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**WORKING DOCUMENT**

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From:	Presidency
To:	Working Party on Financial Services and the Banking Union (CMDI) Financial Services Attachés
N° Cion doc.:	ST 8499 2023 INIT
Subject:	CMDI package: working party 09.10.23 Item 5a: Commission services note on Use of DGS for preventive and alternative measures (Articles 11 – 11d DGSD)

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ANNEX: Overview of the proposed amendments in comparison with the existing DGSD

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Existing DGSD	Proposed amendments	Explanation / Justification
<b><i>I. Streamlining of terminology: preventive measures under DGSD, alternative measures under DGSD and alternative private sector measures under BRRD</i></b>		
<i>DGSD, Article 11(3) and (6)</i>	<i>DGSD, Article 11(3) and (5)</i>	
<p><i>Article 11(3)</i>            3. Member States may allow a DGS to use the available financial means for <b>alternative measures in order to prevent the failure</b> of a credit institution provided that the following conditions are met:            .....  <i>Article 11(6)</i>            6. Member States may decide that the available financial means may also be used to finance <b>measures to preserve the access of depositors to covered deposits</b>, including transfer of assets and liabilities and deposit book transfer, in the context of national insolvency proceedings, provided that the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned.</p>	<p><i>Article 11(3)</i>            3. Member States may allow DGSs to use the available financial means for <b>preventive measures</b> as referred to in Article 11a <b>for the benefit of a credit institution</b> where all of the following applies:            .....  <i>Article 11(6)</i>            5. Where a credit institution is wound up in accordance with Article 32b of Directive 2014/59/EU in order to exit the market or terminate its banking activity, Member States may allow DGSs to use the available financial means for <b>alternative measures to preserve the access of depositors to their deposits</b>, including the transfer of assets and liabilities and a deposit book transfer, provided that the DGS confirms that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e of this Directive and that all the conditions laid down in Article 11d of this Directive are met.</p>	<p>Without changing the substance, the proposal aims at streamlining the terminology used in DGSD and BRRD and at distinguishing between different measures.</p>

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<p><i>BRRD, Article 32(1)(b) and Article 59(4)</i></p>	<p><i>BRRD, Article 2(1), definition (29a), Article 30a(2), Article 32(1)(b), Article 59(4)</i></p>	
<p><i>Article 32(1)(b)</i></p> <p>1. Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in point (a) of Article 1(1) only if the resolution authority considers that all of the following conditions are met:</p>	<p><i>Article 2(1)</i></p> <p>(29a) <b>‘alternative private sector measure’ means any support not qualifying as extraordinary public financial support;</b></p> <p><i>Article 30a(2)</i></p> <p>2. Competent authorities shall notify resolution authorities as early as possible where they consider that there is a material risk that one or more of the circumstances in Article 32(4) would apply in relation to an institution or an entity referred to Article 1(1), points (b), (c) or (d). That notification shall contain:</p> <p>(a) the reasons for the notification;</p> <p>(b) an overview of <b>the measures which would prevent the failure of the institution</b> or entity within a reasonable timeframe, their expected impact on the institution or entity as regards the circumstances referred to in Article 32(4) and the expected timeframe for the implementation of those measures.</p> <p><i>Article 32(1)(b)</i></p> <p>1. Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in point (a) of Article 1(1) only if the resolution authority considers that all of the following conditions are met:</p>	<p>The BRRD introduces a definition of ‘alternative private measures’ to clarify that any support from private sources would fall within the scope, including the use of private DGS (including IPS recognized as DGS) funds for preventive measures under DGSD and IPS support measures with funds collected for non-DGSD purposes.</p> <p>Reference to alternative private sector measures under Article 32(1)(b) and Article 59(4) BRRD remains unchanged.</p>

