemes which should ensure similar funding conditions across the EU. Furthermore, the borrowing mechanism is consistent with the principle that the cost of financing the schemes should be borne by market participants and not by taxpayers. In this respect, the mutual borrowing system allows market participants at EU level to contribute, on a purely temporary basis and for a limited amount, to the temporary needs of compensation schemes in other Member States, without impinging upon the fiscal responsibility of Member States.

The proposal also addresses the risk of simultaneous shortage of funds in national schemes by providing a limit on the amount of each loan and, by stating that a scheme which has received and not yet repaid loans received from other schemes, should neither borrow from, nor lend to, other schemes.

While understanding the legitimate concerns of the Swedish Parliament, the Commission considers that its proposal is fully consistent with the subsidiarity principle. The Commission believes that the legislator disposes with wide discretionary power, pursuant to article 5, paragraphs 1 and 3 of the Treaty on the Functioning of the European Union, to decide if the objectives proposed to be achieved by the Directive would be better met at Union than at Member State level. The proposal is now under negotiation within the ordinary legislative procedure in the European Parliament and the Council.

Yours sincerely,

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[1] Article 4a(8).
[2] Article 4b(3)
[3] Article 4b(2)(b)
[4] Article 4b(2), last sub-paragraph.