

## **Reasoned Opinion of the House of Commons**

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

### **Draft Directive amending Directive 97/9/EC on investor-compensation schemes (12346/10)**

#### ***Relevant Treaty provisions***

1. Article 5(3) of the Treaty on European Union (TEU) states:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

“The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”

2. Article 12(b) TEU further states that:

“National Parliaments contribute actively to the good functioning of the Union [...] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality”.

#### ***Aspects of the Directive which do not comply with the principle of subsidiarity***

3. The House of Commons considers that the draft Directive amending Directive 97/9/EC on investor-compensation schemes does not comply with the principle of subsidiarity in the following respect: the borrowing last resort mechanism between national schemes in Article 4b does not fulfil an objective that can “be better achieved at Union level”.

#### ***Reasons***

4. In its explanatory memorandum, the Commission gives the following justification for establishing a last resort borrowing mechanism between Member State investor-compensation schemes:

“Together with the establishment of consistent funding rules between Member States, the introduction of cooperation arrangements among national schemes will provide greater protection to investors and promote investor confidence in investment services.

“The system is based on the principle of solidarity between the national schemes. According to the proposed Article, a borrowing mechanism among schemes is introduced as a last resort tool.

“These measures should provide schemes with an alternative back up source of funding, under specific conditions and on a temporary basis. They will also facilitate a closer relationship and better on-going coordination between national schemes and will act as an incentive to develop more harmonized practices and working procedures.”

5. The Commission explains that national “schemes should have the right to borrow from the other schemes if their funds are insufficient to cover their immediate needs”, and that “a portion of ex ante funding in each compensation scheme will have to be available for lending to other schemes.”

6. The House of Commons considers it likely that the primary objective of the borrowing mechanism — “to provide greater protection to investors and promote investor confidence in investment services” — will not be achieved. This is because such a mechanism could introduce moral hazard in investment services, the logic being there is a higher risk of a national scheme underwriting inappropriate, careless or risky investments when it knows that it can rely on a back-up source of credit. The House of Commons considers that neither the assessment of borrowing requests by the European Securities and Market Authority nor the obligation to repay the loan within five years will mitigate this risk.

7. To avoid introducing moral hazard it would be better not to have recourse to other Member States’ schemes, but, consistent with the principle of subsidiarity, for each Member State to ensure that members of the investor-compensation scheme take full responsibility themselves. Like Sweden’s Riksdag the House of Commons considers that, in order to achieve investor protection and confidence, there must be an incentive for compensation schemes of this kind to be adequately funded at national level; and it must be for central governments to ensure that an investor compensation scheme can fulfil its commitments. In addition, the House of Commons considers that, as a general rule of investment, risk should be guaranteed where it arises because that is where it is best assessed and where action may be taken in relation to it.

8. In light of the observations above, and in the absence of qualitative and quantitative indicators provided by the Commission to the contrary, the House of Commons cannot see why, by reason of its scale or effects, action by the EU in the form of the compulsory borrowing mechanism, as opposed to separate action by Member States, would better fulfil the objective of giving greater protection to investors and promoting confidence in investment services. On the contrary, the proposed borrowing mechanism may lead to less protection for investors and less confidence in investment services. This aspect of the draft Directive would not therefore produce a result that was “better achieved at Union level” and does not comply with the principle of subsidiarity.