<p>.....</p> <p>(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that <b>any alternative private sector measures, including measures by an IPS</b>, or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments in accordance with Article 59(2) taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;</p> <p><i>Article 59(4)</i></p> <p>4. For the purposes of paragraph 3, an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or a group shall be deemed to be no longer viable only if both of the following conditions are met:</p> <p>.....</p> <p>(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any action, <b>including alternative private sector measures</b> or supervisory action (including early intervention measures), other than the write down or conversion of capital instruments, independently or in combination with a resolution action, would prevent the failure of the institution or the entity referred to</p>	<p>(b) having regard to the timing, the need to implement effectively the resolution strategy and other relevant circumstances, there is no reasonable prospect that <b>any alternative private sector measure, including measures by an IPS</b>, supervisory action, early intervention measures, or write down or conversion of relevant capital instruments and eligible liabilities as referred to in Article 59(2) taken in respect of the institution would prevent the failure of the institution within a reasonable timeframe;</p> <p><i>Article 59(4)</i></p> <p>4. For the purposes of paragraph 3, an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or a group shall be deemed to be no longer viable only if both of the following conditions are met:</p> <p>.....</p> <p>‘(b) having regard to timing, the need to implement effectively the write down and conversion powers or the resolution strategy for the resolution group, and other relevant circumstances, there is no reasonable prospect that any action, including <b>alternative private sector measures</b>, supervisory action or early intervention measures, other than the write down or conversion of capital instruments and eligible liabilities as referred to in paragraph 1a, would prevent the failure of the institution or the</p>	<p style="background-color: #cccccc;"></p>
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in point (b), (c) or (d) of Article 1(1) or the group within a reasonable timeframe.	entity referred to in Article 1(1), points (b), (c) or (d), or the group within a reasonable timeframe.'	
<b>II. Preventive measures</b>		
<i>A. Requirements related to the DGS capacity to implement preventive measures</i>		
<i>Article 11(3)</i>	<i>Article 11a(2)</i>	
(b) the DGS has appropriate systems and procedures in place for selecting and implementing alternative measures and monitoring affiliated risks;	2. Member States shall ensure that DGSs have monitoring systems and decision-making procedures in place that are appropriate for selecting and implementing preventive measures and monitoring affiliated risks.	No amendments to the existing requirement.
<i>B. Consultation requirements and supervision by the designated authority</i>		
<i>DGSD, Article 11(3), second subparagraph and Article 4(7)</i>	<i>DGSD, Article 11a(1)(b) and (3)</i>	
<p><i>Article 11(3)</i></p> <p>3. ....</p> <p>The DGS shall consult the resolution authority and the competent authority on the measures and the conditions imposed on the credit institution.</p> <p><i>Article 4(7)</i></p>	<p><i>Article 11a(1)(a) and (b)</i></p> <p>(a) the request of a credit institution for the financing of such preventive measures is accompanied by a note containing measures as referred to in Article 11b;</p> <p>(b) the credit institution has consulted the competent authority on the measures envisaged in the note referred to in Article 11b (<i>reference is made to measures that the credit institution commits to undertake to ensure or restore compliance with its prudential requirements and actions to mitigate the risk of deterioration of the financial soundness and strengthen the credit institution's capital and liquidity position</i>).</p> <p><i>Article 4(7)</i></p>	<p>While the requirement for consultation with the competent authority remains, the proposed amendments aim to converge practices, streamline the process and shift the burden related to consulting on the adequacy of the measures that the credit institution commits to undertake to ensure or restore compliance with prudential requirements / actions to mitigate the risk of deterioration from the DGS to the credit institution requesting support. The competent authority (CA) is best positioned to express opinion on what needs to be done to ensure compliance with prudential requirements.</p> <p>Under the existing DGSD the designated authorities (DA) supervise DGSs on an</p>

