

EBA-Op-2019-14

30 October 2019

# Opinion of the European Banking Authority on deposit guarantee scheme payouts

## Introduction and legal basis

1. Article 19(6) of the recast Directive 2014/49/EU on deposit guarantee schemes (the Deposit Guarantee Schemes Directive — DGSD) requires that the European Commission (the Commission), supported by EBA, ‘shall submit to the European Parliament and to the Council a report on the progress towards the implementation’ of the DGSD. To support the Commission in meeting its obligation, the EBA committed to drafting three opinions, including this opinion on deposit guarantee scheme (DGS) payouts.
2. The EBA’s authority to deliver an opinion is based on Article 34(1) of Regulation (EU) No 1093/2010<sup>1</sup>, as the topic of the correct application of the DGSD, including as regards issues relating to DGS payouts, is in the EBA’s area of authority, as per Article 26 of that regulation.
3. In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors<sup>2</sup>, the Board of Supervisors has adopted this opinion, which is addressed to the Commission.

## General comments

4. This opinion outlines a number of proposals for the Commission to consider when preparing a report on the implementation of the DGSD to be submitted to the European Parliament and the Council and if and when preparing a proposal for a revised DGSD. This opinion is the second opinion in a set of three, following the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs<sup>3</sup>, which was published by the EBA on 8 August 2019. Further proposals for the Commission to consider will be outlined in the EBA Opinion on DGS funding and the uses of DGS funds. Since the proposals in all three opinions mentioned above are interrelated, the Commission is invited to consider the proposals in all three opinions jointly, if

<sup>1</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

<sup>2</sup> Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 27 November 2014 (EBA/DC/2011/01 Rev4).

<sup>3</sup> EBA Opinion 2019 10.

and when it prepares a proposal for a revised DGSD. Finally, the EBA notes that this opinion and the other two opinions aim to present an expert view from a depositor protection perspective, but they do not include a thorough impact assessment from all of the relevant perspectives. Therefore, the EBA proposes that, where appropriate, more analysis may be warranted.

5. This opinion lists all of the proposals made by the EBA on the topic of DGS payouts. More specifically, it provides proposals on the following topics and subtopics:

- i. The unavailability of deposits, including:
  - i.1. the link between the unavailability of deposits and the institution's 'financial circumstances';
  - i.2. the current prospects of the credit institution repaying deposits and a link to supervisory moratoria.
- ii. DGS payouts for which there are money laundering and terrorism financing (ML/TF) concerns, including:
  - ii.1. the treatment of cases in which there is a suspicion of ML/TF;
  - ii.2. the responsibilities of different authorities in a DGS payout process, including challenges posed by systematic failures of credit institutions to tackle ML/TF risks;
  - ii.3. informing depositors when they are excluded from payout or when the payout is deferred or suspended;
  - ii.4. cooperation between relevant anti-money laundering and combating the financing of terrorism (AML/CFT) and DGS authorities.
- iii. The payout process, including:
  - iii.1. the repayment period;
  - iii.2. the payout method;
  - iii.3. the identification of depositors and representatives;
  - iii.4. the provision of information to depositors during payouts;
  - iii.5. the end of the payout period for a DGS.
- iv. The paying out of sums in accounts when the depositor is not absolutely entitled to the sums held in the account, including:
  - iv.1. the payout approach;

- iv.2. the repayment period.
  - v. Home DGS reimbursing depositors in the host Member State.
  - vi. Passported services without having established branches
  - vii. The approach to temporary high balances (THBs), including:
    - vii.1. the practical application of THB protection;
    - vii.2. the THB time limit;
    - vii.3. informing depositors about THB provisions;
    - vii.4. the THB amount;
    - vii.5. the scope of THB protection;
    - vii.6. the impact of a depositor moving funds eligible for THB protection into different accounts;
    - vii.7. the impact of THBs on DGS contributions.
  - viii. The approach to the setting-off of liabilities fallen due.
  - ix. The cost of living payout.
6. The report attached to this opinion provides detailed analyses of each topic and subtopic, including (i) the background, (ii) the methodology, data sources and their limitations, (iii) the analysis, (iv) the options to address the identified issues and (v) the conclusions, which are also included below as specific EBA proposals to the European Commission.

## Specific EBA proposals to the European Commission

7. In this opinion, the EBA proposes the following:

- i. On the unavailability of deposits:
  - a) More clarity is needed on the treatment of depositors who do not have access to deposits that are due and payable and when the relevant administrative authority has made the decision required under Article 2(1)(8)(a) within 5 working days but it has decided that deposits are not unavailable because the conditions set out in that article have not been met.

An amendment to the EU legal framework is desirable to ensure that depositors who do not have access to deposits that are due and payable, but whose deposits have not been determined as unavailable, have access to an appropriate daily amount from

their deposits. The provision of such an appropriate daily amount should not be executed using DGS funds but should be done using the institution's funds. Furthermore, the main features of such a tool should be considered further if it is to be introduced into the EU legal framework.

b) Finally, such an amendment should:

- be introduced not in the DGSD but in another part of the EU legal framework; and
- mirror the wording in the current Article 33(a)(3) of the Bank Recovery and Resolution Directive (BRRD)<sup>4</sup>.

c) Further clarity is needed on the interpretation of the term 'current prospect' of a credit institution repaying a deposit in Article 2(1)(8)(a) of the DGSD.

d) Further clarity is needed in the EU legislation on the link between the application of national supervisory moratoria and what constitutes a 'current prospect'.

ii. On DGS payouts for which there are ML/TF concerns:

a) In relation to the treatment of cases in which there is a suspicion of ML/TF, the current EU framework is not sufficiently clear on:

- whether, in accordance with the Anti-Money Laundering Directive (AMLD)<sup>5</sup> or the DGSD, a DGS can suspend or defer a payout to a depositor when there is a suspicion of ML/TF;
- whether, in accordance with the AMLD or DGSD, a relevant anti-money laundering (AML) authority or financial intelligence unit (FIU) has the power to instruct a DGS to suspend a DGS payout because of ML/TF concerns; and
- the AML/CFT-related obligations of the credit institution supporting the payout by the DGS and insolvency practitioner in a DGS payout.

b) To help to ensure that suspicious depositors are not repaid without the necessary checks, there is a need to ensure that the relevant EU legislative text dealing with AML clearly states that there must be a relevant authority duly appointed and

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<sup>4</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, and Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC

<sup>5</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

entrusted with the power to instruct a DGS, the insolvency practitioner and/or the credit institution under the bankruptcy proceeding to suspend a payout when there is a suspicion of ML/TF, mindful of the facts that:

- an early information exchange between the DGS, Deposit Guarantee Schemes designated authority (DGSDA), competent authority and AML authorities is necessary to make suspension instructions effective, mindful of relevant confidentiality provisions under the AMLD;
  - such a power should be consistent with other provisions in the existing AML framework and should not undermine current requirements applicable to credit institutions under the AMLD;
  - the introduction of such a power should be accompanied by a consideration of how to align it with the treatment of depositors who have been charged with offences arising out of or in relation to money laundering;
  - an amendment may be needed, mainly in the AMLD and possibly also in the DGSD.
- c) The idea of prioritising AML checks of accounts eligible for DGS protection over accounts and transactions of other clients should be explored further to strike the right balance between the competing objectives of allowing sufficient time to investigate relevant accounts and transactions and maintaining depositor confidence in the DGS protection through fast payouts. In addition, to maintain depositor confidence while AML checks are being carried out, the introduction of a requirement to ensure that depositors have access to an appropriate daily amount from their deposits could be considered in such cases. This proposal is similar to proposal 'i.b', which is discussed in more detail in Chapter 3.1 on the unavailability of deposits, after further considering the features and the pros and cons of such a possibility under the EU AML framework.
- d) More clarity could be introduced in relation to the obligations of the credit institution supporting the payout by the DGS, after further considerations of what this credit institution would realistically be able to do in such a case.
- e) The EU framework could benefit from more clarity on the roles and responsibilities (and so also the liability) of different authorities to mitigate ML/TF risks in situations in which the credit institution has not been performing the necessary checks under its obligations (e.g. reporting suspicious transactions to AML authorities or having a performant internal risk management system in place that can detect ML/TF risks) under the AMLD and the DGSD, resulting in the single customer view (SCV) file it produced not being a reliable source of information for the purpose of the DGS

payout. When considering the roles and responsibilities of different authorities, their current mandates and abilities to perform certain tasks should be taken into account.

- f) The topic of informing depositors about exclusions, suspensions and deferrals of DGS payouts should be explored further. More specifically, whether the depositors should be notified when they are not eligible for a payout in line with the existing DGSD provisions or when their payout is deferred or suspended because of ML/TF concerns (subject to the introduction of a power for the FIU to instruct a DGS, the insolvency practitioner or the credit institution under bankruptcy proceedings to suspend a payout in such cases and mindful of relevant confidentiality provisions in the AMLD) should be explored further.
  - g) Closer cooperation between DGSs and AML authorities, including FIUs, would be useful to improve the authorities' preparedness for a DGS payout, and how such cooperation can be ensured and what it could entail should be assessed further.
  - h) Should the Commission consider that there is merit in the AML/CTF proposals outlined above, relevant national ministries responsible for AML, national AML authorities and/or the FIUs would need to be consulted further and the topics listed above would need to be analysed further in more detail. Once the EBA Opinion on DGS payouts is published, the EBA will be well placed to contribute to this endeavour by carrying out further analyses of these topics, and it will benefit from the expertise on both the DGS and the AML topics, including through involvement of the DGS practitioners.
- iii. On the payout process, it does not seem necessary to:
- a) amend current provisions on the deadline to make the repayable amount available to depositors;
  - b) introduce amendments to the DGSD in relation to the payout method, although the topic should be studied further in the context of passported services without having established branches;
  - c) introduce amendments to the DGSD in relation to the identification of depositors and representatives;
  - d) introduce amendments to the DGSD in relation to the general procedure of informing depositors during payouts. However, there are instances in which this opinion proposes targeted amendments, or further assessment, in relation to informing depositors, for example:
    - in cases in which there are issues related to AML/CFT (as per Chapter 3.2);

- in cases in which depositors reside abroad (as per Chapter 3.6);
  - regarding THBs (as per Chapter 3.7); and
  - regarding set-off (as per Chapter 3.8).
- e) There is a need to introduce amendments to the DGSD to ensure that there is an adequately long minimum time period within which depositors can claim the repayment of their deposits (subject to ensuring that the DGS can still subrogate in the claim to the rights of the depositor as part of the insolvency proceedings).
- iv. On the payout of sums in accounts of which the depositor is not absolutely entitled to the sums held in the account:
- a) The Commission should further assess the need to provide clarity in relation to the payout approaches applicable to sums in accounts of which the depositor is not absolutely entitled to the sums held in the account and the implications this entails for the coverage limit, depositor protection, the continuity of the firm that safeguards funds on behalf of or for the purposes of their its clients and the need to establish a hierarchy of accounts for the purpose of beneficiary accounts, as outlined in the attached report.
  - b) Article 8(3) of the DGSD should be amended to unlink the deadline for the repayment of beneficiary accounts from the determination of unavailability of deposits, and link it instead to the moment that the DGS has received all of the information necessary to determine the repayable amount for the absolutely entitled persons.
  - c) The amendment of Article 8(3) should limit the repayment period of beneficiary accounts to 20 working days after the DGS has received all of the information necessary to determine the repayable amount for beneficiary accounts.
- v. On home DGS reimbursing depositors in the host Member State:
- a) Current provisions in the DGSD that require the payout to be performed by the host DGS on behalf of the home DGS should be maintained as the default method for cross-border payouts. However, the DGSD should be amended to provide restricted flexibility for the home DGS to repay depositors at branches in host Member States directly, in certain circumstances and under certain conditions.
  - b) The overarching condition for the use of such flexibility should be that it ensures that depositors are repaid by the home DGS in a way that is at least as easy as it would have been under the default method. The circumstances and the conditions under which the home DGS should be allowed to repay depositors at branches in the host

Member State would require further analysis, taking those listed in this opinion and the accompanying report as a starting point.

- c) Given the technical nature of this work, the EBA together with its member authorities and schemes is well placed to develop the list of circumstances and conditions under which such restricted flexibility should be available, and it invites the Commission to consider conferring corresponding mandates to the EBA.
- vi. On passported services without having established branches:
- a) The topic of passported services is increasingly important from a DGS payout perspective. It is reasonable to expect further growth in passported service deposits in the near future, given ongoing market developments (such as the use of online or mobile banking and other FinTech innovations) and recent legislative developments (such as the Payment Accounts Directive (Directive 2014/92/EU))<sup>6</sup>. Thus, there is a need to provide further clarity in the DGSD in relation to the treatment of depositors using passported services without having established branches.
  - b) The analysis showed that the issue is complex and any option to introduce the same treatment of depositors using passported services and depositors when there is a branch would necessarily entail considerations of treatments of other types of depositors too. The EBA, together with its member authorities and schemes, is best placed to consider this topic further using the analysis outlined in this opinion as a starting point, before deciding how best to treat such cases.
- vii. On the approach to THBs:
- a) The DGSD should be amended to harmonise the time limit applicable to THBs at 6 months, subject to related amendments in relation to depositor information.
  - b) The DGSD should be amended to include references to relevant provisions concerning THBs in the depositor information sheet, on the DGS's website and using standard communication channels when informing depositors about a payout.
  - c) The DGSD should be amended to harmonise the THB amount at a sufficiently high level while maintaining the possibility for Member States to provide higher or unlimited coverage for payments of insurance benefits or compensation for criminal injuries or wrongful conviction.

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<sup>6</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257, 28.8.2014, p. 214-246



- d) The DGSD should be amended to ensure that the standard coverage level of EUR 100 000 is not deducted from the THB coverage limit.
  - e) There is no need to explicitly allow for the topping up of THB coverage to account for differences in THB protection between Member States.
  - f) In relation to the scope of THB protection, it should be clarified that deposits made in relation to Article 6(2)(a) should apply to funds placed in an account with the aim of using them promptly to affect a specific transaction to purchase or sell a property and when the depositor can provide the necessary evidence, in accordance with the specificities of the real estate market in a given Member State.
  - g) There is a need to clearly and explicitly mention whether THB provisions apply to natural persons only or to legal persons as well. Should the Commission consider that the THB provisions apply to both natural and legal persons, the Commission should further analyse whether legal persons should be split into small and medium-sized enterprises (SMEs) and large corporates or if THB amounts of only SMEs should be covered.
  - h) There is no need to further clarify Article 6(2)(b) and (c), as the text of the DGSD seems to be sufficiently clear, despite seemingly different interpretations in some Member States.
  - i) There is no need to further clarify the term 'legal transferability' in Article 6(2) of the DGSD, as there is a general understanding of this concept among Member States.
  - j) There is a need for more clarity in relation to the treatment of cases in which deposits subject to THB coverage are moved between accounts and, given the technical nature of this issue, if and when the Commission was to propose a revised DGSD, DGS practitioners should be consulted further on this topic in particular.
  - k) There is a need to clarify that DGSs have the right, but not the obligation, to include the THB amount in the calculation of DGS contributions.
  - l) In relation to the practical application of THBs and specifically the need to open a special THB account, there is no need to propose changes to the DGSD and/or to provide any further guidance or advice.
- viii. On the approach to the setting off of liabilities fallen due:
- a) The option for the DGS to take into account the possibility for setting off liabilities fallen due is not a material issue from the perspective of a DGS. Therefore, there is no need to amend the current provisions in the DGSD and, in particular, there are no strong operational or practical benefits to amending the DGSD to explicitly require a DGS to

take into account the possibility for setting off liabilities fallen due when calculating DGS contributions.

- b) However, given the potential importance of such provisions to individual depositors, the DGSD should be amended to require that, if a Member State applies the option for the DGS to take into account the possibility for setting off liabilities fallen due, depositors should be informed of such provisions through the depositor information sheet.
- ix. On the cost of living payout:
- a) Despite numerous practical issues posed by the current cost of living provisions in the DGSD, it is not necessary to amend the DGSD to provide more clarity and/or address those issues, as the current provisions on cost of living payouts are applicable only until 31 December 2023 and become obsolete thereafter.

This opinion will be published on the EBA's website.

Done at Paris, 30 October 2019

[signed]

Jose Manuel Campa

Chairperson for the Board of Supervisors



# REPORT ON DEPOSIT GUARANTEE SCHEME PAYOUTS

**EBA**

EUROPEAN  
BANKING  
AUTHORITY

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## Executive summary

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The Deposit Guarantee Schemes Directive (DGSD) requires that the European Commission (the Commission), supported by the EBA, 'shall submit to the European Parliament and to the Council a report on the progress towards the implementation' of the DGSD. Further to that mandate, on 6 February 2019, the Commission sent a Call for Technical Advice to the EBA 'to provide technical analysis and to provide, where appropriate, policy recommendations on potential amendments reflecting the experience gained by deposit guarantee schemes (DGS) and designated authorities (DGSDA) during the years of application of the DGSD since July 2015'.

To support the Commission in meeting its obligation, the EBA committed to fulfilling this mandate by submitting three opinions to the Commission. The first one, on the eligibility of deposits, coverage level and cooperation between DGSs, was published on 8 August 2019. This EBA Opinion, namely on DGS payouts, constitutes the second of this trilogy. The opinion on DGS funding and the uses of DGS funds will follow later in 2019.

To provide an assessment and, where appropriate, policy recommendations to the Commission, in October 2018 the EBA collected data from DGSDAs and DGSs on the implementation and practical application of the DGSD across Member States. These data, together with other information available to the EBA, served as the basis for an extensive analysis of each topic presented in this report. This report forms the analytical basis for this EBA Opinion on DGS payouts.

The report, and consequently the EBA Opinion, identifies 39 proposals addressed to the Commission. Of these 39 proposals, 30 either propose a change to the DGSD, to related products such as EBA Guidelines or to other elements of EU law, or express a need to study a particular topic further, while the remaining nine proposals conclude that no change to the DGSD or any other part of the DGSD framework is necessary. More specifically, the report proposes changes in relation to the unavailability of deposits, DGS payouts for which there are money laundering and terrorism financing (ML/TF) concerns, some aspects of the payout process, a payout of accounts in which the depositor is not absolutely entitled to the sums held in the account, home DGS reimbursing depositors in the host Member State, passported services without having established branches, the approach to temporary high balances (THBs) and the approach to the setting off of liabilities fallen due. The report proposes no changes in relation to the cost of living payout.

The EBA invites the Commission to consider the proposals outlined in this report when preparing a report on the implementation of the DGSD to be submitted to the European Parliament and the Council, and if and when it prepares a proposal for a revised DGSD. To fully consider the EBA's proposals in relation to the implementation of the DGSD, this report, and in consequence the opinion it is annexed to, should be considered by the Commission alongside the two other EBA Opinions and the corresponding analytical reports, the first on the eligibility of deposits, coverage level and cooperation between DGSs, published in August 2019, and the second on DGS funding and the uses of DGS funds, which is due to be published later in 2019.



# 1. Background

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1. Article 19(6) of the DGSD requires that the Commission, supported by the EBA, 'shall submit to the European Parliament and to the Council a report on the progress towards the implementation' of the DGSD by 3 July 2019. That report 'should, in particular, address':
  - a. the *ex ante* funds target level for DGSs 'on the basis of covered deposits, with an assessment of the appropriateness of the percentage set, taking into account the failure of credit institutions in the EU in the past';
  - b. 'the impact of alternative measures used in accordance with Article 11(3) on the protection of the depositors and consistency with the orderly winding up proceedings in the banking sector';
  - c. the DGSD implementation's 'impact on the diversity of banking models';
  - d. 'the adequacy of the current coverage level for depositors';
  - e. whether or not these matters 'have been dealt with in a manner that maintains the protection of depositors'.
2. Furthermore, Article 19(6) of the DGSD also requires the EBA to report to the Commission on 'calculation models and their relevance to the commercial risk of the members' and to also 'take due account of the risk profiles of the various business models' by 3 July 2019.
3. Further detail of the desired content of the EBA's support was provided by the Commission in a letter sent to the EBA on 6 February 2019, in which it formally requested technical advice from the EBA in relation to the mandate above. In the light of the resource intensity of the task, the Commission requested that the EBA should complete and provide its assessment by 31 October 2019, possibly supplying its input to the Commission in several stages.
4. More specifically, the Commission requested the EBA 'to provide technical analysis ... and to provide, where appropriate, policy recommendations on potential amendments reflecting the experience gained by deposit guarantee schemes and designated authorities during the years of application of the DGSD since July 2015'. The Commission explicitly requested the EBA's input in relation to the following issues:
  - a. the target level and related matters, namely:
    - i. the basis of the target level (covered deposits);

- ii. the target level percentage (0.8% of covered deposits), including its appropriateness and the rationale for some DGSs raising contributions above the minimum target level;
  - iii. the implementation of and practical experience with the application of alternative funding arrangements under Article 10(9) of the DGSD in Member States, including their possible impact on the level of *ex ante* funding;
  - iv. calculating DGS contributions of third-country branches;
- b. alternative measures (Article 11(3) of the DGSD), including the incidence of failure prevention measures, their impact on the depositor protection and their consistency with winding-up proceedings;
- c. the impact of the diversity of banking models, including an analysis of if and how approaches to calculating contributions to DGSs reflect the diversity of bank business models;
- d. the coverage level for depositors and related issues, such as, in particular:
- i. the adequacy of the current coverage level (EUR 100 000);
  - ii. the implementation of provisions on THBs (Article 6(2) of the DGSD) in Member States;
  - iii. the approaches of Member States to third-country branches' equivalence (Article 15 of the DGSD) and their impact on depositor protection;
  - iv. the approaches to setting off covered deposits and liabilities that have fallen due (Article 7(5) of the DGSD) and their effect on the coverage level in Member States;
  - v. an analysis of whether or not there is a need for authorities to report regularly on the levels of covered deposits, eligible deposits and non-eligible deposits across all banks;
  - vi. the implementation of the list of exclusions from eligibility (Article 5(1) of the DGSD);
  - vii. the implementation of optional coverage of pension funds and deposits of local authorities with a small budget (Article 5(2) of the DGSD);
  - viii. the provisions with respect to joint accounts (Article 7(2) of the DGSD);
- e. the assessment of whether or not the matters referred to in Article 19(6), second subparagraph, have been dealt with in a manner that maintains the protection of depositors, such as, in particular:



- i. the practical implementation of the definitions used in the DGSD such as ‘deposit’ and ‘unavailable deposits’ (Article 2(1)(3), Article 2(1)(8) and Article 3(2), second subparagraph, of the DGSD);
  - ii. implications of current anti-money laundering (AML) rules for payouts and their interaction with the provisions of the DGSD (including exchanges of information between authorities responsible for the application of the DGS and AML Directives);
  - iii. the compensation of depositors by using the failing banks’ assets, where available, rather than the DGS’s available financial means;
  - iv. analysis of the role of the EBA in cooperation agreements signed between DGSs (Article 14(5) of the DGSD);
  - v. analysis of cross-border payouts (Article 14(2) of the DGSD), including potential benefits and drawbacks of introducing the possibility of the home DGS directly compensating depositors at a branch in another Member State;
  - vi. analysis of the practical application in the Member States of other selected provisions in the DGSD, such as, in particular, the DGS investment strategy (Article 10(7) of the DGSD) and transfer of DGS contributions (Article 14(3) of the DGSD).
5. In addition to the mandate outlined above, in developing the three opinions, the EBA has identified additional issues that are not explicitly listed in the Commission’s Call for Technical Advice. Some, for example, arise from Member States incorporating the DGSD differently in national law and others have arisen as a result of the application of DGSD provisions to real-life cases. This is in line with the Commission’s request, which also stated that the EBA could ‘provide feedback on additional relevant provisions not listed’ in its request. Examples of such additional topics for which issues have been identified include passported services without having established branches and certain aspects of the approach to THBs, such as the treatment of legal persons.
6. The EBA decided to fulfil the mandate with three separate opinions on:
  - a. the eligibility of deposits, coverage level and cooperation between DGSs;
  - b. DGS payouts;
  - c. DGS funding and the uses of DGS funds.
7. Together, the three EBA Opinions will cover the topics under each of the five points (a-e) of the first subparagraph of Article 19(6) of the DGSD, and some additional topics not explicitly outlined in the Commission’s Call for Technical Advice.

8. To provide an assessment and, where appropriate, policy recommendations to the Commission, in September-October 2018 the EBA collected data from DGSDAs and DGSs on the implementation and practical application of the DGSD across Member States. These data, together with other information available to the EBA, served as the basis for an extensive analysis of each topic. However, the EBA notes that this opinion and the other two opinions aim to present an expert view from a depositor protection perspective, but do not include a thorough impact assessment from all the relevant perspectives, so the EBA proposes that, where appropriate, more analyses may be warranted. This report starts with a description of the broad methodology employed and the data sources used (Chapter 2). Chapter 3 is composed of a section on each of the topics and subtopics. Each section includes first the background and then further information on the methodology, data sources and their limitations, given that different topics required different approaches, and the information used was of different types and qualities. The analysis of each topic or subtopic comes third, followed by the outline and analysis of the options to address the identified issues, and finally the conclusions are given.
9. This report, which forms the analytical basis for the EBA Opinion on DGS payouts, addresses the following topics:
- a. the unavailability of deposits;
  - b. DGS payouts in which there are ML/TF concerns;
  - c. the payout process;
  - d. the payout of sums in accounts of which the depositor is not absolutely entitled to the sums held in the account;
  - e. home DGS reimbursing depositors in the host Member State;
  - f. passported services without having established branches;
  - g. the approach to THBs;
  - h. the approach to the setting off of liabilities fallen due;
  - i. the cost of living payout.

## 2. Methodological approach

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### 2.1 General approach

10. To deliver on the Commission's request for technical assistance, and to be able to take a comprehensive and accurate view across all EU Member States — and non-EU European Economic Area (EEA) countries, also referred to as 'Member States' in the remainder of this report — the EBA used a range of data sources and types of information.

11. The EBA used what it deemed to be the most suitable type, scope and depth of analysis for each topic and subtopic, given the wide range of topics, and differences in the following, among others:

- the characteristics of each topic (qualitative versus quantitative);
- the materiality of the issues identified;
- the level of real-life experience of applying certain provisions.

12. In practice, this means that the analysis in relation to some topics is:

- based on numerical data and calculations, while in other cases it is purely qualitative;
- accompanied by detailed assessments, including uses of scenarios and various options, while other topics, particularly if they are less material, are analysed in less detail;
- focused mainly on how provisions have been implemented, while in other cases the focus is more on the practical application of such provisions.

### 2.2 Data sources

13. The main source of information used for the purpose of this report comes from a survey that the EBA sent to the DGSDAs and DGSs on 4 October 2018. The annex includes the part of the survey relevant to the topics covered in this report. The EBA received responses to the survey from 36 DGSDAs and DGSs from 29 Member States (including two non-EU EEA countries). The EBA did not receive input from Hungary, Iceland, Slovakia or Slovenia. Although most respondents provided answers to all of the questions, this was not always the case, which is why the number of responses is reported separately for each question in Chapter 3. Furthermore, while developing the analysis, the EBA requested further information by means of small, targeted surveys, with questions also included in the annex. The EBA also used information on real-life cases collected in the context of the EBA's mandate in relation to depositor protection.

14. Because of the heterogeneity of the topics covered, Chapter 3 outlines data sources and data limitations separately for each subtopic.

## 3. Assessment

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### 3.1 Unavailability of deposits

15. The EBA considered the current definition of an unavailable deposit as per Articles 2(1)(8) and 3(2) of the DGSD with particular focus on the following parts of the definition:

- the institution appears to be ‘unable for the time being ... to repay the deposit’;
- the determination to be made by the relevant administrative authority that the credit institution appears to be unable to repay deposits for ‘reasons directly related to [the credit institution’s] financial circumstances’, and the ruling by the judicial authority that depositors’ rights have been suspended ‘for reasons which are directly related to the credit institution’s financial circumstances’; and
- ‘the institution has no current prospect of being able to [repay deposits for the time being]’.

The link between national supervisory moratoria across Member States and the non-payment of deposits deserves special attention.

16. When discussing this topic, the EBA took into account the European Court of Justice (ECJ) ruling from 4 October 2018 in the *Nikolay Kantarev v Balgarska Narodna Banka* case (C-571/16 — Kantarev), which included the interpretation of the definition of ‘unavailable deposit’ in Directive 94/19/EC, which was unchanged in the recast DGSD. While the ruling is relevant for all the subtopics, the most relevant provisions are quoted only in subsection 3.1.1.

17. Furthermore, the EBA considered the topic of the determination of the unavailability of deposits based on the results of the survey sent to the DGSDAs and DGSs, as well as real-life cases that show that depositors may lose access to their deposits for reasons not necessarily directly related to the credit institution’s financial circumstances but when the outcome, from a depositor perspective, is the same — funds are not available to them. More specifically, the EBA looked at recent cases in which depositors did not have access to their funds, or access had been severely restricted, for up to a year and a half, without the authorities determining that deposits are unavailable. The EBA also took into account a recent case in which the competent authority suspended accounts of all clients in a credit institution, including accounts of depositors eligible for coverage. In that case, deposits have not been determined to be unavailable, because, as argued by the relevant authority, the suspension is not directly linked to the financial circumstances of the institution, but rather stems from issues related to internal governance and AML concerns.

### 3.1.1. The link between the unavailability of deposits and the institution's 'financial circumstances'

#### Legal basis and background

18. Article 2(1)(8) of the DGSD defines 'unavailable deposit' as 'a deposit that is due and payable but that has not been paid by a credit institution under the legal or contractual conditions applicable thereto, where either: (i) the relevant administrative authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so; or (ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances and which has the effect of suspending the rights of depositors to make claims against it'.
19. Article 3(2) of the DGSD, second paragraph, provides that 'the relevant administrative authority shall make the determination referred to in point (8)(a) of Article 2(1) as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable'.
20. Recital 7 of the DGSD stipulates that '[a]s a result of this Directive, depositors will benefit from significantly improved access to DGSs, thanks to a broadened and clarified scope of coverage, faster repayment periods, improved information and robust funding requirements. This will improve consumer confidence in financial stability throughout the internal market'.
21. Recital 14 of the DGSD stipulates that '[t]he key task of a DGS is to protect depositors against the consequences of the insolvency of a credit institution. DGSs should be able to provide that protection in various ways. DGSs should primarily be used to repay depositors pursuant to this Directive (the "paybox" function)'.
22. Article 33a(3) of Directive 2014/59/EU<sup>7</sup> (the Bank Recovery and Resolution Directive — BRRD) states that 'Member States may provide that where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits'.
23. On 4 October 2018, the ECJ provided its judgment in the *Nikolay Kantarev v Balgarska Narodna Banka* case (C-571/16 — Kantarev). The judgment included the interpretation of the definition of 'unavailable deposit' in Directive 94/19/EC, which was unchanged in the recast DGSD.
24. For the purpose of this chapter on the unavailability of deposits, the most relevant provisions in that ruling are as follows:

<sup>7</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

51 It follows from those provisions that the determination that deposits of a credit institution have become unavailable cannot depend on the insolvency of the credit institution in question or on the withdrawal of its banking licence.

52 First, the unavailability of deposits must be determined within a very short period, without waiting for the necessary conditions for initiating insolvency proceedings or withdrawing a banking licence to be satisfied.

53 Second, the circumstances of insolvency of the credit institution and withdrawal of its banking licence differ from those set out in Article 1(3)(i) of Directive 94/19 [now Article 2(1)(8)(a) of the DGSD]. For instance, withdrawal of a credit institution's banking licence may, inter alia, result from failure to join a deposit-guarantee fund without, however, meaning that the deposits of that institution have become unavailable.

54 In addition, a credit institution's insolvency and withdrawal of its banking licence tend to indicate that the credit institution is facing long-term difficulties. By contrast, since Article 1(3)(i) of Directive 94/19 [now Article 2(1)(8)(a) of the DGSD] subjects determination of the unavailability of deposits to the condition of the credit institution appearing unable "for the time being" to repay the deposit and of having no current prospect of being able to do so, the unavailability may be temporary.

55 It follows that the determination of unavailability of deposits must take place even in the event of temporary difficulties, provided that the credit institution in question is unable to repay a deposit that is due and payable and that there is no current prospect of it being able to do so.

56 That interpretation is borne out by the twofold objective pursued by Directive 94/19. In that regard, it should be noted that that directive is intended, as its first and fourth recitals indicate, both to protect depositors and to ensure the stability of the banking system, by preventing massive withdrawal of deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of public confidence in the soundness of the banking system (judgment of 22 March 2018, *Anisimovienė and Others*, C-688/15 and C-109/16, EU:C:2018:209, paragraph 83).

57 As regards that twofold objective, it is imperative that the deposit-guarantee intervene, and as stated in the eighth and ninth recitals of that directive, within a "very short period" as soon as a credit institution's deposits become unavailable.

58 First, the protection of depositors requires that their deposits be reimbursed as soon as possible from the time of their unavailability so that such depositors are not deprived of their savings and not, as a result, unable, in particular, to meet their daily expenses. Second, the stability of the banking system also calls for the swift

reimbursement of depositors in order to avoid a credit institution's financial difficulties, even if temporary, from resulting in massive withdrawal of deposits and those difficulties thereby spreading to the rest of the banking system.

59 Indeed, having regard to the wording of Article 1(3)(i) of Directive 94/19 [now Article 2(1)(8)(a) of the DGSD] and in particular to the fact that that provision states that the relevant competent authority must determine that deposits have become unavailable if “in [its] view” the necessary conditions in that regard are satisfied, that authority has some latitude. However, that latitude concerns its assessment of the conditions set out in that provision, not those conditions as such, nor the timing of such a determination.

60 As regards the possibility of derogating from the time limit for determining whether deposits are unavailable so that the credit institution may be placed under special supervision, clearly the period set out in the second paragraph of Article 1(3)(i) of Directive 94/19 [now Article 2(1)(8)(a) of the DGSD] is, according to the wording of that provision, a mandatory time limit, from which no other provision of that directive provides for a derogation.

61 In addition, to allow the relevant competent authorities to derogate from the time limit set out in Directive 94/19 for determining that deposits are unavailable so that the credit institution may be placed under special supervision would run counter to the requirement of prompt action which follows from that directive. It is clear both from the twofold objective pursued by that directive, as mentioned in paragraph 56 above, and from the reduction of that time limit, from 21 to five days, introduced by Directive 2009/14, that such a determination must be made within a very short period.

62 Furthermore, the explanatory memorandum to the Proposal for a Council Directive on deposit-guarantee schemes of 4 June 1992 [COM(92) 188 final, OJ 1992 C 163, p. 6], which led to the adoption of Directive 94/19, states, precisely, that the payment of the deposit-guarantee should be based on the objective finding that a depositor has been deprived of the funds which should have been repaid by the credit institution “in order to speed up the payout of the guaranteed amount” and “not to link this payout with the uncertainties of the procedures of reorganising and liquidating the credit institution”.

63 Indeed, recital 12 of Directive 2009/14 states that “deposits may be considered unavailable once [measures for the] early intervention or reorganisation [of the credit institution in question] have been unsuccessful”.

64 However, first, recital 12 refers only to the possibility of regarding deposits as unavailable where early intervention or reorganisation measures have been



unsuccessful without subjecting the determination of unavailability to the fact that such preventative measures have failed.

