



European Commission  
Internal Market and Services DG  
Financial Services Policy and Financial Markets

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6 April 2009

Dear Sir,

**Re: Call for evidence on Investor-Compensation Schemes Directive (Directive 1997/9/EC)**

I am writing on behalf of the Depositary and Trustee Association (DATA)<sup>1</sup> in response to questions 4a and 4b as detailed in the Call for Evidence on the Investor-Compensation Scheme Directive issued on 9 February 2009.

In short, we believe that in the case of third party default, any widening of the Compensation Scheme should be subjected to a rigorous cost benefit analysis and claims should be restricted to the loss of assets deposited with a third party in the course of trading and to defaulting firms which are participants in the relevant Scheme.

We also believe that depositary liability should not go beyond the scope of the current requirements in the UCITS Directive, and hope that the Commission would not consider the implementation of strict liability in the light of recent market incidents, as this could lead to significant cost increases for investors.

It is also important to retain the ability for depositaries to delegate activities to other parties. If that ability were to be removed, it would have a negative impact on costs for investors and might also lead to a reduction in the choice of depositaries.

Our full response is attached and I hope that it will help the Commission in its focus on the issues of concern for the review of the ICSD.

Yours sincerely

Kevin Tomlin  
Chairman of DATA

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<sup>1</sup> DATA represents all depositaries and trustees of UK-based authorised unit trusts and open-ended investment companies. At the end of February 2009, the members of DATA were responsible for safeguarding the assets of 2359 authorised investment funds, representing £354.2 billion of funds under management.

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**4a. Should investors be able to claim compensation in the case of default of the third party where their assets had been deposited?**

In the UK, as a general rule, claims will only be within scope where there is a contractual relationship between the defaulting firm and the investor - although this is generally assessed on a case by case basis.

In any event, taking into account the potential for increased costs, we feel on balance that any extension in scope would need to be limited so that claims are restricted to loss of assets which had been deposited with the third party as counterparty to the transaction in the course of trading, and not to losses arising from investment risk, and that claims are restricted to defaulting firms which are participants in the relevant scheme. In the case of FSCS, UK authorised firms and branches of EEA authorised firms who have passported into the UK. Even so, we feel that any widening of the scheme along the lines suggested should be subjected to a rigorous cost benefit analysis.

**4b. Should investors (such as UCITS or a UCITS unit-holder) be able to claim compensation for loss of assets under the ISCD in those cases where the UCITS depositary or the institution which has been mandated to safe keep the assets, fail to perform its duty?**

We believe that the UCITS Directive is clear as regards depositary responsibilities. In particular, the Directive (Articles 9 and 16) is explicit in assigning responsibility to a Depositary for loss suffered by investors *"as a result of its unjustifiable failure to perform its obligations or its improper performance of them"*.

We understand that in certain jurisdictions, depositaries have strict liability including liability for delegates actions, whether improper or negligent. These go much further than the UCITS Directive requires. Strict liability is clearly not a requirement of the UCITS Directive and we hope the Commission would not consider the implementation of strict liability as the answer to incidents such as the Madoff case. The implementation of a strict liability regime would lead to a significant increase in costs which are ultimately borne by investors, and potential restrictions on holdings within UCITS.

It is also important to maintain the ability for depositaries to delegate activities to other parties (subject to appropriate due diligence). If that ability were removed, it would again have a negative impact on costs and might also lead to a reduction in the choice of depositaries.