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<p>7. The designated authorities shall supervise DGSs referred to in Article 1 on an ongoing basis as to their compliance with this Directive.</p>	<p>7. The designated authorities shall supervise DGSs referred to in Article 1 on an ongoing basis as to their compliance with this Directive. <i>Article 11a(3)</i> 3. Member States shall ensure that DGSs may implement preventive measures only where the designated authority has confirmed that all the conditions laid down in paragraph 1 have been met. The designated authority shall notify the competent authority and the resolution authority.</p>	<p>ongoing basis for their compliance with the DGSD. While the decision to provide or not preventive support is taken solely by the DGS, under the proposed Article 11a(3), the DA would check and confirm that the conditions for the provision of such support are met as part of its supervisory function. Instead of the existing requirement to consult the resolution authority (RA) on the measures and conditions imposed, which was unclear and was not implemented in a consistent way, the DA is now required to notify the CA and the RA about the preventive measure, so that those authorities could take into account such measures and the accompanying commitments undertaken by the credit institution into account where relevant in view of their functions under BRRD.</p>
<p><i>C. Safeguards ensuring that DGS financial support would prevent failure and payout, thus avoiding ‘double payment’, including requirements preventing the outflows of funds</i></p>		
<p><i>Article 11(3)</i></p>	<p><i>Articles 11a(1)(c) and (f), 11b and 11c</i></p>	
<p>(d) the use of alternative measures by the DGS is linked to conditions imposed on the credit institution that is being supported, involving at least more stringent risk monitoring and greater verification rights for the DGS;</p>	<p>(c) the use of preventive measures by the DGS is linked to conditions imposed on the supported credit institution, involving at least more stringent risk monitoring of the credit institution and greater verification rights for the DGS;  <i>Article 11b</i> <i>Note accompanying preventive measures</i></p>	<p>The new Article 11a(1) (c) replicates the exiting Article 11(3)(d) as regards the conditions imposed on the credit institution, the risk monitoring by the DGS and its verification rights. To ensure convergent application and further strengthen and operationalise this provision, the new Article 11b requires the credit institution to present a note outlining the measures that it commits to undertake to ensure or restore compliance</p>

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	<p>1. Member States shall ensure that credit institutions which request a DGS to finance preventive measures in accordance with Article 11(3) present to the competent authority for consultation a note with measures that those credit institutions commit to undertake to ensure or restore compliance with the supervisory requirements applicable to the credit institution concerned and that are laid down in Directive 2013/36/EU and Regulation (EU) No 575/2013.</p> <p>2. The note referred to in paragraph 1 shall set out actions to mitigate the risk of deterioration of the financial soundness and strengthen the credit institution's capital and liquidity position.</p> <p>3. Member States shall ensure that in the event of a capital support measure, the note referred to in paragraph 1 identifies all capital raising measures that can be implemented, including safeguards preventing outflows of funds, a forward-looking capital adequacy assessment, and a subsequent determination of the capital shortfall that the DGS has to cover.</p> <p>4. Member States shall ensure that in the event of a liquidity support measure, the note referred to in paragraph 1 provides for a clearly specified repayment schedule by the credit institution of any funds received as part of the preventive measures.</p> <p><i>Article 11c</i> <i>Remediation plan</i></p>	<p>with the prudential requirements, and actions to mitigate the risk of deterioration of the financial soundness and strengthen the credit institution's capital and liquidity position. The note should also specify the repayment schedule of any liquidity support received from the DGS and in case of capital support, outline all capital raising measures that can be implemented.</p> <p>To ensure compliance with the commitments outlined in the note, the new Article 11c imposes a requirement on the DGS to inform the CA where the credit institution fails to fulfil them and empowers the CA to request a remediation plan. The failure of the credit institution to provide a credible and feasible remediation plan constitutes a barrier for provision of any further preventive support by the DGS, along with supervisory or other measures that the CA might implement under Directive 2013/36/EU (CRD) or under BRRD.</p>
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	<p>1. Member States shall ensure that where the credit institution fails to fulfil the commitments outlined in the note referred to in Article 11b(1), or fails to repay the amount contributed under the preventive measures at maturity, the DGS informs the competent authority thereof without delay.</p> <p>2. In the situation referred to in paragraph 1, Member States shall ensure that the competent authority requests the credit institution to submit a remediation plan describing the steps the credit institution will take to ensure or restore compliance with supervisory requirements, to ensure its long term viability and to repay the due amount contributed by the DGS to the preventive measure, as well as the associated timeframe.</p> <p>3. Where the competent authority is not satisfied that the remediation plan is credible or feasible, the DGS shall not grant any further preventive measures to that credit institution.</p> <p><i>Article 11a(1)(f)</i> (f) the credit institution complies with its obligations under this Directive and has fully reimbursed any previous preventive measure.</p>	<p>Article 11a(1)(f) ensures that the DGS shall not use its funds to provide continuous financial support to a bank where there are no prospects for its recovery or in breach of the LCT. This condition should not prevent the preventive measures to be structured in a way that a number of instruments (capital support, guarantees, etc.) are used in a consecutive manner as part of the same measures and within the limits of the LCT performed when the support was granted.</p>
<p><i>D. Safeguards related to the timing of preventive measures</i></p>		