65 Second, it is to be noted that the second sentence of that recital specifies that that possibility “should not prevent competent authorities from making further restructuring efforts during the payout delay” and therefore implies that such measures do not affect the determination of the unavailability of deposits, nor their reimbursement.

66 As regards the time limit for reimbursing the deposits set out in Article 10(1) of Directive 94/19, it is clear from the wording of that provision that an extension of that time limit is possible only in the case of “wholly exceptional circumstances” and that such extension “shall not exceed 10 working days”.

67 As regards a defaulting credit institution, placing it under special supervision, in order to prevent it from becoming insolvent, is not a wholly exceptional circumstance, but, on the contrary, a circumstance inherent to the activities of a credit institution and to the measure which may be adopted to remedy such a situation.

68 In any event, the fact that the extension of the time limit for reimbursing deposits is reduced to 10 working days shows that that extension does not concern measures which could be adopted in order to avoid that credit institution from becoming insolvent, since those measures require more than 10 days before taking full effect.

69 In the light of all those factors, the answer to the third and sixth questions is that Article 1(3), and Article 10(1) of Directive 94/19 must be interpreted as precluding, first, national legislation according to which the determination that deposits have become unavailable is concomitant with the insolvency of that credit institution and the withdrawal of that institution’s banking licence and, second, derogation from the time limits provided by those provisions for the purposes of determining that deposits have become unavailable and of reimbursing those deposits on the ground that the credit institution must be placed under special supervision.’

### Methodology, data sources and their limitations

25. The survey submitted to the DGSDAs and DGSSs included five questions related to the unavailability of deposits.

26. The EBA also took into account real-life recent cases in Bulgaria, where the ECJ provided a ruling (C-571/16 — Kantarev), Cyprus and Malta.

## Main findings, issues identified and the analysis

27. The survey asked whether in their jurisdiction, the definition of unavailability of deposits is specified further, beyond the definition included in Article 2(1)(8) in conjunction with Article 3(2) of the DGSD. The responses to the survey included the following:

- 24 respondents from 18 Member States do not specify further the definition of unavailability of deposits beyond the definition included in Article 2(1)(8) in conjunction with Article 3(2) of the DGSD;
- 11 respondents from 10 Member States reported that the unavailability of deposits can be triggered by circumstances beyond those included in the definition in Article 2(1)(8) in conjunction with Article 3(2) of the DGSD and that there are further provisions on such circumstances in their jurisdiction.

28. Subsequently, respondents were asked, if there are national provisions further specifying those included in the definition of the unavailability of deposits in the DGSD in their jurisdiction, to outline the additional provisions in the different jurisdictions and to include a link to the relevant legal act together with the relevant article number.

- In the survey responses submitted, the following elements that were further specified in the national provisions implementing Article 2(1)(8) of the DGSD were reported by a number of Member States:
  - eight respondents from eight Member States reported that, in their jurisdictions, it was further specified that the determination of the unavailability of deposits can be triggered by bankruptcy proceedings initiated by a ruling of the court or judicial authority or other authorities;
  - five respondents from four Member States reported that, in their jurisdiction, the description of the time limit of 5 working days for making the determination of the unavailability of deposits was specified further;
  - two respondents from one Member State reported that, in their jurisdiction, it was specified that it is the central bank that is empowered to take a decision related to the credit institution's financial circumstances with the effect of suspending the rights of depositors to make claims against it, not a judicial authority;
  - two respondents from two Member States reported that, in their jurisdiction, it was further specified that the determination of the unavailability of deposits can be triggered by a suspension of payments;
  - one respondent reported that, in its jurisdiction, it was further specified that the determination of the unavailability of deposits can be triggered if the

authorisation issued to a third-country credit institution for setting up a branch in its jurisdiction is revoked, and any other event or act that is provided for in the legislation of the home country of a third-country credit institution with a branch in the respective Member State upon the occurrence of which deposits are subject to compensation pursuant to such legislation.

29. In the survey responses submitted, it was reported that the following additional provisions are outlined by a number of Member States:

- one respondent reported that, in its jurisdiction, the determination of the unavailability of deposits can be triggered by a restructuring of the credit institution;
- one respondent reported that, in its jurisdiction, the determination of the unavailability of deposits can be triggered if the court has ordered business supervision of the credit institution;
- one respondent reported that, in its jurisdiction, the revocation of the authorisation of the credit institution by the competent authority, which would imply that deposits become unavailable, can be because the credit institution's activities would significantly damage the interests of depositors and other clients or currency circulation.

30. The survey asked, if there have been payouts since the implementation of the revised DGSD, what factors and indicators did they consider relevant to make the determination that deposits were unavailable (e.g. following complaints by depositors who were not able to withdraw their funds), including the assessment of whether the institution has current prospects of being able to repay the deposits again. The responses to the survey included the following:

- 10 respondents from six Member States responded by stating that the indicators and factors used to determine that deposits are unavailable in the case of payout were mostly deterioration of the financial situation of a credit institution (illiquidity, over-indebtedness), uncertainty about the ability of the credit institution to fulfil its commitments, problems related to governance or internal controls and restrictions in offering certain banking services or products;
- one respondent responded that, in two cases, in the absence of an insolvency order, the DGS determined the unavailability of deposits based on the fact that the credit union was unable to repay deposits and had no current prospects of being able to do so, because the credit union's infrastructure (e.g. office) had disappeared and its directors were not contactable;
- one respondent responded that the determination of the unavailability of deposits is triggered on the date on which the authorisation of a credit institution was revoked;

- 18 respondents from 16 Member States responded that no payouts have taken place since the implementation of the revised DGSD;
- 13 respondents from 10 Member States responded that another authority (e.g. central bank, court, national competent authority) determines the unavailability of deposits. As such, a DGS or DGSDA has no insight into the factors and indicators used in the assessment of the conditions for the determination of the unavailability of deposits.

31. The survey finally asked which authority is the 'relevant administrative authority' in their jurisdiction. The responses to the survey included the following:

- 23 respondents from 16 Member States reported that their competent authority (supervisory authority) is the 'relevant administrative authority';
- 11 respondents from 10 Member States reported that the national or central bank is the 'relevant administrative authority' and is entrusted with the task of the 'competent authority' (supervisory authority) and the task of the 'resolution authority';
- one respondent reported that the DGS is the relevant administrative authority;
- one respondent reported that the Financial Stability Company (which is the DGS designated authority) is the relevant administrative authority.

32. The responses to the survey show that in a number of Member States the definition of an unavailable deposit is broadened or clarified further. Similarly, in a number of Member States, national law stipulates additional cases in which deposits can be determined to be unavailable.

33. Furthermore, responses to the survey show that, in most cases, authorities other than the DGS/DGSDA are the relevant administrative authorities that are required to make the determination that 'in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so' (see Table 1).

**Table 1. List of DGS designated authorities, DGSs, relevant administrative authorities and competent authorities**

Member State	DGS designated authority	DGS (where different from DGS designated authority)	Relevant administrative authority	Competent authority
Austria	Austrian Financial Market Authority	Uniform Deposit Guarantee Scheme of Austria  Deposit Guarantee Scheme for the Savings Bank Sector	Austrian Financial Market Authority	Austrian Financial Market Authority
Belgium	Guarantee Fund for Financial Services	n/a	National Bank of Belgium	National Bank of Belgium
Bulgaria	Bulgarian Deposit Insurance Fund	n/a	Bulgarian National Bank	Bulgarian National Bank
Croatia	State Agency for Deposit Insurance and Bank Resolution	n/a	Croatian National Bank for credit institutions and Commercial Court	Croatian National Bank for credit institutions and Croatian Financial Services Supervisory Agency for investment firms
Cyprus	Deposit Guarantee Fund for Banks, Deposit Guarantee Fund for CCI's	n/a	Central Bank of Cyprus	Central Bank of Cyprus
Czech Republic	Financial Market Guarantee System	n/a	Czech National Bank	Czech National Bank
Denmark	Guarantee Fund	n/a	Financial Stability Company	Financial Supervisory Authority
Estonia	Guarantee Fund	n/a	Financial Supervision and Resolution Authority	Financial Supervision and Resolution Authority
Finland	Finnish Financial Stability Authority	n/a	Finnish Financial Stability Authority	Financial Supervisory Authority
France	Prudential Supervision and Resolution Authority	Deposit Guarantee and Resolution Fund	Prudential Supervision and Resolution Authority	Prudential Supervision and Resolution Authority
Germany	Federal Financial Supervisory Authority	Deposit Guarantee Scheme for German Private Banks GmbH  Deposit Guarantee Scheme for German Public Banks GmbH  Protection Scheme of the German Savings Banks Association  Protection Scheme of the Cooperative Banks GmbH	Federal Financial Supervisory Authority	Federal Financial Supervisory Authority
Gibraltar	Gibraltar Financial Services Resolution and Compensation Committee	n/a	Gibraltar Financial Services Commission	Gibraltar Financial Services Commission
Greece	Ministry of Finance	Hellenic Deposit and Investment Guarantee Fund	Bank of Greece	Bank of Greece

Member State	DGS designated authority	DGS (where different from DGS designated authority)	Relevant administrative authority	Competent authority
Hungary	National Deposit Insurance Fund of Hungary	n/a	-	Central Bank of Hungary
Iceland	The Icelandic Depositors' and Investors' Guarantee Fund	n/a	-	Financial Supervisory Authority
Ireland	Irish Deposit Guarantee Scheme	n/a	Central Bank of Ireland	Central Bank of Ireland
Italy	Bank of Italy	Depositors' Guarantee Fund of Credit Cooperative Banks  Interbank Deposit Protection Fund	Bank of Italy	Bank of Italy
Latvia	Financial and Capital Market Commission	n/a	Financial and Capital Market Commission	Financial and Capital Market Commission
Liechtenstein	Financial Market Authority	The Deposit Guarantee and Investor Protection Foundation	Financial Market Authority	Financial Market Authority
Lithuania	Deposit and Investment Insurance	n/a	Bank of Lithuania	Bank of Lithuania
Luxembourg	Conseil de protection des déposants et des investisseurs	Fonds de garantie des dépôts Luxembourg	Commission de Surveillance du Secteur Financier	Commission de Surveillance du Secteur Financier
Malta	Depositor Compensation Scheme	n/a	Malta Financial Services Authority	Malta Financial Services Authority
Netherlands	Dutch Central Bank, Deposit Guarantee Fund	n/a	Dutch Central Bank	Dutch Central Bank
Norway	The Norwegian Banks' Guarantee Fund	n/a	Ministry of Finance and Financial Supervisory Authority of Norway	Financial Supervisory Authority of Norway
Poland	Bank Guarantee Fund	n/a	Polish Financial Supervision Authority	Polish Financial Supervision Authority
Portugal	Bank of Portugal	Deposit Guarantee Fund  Mutual Agricultural Credit Guarantee Fund	Bank of Portugal	Bank of Portugal
Romania	Bank Deposit Guarantee Fund	n/a	National Bank of Romania	National Bank of Romania
Slovakia	Deposit Protection Fund	n/a	-	National Bank of Slovakia
Slovenia	Bank of Slovenia	n/a	-	Bank of Slovenia
Spain	Deposit Guarantee Fund of Credit Institutions	n/a	Bank of Spain	Bank of Spain
Sweden	Swedish National Debt Office	n/a	Financial Supervisory Authority	Financial Supervisory Authority
United Kingdom	Financial Services Compensation Scheme	n/a	Financial Services Compensation Scheme for credit unions and the Prudential Regulation Authority for credit institutions and building societies	Prudential Regulation Authority and Financial Conduct Authority

34. The definition of an unavailable deposit in the DGSD requires that, in the view of the relevant administrative authority, the credit institution appears unable, for the time being, for reasons directly related to its financial circumstances, to repay the deposit and the institution has no current prospects of doing so, or the judicial authority has made a ruling that has the effect of suspending the rights of depositors to make claims against the credit institution for reasons that are directly related to the credit institution's financial circumstances. The administrative authority shall make the determination no later than 5 working days after first becoming satisfied that a credit institution has failed to repay deposits that are due and payable.
35. In the EU jurisdictions, the practical application of the determination to be made by the administrative authority has given rise to some differences, as highlighted by the results of the survey, whereby different authorities reported different factors being taken into account in the assessment of whether deposits are unavailable, including some authorities reporting a link between the determination of unavailability and the determination that an institution is failing or likely to fail, or the start of a specific insolvency procedure.
36. The ECJ ruling in the *Kantarev* case provided further clarity in relation to the interpretation of Articles 2(1)(8) and 3(2) of the DGSD. However, it should be noted that the ruling took place on 4 October 2018, namely after Member States transposed the DGSD into national legislation.
37. Furthermore, as mentioned in the introduction to Chapter 3.1, there have been a number of real-life cases in which depositors had no access to deposits that were due and payable for prolonged periods of time because this lack of access was not allegedly directly related to the financial circumstances of the institution (which can undermine trust in depositor protection). Such cases could include governance-related issues (e.g. AML concerns or other concerns) or technical issues, such as failures of IT systems of a credit institution that may not be linked to an institution's financial circumstances.
38. The EBA arrived at the view that such cases pose a challenge to the current framework and the aim of the DGSD to ensure that depositors 'benefit from ... faster repayment periods, [which in turn] improve consumer confidence in financial stability throughout the internal market' (recital 7 of the DGSD) and that, currently, the EU framework is not clear on how to treat depositors in such cases.

### Options to address the identified issues

39. The EBA assessed several options to ensure that the DGSD provides clarity on the treatment of cases in which the deposits are not determined to be unavailable, because the relevant administrative authority has not made the determination that:
- i. the credit institution appears to be unable, for the time being, for reasons that are directly related to its financial circumstances, to repay deposits; and
  - ii. the credit institution has no current prospect of doing so;

but where, from the perspective of the depositor, the credit institution has failed to repay deposits that are due and payable.

40. The following two options were considered:

- Option 1: amend the DGSD by:
  - removing the term ‘financial circumstances’ from Article 2(1)(8)(a) and (b) of the DGSD and so broaden the application of the article to all cases in which the credit institution appears to be unable to repay deposits and it has no current prospects of doing so; or
  - introducing a new article applicable to cases in which such an unavailability is not directly linked to financial circumstances but stems from other reasons, with a different set of rules applicable in such cases.
- Option 2: maintain current DGSD provisions, but ensure that depositors have access to some of their funds:
  - Include in the DGSD and/or other relevant EU legislative acts that depositors must have access to an appropriate daily amount from those deposits for which, in practice, funds are not available to depositors even though the relevant administrative authority has not made the determination that the credit institution appears to be unable, for the time being, for reasons that are directly related to its financial circumstances, to repay deposits and the institution has no current prospect of doing so, but when, from the perspective of the depositor, the credit institution has failed to repay deposits that are due and payable.

**Option 1: amend the DGSD by removing the term ‘financial circumstances’ from Article 2(1)(8)(a) and (b) or by introducing a new article not linked to an institution’s financial circumstances**

41. The EBA identified the following arguments in favour of removing the term ‘financial circumstances’ from Article 2(1)(8) of the DGSD:

- From a depositor perspective, the reason for the failure of the credit institution to repay deposits that are due and payable is of limited relevance, as is whether those reasons are or are not directly linked to that institution’s financial circumstances. Depositors expect to be able to access their deposits at all times and, if they are not available, either that access is restored promptly or their deposits are reimbursed by the DGS.
- Broadening the definition of when deposits are unavailable would introduce a further harmonisation of approaches to cases in which a lack of access to funds is not directly linked to an institution’s financial circumstances.



42. The arguments against amending the current definition of the determination and the key concerns are the following:

- The purpose of the DGSD is to provide protection for depositors in the case of a bank failure (and not when there is no failure) and other pieces of EU legislation include provisions on the tools available to the authorities ahead of bank failure.

The counterarguments to this are as follows:

- The definition of an unavailable deposit is not directly linked to bank failure (regardless of whether this is understood as a determination that the institution is failing or likely to fail or as the institution's licence being withdrawn). Furthermore, the DGSD also includes provisions on failure prevention measures, and deficiencies in areas not directly linked to an institution's financial circumstances, such as governance, may lead to the non-viability of the institution (as per Article 32(4)(a) of the BRRD in conjunction with Article 18 of the Capital Requirements Directive (CRD)<sup>8</sup>, the EBA Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of the BRRD and the EBA Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing<sup>9</sup>).
- A requirement for the relevant administrative authority to determine that the credit institution is unable to repay deposits but when the reasons are not directly linked to an institution's financial circumstances could lead to the failure of that institution, even if it was otherwise viable and the relevant authorities were in the process of finding a solution to the issues faced by that institution. In turn, depending on the size of the institution, such a determination could have a detrimental impact on the stability of the financial sector, which runs counter to the stated aim of the DGSD to contribute to financial stability in the EU.
- There is a need to provide clarity and consistency in the interpretation of the definition, which could be jeopardised if the definition was broadened to also include cases in which there is no direct link to the financial circumstances of an institution.

The counterargument to this is that consistency in the interpretation could be ensured by means of a clear proposal of how to treat cases in which no access to deposits stems from issues other than directly linked to the financial circumstances of an institution.

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<sup>8</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

<sup>9</sup> EBA/GL/2014/13

## **Option 2: maintain current provisions but allow granting of access to a limited amount of deposits**

43. The EBA analysed the option to maintain current provisions in Article 2(1)(8) of the DGSD, but to also find another way to address cases in which the relevant administrative authority has not made the determination that the credit institution appears to be unable, for the time being, for reasons that are directly related to its financial circumstances, to repay deposits and the institution has no current prospects of doing so, but when, from the perspective of the depositor, the credit institution has failed to repay deposits that are due and payable. More specifically, the option discussed was to introduce into the DGSD, or into another relevant EU legislative act, a requirement to ensure that depositors have access to an appropriate daily amount from their deposits. The provision of such an appropriate daily amount would be executed using the institution's funds.

44. The EBA considered that:

- a) A similar provision is already included in Article 33a(3) of the BRRD, which stipulates that 'Member States may provide that where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits'.
- b) Such access to limited amounts of deposits, based on national legislation, has been used in the past in cases in Cyprus, Italy and Malta. More importantly, as these provisions are currently not harmonised at the EU level, in different Member States such provisions have different features leading to different outcomes for the depositors. For example, in a case in Cyprus, depositors could have withdrawn a limited amount of funds on a weekly basis, and the amount they could withdraw changed a few times over the 1.5-year period during which depositors did not have full access to their funds. Furthermore, this withdrawal required physical presence in Cyprus. In the Italian case, the cost of living payments were granted by the temporary administrator in the context of a short supervisory moratorium and Italian depositors could withdraw EUR 250 during the whole moratorium period. In Malta, such a provision concerning access to funds was applicable, but only to legal persons, with the intention to allow firms to withdraw funds to pay salaries.
- c) From an operational and technical perspective, the introduction of such measures should be possible, given that most if not all accounts have some form of restriction, such as daily limits on withdrawals, payments, etc.
- d) Such access to funds would need to be limited, to strike the right balance between avoiding significant outflows of deposits (which could lead to the failure of an institution) and minimising the negative impact on depositors' day-to-day lives.

- e) Given that the provision of such access applies to cases in which the institution has not failed yet, access should be to depositors' funds in the credit institution and should not be confused with cost of living payouts outlined in Article 8(4) of the DGSD, which are applicable in certain cases once funds have been determined to be unavailable.

45. With the above-mentioned considerations in mind, the EBA arrived at the view that more clarity is needed in the EU legal framework in relation to the treatment of depositors who have no access to their deposits that are due and payable when the relevant administrative authority has made the decision within 5 working days but it has been decided that deposits are not unavailable because the conditions in Article 2(1)(8)(a) have not been met. The EBA agreed that, in such cases, the EU legal framework should specify what steps should be taken by the relevant administrative authority and/or other authorities so that depositors whose deposits are due and payable but have not been repaid are not deprived of access to their deposits indefinitely.

46. The EBA arrived at the view that, out of the options outlined in this report, the second option may be more immediately relevant, given the aim to ensure that depositors are not left without access to their funds for prolonged periods. Such a solution could match similar provisions on access to deposits envisaged under Article 33a(3) of the BRRD. However, as the discussed approach relates to events prior to the determination that deposits are unavailable and therefore prior to a DGS payout, the EBA arrived at the view that it should:

- a) be introduced not in the DGSD but in another part of the EU legal framework;
- b) not be done using DGS funds, but should be done using the institution's funds, as was the case in previous real-life cases in Cyprus and Italy;
- c) mirror the wording in the current Article 33(a)(3) of the BRRD.

47. The EBA has not assessed the features of such provisions, including from which point it could apply, what the appropriate amount could be, how it could be claimed, etc. Further analysis would be needed.

## Conclusions

48. The EBA proposes to the Commission that more clarity is needed on the treatment of depositors who do not have access to deposits that are due and payable when the relevant administrative authority has made the decision within 5 working days but it has decided that deposits are not unavailable because the conditions in Article 2(1)(8)(a) have not been met.

49. The EBA proposes to the Commission that an amendment to the EU legal framework is desirable to ensure that depositors who do not have access to deposits that are due and payable, but whose deposits have not been determined as unavailable, have access to an appropriate daily amount from their deposits. The provision of such an appropriate daily amount should not be executed using DGS funds, but should be done using the institution's funds. Furthermore, the

main features of such a tool should be considered further if it is to be introduced in the EU legal framework. Finally, such an amendment should:

- a) be introduced not in the DGSD, but in another part of the EU legal framework; and
- b) mirror the wording in the current Article 33(a)(3) of the BRRD.

### **3.1.2. Current prospect of the credit institution repaying deposits and a link to supervisory moratoria**

#### **Legal basis and background**

50. Article 2(1)(8) of the DGSD defines an ‘unavailable deposit’ as a deposit that is due and payable but that has not been paid by a credit institution under the legal or contractual conditions applicable thereto, where either (i) the relevant administrative authorities have determined that, in their view, the credit institution concerned appears to be unable, for the time being, for reasons that are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so, or (ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution’s financial circumstances and which has the effect of suspending the rights of depositors to make claims against it.

51. Article 3(2) of the DGSD provides that the relevant administrative authority shall make the determination referred to in point (8)(a) of Article 2(1) as soon as possible and, in any event, no later than 5 working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable.

52. Article 33a(3) of the BRRD states that ‘Member States may provide that where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits’.

53. Article 33a(9) of the BRRD states that ‘[t]his Article [related to the moratorium and the right to access an appropriate daily amount] is without prejudice to the provisions contained in the national law of Member States granting powers to suspend payment or delivery obligations ... or to suspend payment or delivery obligations of institutions or entities which are to be wound up under normal insolvency proceedings, and that exceed the scope and duration provided for in this Article. Such powers shall be exercised in accordance with the scope, duration and conditions provided for in the relevant national laws.’

#### **Methodology, data sources and their limitations**

54. The survey submitted to the DGSDAs and DGSSs included five questions related to the unavailability of deposits. One of these questions was directly linked to the application of

supervisory moratoria and one of the questions reported in paragraph 30 also asked about the 'current prospect'.

## Main findings, issues identified and the analysis

### The meaning of the term 'current prospect'

55. The EBA discussed whether there is a need to provide further precision in Article 2(1)(8)(a) of the DGSD on what is meant by an institution having 'current prospects' of being able to repay depositors. The ECJ ruling in the *Kantarev* case clarifies the applicability of the deadline for the decision on the determination of unavailability (5 working days) and clarifies that, once funds are unavailable to depositors, they should be made available within 'a very short time'. However, it would appear that the ECJ ruling does not provide an explicit and generally applicable (positive) definition of what constitutes a 'current prospect'.

56. Thus, the EBA analysed two possible approaches to give meaning to the temporal element of the term 'current prospect':

- Given that the relevant administrative authorities have no more than 5 working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable to make the determination that 'in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so', the interpretation of 'current prospect' should be conceptually linked to the deadline in Article 3(2) of the DGSD. Thus, interpreting 'current prospect' as lasting longer than the deadline applicable to such a determination would undermine the effectiveness of the deadline for the authorities to determine unavailability.
- The deadline for the relevant administrative authority to make the decision that 'in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so' is conceptually different from any deadline to what is considered to be an institution's 'current prospect' to repay depositors. The DGSD does not provide for such a hard deadline in relation to what is considered a 'current prospect' and so any considerations of what constitutes a 'current prospect' should be decoupled from the deadline for making the decision.

57. The EBA then examined which authority is responsible for assessing whether an institution has any 'current prospect' of repaying deposits. The EBA concluded that in most, if not all, Member States, it is not the DGS(DA) but the competent authority that has to make the decision that 'in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so'.

58. The EBA concluded that the term ‘current prospect’ used in Article 2(1)(8)(a) of the DGSD is interpreted differently by authorities across the EU.

### **Overview of supervisory moratoria across the EU**

59. The survey asked respondents if ‘in their jurisdiction there is a supervisory moratorium that may bar depositors from withdrawing their deposits? And if so to describe the criteria, including timelines and safeguards available to depositors (e.g. cost of living), and to describe how and if these interact with the criteria used to determine that deposits are unavailable. The respondents were asked to provide details of specific experiences, if any’. The responses to the survey included the following:

- 19 respondents from 17 Member States reported that, in their jurisdiction, there are no supervisory moratoria;
- one respondent stated that the imposition of a ‘supervisory moratorium’ in their Member State immediately triggers a payout event according to national law. Consequently, the DGS has to reimburse the depositors;
- eight respondents from eight Member States reported that, in their jurisdiction, supervisory moratoria are allowed. The legal specificities (legal power to instruct, duration, etc.) for applying this period differ across Member States:
  - One respondent stated that the special supervision regime is an administrative proceeding regulated in Section VIII, Special Supervision in Case of Risk of Insolvency (Articles 115-121), of the Law on Credit Institutions and contains a set of administrative measures imposed by the central bank on credit institutions under specific circumstances. The central may place a bank under special supervision provided that the bank has not paid deposits that are due and payable, and the central bank has started a procedure for delivery of a decision under Article 20(1)(2) of the Law on Bank Deposit Guarantee. Regarding Article 20(1)(2) of the Law on Bank Deposit Guarantee, the central bank has adopted a decision determining that the deposits are unavailable and that, in its view, the bank appears to be unable, for reasons that are directly related to its financial circumstances, to repay the deposits and has no current prospect of being able to do so; any such decision shall be made no later than 5 working days after the BNB becomes satisfied that the bank has failed to repay deposits that are due and payable.
  - One respondent reported that a ‘supervisory moratorium period’ may be imposed according to the national legislation as a temporary measure to avert any danger to the discharge of an institution’s obligations to its creditors, especially to the safety of the assets entrusted to it, or if the competent authority has reason to believe that effective supervision of the institution is not possible. The competent authority may temporarily impose a ban on sales and payments, so that the institution is closed for business with customers, and/or prohibit the acceptance of payments not intended for the payment of debt vis-à-vis the institution, unless the competent compensation scheme or other

guarantee scheme warrants that the obliged claims will be satisfied in full. After 6 weeks at the latest, the compensation case must be determined even though, theoretically, the supervisory moratorium period could last longer than 6 weeks.

- One respondent reported that the competent authority may establish a moratorium on a credit institution under certain conditions. National law in the respondent's Member State stipulates that deposits are considered unavailable (in the meaning of Article 2(1)(8) of the DGSD) on the sixth working day after a moratorium is declared in relation to a credit institution. This means that if the disbursement of deposits is suspended for longer than 5 working days, the deposits will be determined to be unavailable on the sixth working day.
- One respondent stated that the moratorium can be imposed to a credit institution by the competent authority, following the appointment of a commissioner to a credit institution, when it faces severe liquidity constraints and it is likely that its own funds are insufficient to protect its depositors and other creditors. Specifically, the competent authority may grant an extension for the fulfilment of all or part of the credit institution's obligations, by 20 working days, extendable once by another 10 working days. Moratorium on payable obligations does not constitute unavailability of deposits and consequently does not activate the payout by the DGS. Covered or eligible deposits are not excluded from the scope of this provision. The moratorium is imposed to a credit institution as a temporary precautionary measure.
- One respondent reported that, if a credit institution is put under temporary administration, the special administrators, upon positive opinion of the control committee and approval by the supervisory authority, may suspend the payment of any liability, up to 1 month. If exceptional circumstances are met, such a decision may be extended for 2 more months. Moreover special administrators could even ensure that depositors have access to an appropriate amount of their covered deposits. The Italian legislator does not classify the suspension of payments within the temporary administration as a determination of the unavailability of deposits, triggering the DGS payout. The reasoning behind this is that such a suspension should not be considered as equivalent to full unavailability of deposits but should be considered as an early intervention measure potentially turning out in the solution of the crisis and the return to a healthy situation<sup>10</sup>.
- One respondent stated that the decision regarding supervisory moratoria periods can be taken by the central bank and the time limit for a moratorium period cannot exceed 6 months for credit institutions and 2 months for credit unions. During this period of

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<sup>10</sup> In that Member State, the moratorium tool has been used in five cases in the last 20 years. Two of the five cases ended up with the return of the credit institution to the ordinary management by a merger with another viable credit institution in a going-concern perspective. In the remaining cases, the moratoria turned into a crisis solution in a gone-concern scenario. However, in those latter cases, the supervisory moratoria favoured the transfer of the failed credit institution's assets and liabilities to an acquiring credit institution in the context of compulsory administrative liquidation, which, according to the respondent, ensured public confidence in the banking system and protection of depositors' rights, and maintained financial stability.



moratorium, theoretically, credit institutions are not able to provide financial services and carry out other activities, including withdrawals of deposits. However, in practice, when the central bank decides on setting a moratorium period for a credit institution, it can also decide on the amount and the frequency of deposits allowed to be withdrawn by depositors during that moratorium period. During a recent real-life case, each depositor was allowed to withdraw EUR 145 per day for the whole moratorium period, which lasted from 17 to 24 November 2011.

- One respondent reported that there are no timelines defined and it is possible to put restrictions on withdrawals, namely no more than EUR 100 000 as of the starting date of the moratorium period. However, in every case, each depositor must have the possibility to withdraw their deposits up to EUR 100 000, otherwise after 5 working days the unavailability of deposits is declared and the DGS pays out the covered deposits according to Article 6(2) of the DGSD.
- One respondent stated that the competent authority, by means of a public notice, can limit the amount of withdrawals from depositors to EUR 250 per day on the day that the competent authority appointed a competent person. The competent authority can increase the withdrawal limit to EUR 2 500 per day 3 months later and, a year later, while the European Central Bank's final decision on whether to remove its banking licence is pending, all withdrawals are possible.

60. The results of the survey show that, in the sample covered by the report, there are 17 Member States where there are no supervisory moratoria and eight Member States where there are. They also show that, where such supervisory moratoria exist, they have different features (e.g. scope, maximum duration, roles, etc.).

#### **The link between 'current prospect' and the supervisory moratoria**

61. The EBA examined if, given the multiple approaches across the EU with regard to the application of a supervisory moratorium period, such supervisory moratoria might contradict or undermine the effectiveness of the deadline of 5 working days for the authorities to make the determination that 'in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so' as per Article 3(2) of the DGSD.

62. Furthermore, the EBA took into account the ECJ ruling in the *Kantarev* case and, in particular, paragraph 61 of that ruling, which states that 'to allow the relevant competent authorities to derogate from the time limit set out in Directive 94/19 for determining that deposits are unavailable so that the credit institution may be placed under special supervision would run counter to the requirement of prompt action which follows from that directive.' This ECJ Ruling also states, in paragraph 62, the following: '[f]urthermore, the explanatory memorandum to the Proposal for a Council Directive on deposit-guarantee schemes of 4 June 1992 [COM(92) 188



final, OJ 1992 C 163, p. 6], which led to the adoption of Directive 94/19, states, precisely, that the payment of the deposit-guarantee should be based on the objective finding that a depositor has been deprived of the funds which should have been repaid by the credit institution “in order to speed up the payout of the guaranteed amount” and “not to link this payout with the uncertainties of the procedures of reorganising and liquidating the credit institution”’.

63. The EBA considered that the ECJ ruling does not allow relevant administrative authorities to take longer than 5 working days to make the determination that ‘in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so’ (irrespective of whether a credit institution has been placed under special supervision). However, the ECJ ruling does not explicitly say how putting an institution under special supervision affects the assessment of whether there is a ‘current prospect’ that the institution will repay deposits.

64. Thus, the EBA arrived at the view that in the EU legislation there appears to be a lack of clarity on the link between the application of national supervisory moratoria and what constitutes a ‘current prospect’.

65. The EBA then considered that, in some instances, in which the deadline applicable to the supervisory moratoria is reached, this could be understood as, effectively, the ultimate deadline for what can be considered as the ‘current prospect’ to make the funds available to the depositors. This is because, once the deadline of the supervisory moratorium expires, deposits would be determined to be unavailable (even though, in some Member States, there is also an interim deadline for when the funds must be determined to be unavailable, even if the supervisory moratorium can still apply). As such, there seems to be a link between the maximum length of the supervisory moratoria and what constitutes a ‘current prospect’. However, the link is not necessarily straightforward, given the possibility of interim deadlines.

### Options to address the identified issues

#### **The meaning of the term ‘current prospect’**

66. The EBA considered whether there is merit in further clarifying what the term ‘current prospect’ means or if there is no need to provide further clarity. The EBA considered the following arguments in favour of providing a more precise term:

- more precision would provide more consistency between Member States;
- more precision would provide more clarity and guidance for the authorities assessing each case.

67. The EBA also considered the following arguments against providing more precision in respect of the term ‘current prospect’:

- Each case is different and so the authorities need flexibility to assess each case on its own merits and to assess whether, in a given case, there is any 'current prospect' of depositors regaining access to their funds or not.
- It could be argued that the notion of the deadline to decide on whether deposits are unavailable and the notion of whether there is any current prospect of depositors getting access to their funds are independent. Thus, any clarification of the term 'current prospect' should not be affected by the deadline to make the decision on whether deposits are unavailable.

### **The link between 'current prospects' and the supervisory moratoria**

68. Given the apparent lack of clarity in the EU legislation on the link between the application of national supervisory moratoria and what constitutes a 'current prospect', the only option considered by the EBA was to seek further clarity on this interaction.

### **Conclusions**

69. The EBA proposes to the Commission that further clarity should be provided on the interpretation of the term 'current prospect' of a credit institution repaying a deposit in Article 2(1)(8)(a) of the DGSD.

70. The EBA proposes to the Commission that further clarity should be provided in the EU legislation on the link between the application of national supervisory moratoria and what constitutes a 'current prospect'.

## 3.2 Deposit guarantee scheme payouts for which there are money laundering and terrorism financing concerns

71. The EBA assessed the topic of DGS payouts for which there are money laundering (ML) and/or terrorism financing (TF) concerns that could affect the DGS payout process. This opinion is based on the results of the EBA survey sent to the DGSDAs and DGSs, as well as the EBA's assessment of real-life cases in which DGSDAs/DGSs faced difficulties when performing a payout amid ML/TF concerns. The EBA has identified a number of issues, which can be categorised under the following four sub-headings, noting that they are interrelated:

- i. the treatment of cases in which there is a suspicion of ML/TF;
- ii. the responsibilities of different authorities in a DGS payout process, including challenges posed by credit institutions' systematic failure to tackle ML/TF risks;
- iii. informing depositors when they are excluded from payout, or the payout is deferred or suspended;
- iv. cooperation between relevant anti-money laundering and combating the financing of terrorism (AML/CFT) and DGS authorities.

### 3.2.1 Treatment of cases in which there is a suspicion of money laundering and terrorism financing

#### Legal basis and background

72. Article 5(1)(c) of the DGSD excludes from repayment by a DGS 'deposits arising out of transactions in connection with which there has been a criminal conviction for money laundering as defined in Article 1(3) of Directive (EU) 2015/849' on the prevention of the use of the financial system for the purposes of ML/TF<sup>11</sup>.

73. Article 8(8) of the DGSD provides that '[n]otwithstanding the time limit laid down in paragraph 1 of this Article, where a depositor or any person entitled to or interested in sums held in an account has been charged with an offence arising out of or in relation to money laundering as defined in Article 1(3) of Directive (EU) 2015/849, a DGS may suspend any payment relating to the depositor concerned, pending the judgement of the court'.

74. Article 8(5)(a) of the DGSD stipulates that repayment may be deferred when 'it is uncertain whether a person is entitled to receive repayment or the deposit is subject to legal dispute'.

<sup>11</sup> In compliance with Article 66 of Directive (EU) 2015/849, references to the repealed Directive 2005/60/EC shall be construed as references to Directive (EU) 2015/849.

75. Article 8(5)(b) of the DGSD provides that repayment may be deferred if ‘the deposit is subject to restrictive measures imposed by national governments or international bodies’.

76. Article 4(8) of the DGSD stipulates that ‘Member States shall ensure that a DGS, at any time and upon request, receives from their members all information necessary to prepare for a repayment of depositors, including markings under Article 5(4)’.

77. Article 5(4) of the DGSD requires that Member States ensure that ‘credit institutions mark eligible deposits in a way that allows an immediate identification of such deposits’. This requirement has led respondents to request an electronic file called a Single Customer View (SCV) file from credit institutions.

78. In accordance with the EBA Guidelines on stress tests of deposit guarantee schemes under Directive 2014/49/EU<sup>12</sup>, an SCV file means a file containing the ‘individual depositor information necessary to prepare for a repayment by a DGS, including the aggregate amount of eligible deposits of every depositor’ (paragraph 11). Furthermore, the quality of the SCV files ‘should be assessed in relation to whether it would provide the DGS, in case, of failure, with all the information necessary to complete its intervention in relation to a depositor, including the identity of depositors, their contact details, account held and corresponding amounts, and amounts of eligible and covered deposits’ (paragraph 67). In accordance with the guidelines, a DGS is required to carry out an assessment of the compliance of the SCV file’s format and the credit institution’s ability to deliver it promptly, and not an assessment of if every data point is correct.

79. Article 2 of Directive (EU) 2015/849 lists legal and natural persons to whom the directive applies. These ‘obliged entities’ are:

(1) credit institutions;

(2) financial institutions;

(3) the following natural or legal persons acting in the exercise of their professional activities:

(a) auditors, external accountants and tax advisors, and any other person that undertakes to provide, directly or by means of other persons to which that other person is related, material aid, assistance or advice on tax matters as a principal business or professional activity;

(b) notaries and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the:

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<sup>12</sup> EBA/GL/2016/04

- (i) buying and selling of real property or business entities;
  - (ii) managing of client money, securities or other assets;
  - (iii) opening or managing bank, savings or securities accounts;
  - (iv) organisation of contributions necessary for the creation, operation or management of companies;
  - (v) creation, operation or management of trusts, companies, foundations or similar structures;
- (c) trust or company service providers not already covered under points (a) or (b);
- (d) estate agents including when acting as intermediaries in the letting of immovable property, but only in relation to transactions for which the monthly rent amounts to EUR 10 000 or more;
- (e) other persons trading in goods to the extent that payments are made or received in cash in an amount of EUR 10 000 or more, whether the transaction is carried out in a single operation or in several operations that appear to be linked;
- (f) providers of gambling services;
- (g) providers engaged in exchange services between virtual currencies and fiat currencies;
- (h) custodian wallet providers;
- (i) persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, when the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more;
- (j) persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, when the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more.

80. Article 8 of Directive (EU) 2015/849 states that:

‘1. Member States shall ensure that obliged entities take appropriate steps to identify and assess the risks of money laundering and terrorist financing, taking into account risk factors including those relating to their customers, countries or geographic areas, products, services, transactions or delivery channels. Those steps shall be proportionate to the nature and size of the obliged entities.

2. The risk assessments referred to in paragraph 1 shall be documented, kept up-to-date and made available to the relevant competent authorities and self-regulatory bodies concerned. Competent authorities may decide that individual documented risk assessments are not required where the specific risks inherent in the sector are clear and understood.

3. Member States shall ensure that obliged entities have in place policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified at the level of the Union, the Member State and the obliged entity. Those policies, controls and procedures shall be proportionate to the nature and size of the obliged entities.

4. The policies, controls and procedures referred to in paragraph 3 shall include:

(a) the development of internal policies, controls and procedures, including model risk management practices, customer due diligence, reporting, record-keeping, internal control, compliance management including, where appropriate with regard to the size and nature of the business, the appointment of a compliance officer at management level, and employee screening;

(b) where appropriate with regard to the size and nature of the business, an independent audit function to test the internal policies, controls and procedures referred to in point (a).

5. Member States shall require obliged entities to obtain approval from their senior management for the policies, controls and procedures that they put in place and to monitor and enhance the measures taken, where appropriate.'

81. Article 33 of Directive (EU) 2015/849 states the following:

'1. Member States shall require obliged entities, and, where applicable, their directors and employees, to cooperate fully by promptly:

(a) informing the FIU [Financial Intelligence Unit], including by filing a report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such cases; and

(b) providing the FIU, directly or indirectly, at its request, with all necessary information, in accordance with the procedures established by the applicable law.

All suspicious transactions, including attempted transactions, shall be reported.

2. The person appointed in accordance with point (a) of Article 8(4) shall transmit the information referred to in paragraph 1 of this Article to the FIU of the Member State in whose territory the obliged entity transmitting the information is established.'

82. Article 36 of Directive (EU) 2015/849 states the following:

'1. Member States shall ensure that if, in the course of checks carried out on the obliged entities by the competent authorities referred to in Article 48, or in any other way, those authorities

discover facts that could be related to money laundering or to terrorist financing, they shall promptly inform the FIU.

2. Member States shall ensure that supervisory bodies empowered by law or regulation to oversee the stock, foreign exchange and financial derivatives markets inform the FIU if they discover facts that could be related to money laundering or terrorist financing.’

83. Article 39 of Directive (EU) 2015/849 states:

‘1. Obligated entities and their directors and employees shall not disclose to the customer concerned or to other third persons the fact that information is being, will be or has been transmitted in accordance with Article 33 or 34 or that a money laundering or terrorist financing analysis is being, or may be, carried out.

2. The prohibition laid down in paragraph 1 shall not include disclosure to the competent authorities, including the self-regulatory bodies, or disclosure for law enforcement purposes.

3. The prohibition laid down in paragraph 1 shall not prevent disclosure between the credit institutions and financial institutions or between those institutions and their branches and majority-owned subsidiaries located in third countries, provided that those branches and majority-owned subsidiaries fully comply with the group-wide policies and procedures, including procedures for sharing information within the group, in accordance with Article 45, and that the group-wide policies and procedures comply with the requirements laid down in this Directive.

4. The prohibition laid down in paragraph 1 shall not prevent disclosure between the obliged entities as referred to in point (3)(a) and (b) of Article 2(1), or entities from third countries which impose requirements equivalent to those laid down in this Directive, who perform their professional activities, whether as employees or not, within the same legal person or a larger structure to which the person belongs and which shares common ownership, management or compliance control.

5. For obliged entities referred to in points (1), (2), (3)(a) and (b) of Article 2(1) in cases relating to the same customer and the same transaction involving two or more obliged entities, the prohibition laid down in paragraph 1 of this Article shall not prevent disclosure between the relevant obliged entities provided that they are from a Member State, or entities in a third country which imposes requirements equivalent to those laid down in this Directive, and that they are from the same professional category and are subject to obligations as regards professional secrecy and personal data protection.

6. Where the obliged entities referred to in point (3)(a) and (b) of Article 2(1) seek to dissuade a client from engaging in illegal activity, that shall not constitute disclosure within the meaning of paragraph 1 of this Article.’

84. Article 33a(3) of the BRRD2 (Directive 2014/59/EU) states that ‘Member States may provide that where the power to suspend payment or delivery obligations is exercised in respect of eligible

deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits’.

### Methodology, data sources and their limitations

85. The survey submitted to the DGSDAs and DGSs included 12 questions related to DGS payouts for which there are ML/TF concerns. More specifically, 2 of the 12 questions related to the respondents’ real-life experience of DGS payouts amid ML/TF issues.

### Main findings, issues identified and the analysis

86. The survey asked whether Member States having experienced payouts under the revised DGSD had encountered any specific challenges or issues in relation to AML/CFT and asked what steps were taken to ensure that the payout was in line with the DGSD and AMLD provisions. The responses to the survey included the following:

- Two respondents reported that the unavailability of deposits was triggered after concerns were raised by a third-country authority of ML vulnerabilities at the credit institution.
- One of these respondents stated that, to comply with the DGSD and AMLD provisions, the authorities imposed the following conditions during the payout:
  - a. the physical presence of depositors was required for the purpose of confirming their identity;
  - b. the reimbursement could be sent only to accounts in the EEA, where AML checks are fulfilled according to EU standards; and
  - c. the payment could be made only to the same person as the beneficiary of the account in the failed credit institution.
- The other respondent reported that, in its case, there were serious doubts concerning the quality of the information in the SCV file, including whether depositors who have been convicted of money laundering offences have been excluded from the SCV file, and flagging depositors who have been charged with an offence arising out of or in relation to money laundering. These concerns with the quality and reliability of the data made it challenging for the DGS to assess the adequacy of the information in the SCV file, while ensuring a timely payout in line with the DGSD deadline. The respondent also mentioned challenges in relation to replying to depositor queries in such a situation, given the obligation in the AMLD that the reports to the FIU pursuant to Article 39 of the AMLD cannot be disclosed to the person mentioned in the report. Depending on the implementation of Article 39 of the AMLD into national legal order, such a breach would constitute an offence or even a crime. In addition, this respondent pointed out the legal and financial risk for a DGS, given the uncertainty regarding if it would be able to recover funds in a case of insolvency if a payment is made to a depositor that should have been excluded from the SCV file by the credit institution, but when the credit institution has not excluded them. To address these issues, the respondents mentioned that, owing to



the specific circumstances and the increased risks from an AML point of view by the credit institution, the designated authority decided to assess the SCV file with the support of the AML/CFT competent authority. Where necessary, suspicious activity reports were made to the FIU whose feedback was taken into account when making repayments.

- Another respondent explained that, in its case, it was challenging to comply with the enhanced due diligence provisions of the AMLD when the origin of the funds left in an account was unclear owing to the credit institution's failure to carry out adequate AML checks to establish this during the business relationship with a depositor, with these checks therefore having to be verified at the time of the payout. The respondent argued that such cases are not clearly covered by the DGSD and so difficulties resulted from the absence of provisions that allow a deferral of the reimbursement in cases in which there is a suspicion of ML but the depositor has not yet been charged. To address these challenges, the respondent reported that the DGS focused on assessing depositors flagged as high risk from an AML/CFT perspective, on the basis of a set of indicators (including sanctions, residence of the depositor, evidence from past investigations and features of financial institutions or other relevant information).

87. Those authorities that had experience with real-life cases of DGS payouts amid AML concerns highlighted a number of areas in which, in their view, legal provisions set out in the AMLD and the DGSD were not aligned and would benefit from further clarifications. These areas include:

- In cases in which there is a suspicion that a depositor is involved in ML or that funds deposited have derived from criminal activities, in the absence of criminal charges or conviction of ML crimes, Articles 5(1), 8(5) and 8(8) of the DGSD do not provide a clear legal basis for a DGS to defer the reimbursement of deposits relating to that depositor.
- Article 33 of the AMLD requires obliged entities to report to the FIU when they know, suspect or have reasonable grounds to suspect that ML/TF has occurred or is being attempted (a suspicious transaction report — STR). In those cases, pursuant to Article 32 of the AMLD, the FIU can issue specific instructions to obliged entities; this includes the possibility to instruct obliged entities to suspend transactions. DGSs are not obliged entities under the AMLD.
- When an STR has been submitted to the FIU, the AMLD provides that the FIU has powers to request the relevant credit institution to suspend the transaction. However, the powers of the FIU in relation to the DGSDA/DGS have not been explicitly set out in the AMLD and therefore it is not clear if the EU framework allows the FIU or any other authority to instruct the DGSDA/DGS to suspend a payout related to accounts in which the transactions have been suspended. The DGSD is also silent on this matter.
- In cases in which the information in the SCV file may not be reliable because of a systematic failure by the credit institution in question to apply the necessary AML/CFT measures, the current framework is not sufficiently clear on who is responsible for the application of the necessary AML/CFT measures (also considering that the DGS is not an obliged entity under the AMLD).

88. The EBA discussed if the credit institutions supporting the payout by the DGS<sup>13</sup> are obliged entities under the AMLD in their capacity as regards supporting the DGS payout and therefore if they are subject to AML/CFT obligations set out in the legislation, including the reporting of suspicious transactions to the FIU in accordance with Article 33 of Directive (EU) 2015/849. The EBA arrived at the view that, on the one hand, currently the AMLD does not provide any exemptions for payouts processed by the credit institution supporting the payout by the DGS. On the other hand, DGSs are not within the scope of Directive (EU) 2015/849 and therefore do not have to comply with the directive's ML/TF detection and reporting rules when processing a payout themselves. The EBA considered that the following issues could arise in relation to the fulfilment of the obligation on AML/CFT:

- The credit institution supporting the payout by the DGS will potentially have access only to limited information because it would have to rely on information contained in the payout instruction received from the DGS or in the cheque. Therefore, to fulfil its AML/CFT obligations, the credit institution supporting the payout by the DGS would have to consider obtaining more information, on a risk-sensitive basis, from depositors at the time of the payout.
- In addition, the credit institution supporting the payout by the DGS — an obliged entity under the AMLD — when acting on the DGS's behalf, could be requested (in certain cases and under certain conditions) by the FIU to suspend a transaction (i.e. to suspend a payout to the depositor). This means that, by fulfilling its obligations under the AMLD, the credit institution supporting the payout by the DGS may potentially be in conflict with the deadlines set by the DGSD.

89. The EBA also notes that, in some Member States, insolvency practitioners take part in the payout process and so their role in DGS payouts for which there are AML/CFT concerns should also be taken into account.

90. The EBA analysed whether there is a potential lack of clarity in the DGSD in relation to the legal grounds to defer or suspend a payout when the credit institution or the AML competent authority has suspicions that depositors are involved in ML/TF and have submitted reports to that extent to the FIU. In particular, the EBA analysed if the following provisions in the DGSD, which have been invoked by some authorities in past cases, constitute a sufficient legal basis for deferring reimbursements in the context of ML concerns:

- Article 8(5)(a) of the DGSD regarding the possibility to defer repayment when it is uncertain if depositors are entitled to the repayment;
- Article 8(5)(b) of the DGSD, which refers to restrictions imposed by 'national governments and international bodies';

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<sup>13</sup> Credit institutions can support a DGS payout in different ways. In cases in which the DGS uses an agent bank for payout, the credit institution that acts as the agent bank makes available to depositors the compensation that has been determined by the DGS. If a DGS pays out using electronic payment transactions, the depositor will be paid out from the bank account of the DGS and will therefore involve a credit institution. If a DGS pays out via cheque, the depositor will have to cash this check with a credit institution.

- Article 8(8) of the DGSD regarding the possibility to suspend repayment in relation to depositors charged with ML offences.

91. The EBA arrived at the view that none of these provisions clearly applies to cases in which a depositor is suspected of ML/TF or in which there is an increased risk that ML/TF could be, or could have been, attempted. Thus, the EBA arrived at the view that, currently, neither the DGSD nor other EU legislation prevents DGSs from paying out the depositor (even when the DGS knows, suspects or has reasonable grounds to suspect that ML/TF has occurred or is being attempted, or that an STR has previously been filed concerning a transaction on an account of a depositor that needs to be compensated), in spite of the AMLD's stated aim to prevent ML/TF. At this stage, it seems that only the national law of a Member State can, in compliance with Articles 4 and 5 of Directive (EU) 2015/849, extend the application of the AMLD to DGSs. This is important because, in a number of recent cases, a declaration from public (third-country) authorities that the credit institutions in question were associated with ML activities has directly or indirectly led to the determination of unavailability of deposits. In the absence of a clear legal framework, there is a risk that a DGS is reimbursing (or is forced to reimburse) a depositor who is suspected of money laundering without appropriate checks. Therefore, the EBA considers that there is a need to provide clarity in relation to cases in which there is a suspicion of ML/TF.

### Options to address the identified issues

92. As outlined above, the EBA is of the view that there is a need for more clarity and legislative convergence in relation to cases in which there is a suspicion of ML/TF, in the absence of a criminal conviction, including in relation to the role of the credit institution supporting the payout by the DGS. The EBA considered the following potential solutions:

- a. Amendments to the DGSD:
  - Include a provision to clarify that a DGS may defer or suspend a repayment when there is a suspicion of ML/TF that has been reported to the FIU in line with the AMLD, even in the absence of a request from the FIU to block the transaction, as a basis for deferral or suspension of the payout.
- b. Amendments to the AMLD:
  - Expressly clarify and include in the AMLD that the FIU has powers to instruct a DGSDA/DGS to suspend the payout for one or several depositors on the basis of ML/TF suspicions or concerns, including the following considerations:
    - i. when such an instruction should be issued; and
    - ii. if there should be a deadline for the FIU to conclude its investigation and so a limit on the length of such a suspension.

The inclusion of such a power to instruct a DGSDA/DGS to suspend the payout should take into account that, currently, the DGSD provides that a DGS may suspend any payment relating to the depositor who has been charged with an offence arising out of or in relation to money laundering, but it is not obliged

to do so. Thus, the introduction of such a power should be accompanied by a consideration of how to align it with the treatment of depositors who have been charged.

- Include in the AMLD a specific provision that would clearly state that the FIUs, AML/CFT competent authorities and DGSDAs/DGSs are allowed to cooperate and exchange information.

93. The EBA considered that amending only the DGSD to allow a deferral or a suspension of a payout by a DGS may not be sufficient to address the issue because:

- Currently, a DGS does not have the necessary information about the identification and verification of the identity of the depositor, any insight into their past transactions or the resources to access a depositor from an AML perspective.
- Credit institutions are subject to the ‘prohibition of disclosure’ under Article 39 of the AMLD, which states that obliged entities must not disclose to the customer or any other third party (even if the DGS is also the AML/CFT supervisor) that an STR has been submitted or that they are thinking of submitting one to the FIU. Thus, it could be argued that credit institutions may not be allowed to flag depositors subject to an STR or depositors suspected of ML/TF in the SCV files in all cases. Consequently, unless instructed to suspend a reimbursement, a DGS may not be in a position to know which depositors or which accounts are ‘suspicious’.

94. Therefore, allowing the DGS to defer or suspend a reimbursement when they may not be in a position to identify suspicious accounts or transactions, would be, on its own, ineffective.

95. The EBA also discussed whether the relevant authority with the power to instruct the DGS to defer or suspend a payout should also have the same power in relation to the insolvency practitioner and/or the credit institution that is subject to the bankruptcy proceeding, as necessary. The EBA considered arguments that it could be useful because, at the moment of failure of a credit institution, insolvency practitioners are responsible for the management of the failed credit institution and for accepting claims from creditors, including the claim from the DGS subrogated to the rights of eligible depositors. In some jurisdictions, they are also involved in the payout of covered deposits. Moreover, insolvency practitioners themselves may be obliged entities under national law and may have to comply with the relevant AMLD provisions, as could be the case for the credit institution supporting the payout by the DGS as discussed above.

**The timing of an FIU’s instruction to a DGSDA/DGS to suspend the payout for one or several depositors on the basis of money laundering and terrorism financing suspicions or concerns**

96. The EBA then considered when such an instruction by an FIU should be issued. The EBA acknowledged that, in the light of the short time for the DGS to make funds available to depositors (7 working days), for the instruction to be effective, the DGS and/or the insolvency practitioner involved in the payout would need to receive such an instruction as soon as

possible, and ideally upon the determination of the unavailability of deposits. The EBA also considered that, to be able to issue an instruction to suspend a payout, the instructing authority/FIU would first need to be alerted by the relevant administrative authority before the unavailability of deposits was determined. The EBA considered that this issue further reinforced the need for cooperation between the relevant DGS and AML authorities ahead of the determination of the unavailability of deposits. The EBA also briefly discussed the additional complexity of issuing instructions to suspend a payout in cross-border failures, because the home DGS would have to cooperate with the relevant AML authorities in the host Member States.

97. The EBA considered that, if the relevant AML authorities transmit the instruction to suspend a payout but, for operational reasons, the DGS cannot stop the payout process, subsequently the DGS should not be held responsible for reimbursing deposits for which the FIU issues an instruction to suspend or defer the reimbursement.

98. Thus, based on the arguments outlined above, the EBA arrived at the view that there should be a relevant authority expressly and clearly entrusted with the power to instruct a DGS, the insolvency practitioner and/or the credit institution under the bankruptcy proceeding to suspend a payout when there is a suspicion of ML/TF, mindful of the fact that:

- an early information exchange between the DGS, DGSDA, competent authority and AML authorities is necessary to make suspension instructions effective;
- such a power should be consistent with other elements of the existing AML framework;
- the introduction of such a power should be accompanied by a consideration of how to align it with the treatment of depositors who have been charged with offences arising out of or in relation to money laundering; and
- an amendment may be needed mainly in the AMLD but also potentially in the DGSD.

#### **The impact of the suspension period on depositor confidence**

99. Finally, the EBA discussed if there should be a deadline for the investigating authorities to conclude their investigation after the instruction to suspend a payout (and for deciding whether a depositor should or should not be repaid in light of the AML/CFT provisions) to maintain depositor confidence (including by informing depositors of the status of their repayment — as discussed later in section 3.2.3).

100. The EBA considered the following arguments in favour of such a time limit:

- A prolonged period when depositors do not have access to their funds could lead to a potential loss of confidence in the DGS and could have knock-on effects on financial stability, in particular if the DGS would not be able to inform the depositor of the reasons for such a suspension.
- If the suspicion cannot be confirmed after a prolonged suspension of the reimbursement, the depositors may be allowed to claim damages against the DGS.

101. The EBA also considered the following arguments against such a time limit:

- It is impossible to predict how long an investigation will take because it depends on the complexity of the situation, the number of transactions and/or the accounts to be suspended and analysed, and other factors.
- A deadline would be artificial, because once the deadline passes, but the DGS is aware that the investigations are ongoing, it may not be confident that the depositor is entitled to a repayment, in which case the current framework allows for a deferral without a deadline.
- The DGSD already includes provisions on the suspension and deferral of payouts in different cases, without a deadline, and so imposing a deadline when the suspension results from an instruction by the relevant AML/CFT competent authority and/or the FIU, and not in other cases, would be inconsistent.
- Currently, under the AMLD, there is no deadline for the conclusion of an investigation by the FIU.

102. The EBA concluded that, while from a depositor protection perspective there are strong arguments to ensure that such a suspension does not take too long, there are also strong arguments for why a deadline to conclude the investigations would not be appropriate or even possible. On that basis, the EBA decided that there is little merit in proposing a deadline for releasing the suspension of a payout when the DGS is instructed by the FIU to do so.

103. The EBA then assessed if, from the financial stability perspective, there are other ways to ensure that the suspension of a DGS payout does not have a negative impact on depositors' confidence. The EBA discussed whether under such a suspension, there would be merit in proposing that, where possible, the relevant FIUs prioritise their investigations and necessary checks in relation to accounts or transactions of eligible depositors. Currently, in other areas, AML checks are done on a risk-based approach and do not draw a distinction between depositors eligible for coverage, those who are not eligible and other clients. The arguments in favour of introducing a prioritisation of accounts of depositors eligible for coverage are as follows:

- It would lead to a quicker payout of deposits for those depositors for whom ML/TF suspicions are not substantiated. This would also reduce the risk of negative impact on depositor confidence and, in turn, on DGSs' reputation and financial stability.
- It would be in line with relevant provisions in EU legislation related to the preferential treatment of depositors eligible for DGS protection, including:
  - the DGSD, which provides that only eligible depositors are protected, while those who are not eligible are not; or
  - the BRRD, in which eligible depositors enjoy a preference in the creditor hierarchy over other creditors.

104. Thus, the EBA decided that, from a depositor protection perspective, there is merit in further exploring how such a prioritisation could work in practice and how it could be aligned with current AML practices. Another possibility to mitigate the negative effects of a prolonged

suspension could be to provide such depositors with access to an appropriate daily amount from those deposits, similarly to the proposal discussed in detail in Chapter 3.1 on the unavailability of deposits and proposed by the EBA for the Commission's consideration. The features and the pros and cons of such a possibility in the AML context would need to be considered further.

#### **Further analysis of the topics outlined in this chapter**

105. The EBA decided that, should the Commission consider that there is merit in the proposals outlined in this chapter, relevant AML authorities and/or the FIUs would need to be consulted further and the topic of DGS payout when there are ML/TF concerns should be analysed further in more detail.

106. Finally, the EBA decided that, should the Commission agree that further analysis was needed, the EBA is well placed to perform such an analysis in a holistic way and benefits from expertise on both the DGS and AML topics.

#### **Conclusions**

107. The EBA highlights to the Commission that the current EU framework is not sufficiently clear on:

- i. whether in accordance with the AMLD or DGSD, a DGS can suspend or defer a payout to a depositor when there is a suspicion of ML/TF;
- ii. whether in accordance with the AMLD or DGSD, a relevant AML authority or FIU has the power to instruct a DGS to suspend a DGS payout because of AML/CFT concerns; and
- iii. the AML/CFT-related obligations of the credit institution supporting the payout by the DGS and insolvency practitioner in a DGS payout.

108. The EBA proposes to the Commission that it ensures that the relevant EU legislative text clearly states that there must be a relevant authority duly appointed and entrusted with the power to instruct a DGS, the insolvency practitioner and/or the credit institution under the bankruptcy proceeding to suspend a payout when there is a suspicion of ML/TF, mindful of the facts that:

- an early information exchange between the DGS, DGSDA, competent authority and AML authorities is necessary to make suspension instructions effective, mindful of relevant confidentiality provisions in the AMLD;
- such a power should be consistent with other elements of the existing AML framework and should not undermine current requirements applicable to credit institutions under the AMLD;
- the introduction of such a power should be accompanied by a consideration of how to align it with the treatment of depositors who have been charged with offences arising out of or in relation to money laundering;
- an amendment may be needed, mainly in the AMLD and possibly also in the DGSD.



109. The EBA highlights to the Commission that the idea of prioritising AML checks of accounts eligible for DGS protection over accounts and transactions of other clients should be explored further to strike the right balance between the competing objectives of allowing sufficient time to investigate relevant accounts and transactions and maintaining depositor confidence in the DGS protection through fast payout. In addition, to maintain depositor confidence while AML checks are being carried out, the introduction of a requirement to ensure that depositors have access to an appropriate daily amount from their deposits could be considered in such cases. This proposal is similar to the proposal discussed in more detail in Chapter 3.1 on the unavailability of deposits, after further considering the features and the pros and cons of such a possibility under the EU AML framework.
110. The EBA also proposes to the Commission that more clarity could be introduced in relation to the obligations of the credit institution supporting the payout by the DGS, after further considerations of what this credit institution would realistically be able to do in such a case.
111. The EBA proposes to the Commission that, should the Commission consider that there is merit in the proposals above, relevant AML authorities and/or the FIUs would need to be consulted further and the topics listed above should be analysed further in more detail.
112. Finally, the EBA invites the Commission to consider that the EBA is well placed to contribute to this endeavour by carrying out further analysis of these topics, and benefits from expertise on both the DGS and AML topics, including through the involvement of the DGS practitioners, after the publication of this EBA Opinion on DGS payouts.

### **3.2.2 Responsibilities of different authorities in a deposit guarantee scheme payout process, including challenges posed by credit institutions' systematic failure to tackle money laundering and terrorism financing risks**

#### **Legal basis and background**

113. Article 4(8) of the DGSD stipulates that 'Member States shall ensure that a DGS, at any time and upon request, receives from their member institutions all information necessary to prepare for a repayment of depositors, including markings under Article 5(4)'.
114. Article 5(4) of the DGSD requires that Member States ensure that 'credit institutions mark eligible deposits in a way that allows an immediate identification of such deposits'. This requirement has led respondents to request from credit institutions an electronic SCV file.
115. In accordance with the EBA Guidelines on stress tests of DGSs under Directive 2014/49/EU<sup>14</sup>, an SCV file means a file containing the 'individual depositor information necessary to prepare for a repayment by a DGS, including the aggregate amount of eligible deposits of every depositor' (paragraph 11). Furthermore, the quality of the SCV files 'should be

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<sup>14</sup> EBA/GL/2016/04



assessed in relation to whether it would provide the DGS, in case, of failure, with all the information necessary to complete its intervention in relation to a depositor, including the identity of depositors, their contact details, account held and corresponding amounts, and amounts of eligible and covered deposits' (paragraph 67). In accordance with the guidelines, a DGS is required to carry out an assessment of the quality of the SCV files of its members.

116. Article 9(2) of the DGSD provides that 'without prejudice to rights which it may have under national law, the DGS that makes payments under guarantee within a national framework shall have the right of subrogation to the rights of depositors in winding up or reorganisation proceedings for an amount equal to their payments made to depositors'.

117. Articles 2, 8, 33, 36 and 39 of Directive (EU) 2015/849 quoted in the background to section 3.2.1 are relevant here, too.

### Methodology, data sources and their limitations

118. The survey submitted to the DGSDAs and DGSs included 12 questions related to DGS payouts when there are ML/TF concerns. This section considers the remaining 10 questions not analysed in the previous section.

### Main findings, issues identified and the analysis

119. As already outlined in section 3.1.1, one respondent to the survey reported difficulties for a DGS under the current DGSD to comply with the obligation to reimburse depositors quickly when a cooperation with various AML authorities is deemed necessary and when the reliability of the information in the SCV file may be questioned.

#### **Authorities and stakeholders responsible for relevant checks and procedures in place**

120. The above-mentioned survey also asked about the procedures in place in each jurisdiction to identify and mark eligible deposits and ensure that DGSD provisions are adhered to when it comes to determining deposits excluded from any repayment, or when the repayment is suspended or deferred. The following provides a summary of the main questions and responses received.

121. Respondents were asked what procedures are in place to ensure that, in the case of a payout, Article 5(1)(c) of the DGSD is adhered to (i.e. that deposits arising out of transactions in connection with which there has been a criminal conviction for ML are excluded). The responses to the survey included the following:

- 29 respondents from 23 Member States reported that credit institutions have to mark such deposits in the SCV file and oftentimes this requirement is embedded into specific laws, decrees or regulations;
- four respondents from four Member States replied that the DGS has procedures in place in addition to the markings in the SCV file provided by the credit institution;

- three respondents from three Member States reported to have procedures in place whereby another authority such as the competent authority, FIU or court instructs the DGS to exclude such deposits;
- one respondent reported that depositors have to sign a legal document declaring that, in addition to the markings by the credit institution in the SCV file, the beneficiary is not charged with an offence arising out of or in relation to money laundering,

122. Respondents were also asked which authority is responsible for performing the relevant checks in order to exclude deposits from any repayment arising out of transactions in connection with which there has been a criminal conviction for ML:

- 19 respondents from 14 Member States stated that credit institutions are responsible in the first place;
- eight respondents from eight Member States referred to the DGS or a cooperation between the DGS and other authorities such as competent authorities, FIUs or courts as being responsible; and
- seven respondents from seven Member States referred to credit institutions and the DGS as being responsible.

123. The survey asked what procedures are in place to ensure that, in the case of a payout, Article 8(8) of the DGSD is adhered to (i.e. suspension of payments pending the judgement of the court notwithstanding the time limit laid down in paragraph 1 of this article), when a depositor or any person entitled to or interested in sums held in an account has been charged with an offence arising out of or in relation to ML as defined in Article 1(2) of Directive 2005/60/EC. The responses to the survey included the following:

- 26 respondents from 20 Member States reported that credit institutions have to mark such deposits in the SCV file and oftentimes this requirement is embedded into specific laws, decrees or regulations;
- four respondents from three Member States reported that the DGS performs procedures in addition to the markings by the credit institution in the SCV file;
- three respondents from two Member States reported to have procedures in place whereby another authority such as the police/prosecution authorities or court instructs the DGS to exclude such deposits;
- seven respondents from seven Member States replied that they have procedures in place, but did not describe what kind of procedures they have in place;
- two respondents from two Member States reported that a case-by-case or ad hoc approach would be used;

- one respondent reported that depositors have to sign a legal document declaring that, in addition to the markings by the credit institution in the SCV file, the beneficiary is not charged with an offence arising out of or in relation to money laundering.
124. A further question was which authority or stakeholder is responsible for the performing the relevant checks to ensure adherence to Article 8(8) of the DGSD. The responses to the survey included the following:
- 14 respondents from 10 Member States stated that credit institutions or the insolvency practitioner bear the responsible alone;
  - 14 respondents from 13 Member States referred to the DGS or to a cooperation between the DGS and other authorities such as competent authorities, FIUs or courts;
  - two respondents from two Member States indicated that another authority or a credit institution involved in the reimbursement bears the responsibility.
125. Respondents were asked what procedures are in place to ensure that, in the case of a payout, Article 8(5)(a) of the DGSD is adhered to, namely regarding the deferral of repayments for which it is uncertain if a person is entitled to receive repayment or in case the deposit is subject to a legal dispute. The responses to the survey included the following:
- 27 respondents from 21 Member States reported that credit institutions have to mark such deposits in the SCV file and oftentimes this requirement is embedded into specific laws, decrees or regulations;
  - five respondents from three Member States reported that the DGS performs procedures in addition to the markings by the credit institution in the SCV file;
  - eight respondents from eight Member States replied that they have procedures in place, but did not describe what kind of procedures they have in place;
  - two respondents of two Member States reported that a case-by-case or ad hoc approach would be used.
126. The survey also asked which authority or stakeholder is responsible for performing the relevant checks in order to adhere to the provision of Article 8(5)(a) of the DGSD to defer repayment if it is uncertain whether a person is entitled to receive the repayment or the deposit is subject to legal dispute. The responses to this question included the following:
- 13 respondents from 11 Member States referred to the DGS or a cooperation between the DGS and other authorities such as competent authorities, FIUs or courts as being responsible for deferring repayment;
  - 17 respondents from 14 Member States answered that credit institutions were responsible for such checks in the first place; and
  - four respondents from four Member States referred to credit institutions and the DGS as being responsible.

127. The survey asked respondents what procedures are in place to ensure that, in the case of a payout relating to Article 8(5)(b) of the DGSD, repayment is deferred if the deposit is subject to restrictive measures imposed by national governments or international bodies. The responses to this question included the following:

- 28 respondents from 22 Member States reported that credit institutions have to mark such deposits in the SCV file and this requirement is embedded into specific laws, decrees or regulations;
- five respondents from three Member States reported that the DGS performs procedures in addition to the markings by the credit institution in the SCV file;
- five respondents from five Member States replied that they have procedures in place, but did not describe what kind of procedures they have in place;
- two respondents from two Member States reported that a case-by-case or ad hoc approach would be used.