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<i>Article 11(3)(a)</i>	<i>Article 11(3)(a)</i>	
(a) the resolution authority has not taken any resolution action under Article 32 of Directive 2014/59/EU;	(a) none of the circumstances referred to in Article 32(4) of Directive 2014/59/EU are present (i.e. according to the assessment of the CA or the RA as the case may be in the relevant MS, by argument of Article 32(2) BRRD)	To ensure the preventive nature of the financial support provided by the DGS, the preventive measures under DGSD could only be implemented before the relevant authority (CA or RA as the case may be) makes the assessment that the credit institution is failing or likely to fail (FOLF). Once the FOLF assessment is made, the procedure under Article 32 BRRD would be launched. However, alternative private sector measures, including IPS measures with funds that are not used to meet DGSD requirements, would still be possible and, according to Article 32(1)(b) BRRD, would be taken into account by the RA.
<i>E. Safeguards ensuring that DGS funds are used to ensure access to covered deposits by preventing failure and payout</i>		
<i>Article 11(3)(e)</i>	<i>Article 11a(1)(d) and Article 11e(3)</i>	
<i>Article 11(3)(e)</i> (e) the use of alternative measures by the DGS is linked to commitments by the credit institution being supported with a view to securing access to covered deposits;	<i>Article 11a(1)(d)</i> (d) the use of the preventive measures by the DGS is conditional upon the credit institution's commitments to secure access to covered deposits;  <i>Article 11e(3)</i> 3. Member States shall ensure that the amount used to finance the resolution of credit institutions, as referred to in Article 11(2), for the preventive measures referred to in Article 11(3), or for the alternative measures referred to	Regardless of the type of the measure for which DGS funds are used, the ultimate goal of the DGS remains the protection of covered deposits – through reimbursement within a short period (in a payout scenario) or by ensuring continued access of depositors to their money (in the case of preventive measures, alternative measures or in resolution). To ensure that DGS funds are not used for purposes other than protection of covered deposits, the existing Article 11(3)(e) requires that the provision of preventive financial support by the DGS

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	in Article 11(5), does not exceed the amount of covered deposits at the credit institution.	is linked to ‘commitments by the credit institution being supported with a view to securing access to covered deposits’. As an additional safeguard in this respect, Article 11e(3) of the Commission’s proposal limits the maximum amount a DGS could contribute for a measure outside payout, including for preventive support, to the total amount of covered deposits in the supported credit institution.
<i>F. Safeguard related to the cost of the measure*<sup>1</sup></i>		
<i>Article 11(3)(c)</i>	<i>Article 11(3)(b) and Article 11(e)</i>	
<i>Article 11(3)(c)</i> (c) the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS;	<i>Article 11a(3)(b)</i> (b) the DGS has confirmed that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e (LCT);  <i>Article 11(e)</i> <i>Least cost test</i> .....	In line with the EG statement from June 2022, the proposed amendments provide for a harmonized least cost test (LCT) for the use of DGS funds for measures other than payout. Given that the primary use of DGS funds is to repay depositors (Article 11(1) of the existing DGSD and the Commission proposal), the net cost for the DGS in a payout scenario is used as a counterfactual for the net cost of all other uses of DGS funds, including for the net cost of preventive measures.
<i>G. Safeguards ensuring that DGSs are replenished following the use of their available financial means for preventive measures</i>		
<i>Article 11(3) and (5)</i>	<i>Article 11a(1)(e) and 11(4)</i>	
Article 11(3)(f) (f) the ability of the affiliated credit institutions to pay the extraordinary contributions in	<i>Article 11a(1)(e)</i>	The current text is preserved, and a clarification is made that the scenarios under

<sup>1</sup> The LCT was subject to a dedicated discussion in the CWP of 18 September, while this overview only refers to it as one of the important safeguards for the use of DGS funds for preventive measures