128. The survey also asked which authority or stakeholder is responsible for the relevant checking of the provision of Article 8(5)(b) of the DGSD in case the repayment is to be deferred owing to restrictive measures imposed by national governments or international bodies. The responses to the survey included the following:

- 13 respondents from 11 Member States referred to the DGS or a cooperation between the DGS and other authorities such as competent authorities, FIUs or courts as being responsible for deferring repayment;
- 16 respondents from 13 Member States reported that credit institutions were responsible in the first place; and
- five respondents from five Member States referred to credit institutions and the DGS as being responsible.

129. The results of the survey showed that there are different approaches across the EU to which stakeholder is responsible for checks stemming from Articles 5(1)(c), 8(5)(a), 8(5)(b) and 8(8) of the DGSD. The majority of respondents reported that they have procedures in place to exclude deposits from payout and to defer or suspend repayments as required or permitted by the DGSD. A minority of DGSs have procedures in place governed by a different legal framework than the one transposing the DGSD or have no specific procedures in place to exclude deposits from payout or to defer or suspend repayments. However, the majority of respondents reported that credit institutions are responsible for marking eligible deposits and producing the SCV file identifying eligible depositors and excluding non-eligible depositors. This is in line with the observation in paragraph 22 that DGSs are not in a position to carry out advanced AML/CFT checks.

130. The survey, however, did not ask about the responsibility in relation to flagging cases in which there is a suspicion of ML/TF currently not directly covered by the DGSD. The survey also did not ask directly about cases in which a credit institution has not been performing the checks it is required to perform under the AMLD and in which, thus, the reliability of the SCV file produced by that institution is questionable.

131. This is an important issue because some Member States highlighted the lack of clarity on the DGS's responsibility in cases in which, owing to errors or omissions in the SCV file, depositors who are reimbursed are only later found to be ineligible. A particular consequence of such a scenario is that the recovery of DGS funds from the failed institution's estate via subrogation in accordance with Article 9(2) of the DGSD may cause issues in some jurisdictions when non-eligible deposits have been reimbursed. Indeed, the privilege referred to by Article 108 of the BRRD refers to the covered deposits.

132. The EBA also briefly considered what the consequences would be for the DGS and if more legal support could be useful if it paid out deposits (when they have become unavailable) of which the holder has never been identified pursuant to Article 9(1) of Directive 2005/60/EC or who is suspected of, charged with or convicted of ML/TF offences, if the DGS was not aware of this.

#### **Marking of individual accounts and transactions that are considered suspicious**

133. The EBA discussed which stakeholder should be responsible for flagging suspicious accounts. The EBA considered arguments that it could not be the DGS for reasons already mentioned in the sections above — the DGS does not normally have access to information that would allow it to determine if a particular account or transaction is suspicious from an AML/CFT perspective.

134. The EBA then discussed if such accounts and transactions could potentially be flagged in the SCV file. The EBA considered that, if such information could be included in the SCV file (and it is not clear if it could, for confidentiality reasons), it could potentially be done in two circumstances:

- when the credit institution has submitted an STR to the FIU; and
- when the FIU has instructed the credit institution to suspend the account(s) of the depositor or to stop the transaction.

#### **Bank-wide issues with the failed institution's AMLD compliance**

135. The EBA then discussed the case in which a credit institution is not performing its role as an obliged entity under the AMLD to a satisfactory extent and in which, as a consequence, a DGS cannot rely on the identification of some or all depositors and relevant markings performed by the credit institution as reported within the SCV file (in relation to suspicious accounts but also accounts of depositors who have been convicted of ML crimes or have been charged with such offences). The EBA considered this to be crucial, because DGSs rely on the accuracy of the information in the SCV file. The EBA considered who should instruct the suspension of the payout in order to perform necessary ML/TF checks and who should execute the checks in such cases, to ensure that the information in the SCV file is correct from an AML/CTF perspective. It appears from the survey results and further consideration by the EBA that a DGS would, at most, be able to perform some limited checks, such as checks of the completeness of the SCV file for

individual depositors (e.g. name, address, etc.), but it would not be able to carry out a full customer due diligence check or perform a screening of transactions, including because such complete information would not be available in the SCV file.

136. The EBA then considered if the responsibility for such checks could fall on the insolvency practitioner, the AML/CFT competent authorities, the FIU or the prudential competent authorities. The EBA considered that the EU framework could benefit from more clarity in this regard, including in relation to the obligations of the credit institution supporting the payout by the DGS, as discussed in section 1.1.1.

#### Options to address the identified issues

137. At this stage, the EBA did not attempt to provide a definite answer to which stakeholder may be best placed to step into the shoes of the failed credit institution and perform the mandatory checks that the credit institution failed to perform. However, the EBA considered that the view that DGSs are currently not in a position to perform such checks supports the proposal that there should be a relevant authority entrusted with the power to instruct the DGS, the insolvency practitioner and/or the credit institution under the bankruptcy proceeding to defer or suspend a payout. It also stresses the need for cooperation between the AML supervisors, the FIU and the DGSDA/DGS in DGS payouts.

#### Conclusions

138. The EBA proposes that the EU framework could benefit from more clarity on the roles and responsibilities (and so also the liability) of different authorities to mitigate ML/TF risks in situations in which the credit institution has not been performing the necessary checks under its obligations (e.g. reporting suspicious transactions to AML authorities or having a performant internal risk management system in place that can detect ML/TF risks) under the AMLD and the DGSD, resulting in the SCV file it produced not being a reliable source of information for the purpose of the DGS payout. When considering the roles and responsibilities of different authorities, their current mandates and abilities to perform certain tasks should be taken into account.
139. The EBA invites the Commission to consider that the EBA is well placed to contribute to this endeavour by carrying out further analysis of these topics, and benefits from expertise on both the DGS and AML topics, after the publication of this EBA Opinion on DGS payouts.

### 3.2.3 Informing depositors when they are excluded from payout or when the payout is deferred or suspended

#### Legal basis and background

140. Article 39 of Directive (EU) 2015/849, previously quoted in section 3.2.1, is relevant for this section.

#### Methodology, data sources and their limitations

141. The survey submitted to the DGSDAs and DGSs did not include specific questions related to informing depositors about the exclusion, suspension or deferral of the reimbursement of their deposits. But the issue has been raised by the authorities in the course of broader discussions of DGS payouts for which there are AML concerns.

#### Main findings, issues identified and the analysis

142. The EBA considered the question of whether the depositors should be notified when they are not eligible for a payout in line with the existing DGSD provisions or when their payout is deferred or suspended because of ML/TF concerns (subject to the introduction of a power for the FIU to instruct a DGS, the insolvency practitioner or the credit institution under the bankruptcy proceeding to suspend a payout in such cases), as discussed in section 3.2.1 of this report. Such a notification may be desirable from a depositor and DGS perspective, particularly in cases when the payout is suspended for a long period of time, especially since depositors who cannot access their funds would, in such a case, approach the DGS with questions. However, these important issues would need to be considered in the light of provisions in the AMLD, which prevent any disclosures to the customer or a third party of STRs made to the FIU. Therefore, under the AMLD, any notifications made to the depositor could be considered as a ‘tipping off’ and a breach of the AMLD.

#### Options to address the identified issues

143. The EBA did not consider options to address these issues at this stage, but considered that they should be explored further, after the publication of this EBA Opinion on DGS payouts.

#### Conclusions

144. The EBA proposes to the Commission that the topic of informing depositors about exclusions, suspensions and deferrals of DGS payouts should be explored further. More specifically, whether the depositors should be notified when they are not eligible for a payout in line with the existing DGSD provisions or when their payout is deferred or suspended because of ML/TF concerns (subject to the introduction of a power for the FIU to instruct a DGS, the insolvency practitioner or the credit institution under bankruptcy proceedings to suspend a payout in such cases and mindful of relevant confidentiality provisions in the AMLD) should be explored further. As with other topics discussed in this chapter, the EBA is well placed to contribute to this endeavour by carrying out further analyses of these topics, and benefits from

expertise on both the DGS and AML topics, after the publication of this EBA Opinion on DGS payouts.

### **3.2.4 Cooperation between relevant AML/CFT and DGS authorities**

#### **Legal basis and background**

145. Article 3(2) of the DGSD states that ‘competent authorities, designated authorities, resolution authorities and relevant administrative authorities shall cooperate with each other and exercise their powers in accordance with this Directive’. The DGSD does not explicitly mandate cooperation with relevant AML supervisory authorities or the FIU.

146. Article 57b(1) of the AMLD provides that Member States may authorise the exchange of information between the AML/CFT competent authorities and authorities entrusted with the supervision of the financial sector. The information received shall, in any event, be subject to professional secrecy requirements at least equivalent to those referred to in Article 57a(1). While the intention of the AMLD is to ensure that there are no obstacles for the widest scope of cooperation and information exchange between different parties, the use of the term ‘authorities entrusted with the supervision of financial sector’ raises questions as regards whether the DGSs fall within this category.

#### **Methodology, data sources and their limitations**

147. The survey circulated to the DGSDAs and DGSs asked respondents about their cooperation with different stakeholders, including AML/CFT competent authorities. Results in relation to cooperation with other authorities are reported in the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs.

#### **Main findings, issues identified and the analysis**

##### **Cooperation between authorities**

148. The survey circulated to the DGSDAs and DGSs included a matrix that asked respondents if they have (i) ‘regular contacts’ and (ii) written Memorandums of Understanding on cooperation and/or information exchange or similar agreements with different stakeholders, including AML/CFT authorities (without specifying whether this is the AML supervisors or the FIU). In relation to the question on the DGSDAs’/DGSs’ regular contact with the AML/CFT authorities (understood as the AML supervisor and/or the FIU), the survey responses included the following:

- 22 respondents from 19 Member States do not have regular contact with the AML/CFT authorities;
- 10 respondents from eight Member States reported that they have regular contact with the AML/CFT authorities.



149. In relation to the question on the DGSDAs'/DGSS' Memorandums of Understanding or agreements with the AML/CFT authorities, the survey responses included the following:

- 27 respondents from 23 Member States do not have in place such agreements to exchange information with the AML/CFT authorities;
- six respondents from five Member States replied that they do have in place written information exchange Memorandums of Understanding or similar agreements with the AML/CFT authorities. Among them:
  - two respondents from one Member State replied that they share the relevant information based on a written information exchange Memorandum of Understanding;
  - three respondents from three Member States replied that they share the relevant information in accordance with the established legal framework in their jurisdiction; and
  - one respondent reported that the DGS and the AML/CFT authority are both part of the same organisation.

150. The results of the survey point to a lack of cooperation between the DGS(DA)s and AML/CFT authorities, with the majority of respondents reporting that they do not have regular contact with the AML/CFT authorities. Moreover, the vast majority of respondents replied that they do not have in place any arrangements for exchanging relevant information between them, in comparison with a small minority of respondents who reported that they do have in place a Memorandum of Understanding with AML/CFT authorities. There could be many reasons why the levels of cooperation are so low, but one of the reasons may potentially be the lack of explicit legal requirements in the DGSD or the AMLD. Moreover, the lack of explicit provisions in the law may be perceived as an obstacle to cooperation.

151. The EBA discussed if a lack of regular contact and a lack of formal agreements to exchange information between the DGS(DA)s and AML/CFT authorities is an issue and when cooperation between authorities is necessary. DGSs have to rely on the data provided by the failed credit institution in the SCV file to ensure that deposits arising out of transactions in connection with which there has been a criminal conviction for money laundering are excluded from repayment by a DGS. However, there are instances in which a DGS cannot rely solely on the data provided in the SCV file, for example because there were systematic bank-wide issues arising from the credit institution's failure to comply with its AML/CFT obligations. The real-life cases described in section 3.2 of this report show that cooperation on these issues between DGS(DA)s and AML/CFT authorities (and possibly also involving competent authorities responsible for supervision) is essential, particularly in cases in which there is a suspicion of ML/TF, which may result in the suspension of the payout as described in section 3.2 of this report. To prepare for such cooperation, regular contact and formal agreements to cooperate and exchange information between DGS(DA)s and AML/CFT authorities would be useful.

152. As outlined in sections 3.2.1 and 3.2.2, there are good arguments for further cooperation between AML authorities, FIUs and DGSDAs/DGSs. However, the EBA also considered the following arguments against basing this cooperation between DGS(DA)s and AML authorities on the information/role in the SCV file:

- The information that the DGS obtains from the credit institution through the SCV file submitted is extracted from the credit institution's systems and so is, in principle, already available to the relevant AML authorities directly from the credit institution (together with other relevant information that is not included in the SCV file, for example on individual transactions). Therefore, it is not necessary or useful to engage the DGS.
- A DGS has only limited information extracted from the credit institution's data sets (which is relevant for the payout but would appear to be of limited relevance to the AML authorities).

A counterargument considered by the EBA is that the SCV files may at least in some Member States potentially also contain markings that provide some insight into the quality of the depositor data and flagging on accounts in which depositors are not identified, which may be relevant from an AML/CTF perspective.

- It is very difficult or impossible for a DGS to be able to detect ML/TF concerns, including based on stress testing of SCV files. This is the case because SCV file checks are done by the DGSs on the compliance with the format of the file and not on the detailed content related to individual depositors or their transactions.
- While the DGSs are required to test the quality of the SCV files based on the EBA Guidelines on stress tests of DGSs, the SCV files are tested regularly, but for any individual institution only at intervals, and so it is not an appropriate tool to identify AML issues. Such a SCV test can also be based on a sample of depositors or be pseudomised.

153. In the light of the arguments and counterarguments presented above, the EBA arrived at the view that the lack of cooperation highlighted by the results to the survey is an issue and it should be addressed, taking into account the limitations in the usefulness of the information in the SCV file.

### **Ways to cooperate**

154. The EBA then discussed what such cooperation could entail. Possible ways and preliminary ideas identified by the EBA include:

- meetings and discussions between DGSs and AML/CFT authorities to discuss and agree on cooperation procedures for future DGS payout events, including the type of information to be exchanged;
- ahead of the determination of unavailability of deposits, the AML/CFT authorities and/or the FIU could, on request from the DGSs, share with the DGSs information that could have an impact on the payouts process;
- in the business-as-usual phase, the AML/CFT authorities could flag to the DGS issues with identification of depositors discovered in the course of the AML on-site inspections or other intelligence.

155. Finally, notwithstanding the consideration above, the EBA considered arguments that such cooperation may be challenging because of the confidentiality of data and the sensitivity of cases in which there are AML/CFT concerns. In addition, the lack of explicit legal provisions requiring such cooperation is an obstacle.

### Options to address the identified issues

156. The EBA arrived at the view that the apparent lack of cooperation between DGSDAs and relevant AML authorities is an issue and has considered initial ideas of what such cooperation could entail, but ultimately did not assess precise options to address this issue at this stage. Instead, the EBA considered that given:

- the complexity of the topic of DGS payouts for which there are AML concerns and, more broadly, cooperation between relevant AML and DGS authorities;
- the fact that the initial assessment was done by DGS experts from a depositor protection perspective, but with limited input from AML/CFT experts, and so requires further analysis involving a broader range of stakeholders; and
- the technical nature of this work;

the opinion should highlight to the Commission that the EBA (including its substructures set up to discuss AML (currently the Joint Committee's AML Sub-Committee) and DGS topics) is well placed to perform further analysis of this topic in a holistic way, and to benefit from the expertise on both topics, including through the involvement of the DGS practitioners, after the publication of the EBA Opinion on DGS payouts.

### Conclusions

157. The EBA concluded that closer cooperation between DGSs and AML authorities, including FIUs, would be useful and proposes to the Commission that both how to ensure such cooperation and what this cooperation could entail should be assessed further.

158. The EBA also invited the Commission to consider that the EBA is well placed to perform further analysis of this topic in a holistic way, and to benefit from expertise on both the DGS and AML topics, including through the involvement of the DGS practitioners, after the publication of this EBA Opinion on DGS payouts.

## 3.3 Payout process

### 3.3.1 Repayment period

#### Legal basis and background

159. Article 8(1) requires that ‘DGSs shall ensure that the repayable amount is available within seven working days of the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1)’.

160. Article 8(2) states ‘[h]owever, Member States may, for a transitional period until 31 December 2023, establish the following repayment periods of up to:

- (a) 20 working days until 31 December 2018,
- (b) 15 working days from 1 January 2019 until 31 December 2020,
- (c) 10 working days from 1 January 2021 until 31 December 2023.’

#### Methodology, data sources and their limitations

161. The survey circulated to the DGSDAs and DGSs included one question in relation to the repayment period.

#### Main findings, issues identified and the analysis

162. The survey asked what the current legal repayment period is applicable to a DGS. The responses to the questions included the following:

- 19 respondents from 15 Member States reported that the repayment period is 7 working days;
- 14 respondents from 14 Member States reported that it is in line with Article 8(2) of the DGSD (i.e. longer than 7 working days).

#### Options to address the identified issues

163. In the light of the responses to the survey and the fact that, after the transitional period until 31 December 2023, all Member States will be required to have a 7 working day payout deadline in place, the EBA is of the opinion that there is no need to amend the current provisions in the DGSD.

#### Conclusions

164. The EBA proposes to the Commission that there is no need to amend the current provisions on the deadline to make the repayable amount available to depositors.

### 3.3.2 Payout method

#### Legal basis and background

165. Article 8(1) DGSD requires that ‘DGSs shall ensure that the repayable amount is available within seven working days of the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1)’.

166. Article 8(6) DGSD states that ‘[t]he repayable amount shall be made available without a request to a DGS being necessary. For that purpose, the credit institution shall transmit the necessary information on deposits and depositors as soon as requested by the DGS.’

#### Methodology, data sources and their limitations

167. The survey circulated to the DGSDAs and DGSs included three questions in relation to the payout method.

#### Main findings, issues identified and the analysis

168. The survey asked respondents what payout methods are available to the DGSs (agent bank, cash, bank transfer, postal order, etc.). The responses to the questions included the following<sup>15</sup>:

- 18 respondents from 15 Member States reported using electronic payment transactions through digital platforms;
- 11 respondents from 11 Member States reported using an agent bank. Among them:
  - three respondents further clarified that the agent bank would do an electronic payment transaction for the depositor;
  - two respondents reported that the agent bank would payout in cash;
  - two respondents reported that depositors could be reimbursed by an agent bank in various ways: collecting cash, bankers draft, electronic payment transactions or opening a new current account;
  - one respondent reported that the use of an agent bank is planned for the future.

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<sup>15</sup> Payout via bank transfer (or ‘electronic payment transaction’) using digital platforms generally implies that repayments are made via an internet-based solution and subsequently achieved through an electronic payment transaction. Payout via an agent bank can be performed via multiple approaches, such as payout in cash, transfer or opening a new bank account at the agent bank. Finally, a cheque or other financial instrument is often sent via post to the depositor, which can be cashed by a depositor or legal representative of the depositor at another bank. This explanation was based on the non-binding guidance paper of the European Forum of Deposit Insurers (EFDI) on ‘Pay-out in 7 working days’ (<https://www.efdi.eu/efdi-eu-committee-non-binding-guidance-paper-pay-out-7-working-days>).

- 10 respondents from nine Member States repay via cheques (partly via postal services). One of the respondents clarified that payment via cheque occurs when an electronic payment transaction is not possible;
- three respondents from three Member States allow cash payouts up to a certain threshold.

169. The survey also asked respondents if their DGS envisages separate payout procedures for domestic depositors to whom its standard payout procedures may not be accessible. The responses to the questions included the following:

- 19 respondents from 18 Member States do not envisage separate payout procedures for domestic depositors to whom its standard payout procedures may not be accessible;
- 10 respondents from nine Member States envisage separate payout procedures for domestic depositors to whom its standard payout procedures may not be accessible.

170. Furthermore, the survey asked if there are differences in the repayment procedure for depositors who reside abroad. The responses to the questions included the following:

- 28 respondents from 23 Member States do not provide different repayment procedures for depositors who reside abroad;
- four respondents from four Member States provide different repayment procedures for depositors who reside abroad.

171. In the light of the survey results, the EBA observed that:

- DGSs utilise a large range of different payout methods such as electronic payment transactions, agent banks, cheques, cash over the counter or payouts at a postal office. This may be due to historical reasons, different market structures, the payment methods available in a given Member State and geographic distributions of institutions across the Member States.
- There appears to be a tendency towards electronic payment transactions as the primary repayment method in the EU, in line with the trend for further digitalisation of payment practices.
- In addition, a number of DGSs have more than one payout method in place, which enables them to better serve depositors and specific situations.
- Only one-third of respondents envisage separate payout procedures for domestic depositors to whom its standard payout procedures may not be accessible.

- The results of the survey showed that most DGSs would use the same payout method for the reimbursement of depositors who reside abroad as for domestic depositors. However, although the same payout method is used, parts of the processes might be adapted because the procedures used for communication with and identification of domestic depositors cannot be used for depositors who reside abroad. In these cases, DGSs plan to use other procedures such as a reimbursement request by paper application forms to collect the new account number for electronic payment transactions. DGSs that have multiple payout methods in place could, on request of the depositor, offer an alternative payout solution.

172. The EBA concluded that the differences in payout methods applied by DGSs in the EU are not an issue per se, since those differences can be well explained by the different payment practices and market structures applicable in the Member States. However, in the context of considering the topic of passported services without having established branches, the EBA has identified issues regarding the application of DGS payout methods when reimbursing depositors who reside in other Member States. These issues are dealt with in Chapter 3.6 of this report.

#### Options to address the identified issues

173. In the light of the responses to the survey, the only option considered by the EBA was to propose no amendments to the DGSD.

#### Conclusions

174. The EBA proposes to the Commission that it does not seem necessary to introduce amendments to the DGSD in relation to the payout method, although DGSs' payout methods for depositors residing in other Member States should be studied further in the context of passported services without having established branches.

### 3.3.3 Identification of depositors and representatives

#### Legal basis and background

175. Article 4(8) of the DGSD stipulates that 'Member States shall ensure that a DGS, at any time and upon the DGS's request, receives from their members all information necessary to prepare for a repayment of depositors, including markings under Article 5(4)'. The latter article of the DGSD requires that Member States ensure that 'credit institutions mark eligible deposits in a way that allows an immediate identification of such deposits'. This requirement has led to the creation of the SCV file.

176. Article 8(5)(a) of the DGSD stipulates that '[r]epayment as referred to in paragraphs 1 and 4 may be deferred where it is uncertain whether a person entitled to receive repayment or the deposit is subject to legal dispute'.

177. Article 8(6) of the DGSD stipulates that '[t]he repayable amount shall be made available without a request to a DGS being necessary. For that purpose, the credit institution shall transmit the necessary information on deposits and depositors as soon as requested by the DGS.'

### Methodology, data sources and their limitations

178. The survey circulated to the DGSDAs and DGSs included three questions in relation to the method used for the identification of depositors and representatives.

### Main findings, issues identified and the analysis

179. The survey asked respondents what their current procedural requirements are under each payout method for depositors identifying themselves in order to be reimbursed in cases of a payout. The responses to this question included the following:

- In cases in which electronic payment transactions are used as a payout method:
  - six respondents from seven Member States reported that the identification of depositors is performed by the DGS through a web platform using some type of electronic identification document (ID) linked to a national or tax ID;
  - three respondents from one Member State explained that the DGS sends a letter with a unique QR code to the depositor and requests a reply letter providing an account number on which the depositor wants to be reimbursed, accompanied by a copy of an identification document;
  - three respondents from three Member States reported that the identity is checked by the credit institution chosen by the depositor to receive the reimbursement;
  - one respondent reported that the DGS sends a letter to the depositor and requests a reply letter providing an account number on which the depositor wants to be reimbursed, accompanied by a copy of an identification document;
  - one respondent reported that, instead of identification through a web platform, the DGS could also send a giro cheque to the depositor with a request to send back a copy of the person's ID or driver's licence;
  - one respondent reported that the postal service verifies the latest postal address;
  - one respondent reported that it is performed on a case-by-case basis;



- one respondent reported that the identity is checked online by the payout platform through a Q&A based on information requested from the bank in its SCV file;
- one respondent reported that depositors fill in a form and provide evidence of an account held at another credit institution and proof of their identity.
- When reimbursement is performed via an agent bank:
  - four respondents from four Member States reported that the identification is performed electronically by the agent bank;
  - four respondent from four Member States reported that the depositor has to be physically present at the agent bank in order to perform the identity check;
  - one respondent reported that the postal services verify the identity when reimbursement takes place via cash over the counter.
- In cases in which cheques are sent to perform the payout:
  - two respondents from two Member States reported that the identification of depositors is performed by employees of the DGS, based on the data received from the failed credit institution;
  - two respondents from two Member States reported that the credit institution at which the cheque is cashed performs this task.

180. The EBA examined whether the repayable amount has to be provided to the depositor whose funds have become unavailable or the amount can be transferred to a different account holder. The responses to this question included the following<sup>16</sup>:

- nine DGSs from eight Member States have reported that the repayment has to be made to an account in the same name as the depositor;
- six DGSs from six Member States reported that the repayment can also be made to an account under a different name.

181. Subsequently, the survey asked how DGSs deal with depositors who need to be represented. The responses to this question included the following:

- In general, DGSs require:

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<sup>16</sup> In the context of this question, the EBA did not discuss payout to, for example, depositors who have to be represented or inheritors of a deceased depositor, as, in these cases, it may be more likely that the amount is transferred to an account in the name of a different account holder.

- a valid proof of the powers of representation, sometimes accompanied by a document of an attorney or a notary;
  - a proof of identification by the legal guardian;
  - the identification information of the depositor that is represented to be included in the SCV file.
- The identification and/or verification of the identity of representatives of depositors is mostly a manual process that can take longer than the identification of depositors who are not represented and that are fit for straight-through payout.

182. The survey then asked how depositors who reside abroad identify themselves to the DGS. The responses to this question included the following:

- 28 respondents from 22 Member States reported that such depositors are identified in the same manner as domestic depositors;
- two respondent reported that such depositors may be represented by a power of attorney;
- one respondent reported that such depositors are identified through filled in paper forms.

183. Finally, the survey asked if the procedures for depositor identification are included in the national legislation or other administrative provisions, or if it is done on a case-by-case basis. The responses to this question included the following:

- 11 respondents from 11 Member States outline the procedures for depositor identification in their national legislation;
- 10 respondents from 10 Member States outline the procedures for depositor identification in other administrative provisions (e.g. internal DGS rules or internal business processes);
- nine respondents from seven Member States have put in place predefined depositor identification procedures and identify depositors on a case-by-case basis.

184. The results of the survey showed that:

- There are different identification methods across the EU, which are adapted to the payout method used.
- For the majority of DGSs, the depositor identification procedures are not outlined in national legislation.

- Most Member States have internal procedures for the identification of natural persons through general identification rules.
- When available in the Member State and available to the DGS, often the national ID number is used to check the identity of depositors, based on national legislation that allows the DGS to access and use such depositor data.

185. The EBA concluded that the differences in identification methods applied by DGSs in the EU are not an issue, since those differences can be well explained by the different payout methods and identification practices applied in the Member States.

### Options to address the identified issues

186. In the light of the responses to the survey, the only option considered by the EBA was to propose no amendments to the DGSD.

### Conclusions

187. The EBA proposes to the Commission that no amendments to the DGSD in relation to the identification of depositors and representatives seem necessary.

#### 3.3.4 Provision of information to depositors during payout

##### Legal basis and background

188. Article 8(7) of the DGSD requires that ‘any correspondence between the DGS and the depositor shall be drawn up:

- in the official language of the Union institutions that is used by the credit institution holding the covered deposit when writing to the depositor; or
- in the official language or languages of the Member State in which the covered deposit is located.

If a credit institution operates directly in another Member State without having established branches, the information shall be provided in the language that was chosen by the depositor when the account was opened.’

189. The second subparagraph of Article 16(3) of the DGSD stipulates that ‘[t]he website of the DGS shall contain the necessary information for depositors, in particular information concerning the provisions regarding the process for and conditions of deposit guarantees as envisaged under this Directive’.

190. Article 16(8) of the DGSD states that ‘[i]f a depositor uses internet banking, the information required to be disclosed by this Directive may be communicated by electronic means. Where the depositor so requests, it shall be communicated on paper.’

### Methodology, data sources and their limitations

191. The survey circulated to the DGSDAs and DGSs included three questions in relation to the procedures used by DGSs to inform depositors in an event of a payout.

### Main findings, issues identified and the analysis

192. The survey asked respondents what their current procedures are for informing domestic depositors about the payout and what next steps depositors need to take to be reimbursed. The responses to this question included the following:

- 29 respondents from 27 Member States publish the information on the failure of a member credit institution on the DGS website;
- 32 respondents from 27 Member States use public press and social media to inform depositors about the payout;
- 15 respondents from 13 Member States inform eligible depositors by direct mail, mostly via postal services;
- 16 respondents from 14 Member States publish the information on the failure of a member credit institution on the website of the failed credit institution;
- one respondent uses the online banking system of the failed credit institution to inform depositors of the failure;
- one respondent mentioned setting up at the DGS a call centre available for depositors.

193. The survey also asked respondents if they have separate procedures in place to inform depositors who reside abroad or may not be easy to reach for other reasons. The responses to this question included the following:

- 30 respondents from 26 Member States do not have separate procedures in place to inform depositors who reside abroad or may not be easy to reach for other reasons;
- three respondents from three Member States have separate procedures in place to inform depositors who reside abroad or may not be easy to reach for other reasons;
- four respondents from three Member States reported that the information is also published in English on the website of the DGS;
- one respondent reported that, in that case, the DGS should work together with the insolvency practitioner.

194. The survey then asked respondents if the procedures for informing depositors are included in their national legislation, if there are other administrative provisions planned or if it is done on a case-by-case basis. The responses to this question included the following:

- 21 respondents from 20 Member States outline the procedures for informing depositors in their national legislation;
- seven respondents from five Member States outline the procedures for informing depositors in other administrative provisions (e.g. internal DGS rules or internal business processes);
- four respondents from four Member States do not have fixed procedures in place for informing depositors and inform depositors on a case-by-case basis.

195. The results of the survey showed that DGSs utilise various ways to inform domestic depositors about a payout event, for example by:

- publishing a statement on the DGS/DGSDA website or on the website of the credit institution concerned and its affiliates and branches;
- issuing press releases and publishing advertisements in local and national newspapers and by giving press interviews for national TV;
- direct mailing and sending physical letters to the eligible depositors;
- social networks and by sending text messages to depositors.

196. The results of the survey related to informing depositors who reside abroad or who may not be easy to reach for other reasons showed that:

- DGSs mostly utilise the same ways to inform depositors who reside abroad or may not be easy to reach for other reasons as for domestic depositors;
- some DGSs publish the information on the failed credit institution in English on their website.

197. The EBA concludes that DGSs across the EU:

- utilise various ways to inform domestic depositors about a payout event;
- use the same communication channels and apply the same methods for informing depositors who reside abroad, in most Member States;
- outline the information procedures in national legislation or other policy documents.

198. The EBA observed that:

- minor differences in the general approach to informing depositors are not an issue; whereas
- the fact that procedures for informing depositors residing abroad are not different from those used for domestic depositors could lead to issues, depending on the payout method, particularly in the light of the increasing numbers of depositors using passported services, as discussed in Chapter 3.6.

### Options to address the identified issues

199. In the light of the responses to the survey, the only option considered by the EBA was to propose no amendments to the DGSD, although the potential for further analysis of DGSs' practices of informing depositors living abroad was considered in the context of passported services without having established branches.

### Conclusions

200. The EBA proposes to the Commission that it does not seem necessary to introduce amendments to the DGSD in relation to the general procedure of informing depositors during payouts. However, there are instances in which this opinion proposes targeted amendments, or further assessment, in relation to informing depositors, for example:

- in cases in which there are issues related to AML/CFT (as per Chapter 3.2);
- in cases in which depositors reside abroad (as per Chapter 3.6);
- regarding THBs (as per Chapter 3.7); and
- regarding set-off (as per Chapter 3.8).

### 3.3.5 End of the payout period for a DGS

#### Legal basis and background

201. Article 9(3) of the DGSD states that 'Member States may limit the time in which depositors whose deposits were not repaid or acknowledged by the DGS within the deadlines set out in Article 8(1) and (3) can claim the repayment of their deposits'.

202. Recital 41 of the DGSD states that '[i]n order to secure repayment, DGSs should be entitled to subrogate into the rights of repaid depositors against a failed credit institution. Member States should be able to limit the time in which depositors whose deposits were not repaid, or not acknowledged within the deadline for repayment, can claim repayment of their deposits, in order to enable DGSs to exercise the rights into which it is subrogated by the date on which those rights are due to be registered in insolvency proceedings.'

## Methodology, data sources and their limitations

203. The survey circulated to the DGSDAs and DGSs included one question in relation to the end of payout.

## Main findings, issues identified and the analysis

204. The survey circulated to the DGSDAs and DGSs asked respondents if they limit the period in which depositors whose deposits were not repaid or acknowledged by the DGS within the deadlines set out in Article 8(1) and (3) can claim the repayment of their deposits. If the answer to this question was yes, respondents were also asked what limit they set and how the DGS defines the end of the payout period. The responses to this question included the following:

- three respondents from three Member States indicated that the time limit is related to other deadlines (e.g. deadline of insolvency law);
- five respondents from three Member States have no time limit;
- if the time limit is set by their national law or the DGS itself, the following time limits are applicable:
  - three respondents from three Member States reported that the time limit is less than 1 year;
  - eight respondents from eight Member States reported that the time limit is between 1 year and 3 years;
  - 11 respondents from 10 Member States have set a time limit of more than 3 years.

205. The EBA observes that there are significant differences between Member States in relation to the deadline by which depositors lose their right to receive reimbursement from the DGS, ranging from 3 months in one Member State to unlimited time in other Member States.

206. As different deadlines set by a DGS for the end of the reimbursement period may result in different treatments of depositors across the EU, the EBA examined:

- the rationale for having such a deadline;
- the link between that deadline and the end of the insolvency proceedings;
- when a deadline is set, what the appropriate length would be.

## Options to address the identified issues

207. The EBA considered maintaining current provisions (meaning leaving it up to the discretion of the Member States to set the time limit) and the following alternative options:

- option 1: removing the current provisions that allow Member States to set a time limit;

- option 2: linking the time limit to the end of the insolvency;
- option 3: setting an adequately long time limit.

#### **Option 1: removing the current provisions that allow Member States to set a time limit**

208. The EBA identified the following arguments in favour of removing the current provisions, and thus removing the option for Member States to set a time limit to claim the repayment of deposits:

- There may be various reasons that depositors may not know about the failure of the credit institution for years (e.g. when a depositor has moved abroad but has not updated their contact details) and therefore they should not be deprived of their funds.
- A proactive approach of the DGSs towards informing depositors can help to speed up the reimbursement process instead of a passive approach with a deadline.
- Removing the time limit would ensure a harmonised approach across Member States and so ensure the same treatment of depositors.

209. The EBA also considered the following arguments against removing current provisions:

- A deadline for the reimbursement by a DGS is set in order to facilitate an orderly liquidation process once the depositors have been reimbursed.
- Insolvency procedures can take many years and, for operational reasons, DGSs need to know the final deadline within which depositors can claim the repayment of their deposits.
- Depositors can reasonably be expected to notice that their credit institution has failed, if given a sufficiently long time to do so.
- The DGS subrogates into the rights of the repaid depositors and seeks to recover its funds in insolvency, which means that, before it received funds in the insolvency, it must be clear what the amount of its subrogated claim is.

#### **Option 2: linking the time limit to the end of the insolvency**

210. The EBA determined that linking the end of payout to the end of the insolvency is suboptimal because:

- There are differences in insolvency laws across the EU.
- Insolvency procedures can take many years and, for operational reasons, DGSs need to know the final reimbursement deadline.



- A deadline within which depositors can claim the repayment of their deposits by a DGS is set in order to facilitate an orderly liquidation process once the depositors have been reimbursed.

### **Option 3: setting an adequately long time limit**

211. The EBA assessed the appropriateness of setting an adequately long time limit by which depositors whose deposits were not repaid or acknowledged by the DGS can claim repayment of their deposits. An adequately long minimum time limit (reflecting the possibility of the DGS to still subrogate in the claim to the rights of the depositor as part of the insolvency proceedings) could be deemed appropriate because:

- It strikes the right the balance between providing ample opportunity for the depositor to claim their deposits and avoiding operational issues for DGSs of a case open in perpetuity.
- On the other hand, a depositor could reasonably be expected to notice that their credit institution has failed, if they had an interest in the amount left in the account, and an appropriately long period would increase the likelihood that the depositor becomes aware of the failure.

212. The EBA assessed the argument that, while setting an appropriately long time limit seems reasonable, in the vast majority of Member States this is already the case.

213. The EBA has weighed different options to further harmonise the approach to the time limit by which depositors can claim their reimbursement. The EBA has concluded that there is a need for an adequately long minimum time limit (reflecting the possibility of the DGS to still subrogate in the claim to the rights of the depositor as part of the insolvency proceedings).

### **Conclusions**

214. The EBA proposes to the Commission that there is a need to ensure that there is an adequately long minimum time period within which depositors can claim the repayment of their deposits (subject to ensuring that the DGS can still subrogate in the claim to the rights of the depositor as part of the insolvency proceedings).

## 3.4 Payout of sums in accounts of which the depositor is not absolutely entitled to the sums held in the account

### 3.4.1 Payout approach

#### Legal basis and background

215. Article 7(3) DGSD states that '[w]here the depositor is not absolutely entitled to the sums held in an account, the person who is absolutely entitled shall be covered by the guarantee, provided that that person has been identified or is identifiable before the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling referred to in point (8)(b) of Article 2(1). Where several persons are absolutely entitled, the share of each under the arrangements subject to which the sums are managed shall be taken into account when the limit provided for in Article 6(1) is calculated.'

#### Methodology, data sources and their limitations

216. The survey circulated to DGSDAs and DGSs included two questions related to accounts of which the depositor (or 'account holder') is not absolutely entitled (hereafter such accounts are referred to as 'beneficiary accounts'). However, the issue of the payout approach for these type of accounts was not part of the survey initially circulated to DGSDAs and DGSs. Relevant authorities raised it as an important issue to be analysed further in the course of preparing the opinion.

#### Main findings, issues identified and the analysis

217. The report accompanying the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs<sup>17</sup> describes the 'see-through' approach that is used by DGSs to repay persons who are absolutely entitled to the sums held in beneficiary accounts. More specifically, it states that:

'depending on the payout approach applied, the DGS would either (i) pay out to the holder of the account — i.e. the investment firm or financial institution — based upon the eligibility and coverage of the persons absolutely entitled to the sums held in the account or (ii) pay out directly to the persons absolutely entitled to the sums held in the account (who would then subrogate their claim on the sums that they are absolutely entitled to). The latter approach would affect the contractual relationship between the investment firm or financial institutions and their clients. As a consequence, directly paying out to the persons absolutely entitled to the sums held in the account endangers the continuity of the business of the institution

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<sup>17</sup> Opinion of the European Banking Authority on the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes, EBA-Op-2019-10.

that safeguarded the money on behalf or for the purpose of its clients. It could ultimately even lead to the failure of that firm or institution.

On the other hand, while from the perspective of the continuity of the investment firm or financial institution there is a clear issue with directly paying out to the persons absolutely entitled, the issue is not solved by not applying the see-through approach (i.e. not compensating such depositors at all), because in that case both the clients, users or holders and the investment firms and financial institutions would lose access to the funds after the failure of the credit institution.’

218. The EBA identified the following three payout approaches that are currently applied by DGSs to pay out beneficiary accounts, noting that alternative or ‘hybrid’ options are also used by some DGSs:

- i. pay out to the persons absolutely entitled (approach 1);
- ii. pay out to the account holder, taking into account the coverage limit of each absolutely entitled person based on their SCV file (approach 2);
- iii. pay out to the account holder, not considering the other accounts of the persons absolutely entitled (approach 3).

219. Under approach 1 (pay out to the persons absolutely entitled):

- the DGS would fully integrate into the SCV of a particular person the sums held in a (beneficiary) account to which this person is absolutely entitled;
- the compensation would be made available to this person in one or multiple payments (the latter could occur when the DGS only at a later stage receives information on the persons absolutely entitled to the sums held in the (beneficiary) account); and
- the total compensation would take into account the coverage limit of EUR 100 000 per person.

220. Approach 2 refers to paying out to the account holder, taking into account the coverage limit of each absolutely entitled person based on their SCV. Under this approach:

- similarly to the first approach, the DGS would fully integrate into the SCV of a particular person the information about that particular person and the sums held in a (beneficiary) account to which this person is absolutely entitled;
- the compensation for the sum held in a (beneficiary) account would be paid to the account holder instead of to the person absolutely entitled;
- an operational challenge is that it requires a ‘hierarchy of accounts’. For example, if a person has EUR 100 000 in a savings account with credit institution A and is absolutely entitled to EUR 100 000 held in a beneficiary account with credit institution A by a particular account holder, it is not clear which account the DGS would compensate (and for which account the depositor would have to file a claim with the insolvency practitioner) and, subsequently, to whom would the DGS need to make a payment.

221. Under approach 3 (pay out to the account holder, not considering the other accounts of the persons absolutely entitled) the DGS would look, on a standalone basis, at the sums held in (beneficiary) accounts on behalf of or for the purpose of persons absolutely entitled. Under this approach:

- the compensation to the account holder would be capped at (the coverage limit of) EUR 100 000 per person absolutely entitled;
- the determination of the repayable amount would not take into account any other deposits held by the persons absolutely entitled;
- following up on the example above, the DGS would pay out both (i) EUR 100 000 to the depositor as compensation for the savings account with credit institution A and (ii) EUR 100 000 to the account holder as compensation for the sums held in the account for the purpose of or on behalf of this particular person.

222. The three baseline approaches analysed in this chapter would lead to different outcomes. To illustrate this, Table 2 provides an example for a stylised credit institution with three accounts:

- payment account 1, containing EUR 40 000 for person A;
- payment account 2, containing EUR 100 000 for person B; and
- beneficiary account 3, held by firm C and containing EUR 160 000, of which person A is entitled to 50% (EUR 80 000) and person B is entitled to the other half (EUR 80 000).

**Table 2. Examples of potential payout approaches for sums in accounts of which the depositor is not absolutely entitled**

Entity	Account with bank	Amount (in EUR)	Payable amount under payment method (in EUR)		
			Approach 1 (pay out to the persons absolutely entitled)	Approach 2 (pay out to the account holder, taking into account the coverage limit based on the SCV of each person absolutely entitled)	Approach 3 (pay out to the account holder, not considering other accounts of persons absolutely entitled)
Person A	Payment account 1	40 000	100 000	40 000	40 000
	Beneficiary account 3 (50% absolute entitlement to EUR 160 000)	80 000			
Person B	Payment account 2	100 000	100 000	100 000	100 000
	Beneficiary account 3 (50% absolute entitlement to EUR 160 000)	80 000			
Firm C	Beneficiary account 3 (account holder, no entitlement)	160 000	—	60 000	160 000
<b>Total payable amount (in EUR)</b>			<b>200 000</b>	<b>200 000</b>	<b>300 000</b>

223. In this example, the three approaches would lead to the following payable amounts for the DGS:

- a. Under approach 1, the eligible amount of person A would be EUR 120 000 in total, of which the DGS would compensate EUR 100 000. The eligible amount of person B would be EUR 180 000 in total, of which the DGS would compensate EUR 100 000. Firm C would receive nothing, because it is not entitled to any sums held with the credit institution. The total payable amount for the DGS is EUR 200 000.
- b. Under approach 2, the eligible amounts of person A (EUR 120 000) and person B (EUR 180 000) would be calculated similarly to how it would be done under approach 1. However, the payout of sums held in the beneficiary account would be made to the account holder (firm C). For the purpose of this example, it is then assumed that the DGS has established a rule under which sums held in payment accounts are compensated before sums held in beneficiary accounts (according to the hierarchy of accounts). As a consequence, the DGS would pay out EUR 40 000 to person A (the amount held in payment account 1) and EUR 100 000 to person B (the amount held in payment account 2). The DGS would pay out EUR 60 000 to firm C (the remaining part of the EUR 80 000 entitlement of person A to beneficiary account 3, which is still within the coverage limit of EUR 100 000 for person A). The total payable amount for the DGS is EUR 200 000.
- c. Under approach 3, persons A and B would receive a payment equal to the sums held in their payment accounts, in consideration of the coverage limit of EUR 100 000. Firm C would receive compensation for the sums held in the beneficiary account, up to EUR 100 000 per (eligible) absolutely entitled person. As such, the DGS would pay out EUR 40 000 to person A (the amount held in payment account 1) and EUR 100 000 to person B (the amount held in payment account 2). The DGS would pay out EUR 160 000 to firm C (because the sums to which persons A and B are absolutely entitled are, for each person, below EUR 100 000). The total payable amount for the DGS is EUR 300 000.

224. The EBA identified that currently there are significant differences between Member States in relation to the approach used to repay beneficiary accounts.

- five DGSs from five Member States would apply approach 1;
- three DGSs from three Member States would apply approach 2;
- one DGS would, if the absolutely entitled person also had a personal account at the failed credit institution, firstly compensate for that bank account and subsequently for the beneficiary account, taking into account the maximum coverage level of EUR 100 000 (applicable to the total payout of both accounts);

- one DGS would, if the absolutely entitled person also had a personal account at the failed credit institution, firstly compensate directly to the depositor the funds on that bank account (up to EUR 100 000) and subsequently the funds on the beneficiary account (up to another EUR 100 000);
- one DGS would apply approach 3.

225. Given the different practices within the EU, the EBA considered that, before the need for harmonising the payout approaches for such accounts could be assessed, the pros and cons of each approach needed to be analysed. The EBA identified the following considerations, which are rated in Table 3:

- whether or not a depositor can (indirectly) receive compensation above the coverage limit:
  - Under approaches 1 and 2, no depositor would be entitled to total compensation higher than the coverage limit.
  - Under approach 3, the following issue arises: for some depositors, the total compensation can (indirectly) be higher than the coverage limit, while Article 7(1) of the DGSD states that '[t]he limit [coverage level] referred to in Article 6(1) [EUR 100 000] shall apply to the aggregate deposits placed with the same credit institution irrespective of the number of deposits, the currency and the location within the Union'. As a counterargument, it could be argued that it is already possible that the same person can indirectly benefit from a payout above EUR 100 000 in total if they have an individual account as a natural person and an indirect separate account as a sole trader registered as a legal person with the same credit institution, and the total amount on both accounts is above EUR 100 000. On the other hand, it could be argued that, in such a case, the natural person and the legal persons have their own independent legal capacity and are acting on their behalf and for their own account, which is not the case when a depositor has an individual account and is also the person absolutely entitled to the sums held in an account in relation to funds entrusted with an investment firm or a payment institution. This applies whether or not there is a risk for depositors to lose money owing to decisions by the account holder (and beyond their control or awareness).
  - Under approaches 1 and 2, some depositors might lose money because — outside their influence and without their knowledge — the account holder deposited funds to which they are absolutely entitled with the same credit institution as that which holds their personal accounts.
  - Under approach 3, as long as the sums held in (beneficiary) accounts to which they are absolutely entitled remain below EUR 100 000, there is no risk that these depositors will lose money as a result of — outside their influence and

without their knowledge — the account holder depositing funds with the same credit institution as that which holds their personal accounts.

- whether or not the payout approach affects or endangers the continuity of the firm that safeguarded funds on behalf of or for the account of their clients:
  - Under approach 1, the compensation is not made available to the account holder. Directly paying out to the persons absolutely entitled to the sums held in the account endangers the continuity of the business of the firm that safeguarded the money on behalf or for the purpose of its clients. It could ultimately even lead to the failure of that firm.
  - Under approach 2, the compensation is made available to the account holder, but the level of compensation received by the account holder is dependent on the personal financial circumstances of the persons absolutely entitled. There is no way for the account holder to ensure that the sums held in such a beneficiary account will be returned in full to the account holder after the failure of the credit institution because the person absolutely entitled might have other personal accounts with the credit institution. As such, the continuity of the firm may be endangered because there is a chance that only part of the funds would be returned to the account holder while, depending on the specific legal provisions between the account holder and its clients, the account holder may still need to repay its clients.
  - Under approach 3, the account holder knows in advance whether or not compensation will be received for sums held on behalf of or for the purpose of the persons absolutely entitled (because the compensation is independent of the other personal accounts of the person absolutely entitled). *Ex ante*, it would be sufficient for the account holder to check that (i) the persons absolutely entitled are eligible for compensation and (ii) the sums held on behalf of or for the purpose of each person absolutely entitled are below EUR 100 000. This limits the risk that the relationship between the account holder and its clients breaks down because funds are still safeguarded by the account holder.
- whether or not the payout approach requires a hierarchy of accounts:
  - Under approaches 1 and 3, the DGS does not need to establish a hierarchy of accounts to operationalise the approach for paying out accounts of which the account holder is not absolutely entitled in a consistent way.
  - Under approach 2, the DGS needs to establish a hierarchy of accounts to operationalise the approach in a consistent way.

**Table 3. Considerations related to payout approaches for accounts of which the account holder is not absolutely entitled**

Consideration	Approach 1 (pay out to the persons absolutely entitled)	Approach 2 (pay out to the account holder, taking into account the coverage limit per person based on the SCV)	Approach 3 (pay out to the account holder, not considering the other accounts of the persons absolutely entitled)
A. A person can (indirectly) receive compensation above the coverage limit	No	No	Yes
B. The risk that persons lose money because funds to which they are absolutely entitled in a (beneficiary) account are with the same credit institution as their personal account	Yes	Yes	No
C. Depending on the payout approach, the failure of the credit institution endangers the continuity of the business of the account holder that safeguards funds on behalf of or for the purpose of its clients	Yes	Depends	No
D. The need to establish a hierarchy of accounts for the purpose of beneficiary accounts*	No	Yes	No

\* A hierarchy of accounts might still be needed for other purposes, but that is beyond the scope of this topic.

226. Based on the analysis above, the EBA observed that:

- the different approaches applied across Member States will lead to different outcomes for persons absolutely entitled and account holders (i.e. managing the beneficiary account) depending on the jurisdiction;
- there is a potential risk to financial stability stemming from the current approaches applied in some Member States, since the failure of the credit institution may, in some circumstances, endanger the continuity of the business of the account holder that safeguards funds on behalf of or for the purpose of its clients;
- in most Member States, until now, this issue has not received a lot of attention and limited analysis has been performed and limited consideration has been given in the quest of finding the most optimal solution;
- the issue could potentially become more relevant in the future, considering market developments such as the rise of payment services providers and e-money institutions, which are required to safeguard the funds of their users.



## Options to address the identified issues

227. Based on the survey results and discussions with relevant authorities, the EBA has identified a number of approaches that DGSs may use when repaying sums in accounts of which the account holder is not absolutely entitled to the sums held in the account. This chapter provided an initial analysis of the approaches and their consequences.
228. The EBA did not attempt to provide a policy recommendation on this issue but, given that the approach to the treatment of such depositors could lead to different treatments of depositors in different Member States, it arrived at the view that this complex issue should be analysed further. This assessment is in line with the proposal on a related issue in the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs in which the EBA also proposed further analysis.

## Conclusions

229. The EBA proposes that the Commission should further assess the need to provide clarity in relation to the payout approaches applicable to sums in accounts of which the depositor is not absolutely entitled and the implications this entails for the coverage limit, depositor protection, the continuity of the firm that safeguards funds on behalf of or for the purposes of its clients and the need to establish a hierarchy of accounts for the purpose of beneficiary accounts, as outlined in this report.

### 3.4.2 Repayment period

#### Legal basis and background

230. Article 7(3) DGSD states that '[w]here the depositor is not absolutely entitled to the sums held in an account, the person who is absolutely entitled shall be covered by the guarantee, provided that that person has been identified or is identifiable before the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling referred to in point (8)(b) of Article 2(1). Where several persons are absolutely entitled, the share of each under the arrangements subject to which the sums are managed shall be taken into account when the limit provided for in Article 6(1) is calculated.'
231. According to Article 8(3) DGSD, 'Member States may decide that deposits referred to in Article 7(3) are subject to a longer repayment period, which does not exceed three months from the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1).'

### Methodology, data sources and their limitations

232. The survey circulated to the DGSDAs and DGSs included one question in relation to the longer repayment period for accounts of which the account holder is not absolutely entitled to the sums held in the account.

### Main findings, issues identified and the analysis

233. The survey asked respondents if they consider the longer repayment period of 3 months provided for in Article 8(3) adequate to repay deposits referred to in Article 7(3) and, if not, they were asked to suggest a different period. The responses received were as follows:

- 25 respondents from 22 Member States reported that they consider the current 3-month repayment period adequate. Of those respondents:
  - five respondents from two Member States highlighted that this is a theoretical assessment, since they do not have practical experience of repaying such accounts;
  - three respondents from three Member States reported that they have concerns about the adequacy of the repayment period in the case of legal disputes or when depositors do not submit the required information on time;
  - one respondent explained that it is adequate because member institutions include the required information in the SCV file;
  - one respondent pointed out that the repayment period should start after the DGS has received the required information.
- five respondents from three Member States reported that they consider the 3-month repayment period to not be adequate in all situations and suggested that the time limit be extended for certain cases;
- two respondents from two Member States did not provide an answer because they did not have practical experience of repaying such accounts under the revised DGSD;
- one respondent reported that the provision has not been transposed in national law.

234. The EBA assessed the appropriateness of linking, in the current provisions in Article 8(3) of the DGSD, the deadline for repayment of beneficiary accounts to the determination of the unavailability of deposits. Linking the deadline to the moment of the determination of the unavailability of deposits may not be appropriate for the following reasons:

- It is not within the DGS's power to ensure that the account holder and/or the person absolutely entitled to the amount will provide, on time, the information needed to assess if the absolutely entitled person is eligible and entitled to the amount.
- Such a deadline seems to suggest that the depositor must be paid out within that period, even though this would not be possible if the information regarding how much and to whom the amount should be paid is not provided (because this is outside the DGS's power), thus rendering the deadline potentially unrealistic.

235. Nevertheless, the EBA identified a number of advantages of having such a deadline. A repayment deadline creates:

- clarity for depositors as regards when they can expect to be reimbursed; and
- an incentive for the DGS to ensure that the repayment for such accounts is made in due course.

236. Therefore, the EBA concluded that it is desirable to have a deadline in place, but that it should not be linked to the determination of the unavailability of deposits.

### Options to address the identified issues

237. The EBA considered the following options:

- to maintain the current 3-month deadline, but to amend the DGSD and make the 3-month period start from the moment the DGS receives the necessary information to be able to determine the amount and make it available to the depositor; or
- to remove the current 3-month deadline linked to the determination of unavailability of deposits, but specify that the DGS should make an effort to collect the necessary information without undue delay and, once the DGS receives the necessary information, to specify that the funds should be made available to the depositor as soon as possible but no later than within the currently applicable repayment deadline.

238. The EBA arrived at the view that the first option would not be appropriate because:

- there is no clear reason why the DGS would need 3 months to make the amount available to the depositor once it has all the necessary information;
- in comparison with the current wording of the DGSD, the first option provides a longer repayment period and extends the deadline for the depositor to receive its funds, thereby providing potentially worse treatment to such depositors.

239. The second option is considered to be preferable, because it:

- recognises that the DGS may not have received the necessary information within the current 3-month deadline; but
- includes a safeguard to ensure that the DGS makes an effort to collect the information without undue delay;
- ensures that, once the DGS has all the information, it should be able to make the amount available promptly; but
- still allows the DGS a number of days (the same as the currently applicable deadline for making the amount available) to make any final checks and to calculate the final amount.

240. The EBA then discussed whether the payout deadline should then be 7 working days or longer (but shorter than the 3-month deadline). The following arguments were made in favour of the deadline of 7 working days:

- It is in the depositor's interest to receive funds as soon as possible after the DGS has received the necessary information.
- It is in alignment with the repayment period applicable to regular deposits.

241. On the other hand, the following arguments were made in favour of a longer deadline:

- When the information on the person absolutely entitled is not already required or available in the SCV file, the determination of the repayable amount for a beneficiary account may take more time than for a regular account, because the DGS has to assess more information (in terms of quantity and complexity), as, for regular payouts, the information is provided in the SCV file in a standard format.
- In addition, depending on the type of failed credit institution and the type of beneficiary accounts held at the institution, the number of accounts and beneficiaries to assess can potentially be very large.
- A longer deadline would not prevent a DGS from repaying depositors ahead of the deadline if they can swiftly make the determination of the repayable amount.

242. Based on the arguments listed above, the EBA arrived at the view that, on balance, there is a need to provide a deadline that is longer than 7 working days but shorter than 3 months. Based on the repayment periods applicable during the transitional period (Article 8(2) of the DGSD), the EBA arrived at a compromise repayment deadline of 20 working days once the DGS has received all of the information necessary to determine the repayable amount.

## Conclusions

243. The EBA proposes to the Commission that Article 8(3) of the DGSD should be amended to unlink the deadline for the repayment of beneficiary accounts from the determination of the unavailability of deposits, and link it instead to the moment that the DGS has received all of the information necessary to determine the repayable amount for the absolutely entitled persons.

244. The EBA proposes to the Commission that the amendment should limit the repayment period of beneficiary accounts to 20 working days after the DGS has received all of the information necessary to determine the repayable amount for beneficiary accounts.

## 3.5 Home deposit guarantee scheme reimbursing depositors at branches in host Member State

### Legal basis and background

245. Article 14(1) of the DGSD requires that ‘DGSs shall cover the depositors at branches set up by their member credit institutions in other Member States’.

246. Article 14(2) of the DGSD requires that ‘[d]epositors at branches set up by credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State. The DGS of the host Member State shall make repayments in accordance with the instructions of the DGS of the home Member State. The DGS of the host Member State shall not bear any liability with regard to acts done in accordance with the instructions given by DGS of the home Member State. The DGS of the home Member State shall provide the necessary funding prior to payout and shall compensate the DGS of the host Member State for the costs incurred. The DGS of the host Member State shall also inform the depositors concerned on behalf of the DGS of the home Member State and shall be entitled to receive correspondence from those depositors on behalf of the DGS of the home Member State.’

247. Article 14(5) of the DGSD states that ‘[i]n order to facilitate an effective cooperation between DGSs, with particular regard to this Article and to Article 12, the DGSs, or, where appropriate, the designated authorities, shall have written cooperation agreements in place. Such agreements shall take into account the requirements laid down in Article 4(9). The designated authority shall notify EBA of the existence and the content of such agreements and EBA may issue opinions in accordance with Article 34 of Regulation (EU) No 1093/2010. If designated authorities or DGSs cannot reach an agreement or if there is a dispute about the interpretation of an agreement, either party may refer the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010 and EBA shall act in accordance with that Article. The absence of such agreements shall not affect the claims of depositors under Article 9(1) or of credit institutions under paragraph 3 of this Article.’

248. The EBA Guidelines on cooperation agreements between DGSs under Directive 2014/49/EU (EBA/GL/2016/02) specify the objectives and minimum content of cooperation agreements between DGSs or, where appropriate, designated authorities that are required to have such cooperation agreements in place in accordance with Article 14(5) of Directive 2014/49/EU.

### Methodology, data sources and their limitations

249. The survey circulated to the DGSDAs and DGSs included two questions related to home DGS reimbursing depositors at branches in the host Member State.

## Main findings, issues identified and the analysis

250. The survey asked respondents to submit their view on the potential benefits and drawbacks of introducing a possibility to allow the home DGS to repay depositors at branches in other Member States. The responses to the question were as follows:

- 17 respondents from 13 Member States reported that they see benefits of introducing such a possibility;
- eight respondents from eight Member States submitted both benefits and drawbacks; and
- six respondents from six Member States did not see benefits and/or provided only drawbacks of such a possibility.

251. In their answers, the respondents provided the following examples of potential benefits of introducing a possibility to allow the home DGS to repay depositors at branches in other Member States:

- It could increase the efficiency of the payout because fewer stakeholders would be involved. Potential gains in efficiency could mean:
  - a speedier payout process, which benefits the depositors at branches in the host Member State because they will receive their reimbursements faster; and/or
  - potentially lower costs for the home DGS.
- There would be decreased operational risk and a lower risk of errors, because fewer parties would be involved in the payout process.
- The introduction of such a possibility increases flexibility for the DGS to adapt to specific circumstances, to best serve the depositors.
- There would be a greater ability to incorporate technological developments in the field of electronic identification and payout mechanisms, which could possibly allow DGSs to swiftly make amounts available to depositors regardless of where they are in the EU.

252. Respondents to the survey provided the following drawbacks of the home DGS reimbursing depositors in a branch in a host Member State:

- The home DGS does not have as much knowledge of the national legislation in the host Member State as the host DGS, which could create challenges when engaging with depositors and handling complex cases.

- It could lead to issues with effective communication with depositors, including because of different languages in the home and the host Member States.
- It could also lead to potentially higher costs if the home DGS pays out via an agent bank and has to set up agreements for the provision of services with agent banks in the host Member States.

253. In addition, while providing the benefits, some respondents also provided the following conditions that, according to them, should apply if a home DGS directly reimburses depositors in a branch in a host Member State. Those conditions can be summarised as follows:

- The home DGS should have a payout method in place that is suitable for an effective payout to the depositors at branches in the host Member State.
- The host DGS should be involved in the communication with the depositors and should provide assistance to the home DGS when dealing with complex cases.

254. The second question in the survey asked if there are particular circumstances or conditions under which the home DGS could be allowed to directly repay depositors at a branch in a host Member State. The responses to the question were as follows:

- 21 respondents from 21 Member States provided one or more circumstances under which the home DGS could be allowed to directly repay depositors at a branch in a host Member State;
- three respondents from three Member States answered that the home DGS should have the full power to decide on the most suitable way to reimburse depositors protected by branches in host Member States, providing flexibility with the best outcome of the depositor in mind, and there should not be particular circumstances or conditions imposed in the DGSD; and
- one respondent answered that there are no circumstances under which it should be allowed.

255. In their answers, the respondents provided the following examples of circumstances under which the home DGS could be allowed to directly repay depositors at a branch in a host Member State:

- if a host depositor has a deposit at the branch in the host Member State and also has a deposit at the same credit institution in the home Member State;
- similarly, if a host depositor has multiple accounts of the same credit institution at multiple branches in different host Member States;



- if the depositor at the foreign branch is a resident of the home Member State, or when the majority of the depositors are residents of the home Member State;
- when the home Member State and the host Member State share a language;
- in the situation that the host DGS is already engaged in a domestic DGS payout scenario and therefore does not have sufficient resources available to execute an additional payout case.

256. In their answers to the above-mentioned question, the respondents also provided some conditions which should apply if a home DGS would reimburse depositors at branches in the host Member State directly. These conditions are similar to those mentioned by some respondents in their answers to the first question. The conditions that were mentioned most frequently are:

- The payout method used by the home DGS should make it possible for the depositors in the host Member State to be repaid at least as easily as they would have if they would be repaid by the host DGS.
- The home and the host DGSs should provide similar services to the depositors at branches in the host Member State, which means ensuring that the depositors in the host Member State have a similar experience to what they would have had if they would have been reimbursed by the host DGS, for example the use of their own language.
- The host DGS should be involved as a contact centre, which host depositors can contact when they have questions, and/or the host DGS should proactively assist the home DGS as a communication channel during the payout case.

257. The EBA also discussed a real-life example of a failure of a branch where a home DGS decided, after consulting with the respective host DGS, that it would reimburse the depositors at branches in the host Member State directly. The main reasons for this decision were the facts that (i) most depositors at the branch were residents of the home Member State and (ii) the host DGS was dealing with a significant domestic payout at the same time.

258. Taking into account the responses to the survey, and the real-life case, the EBA considered that there are specific circumstances under which repaying depositors at branches in the host Member State by the home DGS may be better for the depositors, and better for the DGSs, provided certain conditions are met. The EBA considered that this may be the case in some specific cases, but that the current set-up of home-host cooperation (reimbursement to depositors at branches in the host Member State by the host DGS) should remain as the default option.

259. The EBA discussed what these circumstances and conditions could be. Thus, this section firstly describes the most evident *circumstances* in which reimbursement by the home DGS

might be desirable and secondly provides a list of potential *conditions* that should apply in those circumstances.

### **Circumstances when the home DGS could repay depositors in the host Member State directly**

260. The EBA considered that the circumstances can be divided into two categories:
- i. overall circumstances, when the home DGS decides to reimburse *all* depositors at branches in a host Member State, for example when:
    - the host DGS is not able to perform the reimbursement on behalf of the home DGS because the host DGS is performing a payout process in relation to another credit institution at the same time;
    - a direct payout by the home DGS to depositors at branches in the host Member State is more efficient and faster.
  - ii. individual circumstances, in which the home DGS decides to reimburse only a limited number of individual depositors at branches in the host Member State, for example when:
    - the depositor at the branch in the host Member State has multiple accounts at different branches in different Member States;
    - the depositor at the branch in the host Member State resides in the home Member State.

#### ***Overall circumstances***

*Host DGS is not able to reimburse depositors at branches in the host Member State owing to other DGS activation*

261. In the scenario in which the host DGS is already actively involved in a DGS payout, the host DGS may have limited resources available to execute an additional payout. This might jeopardise a swift, efficient and correct payout to the depositors at branches in the host Member State. In this scenario, the EBA considered that the home DGS may be given the flexibility to decide to repay all respective depositors at branches in the host Member State directly.

*Direct payout by the home DGS to depositors at branches in the host Member State is more efficient and faster*

262. The EBA discussed arguments that there may be many situations in which the repayment by the home DGS to depositors at branches in the host Member State could be more efficient than for these depositors to be repaid by the host DGS. This may be the case, for example, when

both the home DGS and the host DGS pay out via electronic payment transactions<sup>18</sup>; the home DGS could ask the host DGS to collect the new account numbers (IBANs) of depositors at branches in the host Member State, but the home DGS would make the payment directly to the depositor, without the money passing through the host DGS. Furthermore, this may also be the case when the home DGS is technically capable of collecting the IBANs from the depositors at branches in the host Member State directly, or when IBANs are not necessary<sup>19</sup>.

### ***Individual circumstances***

#### *Depositor at a branch in the host Member State has multiple accounts at different branches*

263. The EBA discussed a case in which a depositor has:

- i. one or more accounts at branches of a credit institution in the home Member State and one or more accounts at branches of the same credit institution in the host Member State(s); or
- ii. multiple accounts at branches of the same credit institution in different host Member States.

264. In such cases, the EBA considered that it might be in the interest of the depositor to be repaid by only one DGS. The alternative would be a pro rata payout by multiple DGSs, which might lead to confusion for the depositor. Additionally, this approach is prone to errors on the side of DGSs. Therefore, the home DGS may need to be given the flexibility to reimburse individual depositors directly in these circumstances.

#### *Depositor at a branch in the host Member State resides in the home Member State*

265. The EBA discussed a scenario in which the depositor who has deposits with a branch in the host Member State resides in the home Member State. In such a case, it might be better for the depositor to be reimbursed via the home DGS. Such a case can be illustrated with the following example: assume that a depositor resides in Member State A, which is also the home Member State of a credit institution, and has an account at a branch of that credit institution in Member State B. It could then be the case that the host DGS in Member State B reimburses depositors via an agent bank for which depositors need to collect their reimbursement in person. The depositor at the branch in Member State B but residing in Member State A might have to travel to Member State B to get reimbursed. In such a scenario, it is likely that the depositor is better

<sup>18</sup> After the host DGS submits the IBAN to the home DGS, the home DGS could perform the final step of the process: the actual transfer of the compensation via electronic payout. This process will be faster and less prone to errors than if the host DGS were to perform this final step. In this scenario, the host DGS remains the main contact point for the depositors at branches in the host Member State, while only the final step of the reimbursement process is done by the home DGS. Thus, a role for the host DGS will still be required, also including, for example, communicating with depositors and providing assistance to the home DGS to deal with complex cases such as THBs or beneficiary accounts.

<sup>19</sup> In such a case, the home DGS could immediately pay out to depositors at branches in the host Member State without involvement of the host DGS in the payout process. Also in this example, some degree of involvement by the host DGS is highly recommended, for example by being a contact point for depositors at branches in the host Member State and providing assistance to the home DGS in handling complex cases.

off receiving the reimbursement directly from the home DGS. Also in this situation, certain conditions may need to apply. For example, the depositor at a branch in the host Member State may prefer to contact the host DGS for questions, or may have to retain the right to request to be paid out by the host DGS.

### **Conditions for reimbursement by the home DGS**

266. Based on the survey responses, the EBA considered a number of conditions that may need to apply when the home DGS repays a depositor at a branch in the host Member States. Examples of such potential conditions are as follows:

- The EBA considered that the most important condition is that the depositors at branches in the host Member State will be repaid by the home DGS in a way that is at least as easy as they would have had under the default method (i.e. they should not be worse off).
- The home DGS should have the technical capability to make the amount available to the depositors at branches in the host Member State, bearing in mind the number of depositors and the ability of the home DGS's payout method to reimburse depositors at branches in the host Member State.
- The home DGS should be able to communicate in the language of the host Member State with the depositors at branches in the host Member State, reflecting Article 8(7), which requires DGSs to communicate (i) in the official language of the Union institutions that is used by the credit institution holding the covered deposit when writing to the depositor, or (ii) in the official language or languages of the Member State in which the covered deposit is located. The host DGS could potentially assist the home DGS in communicating with depositors in the language of the host Member State.
- The host DGS should be involved to some extent in the reimbursement process, for example by providing assistance with communication with depositors at branches in the host Member State or assistance with translations and complex cases. Close contact between home and host DGSs is, in any case, desirable to create clarity for the host DGS about its role and responsibilities and the expectations that the home DGS may still have.
- The home and host DGSs should discuss the possibility of direct reimbursement in advance of any failure, when they draft bilateral specifications, develop process manuals and perform DGS stress tests. These discussions could be based on information that the home DGS has received in the SCV files of banks with branches. It is important that, in the *ex ante* agreements between the relevant DGS authorities, there is clarity about the circumstances and conditions that apply to direct reimbursement to depositors in the host Member State by the home DGS to avoid uncertainty and unnecessary discussions at the moment of an actual payout.

267. The EBA considered that not all of the circumstances and conditions can be predicted in a business-as-usual context, for example the overall circumstance ‘Host DGS is not able to perform the payout’, and that this report may not be the place to outline all such cases. Thus, the EBA concluded that such circumstances and conditions would need to be explored further.