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<p>accordance with paragraph 5 of this Article is confirmed in the assessment of the competent authority.</p> <p><i>Article 11(5)</i></p> <p>5. If available financial means are used in accordance with paragraph 3 of this Article, the affiliated credit institutions shall immediately provide the DGS with the means used for alternative measures, where necessary in the form of extraordinary contributions, where:</p> <p>(a) the need to reimburse depositors arises and the available financial means of the DGS amount to less than two-thirds of the target level;</p> <p>(b) the available financial means fall below 25 % of the target level.</p>	<p>(e) the affiliated credit institutions are able to pay the extraordinary contributions in accordance with Article 11(4);</p> <p><i>Article 11(4)</i></p> <p>4. Where available financial means are used for preventive measures as referred to in Article 11a, the affiliated credit institutions shall immediately provide the DGS with the means used for such measures, where necessary in the form of extraordinary contributions, where any of the following applies:</p> <p>(a) the need to repay depositors arises and the available financial means of the DGS amount to less than two-thirds of the target level;</p> <p>(b) the available financial means of the DGS fall below 25 % of the target level.</p>	<p>points (a) and (b) of Article 11(4) are alternative.</p>
<p>Alignment with the requirements under the prudential and State-Aid framework</p>		
<b>III. Alternative measures</b>		
<i>A. Safeguards related to the cost of the use of DGS funds for alternative measures<sup>2</sup></i>		
<p><i>Article 11(6)</i></p>	<p><i>Article 11(5) and Article 11e</i></p>	
<p><i>Article 11(6)</i></p> <p>6. Where a credit institution is wound up in accordance with Article 32b of Directive</p>	<p><i>Article 11(5)</i></p> <p>5. Where a credit institution is wound up in accordance with Article 32b of Directive</p>	

<sup>2</sup> The LCT was subject to a dedicated discussion in the CWP of 18 September, while this overview only refers to it as one of the important safeguards for the use of DGS funds for preventive measures

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<p>2014/59/EU in order to exit the market or terminate its banking activity, Member States may allow DGSs to use the available financial means for alternative measures to preserve the access of depositors to their deposits, including the transfer of assets and liabilities and a deposit book transfer, provided that the DGS confirms that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e of this Directive and that all the conditions laid down in Article 11d of this Directive are met.</p>	<p>2014/59/EU in order to exit the market or terminate its banking activity, Member States may allow DGSs to use the available financial means for alternative measures to preserve the access of depositors to their deposits, including the transfer of assets and liabilities and a deposit book transfer, provided that the DGS confirms that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e of this Directive and that all the conditions laid down in Article 11d of this Directive are met.</p> <p><i>Article 11e</i> <i>Least cost test</i> .....</p>	
<p><i>B. Safeguards ensuring that DGS funds are used to ensure access to covered deposits</i></p>		
<p>-</p>	<p><i>Article 11e(3)</i> <i>Article 11e(3)</i> 3. Member States shall ensure that the amount used to finance the resolution of credit institutions, as referred to in Article 11(2), for the preventive measures referred to in Article 11(3), or for the alternative measures referred to in Article 11(5), does not exceed the amount of covered deposits at the credit institution.</p>	<p>See above (same for use of DGS funds for preventive measures, alternative measures and in resolution)</p>
<p><i>C. Requirements ensuring the transparency of marketing process</i></p>		
	<p>Article 11d</p>	<p>Ensure the transparency of the marketing process should an institution be transferred to a buyer as part of an alternative measure in insolvency.</p>

	<p><i>Article 11d</i> <i>Transparency of marketing process in alternative measures</i></p> <p>1. Where Member States allow the use of DGS funds for the alternative measures referred to in Article 11(5), they shall ensure that when DGSS finance such measures the credit institutions market, or make arrangements for the marketing of, the assets, rights and liabilities those credit institutions intend to transfer. Without prejudice to the Union State aid framework, such marketing shall comply with all of the following:</p> <ul style="list-style-type: none"><li>(a) the marketing is open and transparent and does not misrepresent the assets, rights and liabilities that are to be transferred;</li><li>(b) the marketing does not favour, nor discriminate between, potential purchasers and does not confer any advantages on a potential purchaser;</li><li>(c) the marketing is free from any conflict of interest;</li><li>(d) the marketing takes account of the need to implement a rapid solution taking into account the deadline laid down in Article 3(2), second subparagraph, for the determination referred to in Article 2(1), point (8)(a);</li><li>(e) the marketing aims at maximising, as much as possible, the sale price for the assets, rights and liabilities concerned.</li></ul>	
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