268. Finally, the EBA assessed the need and the possibility to provide *ex ante* clarity to depositors at branches in host Member States regarding (i) which DGS protects them (in all cases the home DGS) and (ii) which DGS will execute any potential reimbursement (the host DGS or, if flexibility is introduced in the DGSD, the home DGS). The EBA considered the following arguments against the need to inform depositors *ex ante* about which DGS will perform the payout:

- The depositor should know that their deposits are protected and that they will be reimbursed if their credit institution fails, but does not need to know in advance which DGS will operationalise the payout. It becomes relevant to the depositor only once there is a determination of unavailability of deposits and depositors must know what to do to claim their funds — they do not need to know this in advance. Communicating this information in advance might lead to confusion.
- While, ideally, the home and the host DGSs could agree in advance which of them will perform a payout to depositors in a branch, the decision of the home DGS to reimburse depositors at branches in the host Member State directly instead of using the host DGS can be an ad hoc decision at the moment of an actual payout event, depending on the circumstances and conditions of each case. Therefore, the EBA concluded that it is most important that depositors at branches in the host Member State are informed at the time of an actual payout event which DGS will reimburse them.
- Under the current provisions in Articles 14 and 16 of the DGSD, depositors are not informed in advance which DGS will actually perform the payout. For example, the information sheet only mentions the home DGS, which ultimately protects the deposits, but does not mention the host DGS, even though the host DGS is required to perform the payout on behalf of the home DGS.

### Options to address the identified issues

269. Given the main findings stemming from the responses to the survey in relation to the possibility of the home DGS reimbursing depositors in the host Member State, the EBA considered whether there is merit in proposing an amendment of the DGSD to provide for this flexibility or whether to maintain current provisions, obliging payout by the host DGS to depositors at branches in the host Member States under any circumstance.

270. Taking into account the need to reimburse depositors at a branch in the host Member State in a swift and correct way, the EBA has concluded that providing restricted flexibility to the home DGS to payout depositors at a branch in the host Member State directly, in certain circumstances and under certain conditions, can be beneficial for both depositors and the DGSs. For that

reason, the EBA proposes that the DGSD should be amended, noting that current provisions in the DGSD, which require the payout to be performed by the host DGS on behalf of the home DGS, should be maintained as the default method for such payouts, and that the overarching condition for the use of flexibility is that it ensures that depositors are repaid in a way that is at least as easy as they would have had under the default method.

271. In addition, the EBA considered the best legal instrument for providing the circumstances and the conditions under which such restricted flexibility could be granted. The EBA considered whether they should be specified in:

- the revised DGSD;
- the existing EBA Guidelines on cooperation agreements between DGSs; or
- a new EBA product.

272. The EBA concluded that, given the technical nature of this work and the need for further analysis, the EBA (through its internal committees and working groups where its member authorities and schemes participate) is best placed to develop the list of circumstances and conditions under which such restricted flexibility should be available, and that there is no need to include them in the DGSD.

273. The EBA did not assess in detail what the best legal instrument would be to ensure harmonised application across the EU, but a potential option could be EBA guidelines, given that there are already EBA Guidelines on cooperation in cross-border payouts.

## Conclusions

274. The EBA notes that current provisions in the DGSD that require the payout to be performed by the host DGS on behalf of the home DGS should be maintained as the default method for cross-border payouts. However, the EBA proposes that the DGSD should be amended to provide restricted flexibility for the home DGS to repay depositors at branches in host Member States directly, in certain circumstances and under certain conditions.

275. The EBA proposes that the overarching condition for the use of such flexibility is that it ensures that depositors are repaid by the home DGS in a way that is at least as easy as they would have had under the default method. The EBA considers that the circumstances and the conditions under which the home DGS should be allowed to repay depositors at branches in the host Member State would require further analysis, taking those listed in this opinion and the accompanying report as a starting point.

276. The EBA proposes that, given the technical nature of this work, the EBA together with its member authorities and schemes is well placed to develop the list of circumstances and

conditions under which such restricted flexibility should be available, and it invites the Commission to consider conferring corresponding mandates to the EBA.

## 3.6 Passported services without established branches

### Legal basis and background

277. Article 14(1) of the DGSD requires that ‘DGSs shall cover the depositors at branches set up by their member credit institutions in other Member States’.
278. Article 14(2) of the DGSD requires that ‘[d]epositors at branches set up by credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State. The DGS of the host Member State shall make repayments in accordance with the instructions of the DGS of the home Member State. The DGS of the host Member State shall not bear any liability with regard to acts done in accordance with the instructions given by DGS of the home Member State. The DGS of the home Member State shall provide the necessary funding prior to payout and shall compensate the DGS of the host Member State for the costs incurred. The DGS of the host Member State shall also inform the depositors concerned on behalf of the DGS of the home Member State and shall be entitled to receive correspondence from those depositors on behalf of the DGS of the home Member State.’
279. Article 8(5)(e) of the DGSD states that ‘[r]epayment as referred to in paragraphs 1 and 4 may be deferred where the amount to be repaid is to be paid out by the DGS of the host Member State in accordance with Article 14(2)’.
280. The final paragraph of Article 8(7) of the DGSD requires that ‘[i]f a credit institution operates directly in another Member State without having established branches, the information shall be provided in the language that was chosen by the depositor when the account was opened’.
281. Article 33 of the Directive on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (Directive 2013/36/EU<sup>20</sup>) states that ‘Member States shall provide that the activities listed in Annex I may be carried out within their territories, in accordance with Article 35, Article 36(1), (2) and (3), Article 39(1) and (2) and Articles 40 to 46 either by establishing a branch or by providing services, by any credit institution authorised and supervised by the competent authorities of another Member State, provided that such activities are covered by the authorisation’.
282. Article 15 of the Directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (Directive 2014/92/EU, hereafter the ‘Payment Accounts Directive’) states that ‘Member States shall ensure that credit institutions do not discriminate against consumers legally resident in the Union by reason of their nationality or place of residence or by reason of any other ground as referred to in Article 21 of the Charter, when those consumers apply for or access a payment account within the Union. The conditions applicable to holding a payment account with basic features shall be in no way discriminatory.’

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<sup>20</sup> OJ L 176 27.6.2013, p. 338.



283. The EBA Guidelines on cooperation agreements between DGSs<sup>21</sup> specify the objectives and minimum content of cooperation agreements between DGSs or, where appropriate, designated authorities that are required to have such cooperation agreements in place in accordance with Article 14(5) of Directive 2014/49/EU. The European Forum for Deposit Insurers has created a multilateral cooperation agreement on the basis of these guidelines.

### Methodology, data sources and their limitations

284. The survey circulated to the DGSDAs and DGSs did not include questions in relation to DGS payouts of deposits that are operated directly in another Member State without having established branches, but via the freedom to provide services. However, in the course of preparing the opinion, relevant authorities raised it as an important issue to be addressed in the opinion and potentially clarified in the revised DGSD.

285. The survey included one question on the current payout methods applicable to non-resident depositors, which is relevant for this topic.

### Main findings, issues identified and the analysis

#### Description of the passported services phenomenon

286. According to Article 8 of Directive 2013/36/EU, credit institutions need to obtain an authorisation before commencing their activities. It allows them, by virtue of Article 33 of the same directive, to carry out their activities provided they are covered by the authorisation in other Member States without having to solicit a new authorisation in those Member States under (i) the right of establishment (hereafter 'branch') or (ii) the freedom to provide services (hereafter 'passported services').

287. Although national registers provide an overview of the type of licences used by credit institutions active in a Member State, it is often unclear whether or not a credit institution is actively using its passported services licence in the Member State. DGSs often do not have data on the number of deposits taken via passported services because credit institutions often do not earmark those deposits in their customer administrations and/or because DGSs do not request this information from their member institutions.

288. Notwithstanding the limited data available, the EBA discussed anecdotal evidence from DGSDAs and DGSs of recent growth in passported service activities of their member institutions in other Member States, or credit institutions from other Member States offering such services in their Member States. Thus, the treatment of depositors using passported services is increasingly important when preparing for DGS payouts. Furthermore, it is reasonable to expect that, given market developments such as the growth in online and mobile banking and the rise

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<sup>21</sup> EBA/GL/2016/02.

of FinTech developments<sup>22</sup>, and legislative developments such as the Payment Accounts Directive, more deposits will be raised via passported services in the near future.

289. For the purpose of this analysis, a number of DGSs have contributed real-life examples and some data to provide a sense of the relevance and materiality of the use of passported services:

- In one Member State, by the end of April 2019, 10 credit institutions reported having deposits in other EEA Member States. Some credit institutions have reported that they have notified their intention to provide passported services in all EEA Member States, others have reported that they have notified their intention to be active via passported services in only a few EEA Member States. The most common approach is to set up websites in other EEA Member States using local internet domain names and offer products and customer support in the local language. The number of depositors involved and the amounts of the deposits have been increasing since 2013. The DGS in that Member State is expecting an increase in deposits being brokered and leading to passported services, particularly in the light of the implementation of the Revised Payments Services Directive (PSD2). In addition, by the end of April 2019, the relevant administrative authority has been notified by 261 credit institutions from 22 EEA countries that they have the intention to provide passported services in the respective Member State. For now, the DGS has no data available on the amount of deposits attracted from domestic customers by foreign credit institutions using passported services.
- In another Member State, credit institutions were requested to report their passported service activities at the end of 2017. The goal of this survey was to get a better understanding of the scale of cross-border service activities of the member institutions, on the basis of which the DGS could prepare for potential payouts from an operational perspective. These data showed that 75% of the credit institutions in that Member State have notified their intention to provide passported services in other Member States, of which 42% are using the freedom to provide services by actively collecting deposits abroad. In total, at the end of 2017, there were approximately 450 000 depositors via passported services, accounting for EUR 80 billion deposits. In practice, banks operate the services via a website in the local language of the host Member State. In some instances, a bank is active in another Member State as a branch but also offers passported services via that branch in another Member State. As of 1 January 2020, credit institutions will be required to explicitly report in the SCV file if a deposit is held via a services passport and, if so, in which language the bank communicates with the respective depositor<sup>23</sup>.

<sup>22</sup> For example, the rise of savings platforms that help credit institutions to attract depositors in other Member States, potentially driven by the spread in interests rates between Member States. Via such platforms, a depositor can open a term deposit under its own name at a credit institution in another Member State, which is protected by the DGS of that Member State. The harmonised deposit protection in the EU is an important element of the platforms' business model.

<sup>23</sup> This provision was added to the SCV Policy Rule issued by the DGS in that Member State, in order to adhere to the final paragraph of Article 8(7)(b) of the DGSD.

- In yet another Member State, by the end of May 2019, almost 300 foreign credit institutions notified the National Bank of their intention to provide services within the territory of the respective Member State via a services passport. For now, there are no data available on the amount of deposits or the number of depositors being attracted by foreign credit institutions using services passports from the customers in that Member State.

### Implications of passported services for DGS payouts

290. The DGSD draws an explicit distinction between DGS payouts in the case of unavailability of deposits in domestic credit institutions in which the home DGS performs the payout and cases in which deposits become unavailable in a branch in another EU Member State where the host DGS performs the payout on behalf of the home DGS. The DGSD does not make an explicit distinction in relation to cases of unavailability of deposits raised via passported services. Furthermore, the DGSD does not explicitly draw a distinction between domestic depositors and non-resident depositors<sup>24</sup> (see Table 4).

**Table 4. Treatment of depositors in a DGS payout**

	DGS performing the payout	Applicable deadline to make funds available to depositors
Depositors residing in Member State A with deposits in a credit institution in Member State A ('resident depositors')	Home DGS	7 working days (or longer in the transitional period)
Depositors residing in Member State B with deposits in a branch in Member State B of a credit institution from Member State A ('depositors at branches')	Host DGS on behalf of home DGS	7 working days (or longer in the transitional period), although the repayment may be deferred <sup>25</sup>
Depositors residing in Member State B with deposits in a credit institution in Member State A ('non-resident depositors')	Home DGS	7 working days (or longer in the transitional period)
Depositors residing in Member State B with deposits in a credit institution in Member State A via passported services ('passported services depositors')	Home DGS	7 working days (or longer in the transitional period)

291. It is important to note that a branch 'means a place of business in a Member State which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions'<sup>26</sup>. The DGSD envisages payout by the home DGS in relation to the three groups of depositors described in Table 4 (different from those contracting with branches), and payout by the host DGS for depositors where there is a branch<sup>27</sup>.

<sup>24</sup> With the exception of Article 6(4)(b) of the DGSD, which refers to the currency of the Member State where the account holder is resident.

<sup>25</sup> Article 8(5)(e) of the DGSD.

<sup>26</sup> Article 2(1)(10) of the DGSD.

<sup>27</sup> According to Article 14(2) of the DGSD, '[d]epositors at branches set up by credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State'.

292. The EBA has identified a number of issues and potential operational challenges stemming from the above-mentioned provisions in the DGSD, which envisage different treatments of depositors residing outside the Member State where the credit institution is a member of a DGS, depending on the way a credit institution exercises the freedom to operate in other Member States where the depositor is residing. The EBA identified the argument that, from a depositor's perspective, it is not entirely clear why depositors who bank with a credit institution in Member State A but reside in Member State B (because they either moved abroad or used a bank in another Member State via passported services or a branch) are treated differently in DGS payouts. From a supervisory perspective, in the case of a branch, the host relevant authorities retain several competencies for supervision and inspection, being consumer protection and anti-money laundering supervision<sup>28</sup>. However, the EBA is of the view that, from a depositor's perspective, the existence of a particular type of formality (using a 'branch') may not be the most relevant factor for determining the payout approach.

293. The EBA has identified potential challenges with the home DGS reimbursing depositors residing in other Member States where a credit institution does not perform its activities through a branch. This is particularly challenging when the credit institution is actively passporting its services to other Member States and when such depositors constitute a large proportion of the credit institution's client base.

294. The responses to the survey circulated to the DGSDAs and DGSs showed that DGSs utilise a large range of different payout methods, such as electronic payment transactions, agent banks and cheques. Most DGSs will use the same payout method for the reimbursement of depositors who reside abroad. The regular payout methods that DGSs have in place to reimburse domestic depositors are often tailored to the payment methods and/or identification practices in the home Member State. In some instances, this may imply that the payout method used by the home DGS does not provide the same level of speed, costs or accessibility for the relevant depositors and/or quality of service when reimbursing passported services depositors. Examples of the additional challenges faced by such depositors are as follows:

- If a DGS pays out via the physical branches of an agent bank, it might, for example, be necessary for depositors residing in other Member States to physically travel to the home Member State to collect their reimbursement. While, from the perspective of the DGS, the compensation to the depositor will be made available within the legally applicable deadline, the depositor is confronted with additional challenges (and possibly costs) to receive the compensation that has been made available.
- When reimbursement is executed via cheque, depositors residing in other Member States may also experience difficulties when cashing these cheques in the host Member State, as it may not be possible or it may be expensive. Some DGSs offer the possibility to return the cheque and apply for an electronic payout if a depositor is not able to cash the cheque.

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<sup>28</sup> Paragraph 2 of the EBA Guidelines on supervision of significant branches (EBA/GL/2017/14).

- In other instances, the payout method may be suitable for repaying depositors in another Member State, but the procedures have to be adapted, which usually implies more steps and longer processes. For example, a number of DGSs have web portals in place using systems of national electronic identities (linked to national identification numbers) available within the home Member State to enable domestic depositors to log in and verify their identity, after which they can notify the DGS of the bank account number that can be used for electronic payment transaction. Many passported service depositors may not have or use a national electronic identity of the home DGS's Member State. Those DGSs may therefore have alternative procedures in place to reach and reimburse those clients. For example, such DGSs might use paper forms to collect the new bank account in cases of electronic payout. These procedures are often more time consuming because they require manual handling by the DGS in the home Member State. Also in this example, funds are made available by the DGS within 7 working days, but the depositor is confronted with additional steps, and possibly challenges, to receive the compensation that has been made available. Some authorities have reported that they are exploring investing in the development of more efficient payout methods for the reimbursement of passported service deposits, but the lack of data makes it difficult to perform cost-benefit analyses.

295. In addition to the challenges resulting from the type of payout method used by the home DGS, the EBA identified potential issues regarding communication with passported service depositors. Such depositors would be repaid by the home DGS and the current framework does not mention any role for the host DGS. Without establishing any further bilateral cooperation framework, the host DGS would not be in a position to provide the depositors with assistance because it is not equipped to do so. In contrast, depositors at branches would be repaid by the host DGS on behalf of the home DGS, and so would be able to communicate with the host DGS and receive assistance from that DGS. Furthermore, when the home DGS reimburses passported service depositors, it is required to communicate with those depositors in the language that was chosen by them when opening the bank account, in line with Article 8(7)(b) of the DGSD. This requirement may be practically and operationally challenging for DGSs (for the home DGS and, if it was to be involved, possibly also the host DGS if the language chosen by the depositor is not the language in the host Member State), because it could imply that credit institutions should mark such deposits and include the language chosen by the depositor in their administrations and the SCV file and so the DGS has to be able to communicate with the depositors using multiple languages.

### Options to address the identified issues

296. The EBA considered two main options to address the issue of a lack of explicit reference to the treatment of depositors using passported services:

- a. option 1: maintain current provisions and differences of treatment;

- b. option 2: amend the current provisions in the DGSD and align the treatment of depositors using passported services with the treatment of depositors at branches.

297. From a depositor protection perspective, the first option, to maintain current provisions in the DGSD, is suboptimal because it does not address the potential challenges regarding the accessibility of the compensation made available to passported service depositors. If such depositors were to face additional steps and challenges, including potentially substantial costs to receive the reimbursed amount, it could be seen as going against the spirit of the DGSD.

298. The second option considered was to align the treatment of depositors using passported services with the current treatment of depositors when there is a branch and thus performing reimbursement according to the home-host cooperation framework as outlined in Article 14 of the DGSD (including the provision stating that the DGS of the host Member State shall not bear any liability with regard to acts done in accordance with the instructions given by the DGS of the home Member State). The EBA has identified the following arguments in favour of this approach:

- It is very likely that the majority of depositors using passported services are not aware of whether their deposits are with a credit institution using passported services or whether there is a branch, particularly since the information sheet provided to the depositors only mentions which DGS protects their funds (which would be the same) and not which DGS provides the reimbursement (which would be different). However, in (the run-up to) a payout scenario, passported service depositors may contact the host DGS for inquiries, because they may be more familiar with the host DGS, while the host DGS is, according to the current DGSD provisions, not mandatorily involved and therefore may not have the necessary information and mandate to provide answers to those inquiries.
- The host DGS is, in most cases, likely to be better equipped to communicate effectively with the depositors, including because of the language(s) used, than the home DGS.
- It is practically challenging for the home DGS to communicate in multiple languages depending on the language chosen by the passported service depositor when opening a bank account at the credit institution (in line with Article 8(7)(b) of the DGSD). Therefore, if the host DGS performs the payout and communicates with the passported service depositors, the potential challenge of the home DGS having to communicate in multiple languages would be mitigated.
- While, under current provisions of the DGSD, such an alignment would mean that the deadline for the DGS to make the passported service depositors' amount repayable could be deferred (and so it could be argued that the depositor would be worse off), depending on the payout method used, the depositor may ultimately receive the repayment quicker when the amount is made available by the host DGS, even though it took longer to make the compensation initially available. This is

because the payout method used by the host DGS could lead to a faster reimbursement to the depositor living in that Member State<sup>29</sup>.

299. The EBA identified the following arguments against such an alignment:

- It would increase the likelihood that a home DGS has to cooperate with a host DGS in a payout event. It also increases the likelihood that such cooperation would involve a large number of host DGSs in a payout event. This will be operationally challenging and might even jeopardise both the domestic compensation and the cross-border compensations.
- To be able to reimburse depositors at passported services via the host DGS, DGSs have to get better insight into passported service activities in order to make *ex ante* agreements with their partner DGSs on the potential need for cooperation.
- Under current provisions of the DGSD, such an alignment would create a different treatment of depositors using passported services and non-resident depositors banking in the home Member State. However, it could be argued that this difference could be justified by the fact that, in relation to depositors using passported services, they are more likely to constitute a significant proportion of depositors in the credit institution and be concentrated in specific Member States, while non-residents are more likely to be fewer and more dispersed.
- DGSs, in their capacity as the home DGS, would have to cooperate with a larger number of host DGSs, which would increase the number of fully fledged bilateral cooperation agreements and the likelihood that a home DGS has to cooperate with a large number of host DGSs simultaneously during a single payout event.

300. Several more hybrid options were analysed:

- a. option 2.1: reimbursement by the host DGS in the Member State in which the depositor is a resident;
- b. option 2.2: reimbursement by the home DGS, while using the possibility to seek assistance from the host DGS in the Member State in which the depositor is a resident;
- c. option 2.3: reimbursement by the home DGS, introducing the option to defer payout to depositors residing in other Member States;
- d. option 2.4: delete the option to defer payout to depositors at branches in other Member States.

301. Option 2.1 considered by the EBA was to treat all non-domestic depositors in the same way, and so bring all such cases under current provisions requiring the host DGS to repay depositors on behalf of the home DGS (subject to some flexibility as discussed in Chapter 3.5), including allowing a deferral in relation to depositors using passported services and non-resident

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<sup>29</sup> This could be mitigated by introducing the safeguard of 'no depositor worse off' compared with being paid by the home DGS, similar to what is proposed for direct reimbursement by the home DGS reimbursing depositors in the host Member State in Chapter 3.5 of this report.



depositors, to match the approach to repaying depositors when there is a branch. The advantage of this approach is to provide for the same treatment of all non-domestic depositors. The disadvantage of this approach is that, from an operational perspective, the payout will potentially become too complex, since it is not unlikely that the home DGS would need to liaise with numerous DGSs from other Member States in cases of credit institutions providing passported services in multiple Member States.

302. Option 2.2 considered by the EBA was to maintain current provisions that reimbursement to passported service depositors will be performed by the home DGS, but explicitly including a reference in the DGSD (if needed) allowing for a voluntary and lighter form of cooperation between home and host DGSs for passported services (and possibly non-resident depositors). For example, when it is known by the home DGS that a specific credit institution has a considerable number of passported service depositors in another Member State, the home DGS and host DGS may agree bilaterally (or within a multilateral agreement) that the host DGS could be asked to assist in a payout scenario for that credit institution. For example, taking advantage of geographic proximity and language, the host DGS could post press releases, provide information on its website and open a call centre to be able to answer general questions of depositors, which would help the home DGS to satisfy the DGSD requirement to communicate in the language chosen by the depositor when opening the bank account. The host DGS could also provide assistance to the home DGS in dealing with complex cases, for example beneficiary accounts and THBs for which knowledge of the legal provisions applicable in that Member State where the depositor is a resident is needed. A host DGS could also be involved in contacting depositors to obtain the IBAN in case the home DGS pays out via electronic payment transactions. Although this option might already be allowed under the current framework<sup>30</sup>, the scope of such home-host cooperation and the consequences need to be studied further to provide more clarity on this possibility in the DGSD.

303. Option 2.3 was to amend the DGSD to introduce the possibility to defer the deadline for making the repayable amount available to depositors using passported services (and non-resident depositors banking in the home Member State), but maintaining the current approach whereby they are reimbursed by the home DGS. The EBA concluded that this option does not address the core issue, because the main challenge is not with making the repayable amount available within 7 working days but with ensuring that such depositors can access the repayable amount in a simple and effective way without incurring substantial costs. Under the current framework, the DGS is able to make funds available on time, but the passported service depositor has to take extra steps and potentially incur costs to retrieve their reimbursement. Therefore, the EBA arrived at the view that amending the DGSD only to introduce an option to defer a payout to such depositors and potentially also to non-resident depositors banking in the home Member State would not address the main issue if this is not combined with another measure that would help the DGS to perform the payout.

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<sup>30</sup> See Article 14(5) and (6) of the DGSD.



304. Finally, option 2.4 considered by the EBA was to delete the option to defer payout to depositors at branches in other Member States and so ensure that the same deadline to make the repayable amount available applies to all depositors. However, this option, similarly to option 2.3, also does not address the core issue, while also presenting additional challenges for DGSs by requiring that the repayable amount be made available within 7 working days through the host DGS.

305. Table 5 provides an overview of the two main options and the four sub-options and the associated pros and cons from a depositor protection perspective and the operational DGS perspective. The table and the analysis above show that each solution comes with disadvantages and that it is difficult to create consistency in the treatment of the different types of depositors.

**Table 5. Comparison of different payout approaches for passported services**

	Level of protection of passported service depositors			Operational issues (–) and advantages (+) for DGSs (potentially affecting the timing and quality of payouts)
	Deadline to make repayable amount available	When the depositor receives compensation	Communication with depositors	
<b>Option 1:</b> reimbursement by home DGS (no change)	7 working days	Depends on (i) home DGS payout method and (ii) time of action by depositor	Home DGS, in language chosen by depositor when opening the bank account	<ul style="list-style-type: none"> <li>– Home DGS payout system has to be operationally capable to reimburse passported service depositors (trade-off between <i>ex ante</i> investments and <i>ex post</i> manual labour)</li> <li>– Home DGS has to be able to communicate with passported service depositors in the language chosen by the depositors (bearing in mind Article 8(7)(b) of the DGSD)</li> </ul>
<b>Option 2:</b> reimbursement by host DGS in line with Article 14 of the DGSD (including option to defer payout)	May be deferred	Depends on (i) home DGS providing information to host DGS, (ii) host DGS payout method and (iii) time of action by depositor	Host DGS, in language of the host Member State	<ul style="list-style-type: none"> <li>– Potential need to cooperate with a large number of host DGSs simultaneously during a payout</li> <li>– More home-host relations, which increase the need for more, compulsory and fully fledged bilateral cooperation agreements</li> <li>+ Home DGS can use host DGS’s payout and communication facilities</li> </ul>
<b>Option 2.1:</b> reimbursement by host DGS for all non-domestic depositors	May be deferred	Depends on (i) home DGS providing information to host DGS, (ii) host DGS payout method and (iii) time of action by depositor	Host DGS, in language of the host Member State	<ul style="list-style-type: none"> <li>– Potential need to cooperate with a large number of host DGSs simultaneously during a payout</li> <li>– Host DGS would potentially be involved in more payouts than is currently the case</li> <li>+ Home DGS can use host DGS’s payout and communication facilities</li> </ul>

<b>Option 2.2:</b> reimbursement by home DGS, while using the possibility to seek assistance from host DGS	7 working days	Depends on (i) home DGS payout method and (ii) time of action by depositor	Home DGS, assisted by host DGS	<ul style="list-style-type: none"> <li>– <i>Ex ante</i> clarity needed about passported service activities in order to make <i>ex ante</i> agreements on the potential need for cooperation</li> <li>+ The bilateral cooperation can remain voluntary and flexible (as opposed to the current cooperation in the case of branches)</li> <li>+ Home DGS can select which host DGS to involve depending on number of passported service depositors</li> <li>+ Home DGS can use host DGS's payout and communication facilities</li> </ul>
<b>Option 2.3:</b> reimbursement by home DGS, introducing the option to defer payout	May be deferred	Depends on (i) home DGS payout method and (ii) time of action by depositor	Home DGS, in language chosen by depositor when opening the bank account	<ul style="list-style-type: none"> <li>– Home DGS has to be able to communicate with passported service depositors in the language chosen by the depositors (bearing in mind Article 8(7)(b) of the DGSD)</li> </ul>
<b>Option 2.4:</b> introduce a 7 working day payout deadline in all cases	7 working days	Depends on (i) home DGS payout method and (ii) time of action by depositor	Home DGS, in language chosen by depositor when opening the bank account	<ul style="list-style-type: none"> <li>– Home DGS has to be able to communicate with passported service depositors in the language chosen by the depositors (bearing in mind Article 8(7)(b) of the DGSD)</li> <li>– Home DGS payout system has to be operationally capable to reimburse passported service depositors within 7 working days (trade-off between <i>ex ante</i> investments and <i>ex post</i> manual labour)</li> </ul>

306. The EBA arrived at the view that, even though there is a lack of data on the materiality of passported services, it is reasonable to expect that this type of service will be increasingly prevalent, which poses a challenge from the depositor protection perspective. The EBA also observed that the DGSD currently provides two types of solutions for the reimbursement of deposits at cross-border banking activities, which creates different treatments of depositors and operational challenges for DGSs. In consequence, regardless of the current provisions in the DGSD on cooperation within the Union, the treatment of such cases should be addressed and the DGSD should be explicit on the treatment of such cases.

307. The EBA considered different options to address this issue to assess what the clarification in the DGSD should entail. The analysis showed that the issue is complex and any option to introduce the same treatment of depositors using passported services, in relation to depositors when there is a branch, would necessarily entail considerations of treatment of other types of depositors too. The EBA also concluded that the initial analysis shows that, at this stage, there is no obviously superior option. Therefore, further analysis is needed regarding the treatment of depositors using passported services.

## Conclusions

308. The EBA arrived at the view that the topic of passported services is increasingly important from a DGS payout perspective. It is reasonable to expect further growth in passported service deposits in the near future, given ongoing market developments (such as online or mobile

banking and FinTech) and recent legislative developments (such as the Payment Accounts Directive). Thus, the EBA proposes to the Commission that there is a need to provide clarity in the DGSD in relation to the treatment of depositors using passported services.

309. The analysis showed that the issue is complex and any option to introduce the same treatment of depositors using passported services and depositors when there is a branch would necessarily entail considerations of treatments of other types of depositors too. The EBA proposes to the Commission that the EBA, together with its member authorities and schemes, is best placed to consider this topic further using the analysis outlined in this report as a starting point, before deciding how best to treat such cases.

### 3.7 Approach to temporary high balances

310. The EBA uses the term ‘temporary high balances’ or ‘THBs’ to describe deposits referred to in Article 6(2) of the DGSD. The EBA has identified seven interrelated subtopics when considering the topic of THBs:

- i. the practical application of THB protection;
- ii. the THB time limit;
- iii. informing depositors about THB provisions;
- iv. the THB amount;
- v. the scope of THB protection;
- vi. the impact of a depositor moving funds eligible for THB protection into different accounts;
- vii. the impact of THBs on DGS contributions.

311. The legal basis and background in relation to all seven subtopics is the same and so it is included once at the start of this chapter and applies to all of the subtopics.

#### Legal basis and background

312. Article 6(1) of the DGSD states that Member States shall ensure that the coverage level for the aggregate deposits of each depositor is EUR 100 000 in the event of deposits being unavailable.

313. Article 6(2) of the DGSD states that ‘[i]n addition to paragraph 1, Member States shall ensure that the following deposits are protected above EUR 100 000 for at least three months and no longer than 12 months after the amount has been credited or from the moment when such deposits become legally transferable:

- (a) deposits resulting from real estate transactions relating to private residential properties;
- (b) deposits that serve social purposes laid down in national law and are linked to particular life events of a depositor such as marriage, divorce, retirement, dismissal, redundancy, invalidity or death;
- (c) deposits that serve purposes laid down in national law and are based on the payment of insurance benefits or compensation for criminal injuries or wrongful conviction.’

314. Article 6(3) states that '[p]aragraphs 1 and 2 shall not prevent Member States from maintaining or introducing schemes protecting old-age provision products and pensions, provided that such schemes do not only cover deposits but offer comprehensive coverage for all products and situations relevant in this regard'.

315. Article 8(5)(d) of the DGSD requires that '[r]epayment as referred to in paragraphs 1 and 4 may be deferred where:

(d) the amount to be repaid is deemed to be part of a temporary high balance as defined in Article 6(2)'.

316. Article 8(6) requires that '[t]he repayable amount shall be made available without a request to a DGS being necessary. For that purpose, the credit institution shall transmit the necessary information on deposits and depositors as soon as requested by the DGS'.

### 3.7.1 Practical application of temporary high balance protection

#### Methodology, data sources and their limitations

317. The survey circulated to the DGSDAs and DGSs included four questions related to the practical application of THB. The analysis also includes issues that have arisen in real-life cases.

#### Main findings, issues identified and the analysis

318. The survey circulated to the DGSDAs and DGSs asked respondents if they had had specific experience with THB applications since the implementation of the revised DGSD. If so, the survey asked (i) how many THB applications they received and (ii) how many of the THB applications could not have been satisfied in their entirety (because the limit had been applied) and, if there were such cases, if they were aware of cases in which depositors had brought their applications before courts (and, if so, for what reason and what was the result). The responses included the following:

- 25 respondents from 20 Member States reported that they have not had experience of receiving any THBs applications so far;
- nine respondents from eight Member States reported that they have experience with THB applications and among them:
  - four respondents from three Member States reported that they have experience of paying out THB applications, but that the number of cases was very low;
  - five respondents from five Member States reported that they have experience of THB applications but that they did not pay them out, as they did not meet the requirements

for a THB deposit. None of those respondents is aware of any applications brought to the court following the DGS's decision.

319. The survey also asked if the THBs are reimbursed to depositors based on the information in the SCV file, without a depositor's request to the DGS being necessary, or if the depositor must submit a request to the DGS accompanied by supporting documents:

- 32 respondents from 24 Member states confirmed that depositors have to submit a request accompanied by all supporting documents either to the DGS or to the insolvency practitioner of the failed bank;
- three respondents from three Member States reported that a depositor has to submit a request to the insolvency practitioner of the failed credit institution, with the latter being responsible for marking THBs upon failure. In the case of two Member States requests by depositors have to be submitted to the DGS that transfers them to the insolvency practitioner who prepares the SCV payment file;
- three respondents from three Member States reported that this information is included in the SCV file and that depositors do not need to submit a request. In one Member State, the institution does not always receive information on deposits regarding social purposes. In that case, the depositor has to submit a request to the DGS accompanied by the supporting documents.

320. Furthermore, the survey asked if THBs need to be deposited in a special account. The responses to the survey show that this is not required by any respondent.

321. Finally, respondents were asked if institutions in their Member States are required to mark THBs or potential THBs on a continuous basis or only upon failure or not at all:

- 31 respondents from 23 Member States confirmed that potential THB deposits are not marked in the SCV file;
- four respondents from four Member States reported that their member credit institutions have to mark THBs on a continuous basis.

322. In the light of the survey responses, the EBA observed that:

- only a quarter of Member States that filled in the survey have practical experience with THB applications;
- in almost all Member States, the depositor has to submit a request for a THB application accompanied by all of the supporting documents to the DGS or the insolvency practitioner of the failed credit institution.

323. The EBA considered if a depositor should need to open a special THB account in order to receive a THB coverage. In relation to this, the EBA considered:

- whether a credit institution should be obliged to mark THB amounts in the SCV file, as it would make it possible to identify THBs without the need for the depositor to inform and provide proof to the DGS separately that a particular amount was a THB;
- credit institutions could mark THB accounts in the SCV files and subsequently they could be taken into account in the calculation of contributions.

324. The EBA did not discuss the proposal of opening a special THB account to be reimbursed further because:

- it would be operationally challenging for depositors, credit institutions and DGSs to open such an account;
- under the current framework, none of the respondents to the survey requires depositors to open such an account;
- no Member State saw merit in opening a special THB account, so the EBA did not discuss this proposal further.

### Options to address the identified issues

325. The EBA considered these responses to the survey and did not identify any issues.

### Conclusions

326. The EBA considers that, in relation to the practical application of THBs and specifically the need to open a special THB account, there is no need to propose changes to the DGSD and/or to provide any further guidance or advice.

## 3.7.2 Temporary high balance time limit

### Methodology, data sources and their limitations

327. The survey circulated to the DGSDAs and DGSs included one question related to the time limit of THB protection. The analysis also includes issues that have arisen in real-life cases.

### Main findings, issues identified and the analysis

328. The survey circulated to the DGSDAs and DGSs asked respondents what the time limit is for a deposit to be classified as a THB in the different Member States. The responses to the survey revealed the following time limits, counting from the moment the amount is credited in an account or from the moment when such a deposit becomes legally transferable:

- eight respondents from eight Member States reported that deposits are classified as THBs for 3 months;

- 15 respondents from 10 Member States reported that THBs are covered for 6 months;
  - one respondent reported that those deposits are covered for 9 months;
  - seven respondents from six Member States reported that THB deposits are covered for the maximum limit of 12 months;
  - one respondent reported that deposits for social purposes and compensations for criminal injuries or wrongful conviction are covered for up to 6 months while deposits in connection with transactions regarding real estate are covered for up to 12 months.
329. In the light of the survey results, the EBA considered that:
- Member States apply different time limits, ranging from 3 months to 12 months.
  - the most frequently used time limit by Member States is a period of 6 months.
  - some Member States clarified that they apply a different limit for some specific transactions.

### Options to address the identified issues

330. The EBA further considered how to harmonise the time limit of THB protection and assessed which time limit would be the most appropriate to apply across the EU.
331. The EBA considered whether the THB time limit should be harmonised at 6 or 12 months.
332. Arguments in favour of harmonising the time limit at 6 months are that this period would strike the right balance between a sufficient time for the depositor to distribute its deposits among credit institutions in order to enjoy full coverage and what could be considered 'temporary'.
333. An argument in favour of setting the time limit at 12 months is that it offers depositors protection for their THBs for longer and so is better for a depositor. Furthermore, lowering the time limit to 6 months would mean that the jurisdictions currently implementing a higher time limit for their depositors may have to reduce it for harmonisation purposes in the case of DGSD amendment.
334. On balance, the EBA considered that harmonising the time limit applicable to THBs in the Union would be more clear for depositors. The period of 6 months strikes the right balance between a sufficient time for the depositor to distribute its THBs between different credit institutions to enjoy full coverage and what could be considered 'temporary'. Furthermore, the EBA considered that, as long as depositors are clearly and effectively informed of the applicable deadline, they do not need a long period of protection. Therefore, corresponding proposals concerning depositor information are outlined separately, in the next section.



## Conclusions

335. The EBA proposes to the Commission that the time limit applicable to THBs should be harmonised at 6 months, subject to related amendments in relation to depositor information.

### 3.7.3 Informing depositors of temporary high balance protection

#### Legal basis and background

336. Article 16(1) of the DGSD requires that ‘Member States shall ensure that credit institutions make available to actual and intending depositors the information necessary for the identification of the DGSs of which the institution and its branches are members within the Union. Member States shall ensure that credit institutions inform actual and intending depositors of the applicable exclusions from DGS protection.’

337. Article 16(2) of the DGSD states that ‘[b]efore entering into a contract on deposit-taking, depositors shall be provided with the information referred to in paragraph 1. They shall acknowledge the receipt of that information. The template set out in Annex I shall be used for that purpose.’

338. Article 16(3) of the DGSD states that ‘[c]onfirmation that the deposits are eligible deposits shall be provided to depositors on their statements of account including a reference to the information sheet set out in Annex I. The website of the relevant DGS shall be indicated on the information sheet. The information sheet set out in Annex I shall be provided to the depositor at least annually. The website of the DGS shall contain the necessary information for depositors, in particular information concerning the provisions regarding the process for and conditions of deposit guarantees as envisaged under this Directive.’

#### Methodology, data sources and their limitations

339. The survey circulated to the DGSDAs and DGSs included no separate questions related to informing depositors of THB protection. The analysis does include issues that have arisen in real-life cases.

#### Main findings, issues identified and the analysis

340. The EBA considered that, currently, the DGSD does not seem to expressly require DGSs to inform depositors of the applicable THB provisions in the obligatory information sheet, or elsewhere. Given the importance of THB provisions to individual depositors, the EBA considered that depositors should be informed about their rights. Thus, the EBA considered how to ensure that depositors are informed, mindful of the operational difficulties of tracking who has and who does not have a THB claim.

### Options to address the identified issues

341. Based on the importance of THB provisions to individual depositors, the only option considered by the EBA was to provide further clarity on how depositors should be informed of relevant THB provisions. More specifically, the EBA considered using the following channels to inform depositors of their rights:

- The depositor information sheet should highlight to depositors that higher coverage may apply in some circumstances based on national law.
- DGSs should include the relevant THB provisions on their websites.
- DGSs should inform depositors of the applicable THB provisions at the point of failure by means of the standard channels used to inform depositors of the payout.

### Conclusion

342. The EBA proposes to the Commission that the DGSD should be amended to include references to relevant provisions concerning THBs in the depositor information sheet, on the DGS's website and using standard communication channels when informing depositors about a payout.

#### 3.7.4 Temporary high balance amount

### Methodology, data sources and their limitations

343. The survey circulated to the DGSDAs and DGSs included two questions related to the THB amount. The analysis also discussed issues that have arisen in real-life cases.

344. The EBA discussion on the THB amount can be split into three subtopics:

- i. setting a harmonised amount of THB protection;
- ii. setting THB coverage in such a way that the standard coverage level of EUR 100 000 is not deducted from the THB limit;
- iii. topping up coverage to account for differences in THB protection.

### Main findings, issues identified and the analysis

345. The survey circulated to the DGSDAs and DGSs asked what the maximum amount is under THBs in the different Member States. The responses to the survey included the following:

- seven respondents from six Member States reported that the compensation is unlimited in all or certain cases;

- seven respondents from six Member States reported that they have the limit set over EUR 500 000 in all or certain cases. Of these respondents, three respondents from two Member States reported that there is an exception for THBs stemming from compensation from personal injury, for which unlimited coverage applies;
  - nine respondents from five Member States reported that they have the limit set up to a maximum of EUR 500 000 in all or certain cases. One respondent reported that there is an exception for THBs stemming from compensation from personal injury, for which unlimited coverage applies;
  - four respondents from four Member States reported that they have the limit set up to a maximum of EUR 300 000 in all or certain cases;
  - one respondent reported that the limit for THBs stemming from social purposes is EUR 150 000 and a higher limit of EUR 10 million applies to deposits related to the sale of residential property;
  - five respondents from five Member States reported that they have the limit set up to a maximum of EUR 100 000. One respondent reported that there is an exception for THB stemming from damage caused by a crime or compensation for harm or reparation, for which unlimited coverage applies;
  - one respondent reported that they have the limit set up to a maximum of EUR 70 000 in all cases.
346. One respondent reported that they have the limit set up to a maximum of EUR 50 000 for all cases, but clarified that there is a current legal procedure for amending this provision. The responses also revealed other features that have been implemented:
- six respondents from five Member States reported that they have set the limit in their national currency, as they are not part of the Eurozone;
  - six respondents from five Member States clarified that they have set the limit individually for each type of deposit. In the case of one of the Member States, a separate limit applies to deposits listed in Article 6(2)(a) and a cumulative limit applies to deposits listed in Article 6(2)(b) and (c);
  - eight respondents from six Member States mentioned that they apply more than one limit for THB deposits. A separate limit or no limit is usually applied to compensation for personal injury or transactions connected to the sale of residential property.
347. Furthermore, the survey asked respondents whether the limits on THBs (*ex lege* above the main coverage level of EUR 100 000) are set on top of the coverage level of EUR 100 000 or if the EUR 100 000 is included in (or counted for) the THB limit:

- 24 respondents from 21 Member States confirmed that the THB limit is set on top of the first EUR 100 000 coverage;
- 11 respondents from six Member States reported that, within the THB limit, the first EUR 100 000 is included.

### **Setting a harmonised amount of temporary high balance protection**

348. On setting a harmonised amount of THB protection, in the light of the survey results, the EBA considered that:

- Member States apply different limits on the amounts of THB coverage. The DGSD does not provide a limit or any guidance regarding the way to set the limit. Currently, the THB limit varies from EUR 30 000 to unlimited coverage. Most of the non-Eurozone Members have the limit set in national currency.

349. The EBA considered that such discrepancies could lead to different treatments of depositors across the EU. For that reason, although there has been a low number of THB applications in practice up to now and hence the impact on DGSs funds so far has been low, the EBA considered whether there is merit in harmonising the THB amount across the EU.

### **Setting temporary high balance coverage in such a way that the standard coverage level of EUR 100 000 is not deducted from the temporary high balance limit**

350. On setting THB coverage in addition to the coverage level of EUR 100 000, in the light of the survey results, it was observed that some Member States set the THB coverage on top of the coverage level of EUR 100 000, while others include the EUR 100 000 coverage in the THB limit.

### **Topping up coverage to account for differences in temporary high balance protection**

351. The EBA considered whether topping up THB coverage for EU branches should be allowed to ensure that, in the same Member State, all depositors are subject to the same THB protection irrespective of differences between THB provisions between Member States.

352. The survey circulated to DGSDAs and DGSs included two questions related to the topping up of THBs in the context of cross-border payouts. The main findings, issues identified, analysis, solutions and conclusion have been discussed in the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs, published on 8 August 2019 on the EBA website.

353. The first question related to the topping up of THBs asked respondents if they ‘provide additional coverage (“topping-up”) for branches of institutions established in other Member States that operate in [their] jurisdiction (e.g. because of differences in the scope and coverage level for THBs, the scope of DGS coverage and the level of coverage due to exchange rate adjustments)’. The answers received included the following:

- only six respondents offer topping up in their jurisdictions;
- of these six, only three Member States use it in practice;
- respondents from the other three Member States reported that the possibility of topping up is provided for in the national implementation of the DGSD but has never been used in practice.

354. The second question related to topping up THBs asked respondents if they consider that there are 'any issues arising because of this lack of the requirement for a host DGS to offer topping up to EU branches'. The answers received were as follows:

- 25 respondents stated that there are no issues arising from there being no requirement for a host DGS to offer topping up to EU branches;
- eight respondents from eight Member States reported that some issues might arise if topping up is not an option. The main issues that these respondents indicated stem from the fact that the DGSD has not reached full harmonisation. Therefore, there are still differences in the protection between Member States, namely the scope and coverage level of THBs, differences stemming from currency fluctuations when calculating the maximum compensation limit in different currencies and also the scope of coverage, as there are differences in the interpretation of the concept of a deposit between Member States (in some jurisdictions some products may be covered on a national basis while in other Member States they are not covered).

355. The responses to the survey in this area and subsequent discussions by representatives from authorities suggest that the majority of respondents consider topping up not to be causing significant issues that could distort the level playing field between Member States.

### Options to address the identified issues

#### Setting a harmonised amount of temporary high balance protection

356. The EBA considered the following arguments in favour of harmonisation of the THB coverage level, while being mindful of the potential challenges:

- Despite clear differences in living conditions across the EU, such as wages and prices, there is a harmonised coverage level of EUR 100 000 and so it is unclear why differences in prices should be a major reason not to harmonise the threshold of THBs.
- Harmonising the limit at a high level would increase some DGSs' liability theoretically, but in practice it would still be related to real prices and therefore, in practice, it may make less of a difference to the DGSs (e.g. when an average real estate price in a Member State is EUR 100 000 and the THB threshold is increased

from EUR 200 000 to EUR 1 000 000, the likelihood that a THB claim in that Member State is in fact above the previous threshold is likely to be low).

- Harmonisation of the threshold removes the differences between branches and subsidiaries and, to a large extent, eliminates the need for topping up.
- Even if the harmonised threshold increased current thresholds across the EU, the impact on the DGSs would most likely be limited because, based on the recent payouts, the number of THB applications is very low.

357. The arguments against harmonisation in this area are the following:

- Harmonising the amount makes it more difficult to adjust the threshold if there are changes in a particular Member State (e.g. real estate prices increase significantly).
- Real estate prices and costs of living across Member States differ significantly.
- If the threshold of THB were to be harmonised, the scope should be harmonised as well.
- In some jurisdictions, DGSs offer unlimited coverage in relation to payments stemming from certain insurance claims. Harmonising the amount without acknowledging such cases would limit the possibility to protect depositors in such specific cases.

358. The EBA considered current practices in some of the Member States where unlimited coverage applies to some circumstances (e.g. insurance claims). Implementing such exceptions in the scope of coverage would acknowledge current practices and would not limit the possibility to protect depositors in such specific cases.

359. The EBA considered that it is crucial to also consider how the THB coverage level could be harmonised. The following features of harmonisation were considered:

- setting a sufficiently high amount for all Member States;
- the merit of not having any limit, such as for payments of insurance benefits or compensation for criminal injuries or wrongful conviction.

360. The EBA considered that the harmonised threshold should be set at a sufficiently high level to ensure that harmonisation does not significantly lower the protection available to depositors in any Member State. The EBA also considered that maintaining the possibility of higher or unlimited coverage for payments of insurance benefits or compensation for criminal injuries or wrongful conviction is warranted, given that they can significantly exceed current THB thresholds. The EBA considered that even if the harmonised threshold would be higher than the current thresholds across the EU, the impact on the DGSs would most likely be limited because, based on the recent payouts, the number of THB applications in DGS payouts is very low.

However, the EBA did not consider further what the most appropriate amount of the harmonised THB limit might be. The EBA considered that the most appropriate amount should be set by the legislator if and when revising the DGSD.

### **Setting temporary high balance coverage in such a way that the standard coverage level of EUR 100 000 is not deducted from the temporary high balance limit**

361. In the light of the responses to the survey concerning the link between the coverage level of EUR 100 000 and THB protection, the EBA considered the option to clarify the DGSD in this regard. More specifically, the EBA considered whether the DGSD should be clarified to ensure that the standard coverage level of EUR 100 000 is not deducted from the THB coverage limit. The EBA considered that such a clarification would harmonise the approach across the EU and provide clarity to depositors, and so would be desirable.

### **Topping up coverage to account for differences in temporary high balance protection**

362. The EBA considered that explicitly allowing for the topping up of THB coverage in the DGSD would give certainty on whether top-ups are allowed under the DGSD, because in the current wording they are not expressly mentioned.

363. The argument against explicitly allowing for the topping up of THB coverage was that:

- if the DGSD explicitly allowed top-ups, this would require further consideration of how to calculate contributions in relation to such top-up coverage and potentially would require other specifications, when there are very limited instances of top-ups being used in practice.

364. The EBA also considered if the topping up issue should be analysed separately from the adequacy of the coverage level. As topping up is used only in three Member States, the EBA considered that it is unlikely to be creating any level playing field issues. It was therefore decided that there was no reason and no clear need to consider further whether or not to amend the DGSD to regulate topping up.

## **Conclusions**

365. The EBA proposes to the Commission that:

- the THB amount in the DGSD should be harmonised at a sufficiently high level while considering maintaining the possibility for Member States to provide higher or unlimited coverage for payments of insurance benefits or compensation for criminal injuries or wrongful conviction;
- the DGSD should be amended to ensure that the standard coverage level of EUR 100 000 is not deducted from the THB coverage limit.

366. The EBA proposes to the Commission that there is no need to explicitly allow for the topping up of THB coverage to account for differences in THB protection between Member States.

### **3.7.5 Scope of temporary high balance protection**

#### **Methodology, data sources and their limitations**

367. The survey circulated to the DGSDAs and DGSs included one question related to the scope of THB protection. The analysis also includes issues that have arisen in real-life cases.

#### **Main findings, issues identified and the analysis**

368. The survey circulated to the DGSDAs and DGSs asked ‘apart from the deposits mentioned in Article 6(2) of the DGSD, what other deposits could be considered as THBs in your Member State?’ The responses to the survey included the following:

- 26 respondents from 21 Member States responded that only deposits mentioned in Article 6(2) are covered;
- three respondents from two Member States clarified that monies deposited in preparation for the purchase of a private residential property (or an interest in a private residential property) by the depositor and monies that represent the proceeds of an equity release by the depositor in a private residential property are covered;
- three respondents from three Member States responded that coverage is restricted only to funds received from the sale of private residential property;
- one respondent stated that the amount stemming from a lump-sum payment of compensation for harm sustained by the depositors and for an estate, a bequest or a donation is also covered;
- one respondent reported that, in addition to deposits mentioned in Article 6(2), compensations received following claims incurred in respect of a private residential property are also covered.

#### **Events covered by temporary high balance protection**

369. Based on the survey results and discussions with relevant authorities, the EBA observed that some Member States do not seem to provide THB protection of deposits stemming from social events outlined in subparagraph (b) and insurance claims in subparagraph (c) in their national legislation.

370. In addition, the EBA considered that Member States interpret subparagraph (a) on real estate transactions differently. In some Member States, THB provisions apply only to sales of



private properties, while in others provisions also apply to (preparation for) purchases of such properties.

371. Therefore, the EBA considered that different interpretations of elements of Article 6(2) can lead to different treatments of depositors in different Member States — in some, certain events would be covered while in others they would not, with no clear reason for such discrepancies.

#### **Application of temporary high balances to legal persons**

372. The survey circulated to the DGSDAs and DGSs did not include questions regarding whether or not THB provisions should also apply to legal persons. However, during the course of preparing the opinion, one Member State asked whether legal persons should be covered by THB provisions and the EBA decided to analyse the issue further.

373. The EBA observed that, in some Member States, THB provisions have been implemented to apply to natural persons as well as legal persons while, in other Member States, these would apply only to natural persons.

374. The EBA considered that Article 5(1) of the DGSD, on the eligibility of deposits, in general covers deposits of both natural and legal persons. However, given that most of the events covered by Article 6(2)(b), such as marriage, divorce, death, etc., are relevant in relation only to natural persons, Member States interpreted the whole of paragraph 6(2) differently. This could lead to different treatments of depositors across Member States because of different interpretations of the text.

#### **Use of the term 'legal transferability' in Article 6(2)**

375. One Member State raised the question of which kind of cases the term 'legally transferable' should apply to, making the distinction between:

- cases in which depositors cannot dispose of their deposits on the grounds of a decision of a public authority (police, supervisor, judicial authority, etc.);
- cases in which the depositor has voluntarily undertaken in a contract not to dispose of the deposit for some period of time (e.g. fixed term deposits);
- cases in which the depositor bound himself voluntarily through a contract and in which the contractual provisions allow him to withdraw or transfer a deposit (subject to paying a penalty).

#### **Options to address the identified issues**

##### **Events covered by temporary high balance protection**

376. The EBA considered two options to address the different interpretations of what events are covered by current THB provisions:

- option 1: amend the DGSD to provide an exhaustive list of situations under which THB provisions should apply, given that, in some Member States, the authorities considered that some elements of the provision are not applicable/relevant in their jurisdiction;
- option 2: maintain current provisions as they are, given that they already include a list of covered events.

377. The EBA considered that, despite seemingly different implementations in some Member States, the text of the DGSD seems to be sufficiently clear and there is no need to amend it.

378. However, the EBA considered one specific aspect of events covered under Article 6(2)(a), namely purchases of private residential property. More specifically, the EBA considered whether Article 6(2)(a) should be amended to clarify that it should apply to funds placed in an account with the aim of using them promptly to affect a specific transaction to purchase or sell a property and when the depositor can provide the necessary evidence, in accordance with the specificities of the real estate market in a given Member State.

379. The EBA considered the following arguments in favour of providing such a clarification:

- It would provide better protection for depositors, as, in all such cases, it is likely that they will have temporarily high amounts of funds in their accounts, with a limited possibility to split them in anticipation of a purchase or directly after a sale.
- The logic of the THB provisions is to protect depositors in cases of credit institution failure when they temporarily have a high amount of deposits, above the coverage level — there is no clear reason why it should be applicable only to sales of property, and not purchases, too.
- In THB cases, the burden of proof is generally on the depositor and so the DGS can request a depositor to explain and prove that an amount that they have lost in a credit institution failure was on the account for the purpose of purchasing a private residential property.

380. The EBA considered that it would be beneficial to amend Article 6(2)(a) and to keep the wording simple by applying the THB regime both to funds placed in an account with the aim of using them promptly to affect a specific transaction to purchase or sell a property and when the depositor can provide the necessary evidence, in accordance with the specificities of the real estate market in a given Member State. The EBA considered that any such a change to Article 6(2)(a) should not limit the ability of Member States to provide THB coverage for other types of real estate transactions (e.g. in one Member State, protection for equity release mortgage payments is explicitly allowed).

### **Application of temporary high balances to legal persons**

381. The EBA considered that, in the light of the current wording under Article 6(2) of the DGSD referring to situations only applicable to natural persons (i.e. marriage, divorce, retirement, dismissal, redundancy, invalidity or death) and without an explicit exclusion of legal persons in its scope, there is a need to provide further clarity. To that effect, the EBA considered two options:

- option 1: for the purpose of absolute clarity, clearly and explicitly setting out in the DGSD that the THB protection applies to both natural and legal persons;
- option 2: for the purpose of absolute clarity, explicitly excluding legal persons from THB protection and so limiting the THB provisions to natural persons.

382. The EBA considered option 1, which, for the purpose of absolute clarity, proposes to clearly and explicitly set out in the DGSD that the THB protection applies to both natural and legal persons. The following arguments in favour of this option have been identified:

- It would explicitly and clearly apply protection to a larger group of depositors than is currently the case in at least some jurisdictions.
- There is no clear reason why, for example, purchases of private residential property under own name or under a sole trader's company name should lead to different treatments from a depositor protection perspective.
- If deposits even by large corporates are protected by a DGS up to EUR 100 000, it would be inconsistent to limit THB protection only to natural persons, and not extend it to legal persons.

383. The arguments against option 1 are the following:

- In general, legal persons are better placed to make investment decisions and so should not be offered the same level of protection as natural persons.
- It could be claimed that the types of events covered in Article 6(2) seem to focus THB provisions on individual depositors, not legal entities.
- Explicitly extending coverage to legal persons, with section 3.7.4 of this report recommending that the possibility be maintained for Member States to provide higher or unlimited coverage for payments of insurance benefits, would pose potentially significant risks to DGS funds if a DGS was to pay out to a large corporate after it received insurance compensation.

384. In the light of the identified pros and cons of applying the THB coverage to legal entities, and with the aim being to strike the right balance between providing sufficient depositor protection and limiting the potential liability for DGS funds, the EBA considered the option to

limit THB protection of legal persons to small and medium-sized enterprises (SMEs) and to exclude large corporates.

385. The EBA took into account the following considerations regarding including only SMEs under the THB protection:

- Natural persons and SMEs are currently senior and preferred creditors in the creditor hierarchy as per Article 109 of the BRRD, and so offering them more favourable treatment than is offered to large corporates would not be unprecedented or inconsistent with the EU framework.
- While it may not always be immediately obvious whether a particular legal entity is or is not an SME, the burden of proof in THB applications lies on the depositor and so the depositor could provide proof of how it meets the definition of an SME used elsewhere in the EU framework.

386. Based on the arguments outlined above, the EBA arrived at an agreed view that, for the sake of absolute clarity, the DGSD should clearly and explicitly state whether THB provisions apply to natural persons only or to legal persons as well. The EBA proposes to the Commission that, should the Commission consider that THB provisions apply to both natural and legal persons, the Commission should further consider the pros and cons of covering only SMEs and not large corporates.

#### **Use of the term 'legal transferability' in Article 6(2)**

387. The EBA considered whether the term 'legal transferability' in Article 6(2) is sufficiently clear or whether there is a need for further clarification in the DGSD.

388. The EBA considered the following argument in favour of further clarifying the term 'legal transferability':

- The term could mean different things, such as limitations stemming from contractual arrangements between the depositor and the credit institution (e.g. fixed term deposits) or even a depositor and a third party (private law limitations), or only measures imposed by public authorities (police, prosecution; public law limitations).

389. Arguments against further clarifying the term were:

- The EBA considered that it would be difficult to explain every possible case in legislation and provide further clarity.
- It would restrict current provisions to some cases and not others.

390. In the light of these pros and cons, the EBA concluded that there is no need to further clarify the term 'legal transferability' in Article 6(2), as there is general understanding of this concept among Member States.

### Conclusions

391. The EBA proposes to the Commission that there is a need to:

- clarify that deposits made in relation to Article 6(2)(a) should apply to funds placed in an account with the aim of using them promptly to affect a specific transaction to purchase or sell a property and when the depositor can provide the necessary evidence, in accordance with the specificities of the real estate market in a given Member State;
- clearly and explicitly mention whether THB provisions apply to natural persons only or to legal persons as well. Should the Commission consider that the THB provisions apply to both natural and legal persons, the Commission should further analyse if legal persons should be split into SMEs and large corporates or if THB amounts of only SMEs should be covered.

392. The EBA proposes to the Commission that there is no need to:

- clarify Article 6(2)(b) and (c), as the text of the DGSD seems to be sufficiently clear, despite seemingly different interpretations in some Member States;
- further clarify the term 'legal transferability' in Article 6(2), as there is general understanding of this concept among Member States.

### 3.7.6 Impact of a depositor moving funds eligible for temporary high balance protection into different accounts

#### Methodology, data sources and their limitations

393. The survey circulated to the DGSDAs and DGSs did not include questions in relation to the application of THB provisions when a depositor moves funds between accounts. However, while the opinion was being prepared, relevant authorities raised it as an issue that needed to be clarified.

#### Main findings, issues identified and the analysis

394. The EBA considered that, currently, the DGSD does not include restrictions to THB coverage once a depositor moves funds between different accounts. However, the EBA also considered real-life experience with THBs in one Member State, which experienced the highest number of THB applications (six). In that Member State, THB applications have been rejected because the depositors transferred funds that met the definition of a THB from bank account A to bank

account B within the same credit institution and/or to bank account C at another credit institution. The rationale behind the rejection by the DGS is that, by transferring the funds, the depositor made a decision about their funds and if they decided to do it in a way that does not offer them full protection (i.e. distributing funds to ensure they fall under the maximum coverage of EUR 100 000), they should not be offered THB protection. In other Member States, there are no such restrictions, which leads to different treatments of depositors. The EBA considered the following arguments in favour of treating such cases as deposits subject to THB protection:

- Depositor protection should be kept in mind when assessing if transferred funds between accounts should be subject to a THB payout.
- If the depositor can prove that the funds are related to the amount that falls within the scope of a THB payout from its national legislation, the depositor should be covered by the THB provision of the DGSD, regardless of the movement of funds between accounts.
- Tracking funds between different credit institutions is not difficult and the fairest approach is to protect depositors subject to them providing the necessary proof of the transfers.

395. Thus, the EBA considered that the DGSD should be clarified in relation to situations under which, upon receiving the original payment that meets the conditions of a THB, the depositor has moved that amount to another account within the same credit institution or to another credit institution.

### Options to address the identified issues

#### Treatment of funds moved to other accounts and credit institutions

396. The EBA then considered the following three options for the treatment of movements of deposits that may be subject to THB provisions:

- option 1: loss of THB protection upon any move of funds to another account
  - The depositor's transfer of deposits from one account to another within the same institution or to another credit institution loses THB coverage.
- Option 2: loss of THB coverage when moving funds to another credit institution
  - The depositor's transfer of deposits from one account to another account within the same institution would maintain its THB coverage. Deposits moved from one credit institution to another credit institution would lose THB coverage.
- Option 3: THB protection is maintained regardless of where funds are moved

- Deposits moved by the depositor, either within a credit institution or into any other credit institution, would maintain their THB coverage.

397. The EBA considered option 1 as too restrictive for the reasons outlined in the paragraphs above and as contrary to the principle of aggregating the amounts for purposes of determining the repayable amount.

398. The EBA considered the following arguments in favour of option 2:

- A transfer of funds between accounts in the same credit institution should not be seen as a final decision on how to manage the high amount, but it should be seen as a temporary solution before the depositor decides what to do with the amount above the coverage level. In contrast, a transfer to another institution would be considered a final decision.
- Applying THB provisions to amounts transferred to other credit institutions could lead to many difficult scenarios, such as the amount being moved to a credit institution abroad or to a branch protected by another DGS, in which case it is no longer clear which DGS would protect the funds.
- When a depositor transfers THB-related funds to another institution instead of transferring them within the same institution, the funds could have easily been divided between different institutions to meet the basic coverage limit.

399. The arguments in favour of option 3 are the following:

- It provides better protection for depositors than the other options and limits the need for the depositor to understand the intricacies of THB provisions.
- It limits the burden on a DGS to clearly inform depositors of when their funds would and when they would not be subject to THB provisions.
- The cost of extending better protection to depositors is likely to be relatively low given the very low numbers of THB cases in the recent past.
- Tracing transfers of funds between credit institutions is easy and the DGS does not need to be concerned as the burden of proof is on the depositor (however, it may not be possible to determine if the transferred amount is subject to THB protection).
- The transfer of funds between credit institutions is not necessarily a deliberate decision of the depositor, for example:
  - when the THB amount is released to a beneficiary account, funds pass through an intermediate bank account; or

- when the depositor uses an automated system (i.e. as facilitated further through PSD2) to forward certain amounts upon receiving them in another bank account.
- There may be cases in which it is reasonable to expect that the original amount transferred to one account will need to be divided and transferred to another account, potentially in other credit institutions (e.g. in cases in which a divorced couple sells property, proceeds are sent to one account but they then divide the sum into their individual accounts; this is also the case in inheritance with several successors).
  - With regard to the sale of a residential property, in numerous Member States, it will be a notary who initially receives the funds in a beneficiary account with a particular bank. The subsequent transfer of money to the current account of the depositors legally already implies a transfer to another credit institution (in case the depositors have their current account with another bank).
  - Not all credit institutions offer both current accounts and savings accounts (including term deposits). In an environment of high interest rates, the loss of THB coverage when THB amounts are transferred to other credit institutions would impose significant economic costs on depositors.
400. Since option 3 provides depositors with better protection, but brings about difficulties with tracing the funds and challenges posed by transfers of funds between credit institutions that are members of different DGSs, the EBA understands that none of the three options is clearly most favourable.
401. The EBA considered that, irrespective of the chosen option, it is important to provide more clarity on the potential impact of moving funds on the level of the THB protection to depositors.
402. In addition, the EBA considered that it might be in the interest of depositor protection to avoid different outcomes in different Member States. In this sense, the EBA considered that the harmonisation of application across Member States could be preferable from a depositor protection perspective.
403. As it was impossible to reach a common agreement on which option would be preferable, the EBA considered that further clarifications are needed on this topic. The EBA concluded that there may be more options possible, in addition to the three options outlined in this report.

#### **Treatment of funds that have been moved to fixed term deposits**

404. The EBA also considered if THB provisions should apply even if a depositor moves the amount previously subject to THB provisions to a fixed term deposit, with maturity longer than the deadline for THB protection. The current provisions of the DGSD seem to cover those deposits, during the established THB coverage period at national level, from the moment the



amount has been credited or the deposit has become legally transferable, irrespective of the term of the deposit.

405. Arguments in favour of maintaining THB protection for such cases are the same as those outlined in support of option 3 above.

406. An argument against applying the THB protection to such cases is the following:

- Moving deposits into a fixed term deposit longer than the THB deadline suggests that the depositor has taken a longer term investment decision concerning their funds. In that sense, the funds in such an account could no longer be considered as ‘temporary’.

407. However, the EBA considered that explicitly excluding the application of THB protection if a depositor moves the amount previously subject to THB provisions to a fixed term deposit would:

- introduce unnecessary complexity when a key benefit of option 3 is simplicity and clarity to the depositors;
- need to be accompanied by a requirement to clearly inform depositors of such an exemption from the general provisions on THBs;
- raise further questions in relation to which products it would apply to, and why it would apply to fixed term products with a maturity of more than the THB deadline, and not those with the same maturity as the THB deadline.

408. The EBA considered that, given the lack of real-life experiences, further analysis is required.

### Conclusions

409. The EBA proposes that there is a need for more clarity in relation to the treatment of cases in which deposits subject to THB coverage are moved between accounts.

410. The EBA proposes that, given the technical nature of this issue, if and when the Commission was to propose a revised DGSD, DGS practitioners should be consulted further on this topic in particular.

### 3.7.7 Impact of temporary high balances on contributions

#### Legal basis and background

411. Article 2(1) (5) states that ‘[f]or the purposes of this Directive the following definitions apply: “covered deposits” means the part of eligible deposits that does not exceed the coverage level laid down in Article 6’.

412. Article 10(1) states that ‘Member States shall ensure that DGSs have in place adequate systems to determine their potential liabilities. The available financial means of DGSs shall be proportionate to those liabilities. DGSs shall raise the available financial means by contributions to be made by their members at least annually. This shall not prevent additional financing from other sources.’

413. Article 13(1) requires that ‘[t]he contributions to DGSs referred to in Article 10 shall be based on the amount of covered deposits and the degree of risk incurred by the respective member. Member States may provide for lower contributions for low-risk sectors which are regulated under national law. Member States may decide that members of an IPS (institutional protection scheme) pay lower contributions to the DGS. Member States may allow the central body and all credit institutions permanently affiliated to the central body as referred to in Article 10(1) of Regulation (EU) No 575/2013 to be subject as a whole to the risk weight determined for the central body and its affiliated institutions on a consolidated basis. Member States may decide that credit institutions pay a minimum contribution, irrespective of the amount of their covered deposits.’

#### Methodology, data sources and their limitations

414. The survey circulated to the DGSDAs and DGSs included no questions related to the impact of THBs on DGS contributions. The analysis also includes issues that have arisen in real-life cases.

#### Main findings, issues identified and the analysis

415. The EBA considered that the DGSD does not seem to expressly state whether THB should or should not be included in the calculation of DGS contributions.

416. The EBA considered arguments in favour of and against including THB amounts in the calculations of contributions. An argument in favour of including THB amounts was that the amount of THBs covered could be high (especially in the jurisdictions where there is no limit on the amount of THB) and should be taken into account in the build-up of *ex ante* funds. The arguments against reflecting THB amounts in the raised contributions are the following:

- The cost and effort of reflecting THBs in the calculations outweigh any benefits of such additional precision.
- It is operationally very difficult to manage because THB amounts change constantly and are very difficult to capture in the SCV file (because, for example, the SCV file would need to mark whether an amount above coverage level stems from the depositor’s marriage or inheritance, or another reason). However, for the purpose of contributions, this operational challenge could be addressed by means of using an estimate of THB amounts, based on past experience or specific analysis.

- In practice, it is likely that there would be very few cases of THB payouts and so reflecting them in the calculation method would likely be immaterial and does not seem necessary.

417. In the light of the identified pros and cons, the EBA identified that there is little merit in including THB amounts in the calculations of contributions; however, it should not be disallowed.

#### Options to address the identified issues

418. In the light of the analysis outlined above, the option considered by the EBA was to clarify that DGSs should not be required to include the THB amount in the calculations of DGS contributions, but they should have the right to do so.

#### Conclusions

419. The EBA proposes to the Commission that it should be made clear that DGSs have the right, but not the obligation, to include the THB amount in the calculation of DGS contributions.

## 3.8 Approach to the setting off of liabilities fallen due

### Legal basis and background

420. Article 2(1)(4) of the DGSD states that ‘“eligible deposits” means deposits that are not excluded from protection pursuant to Article 5’.
421. Article 2(1)(5) of the DGSD states that ‘“covered deposits” means the part of eligible deposits that does not exceed the coverage level laid down in Article 6’.
422. Article 7(4) of the DGSD states that ‘the reference date for the calculation of the repayable amount shall be the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or when a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1). Liabilities of the depositor against the credit institution shall not be taken into account when calculating the repayable amount.’
423. Article 7(5) of the DGSD states that ‘Member States may decide that the liabilities of the depositor to the credit institution are taken into account when calculating the repayable amount where they have fallen due on or before the date on which a relevant administrative authority makes a determination as referred to in point 8(a) of Article 2(1) or when a judicial authority makes a ruling as referred to in point 8(b) of Article 2(1) to the extent the set-off is possible under the statutory and contractual provisions governing the contract between the credit institution and the depositor’.
424. Paragraph 2 of Article 7(5) requires that ‘[d]epositors shall be informed prior to the conclusion of the contract by the credit institution where liabilities towards the credit institution are taken into account when calculating the repayable amount’.
425. Article 13(2) of the DGSD states that ‘DGSs may use their own risk-based methods for determining and calculating the risk-based contributions by their members. The calculation of contributions shall be proportional to the risk of the members and shall take due account of the risk profiles of the various business models. Those methods may also take into account the asset side of the balance sheet and risk indicators, such as capital adequacy, asset quality and liquidity. Each method shall be approved by the competent authority in cooperation with the designated authority. EBA shall be informed about the methods approved.’

### Methodology, data sources and their limitations

426. The survey circulated to the DGSDAs and DGSs included four questions in relation to the approach by the DGS to taking into account the possibility of setting off liabilities fallen due.

## Main findings, issues identified and the analysis

427. The survey asked respondents if the setting off of liabilities fallen due is legally allowed in their jurisdiction when calculating the repayable amount as per Article 7(5) of the DGSD, and if so, if it is required. The responses to the survey included the following:

- 18 respondents from 11 Member States reported that setting off liabilities fallen due when calculating the repayable amount is not legally allowed in their jurisdiction;
- 11 respondents from 11 Member States reported that setting off all or some liabilities fallen due when calculating the repayable amount is required by national law;
- five respondents from five Member States reported that setting off liabilities fallen due when calculating the repayable amount is legally allowed, but not mandatory, for all or some liabilities.

428. The survey then asked if, when setting off liabilities fallen due when calculating the repayable amount is legally allowed, it applies to the majority of cases or to only specific products such as offset mortgages. The responses to the survey included the following:

- 14 respondents from 14 Member States indicated that setting off liabilities fallen due when calculating the repayable amount is applied to every liability that has fallen due on or before the determination of unavailability of deposits and if the setting off of liabilities fallen due is possible under the regulatory and contractual provisions governing the contract between the credit institution and the depositor;
- five respondents from five Member States reported that setting off liabilities fallen due when calculating the repayable amount applies only to specific cases:
  - one respondent reported that the setting off of liabilities fallen due, in the case of legal entities, is done for on-balance-sheet items;
  - one respondent reported that the setting off of liabilities fallen due for mortgages is not allowed;
  - one respondent reported that the setting off of liabilities fallen due applies to the majority of cases. However, in the light of experience acquired, for the setting off of liabilities fallen due to be effective, the insolvency practitioner must inform the DGS of the depositors' liabilities, which shall be offset against the repayable amount (based on the balance sheet data of the credit institution). It must be noted insolvency practitioner may need a certain amount of time to gather the relevant information and this may thus affect the time needed for making the depositors' repayment. In addition, the insolvency practitioner may also need to liaise with other subjects and stakeholders, such as payment networks, to have evidence of the depositors' liabilities fallen due towards the institution (e.g. in

relation to the use of credit cards). In this context, other subjects may need to be involved by law to correctly identify the potential liabilities;

- one respondent indicated that it is allowed only under certain circumstances ruled by the DGS. The set-off was implemented under the premise of comprehensibility and equal treatment. The aim is to automate the determination of netting items for all credit institutions as far as possible, so that these items are taken into account not only for the SCV file but also for regular reports. Only those liabilities can be set off against claims that are already due at or before the time of the occurrence of a payout case within the meaning of Article 2(1)(8) of the DGSD. These are, for example, normal account overdrafts or due interest and amortisation payments based on a current, uncanceled credit agreement. However, loan amounts granted within an agreed limit (operating loan, mortgage loan, etc.) cannot be set off.
- one respondent reported that the setting off of liabilities fallen due when calculating the repayable amount is allowed only for deposits referred to in Article 5(3) of the DGSD;
- 12 respondents from nine Member States responded that this question is not applicable.

429. The respondents were asked what reference date is used by a DGS for determining the liabilities fallen due and for subsequently taking them into account when calculating the repayable amount as per Article 7(5) of the DGSD. They were also asked whether set-off is automatically triggered or if it requires a claim by the depositor, the credit institution, the DGS or another stakeholder. The responses to the survey included the following:

- six respondents from six Member States reported that the amount of liabilities fallen due is automatically taken into account in the repayable amount in the SCV file, or the SCV file contains two lines regarding the amount of eligible deposits, being the gross amount and the net amount, which includes the set-off of liabilities. Thus, the set-off amount can be calculated by the DGS or the insolvency practitioner;
- two respondents from two Member States reported that the depositor has to claim the set-off amount; however, in one Member State, this is true only for claims of 'special' nature, as the set-off is otherwise automatic;
- 18 respondents from 11 Member States responded that this question is not applicable.

430. The final question of the survey asked whether the determination of the unavailability of deposits, or the determination of failing or likely to fail, triggers the full amount of outstanding loans to become due. The responses to the survey included the following:

- 18 respondents from 16 Member States replied that the determination of the unavailability of deposits or the determination of failing or likely to fail do not trigger the full amount of outstanding loans to become due;
- one respondent reported that it depends on the contract between the institution and the customer. There is no automatic trigger in the DGS regulation. One respondent reported that, in their jurisdiction, set-off applies to the full amount of the liabilities because insolvency law stipulates that the failure of an institution triggers the full amount of the liabilities to be due and payable;
- one respondent explained that national law grants to the insolvency practitioner the choice between the termination of the contracts or their continuation. If the insolvency practitioner chooses to continue the contract, the insolvency practitioner replaces the failed credit institution in the contractual relationship (also in the loan agreements) and the amount of the outstanding loan instalments must thus be paid by the debtor according to the agreed terms and conditions of the loan agreement. If the insolvency practitioner does not make any decision in this respect (within a predetermined time), the contract must end as a default rule and the outstanding loan becomes due.

However, in principle, nothing seems to prevent a repayment plan from being agreed upon between the insolvency practitioner and the debtor. In addition, this legislation does not apply when the supervisor has granted the insolvency practitioner the authorisation to a temporary ongoing business (which may be granted provided that the continuation of the business is considered necessary to maximise liquidation earnings). In the latter case, all of the contracts, including loan agreements, must continue;

- 10 respondents from seven Member States responded that this question is not applicable.

Furthermore, some respondents provided the following additional information:

- three respondents from one Member State replied that the start of the insolvency proceedings may trigger the full amount of outstanding loans to become due;
- two respondents from two Member States replied that the full amount of outstanding loans can become due only when it is set out in the loan agreement between the customer and the credit institution.

431. The EBA has identified the following three subtopics related to the option for the DGS to take into account the possibility for setting off liabilities fallen due, noting that they are interrelated:

- i. the materiality of the setting off of liabilities fallen due;
- ii. the setting off of liabilities fallen due in relation to the calculation of contributions;
- iii. informing depositors about the setting off of liabilities fallen due.

432. The EBA then discussed whether provisions on the option for the DGS to take into account the possibility for setting off liabilities fallen due, and the different approaches among Member States, could create level playing field issues between depositors across the EU and credit institutions and/or Member States.
433. To assess this point, the EBA examined data from three Member States where the setting off of liabilities fallen due applies<sup>31</sup>. More specifically, the EBA looked at the amount of covered deposits after the DGS takes into account the possibility for setting off liabilities fallen due (gross covered deposits minus net covered deposits) in comparison with the total amount of covered deposits. The data showed that the difference is 1.7%, 0.74% and 0.035% in those three Member States.
434. The EBA then discussed the approach to the possibility for setting off liabilities fallen due in relation to the calculation of DGS contributions. Currently, DGSs calculate the DGS contributions of their member credit institutions based on the amount of covered deposits reported by these credit institutions. The EBA discussed the fact that the reported amounts are gross covered deposits.
435. The EBA assessed what the advantages would be of explicitly allowing DGSs to reflect the hypothetical amount of covered deposits taking into account the possibility for setting off liabilities fallen due in the contributions to the DGS:
- It could be argued that it would better reflect the potential liabilities of the DGS on the micro-level, because the amount of contributions of a credit institution with regard to a specific depositor raised by a DGS would reflect the amount of coverage a depositor could receive when their credit institution fails.
  - Operationally, given the fact that the DGS calculates the contributions based on the amount of covered deposits provided by its member credit institutions, it is a logical consequence that, if the credit institution was to automatically include the amount of liabilities fallen due that can be set off in the SCV file or another reporting format to the DGS when calculating the covered amount, the contributions calculated by the DGS are also based on that covered amount including set-off amounts.
436. The EBA also identified arguments against explicitly allowing DGSs to take into account the possibility for setting off liabilities fallen due in the contributions to the DGS:
- When the amount of liabilities fallen due that can be set off is not automatically included by credit institutions, it is operationally challenging and costly for DGSs to take this into account when calculating the contributions.
  - It would provide a benefit of lower DGS contributions to institutions that have a high number of clients who have fallen behind with their payments, because the reported

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<sup>31</sup> In addition, in one Member State, the setting off of all liabilities fallen due is required, but these data were not used to assess level playing field issues.



amount of covered deposits would be lower in their case when the liabilities fallen due are taken into account. It could be argued that it would run counter to the principle that riskier institutions should contribute more to the DGS fund.

437. On balance, the EBA concluded that there is no clear operational or practical benefit for a DGS to take into account the possibility of setting off liabilities fallen due when calculating contributions. Furthermore, given the low materiality of the difference between the gross and net amounts of covered deposits when set-off applies (as it only applies to the amounts due and payable (and where the failing or likely to fail determination or the determination of the unavailability of deposits does not trigger all liabilities to become due), the EBA arrived at the view that the impact of taking into account the possibility of setting off liabilities fallen due is likely to be limited and so level playing field issues are not a major concern.
438. Finally, the EBA discussed if depositors should be informed about the possibility for the DGS to take into account the setting off of liabilities fallen due being applied for the reimbursement of deposits if a credit institution fails.
439. Since the option for the DGS to take into account the possibility for setting off liabilities fallen due might be material for an individual depositor, the EBA is of the opinion that it should be reflected in the communication towards depositors by credit institutions.

#### Options to address the identified issues

440. Given the low materiality of setting off liabilities fallen due, the only option considered by the EBA was to maintain the current flexibility for Member States to choose to apply or not apply the option for the DGS to take into account the possibility for setting off liabilities fallen due, and to now propose further clarifications in relation to reflecting this in the calculation of DGS contributions.
441. The EBA recognised the importance that the option for the DGS to take into account the setting off of liabilities fallen due may have for an individual depositor, given that, in the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs, the EBA proposed that the information on the application of set-off could be included in the information sheet provided by credit institutions to the depositors.
442. The EBA discussed further whether notifying depositors of the option for the DGS to take into account the possibility of setting off liabilities fallen due should be voluntary or mandatory in the information sheet. The EBA analysed the following arguments in favour of specifying the option for the DGS to take into account the possibility for setting off liabilities fallen due in the depositor information sheet:
- Although the option for the DGS to take into account the possibility for setting off liabilities fallen due can be considered as an immaterial issue from the perspective of DGSs and contributions, it may be material for individual depositors. Therefore, it is important that depositors are well informed if set-off is applied.

- Even though information on the option for the DGS to take into account the possibility for setting off liabilities fallen due should be included in the general terms of the contract between the depositor and the credit institution, depositors may need to be informed clearly and on a more regular basis via the information sheet.
443. The EBA also identified the following arguments against including the option for the DGS to take into account the possibility for setting off liabilities fallen due in the information sheet:
- It may lead to confusion because the option for the DGS to take into account the possibility for setting off liabilities fallen due would not apply to all depositors.
  - It may be that some Member States have different types of information sheets in place, for example because the option for the DGS to take into account the possibility for setting off liabilities fallen due does apply to credit institutions, but not to credit unions.
  - The information sheet may not be the best vehicle to inform depositors of such technical provisions and other communication methods might be more suitable.
444. Following these arguments, the EBA discussed whether informing depositors about the option for the DGS to take into account the possibility for setting off liabilities fallen due should be at the discretion of the DGS or whether it should be obligatory (if a Member State chooses to allow to apply set-off). The EBA arrived at the view that, if a Member State does not apply the option for the DGS to take into account the possibility for setting off liabilities fallen due, there is no need to mention this in the information sheet, because it might lead to confusion for depositors. Likewise, when a Member State applies the option for the DGS to take into account the possibility for setting off liabilities fallen due, it should be mentioned in general terms in the depositor information sheet.

## Conclusions

445. The EBA proposes that, based on the analysis of limited data provided by three Member States, the option for the DGS to take into account the possibility for setting off liabilities fallen due is not a material issue from the perspective of a DGS and therefore:
- there is no need to amend the current provisions in the DGSD;
  - there are no strong operational or practical benefits to amending the DGSD to explicitly require a DGS to take into account the possibility for setting off liabilities fallen due when calculating contributions.
446. However, given the potential importance of such provisions to individual depositors, the EBA proposes to the Commission that the DGSD be amended to require that, if a Member State applies the option for the DGS to take into account the possibility for setting off liabilities fallen due, depositors should be informed of such provisions through the depositor information sheet.

## 3.9 Cost of living payout

### Legal basis and background

447. Article 8(1) of the DGSD states that ‘DGSs shall ensure that the repayable amount is available within seven working days of the date on which a relevant administrative authority makes a determination as referred to in point 8(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point 8(b) of Article 2(1)’.

448. Article 8(4) of the DGSD states that ‘[d]uring the transitional period until 31 December 2023, where a DGSs cannot make the repayable amount available within seven working days they shall ensure that depositors have access to an appropriate amount of their covered deposits to cover the cost of living within five working days of a request’.

449. Paragraph 38 in section 5.1d of the EBA Guidelines on cooperation agreements between DGSs under Directive 2014/49/EU (EBA/GL/2016/02) provides that, in the context of a host DGS repaying depositors on behalf of the home DGS, ‘where the full payout is imminent, or where a partial payout would significantly delay the full payout process, the DGSs may agree to forgo partial payout in the interest of ensuring prompt full payout’.

### Methodology, data sources and their limitations

450. The survey circulated to the DGSDAs and DGSs included four questions related to the implementation of Article 8(4) of the revised DGSD: it asked the DGSDAs and DGSs if any depositor has had the opportunity to apply for a cost of living payout, if they have been informed and how and, finally, how this provision might affect the preparation of the regular payout.

### Main findings, issues identified and the analysis

451. The first question in the survey asked DGSDAs/DGSs if any depositors have applied for a cost of living payout when there have been payouts since the implementation of the revised DGSD and the repayable amount has not been made available within 7 working days. The responses to the survey were as follows:

- 16 respondents from 14 Member States reported that they had had payouts since the implementation of the revised DGSD, but that the amount was made available to the depositors within 7 working days;
- one respondent reported that there has been a payout since the implementation of the revised DGSD, but that the amount was made available to the depositors within 20 working days (according to Article 8(2));
- 18 respondents from 15 Member States reported that no DGS payouts have occurred since the implementation of the revised DGSD.

452. The second question in the survey asked DGSDAs/DGSs if depositors have been informed about the possibility of applying for a cost of living payout when there have been payouts since the implementation of the revised DGSD and when the repayable amount has not been made available within 7 working days. The responses to the survey were as follows:

- 31 respondents from 24 Member States answered that this question was not applicable, because (i) no DGS payouts have occurred since the implementation of the revised DGSD, (ii) no payouts occurred when the amount was not made available within 7 working days or (iii) the credit institution could not provide data in time to ensure a proper cost of living payout (as prescribed by Article 8(4), second paragraph);
- two respondents from two Member States answered that depositors have been informed about the possibility of applying for a cost of living payout when there have been payouts since the implementation of the revised DGSD and the repayable amount has not been made available within 7 working days.

453. The third question in the survey asked DGSDAs/DGSs to explain how the information was provided if depositors have been informed about the possibility of applying for a cost of living payout in case there was a payout. The responses to the survey were as follows:

- two respondents from two Member States<sup>32</sup> reported that the information was provided on the DGS's website, for example in the FAQ section under 'How long does it take for the Scheme to pay compensation?'

454. The fourth question in the survey asked DGSDAs/DGSs to give their view on how the provision to offer a cost of living payout could affect the preparation by a DGS of the regular payout. The responses to the survey were as follows:

- 23 respondents from 17 Member States reported that providing a cost of living payout could hinder the preparation of the regular payout process and could potentially endanger regular payout within 7 working days. As an example, one respondent explained that in order to provide a cost of living payout, the DGS needs to analyse if three times the gross weekly minimum wage is available within 5 working days after a request from a depositor;
- six respondents from six Member States reported that offering a cost of living payout increases complexity and might lead to errors because the cost of living payout needs to be deducted from the repayable amount, potentially resulting in a risk of overpayment or incorrect payout to depositors;

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<sup>32</sup> One respondent (LT) reported that, in addition to the information on the DGS's website, credit institutions provide this information to new depositors when opening an account and once per year to existing account holders, in line with the requirements in Article 16 of the DGSD.

- six respondents from three Member States reported that the actions that have to be performed by a DGS to offer cost of living payout are the same as the actions that need to be performed for the actual payout (e.g. obtaining the SCV file from the failed credit institution and preparing to make the cost of living amount available to depositors);
- one respondent reported that the DGS has set up a specific procedure to offer a cost of living payout;
- one respondent from one Member States did not provide an answer.

455. The responses to the survey highlight that there is no real-life experience of providing depositors with a cost of living amount in payout. Nevertheless, the respondents to the survey identified a number of issues in relation to the cost of living provisions:

- The need to make the cost of living amounts available diverts the DGS's resources and hinders the DGS from focusing on making the full amount available in a payout. Thus, the cost of living payout delays the full payout and endangers the applicable deadlines.
- It requires the DGS to pay the depositor twice, which increases the complexity of the payout by introducing a need to deduct the amount provided as a cost of living payment from the remaining reimbursement amount. In addition to making the process more difficult, it also poses risks of overpayment and increases the risk of errors.
- It presents operational difficulties, including the need to establish what the cost of living amount is and whether it is the same for all types of depositors.
- Delays in meeting the deadline to make the full amount available to the depositors may be caused by issues that would also make it difficult to meet the cost of living payout deadline — for example, if a DGS has not received the necessary information from the failed credit institution, or the information is not robust enough, it would have a detrimental impact on the cost of living payout, just as it would on a full payout.

456. The EBA considered the argument that many jurisdictions introduced a 7 working day payout deadline without availing themselves of the longer deadlines allowed in the transitional period, at least partly to avoid the significant operational challenges posed by cost of living payouts.

457. The EBA assessed whether the current provisions on the cost of living payout in the DGSD apply even when a Member State has established a 7 working day repayment period. The EBA considered arguments that cost of living provisions could be interpreted as applying only when a Member State chose not to introduce the 7 working day repayment period yet (i.e. to use the transitional period as per Article 8(2) of the DGSD), because it would be inconsistent to set out

a 5 working day cost of living payout ‘upon request’, which would otherwise overlap with the ordinary 7 working day payout deadline<sup>33</sup>. Moreover, the EBA considered the argument that interpreting current provisions on cost of living as applying even when there is a 7 working day payout deadline could lead to the interpretation that providing a cost of living payout due to operational difficulties (e.g. IT issues or other delays such as the data not being received on time from the failed credit institution or proving to be inadequate) would render ineffective the requirement to make the whole covered amount available to the depositor ‘within 7 working days’ (not the obligation to pay the full repayment amount<sup>34</sup>). The EBA concluded that this would be detrimental to the depositors.

458. The EBA also considered the arguments that the text of the DGSD could be interpreted in such a way that the cost of living provisions may apply during the transitional period even when there is a 7 working day payout deadline, but in practice the payout is taking longer, because the DGS is not ‘materially’ capable of making the repayable amount available (e.g. because of IT issues or other delays). However, the EBA considered that the aim of the DGSD (see recital 39 of the DGSD<sup>35</sup>) was to give an option to Member States to gradually reduce the repayment period to 7 working days while ensuring that depositors have access to an appropriate amount of their covered deposits during that transitional period, but not to allow the possibility of deferring the repayment of the ‘full’ repayable amount beyond the 7 working day deadline, which would undermine the objectives of the DGSD and be detrimental to depositors, as, instead of being repaid the full amount of their covered deposits within the 7 working day established deadline, they would only have access, upon request, to a cost of living payout.

459. The EBA then considered the merit of proposing any changes or clarifications given that, under the current DGSD framework, the cost of living provisions would be applicable only until 31 December 2023, by which point all Member States will be required to have a 7 working day payout deadline in place. Moreover, the EBA considered the argument that any clarifications in this regard would require an amendment of the DGSD, which, given the process of amending EU law, would take a few years.

### Options to address the identified issues

460. Based on the above observations, the EBA presented four options to address the issues identified above:

<sup>33</sup> In addition, the inclusion of the reference to the emergency/interim payout in the (to be provided *ex ante*) information template (footnote 4 on ‘reimbursement’, second subparagraph) in Annex I would seem to indicate that it applies only to those Member States with a repayment period longer than 7 working days. Otherwise, it would not be possible to complete the template *ex ante*.

<sup>34</sup> See Article 8(4), third subparagraph, of the DGSD, which clearly states that ‘[t]he appropriate amount as referred to in the first subparagraph shall be deducted from the repayable amount as referred to in Article 7’.

<sup>35</sup> ‘In many cases, however, the necessary procedures for a short time limit for repayment do not yet exist. Member States should therefore be given the option, during a transitional period, to reduce the repayment period gradually to seven working days. The maximum repayment delay set out in this Directive should not prevent DGSs from making earlier repayments to depositors. In order to ensure that, during the transitional period, depositors do not encounter financial difficulties in the event of failure of their credit institution, depositors should, however, on request, be able to have access to an appropriate amount of their covered deposits to cover their cost of living ...’

- i. maintain the provisions on the cost of living as they are currently in the DGSD;
- ii. remove the cost of living provisions from the DGSD;
- iii. amend the DGSD to make the cost of living provisions optional for Member States (e.g. by amending Article 8(4) to state that DGSs may, instead of shall, make the cost of living amount available);
- iv. amend the DGSD by introducing an additional provision similar to the one in the EBA Guidelines on cooperation agreements, which stipulate that when full payout is imminent, or when a partial payout would significantly delay the full payout process, the DGSs are to forgo partial payout in the interest of insuring prompt full payout.

461. The EBA concluded that, despite numerous practical issues posed by the current cost of living provisions, there is little merit in proposing changes to the DGSD, given that after 2023 the current provisions will no longer apply, as by that point all Member States will be required to have a 7 working day payout deadline in place. For that reason, the option to maintain the current provisions is considered to be the most appropriate.

### Conclusions

462. The EBA is of the view that, despite numerous practical issues posed by the current cost of living provisions in the DGSD, it is not necessary to amend the DGSD to provide more clarity and/or address those issues, as the current provisions on cost of living payouts are applicable only until 31 December 2023 and become obsolete afterwards.

## 4. Conclusions

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463. This report provides the analytical background to the proposals outlined in the EBA Opinion on DGS payouts, and outlines a number of proposals for the Commission to consider when preparing a report on the implementation of the DGSD and for if and when it prepares a proposal for a revised DGSD.
464. To fully deliver on the mandate conferred on the EBA under Article 19(6) of the DGSD, and further outlined in the Commission's Call for Technical Advice from the EBA sent on 6 February 2019, this report should be considered by the Commission alongside two other EBA opinions and the corresponding analytical reports, namely the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs (published on 8 August 2019) and the EBA Opinion on DGS funding and the uses of DGS funds, which is due to be published in the second half of 2019. The EBA notes that this opinion and the other two opinions aim to present an expert view from a depositor protection perspective, but do not include a thorough impact assessment from all of the relevant perspectives, so, where appropriate, the EBA proposes that more analysis may be warranted.



## 5. Annex

### List of questions in the survey relevant to the topics covered in this report

<b>Unavailability of deposits</b>			
<b>Question number</b>	<b>DGSD article number</b>	<b>Question</b>	<b>Answer</b>
1	2(8) and 3(2)	Is the definition of the unavailability of deposits specified further in your jurisdiction, beyond the definition included in Article 2(8) and 3(2) of the DGSD?	<i>[Yes/no]</i>
2	2(8) and 3(2)	If yes, please outline the additional provisions in your jurisdiction and include a link to the legal act (preferably in English) together with the relevant article number.	<i>Free text (if possible please include the text in both the national language and English)</i>
3	2(8) and 3(2)	If there were payouts in your jurisdiction since the implementation of the revised DGSD, what factors and indicators did you consider relevant in order to make the determination that deposits were unavailable (e.g. following complaints by depositors who were not able to withdraw their funds), including the assessment of whether the institution has or does not have current prospects of being able to repay the deposits again?	<i>Free text</i>
4	—	Do you apply in your jurisdiction a supervisory moratorium that may bar depositors from withdrawing their deposits? If yes, please describe the criteria, including timelines and safeguards available to depositors (e.g. cost of living), and how/if these interact with the criteria used to determine that deposits are unavailable. Please provide details of specific experiences, if any.	<i>Free text</i>
5	2(8) and 3(2)	Which authority is the 'relevant administrative authority' in your jurisdiction?	<i>[DGS/DGS designated authority/competent authority/resolution authority/court/other (please specify)]</i>
<b><u>Additional comments</u></b>		<i>Free text</i>	

DGS payouts for which there are money laundering and financing of terrorism concerns				
Question number	DGSD article number	Question	Answer	
1	5(4)	How is it ensured that credit institutions mark eligible deposits in a way that allows immediate identification of such deposits?	<i>Free text</i>	
			What procedures are in place in your jurisdiction to ensure that, in the case of a payout, the DGSD provisions as outlined below are adhered to?	Which authority or stakeholder is responsible for the relevant checks?
2	5(1)(c)	(i) Exclusion from any repayment of ‘deposits arising out of transactions in connection with which there has been a criminal conviction for money laundering’.	<i>Free text</i>	<i>[DGS/DGS designated authority/competent authority/resolution authority/AML authority/failing or failed institution/another stakeholder (free text)]</i>
3	8(5)(a)	(ii) Deferral of repayment if ‘it is uncertain whether a person is entitled to receive repayment or the deposit is subject to legal dispute’.	<i>Free text</i>	<i>[DGS/DGS designated authority/competent authority/resolution authority/AML authority/failing or failed institution/another stakeholder (free text)]</i>
4	8(5)(b)	(iii) Deferral of repayment if ‘the deposit is subject to restrictive measures imposed by national governments or international bodies’.	<i>Free text</i>	<i>[DGS/DGS designated authority/competent authority/resolution authority/AML authority/failing or failed institution/another stakeholder (free text)]</i>
5	8(8)	(iv) Suspension of payment pending the judgment of the court ‘notwithstanding the time limit laid down in paragraph 1 of this Article, where a depositor or any person entitled to or interested in sums held in an account has been charged with an offence arising out of or in relation to money laundering as defined in Article 1(2) of Directive 2005/60/EC’.	<i>Free text</i>	<i>[DGS/DGS designated authority/competent authority/resolution authority/AML authority/failing or failed institution/another stakeholder (free text)]</i>
6	—	If there were payouts in your jurisdiction since the implementation of the revised DGSD, what steps have you taken to ensure that the payout is in line with the DGSD and AMLD provisions?	<i>Free text</i>	

7	—	When dealing with payouts after the implementation of the revised DGSD, have you encountered any specific challenges or issues in relation to money laundering and terrorism financing? Please explain.	<i>Free text</i>
8	—	Do you think that the current DGSD framework would require adjustments in order to close potential gaps and improve the effectiveness of the anti-money laundering measures? Please explain.	<i>Free text</i>
<b><u>Additional comments</u></b>		<i>Free text</i>	

<b>Payout process</b>			
<b>Question number</b>	<b>DGSD article number</b>	<b>Question</b>	<b>Answer</b>
1	8(1)	What is the current legal repayment period applicable to your DGS?	<i>Free text</i>
2	—	What are the payout methods available to your DGS (e.g. agent bank, cash, bank transfer, postal order, etc.)?	<i>Free text</i>
3	—	In the case of a payout, what are the current procedural requirements under each payout method for depositors identifying themselves in order to be reimbursed? How does your DGS deal with depositors who need to be represented?	<i>Free text</i>
4	8(3)	Do you consider the longer repayment period of 3 months provided for in Article 8(3) adequate to repay deposits referred to in Article 7(3)? If not, briefly explain why and, if possible, suggest a different period.	<i>Free text</i>
8	—	Are the procedures for depositor identification included in your national legislation or other administrative provisions, or is it done on a case-by-case basis?	<i>[Outlined in national legislation/outlined in other policy documents/decided on a case-by-case basis by the DGS/other (please explain how)]</i>
9	8(7)	What are your current procedures for informing domestic depositors about the payout and the next steps?	<i>[DGS website, newspapers/online articles, direct mailing, other form of direct communication, other (please explain)]</i>
10	8(7)	Do you have separate procedures in place to inform depositors who live abroad or may not be easy to reach for other reasons?	<i>Free text</i>
11	8(7)	Does your DGS envisage separate payout procedures for domestic depositors to whom its standard payout procedures may not be accessible?	<i>[Yes/no]</i>
12	—	Are there differences in the repayment procedure for depositors who live abroad? Through which means are they able to identify themselves to your DGS?	<i>Free text</i>
13	—	Duplicate of question 11	<i>Free text</i>
14	8(7)	Are the procedures for informing depositors included in your national legislation or other national provisions, or is it done on a case-by-case basis?	<i>[Outlined in national legislation/outlined in other policy documents/decided on a case-by-case basis by the DGS/other (please explain how)]</i>
15	9(3)	Do you limit the period in which depositors whose deposits were not repaid or acknowledged by the DGS within the deadlines set out in Article 8(1) and (3) can claim the repayment of their deposits? If yes, what is the limit set? How does your DGS define the end of the payout period?	<i>Free text</i>
<b>Additional comments</b>		<i>Free text</i>	

<b>Home-host cooperation and cooperation agreements</b>			
<b>Question number</b>	<b>DGSD article number</b>	<b>Question</b>	<b>Answer</b>
2	14(2)	In your view, what are the potential benefits and drawbacks of introducing a possibility to allow the home DGS to directly repay depositors at branches in other Member States (i.e. departing from the current approach in which the host DGS repays depositors on behalf of the home DGS)?	<i>Free text</i>
3	14(2)	In your view, are there particular circumstances or conditions under which the home DGS could be allowed to directly repay depositors at a branch in a host Member State (e.g. the majority of depositors at the branch are residents of the home Member State or a depositor has funds at both the credit institution in the home MS and its branch in the host Member State)?	<i>Free text</i>
<b><u>Additional comments</u></b>		<i>Free text</i>	

## Approach to temporary high balances

Question number	DGSD article number	Question	Answer
1	6(2)	Apart from the deposits mentioned in Article 6(2) of the DGSD, what other deposits could be considered as THBs in your jurisdiction?	<i>Free text</i>
2	6(2)	What is the time limit for a deposit to be classified as a THB in your jurisdiction?	<i>Free text</i>
3	6(2)	What is the maximum amount under THBs in your jurisdiction?	<i>Free text</i>
4	6(2)	Have you had specific experience with THB applications since the implementation of the revised DGSD? If so, (i) how many THB applications did you receive and (ii) how many of the THB applications could not have been satisfied in their entirety (because the limit has been applied)? Are you aware of cases in which depositors have brought their claims before the courts (if so, for what reason and what was the result)?	<i>Free text</i>
5	6(2)	Are the limits on THBs on top of the coverage level of EUR 100 000 or is the EUR 100 000 included in the THB limit?	<i>[THB limit includes EUR 100 000 coverage level/THB limit applies on top of the EUR 100 000 coverage level]</i>
6	—	Are the THBs reimbursed to depositors based on the information in the SCV file, without a request of the depositor to the DGS being necessary, or must depositors submit a request to the DGS accompanied by all supporting documents?	<i>[The reimbursement is made directly, based only on the failed credit institution records/the depositor should submit a request to the DGS accompanied by the supporting documents/other (please explain how)]</i>
7	6(2)	Do THBs need to be deposited in a special account?	<i>[Yes/no]</i>
8	6(2)	Are institutions in your jurisdiction required to mark THBs or potential THBs on a continuous basis or only upon failure or not at all?	<i>[Required to mark on a continuous basis/only upon failure/not at all]</i>
<b>Additional comments</b>		<p>The survey circulated to DGSDAs and DGSs included two questions related to the topping up of THBs in the context of cross-border payouts. The main findings, issues identified, analysis, solutions and conclusion have been discussed in the EBA Opinion on the eligibility of deposits, coverage level and cooperation between DGSs, published on 8 August 2019 on the EBA website. The two questions are as follows:</p> <ul style="list-style-type: none"> <li>(i) Do you provide additional coverage ('topping up') for branches of institutions established in other Member States that operate in your jurisdiction (i.e. because of differences in the coverage for THBs, the scope of DGS coverage and the level of coverage due to exchange rate adjustments)?</li> <li>(ii) In your view, are there any issues arising because of this lack of the requirement for a host DGS to offer topping up to EU branches?</li> </ul>	

## Approach to setting off of liabilities fallen due

Question number	DGSD article number	Question	Answer
1	7(5)	Is set-off legally allowed in your jurisdiction when calculating the repayable amount as per Article 7(5) of the DGSD? If so, is it required?	<i>[Yes/no]</i>
2	7(5)	If set-off is allowed, does it apply to the majority of cases or only to specific products such as offset mortgages?	<i>Free text</i>
3	7(5)	When is set-off triggered in your jurisdiction when calculating the repayable amount as per Article 7(5) of the DGSD? Is it automatic or does it require a claim by the depositor, the bank, the DGS or other?	<i>Free text</i>
4	7(5)	Does the determination of the unavailability of deposits, or the determination of failing or likely to fail, trigger the full amount of outstanding loans to become due?	<i>Free text</i>
<b>Additional comments</b>		<i>Free text</i>	

## Cost of living payout

Question number	DGSD article number	Question	Answer
1	8(4)	If there have been payouts in your jurisdiction since the implementation of the revised DGSD, and the repayable amount has not been made available within 7 working days, have any depositors applied for a cost of living payout?	<i>[Yes/no/not applicable because there were no payouts for which the amount was not made available within 7 working days]</i>
2	8(4)	If there have been payouts in your jurisdiction since the implementation of the revised DGSD, and the repayable amount has not been made available within 7 working days, have depositors been informed about the possibility of applying for a cost of living payout?	<i>[Yes/no/not applicable because there were no payouts for which the amount was not made available within 7 working days]</i>
3	8(4)	If the answer to the question above is 'yes', please explain how the information was provided.	<i>Free text</i>
4	8(4)	In your view, how does the provision of offering a cost of living payout affect the preparation by a DGS of the regular payout?	<i>Free text</i>
<b>Additional comments</b>		<i>Free text</i>	





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