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From: Presidency

To: Working Party on Financial Services and the Banking Union (CMDI)
Financial Services Attachés

Subject: Agenda item 6: Presidency non-paper on selected DGSD technical issues

1. Introduction

The Presidency intends to address several provisions of the CMDI proposal through written procedures. This non-paper covers a selection of provisions amending the DGSD. The provisions are divided into two sections.

With respect to Section 2. 'Selected topics with a proposal', the Presidency has reviewed the comments and drafting suggestions already provided by Member States and the Commission under the previous Presidency, in particular the '*Commission's services non-paper on Article 8b DGSD : coverage of client funds deposits*' (WK9014/2023), the '*Commission's services note on targeted explanation of selected changes related to Article 10 DGSD : the financing of DGS*' (WK9012/2023) and '*Presidency note DGSD selected issues*' (WK 14054/2023). Where appropriate, drafting proposals are presented as a possible way forward.

In Section 3. 'Selected topics based on the Commission's proposal', the Presidency listed those articles included in the Commission's proposal having received very limited comments so far, if any. The Presidency has incorporated these in the written procedure for comments to ensure all Member States' views are taken into account.

If, during the written procedure, it becomes evident that a specific issue merits more in-depth discussions, the Presidency will arrange for it to be discussed in more detail at an upcoming Council Working Party.

2. Selected topics with a proposal

In the subsections below, the Presidency listed the remarks of the Member States that suggested modifications to the Commission's text. The Presidency proposes to accommodate some of these remarks and, where appropriate, proposes drafting suggestions. The proposed changes are marked against the Commission's proposal.

2.1. Article 1(1) on the subject matter, scope and objective of the DGSD

In its proposal, the Commission suggested to refer explicitly in Article 1(1) to the coverage and repayment of deposits, and the use of DGS funds for measures aiming to ensure the access of depositors to their deposits.

The Spanish Presidency, in its October CWP, included the following caveat, which garnered broad support:

*"This Directive lays down rules and procedures relating to the establishment and the functioning of deposit guarantee schemes (DGSs), the coverage and repayment of deposits, and, **where***

appropriate, the safeguards for the use of DGS funds for measures other than repayment of depositors that aim to ensure the access of depositors to their deposits.”

There was overall support for these amendments. While one Member State would prefer to remove the condition of “*to ensure the access of depositors to their deposits*”, it remains unclear what alternative purposes might be intended. One Member State did not want to comment before safeguards were agreed upon. Another Member State suggested to refer to the repayment of ‘deposits’ instead of ‘depositors’. In addition, the Presidency recognises that the wording “*where appropriate*” could be interpreted in different ways.

Taking stock of the suggestions reflected in the Spanish Presidency’s Progress Report, this Presidency would like to suggest the following adjustments below to Article 1(1).

Drafting suggestion

In Article 1, paragraph 1 would be replaced by the following:

*This Directive lays down rules and procedures relating to the establishment and the functioning of deposit guarantee schemes (DGSs), the coverage and repayment of deposits, and, **where applicable appropriate, the safeguards for the use of DGS funds for measures other than repayment of deposits depositors** that aim to ensure the access of depositors to their deposits.*

2.2. Recital 2 and Article 4 on DGS membership and compliance with contribution obligations

The Commission’s proposal in Article 4 intends to allow DGSs to apply pecuniary sanctions for late payment of contributions and improve coordination and timely communication between relevant authorities to take enforcement actions against a credit institution that fails to comply with its DGS obligations. Finally, it is proposed that, to support further convergence of DGSs’ practices and assist DGSs in testing their resilience, the EBA should issue guidelines on stress testing of DGS systems.

Article 4 was already discussed at length by the Spanish Presidency in its *Presidency note DGSD selected issues* of 30 October 2023. The proposals presented in that note, and thereafter in the Spanish Presidency’s Progress Report, are supported by most Member States.

Member States, however, still raised the following concerns:

1. **Mandatory application of statutory interest rates**: One Member State suggests that allowing the DGS the option to impose statutory interest rates should be maintained. The rationale, however, behind this suggestion is unclear, especially considering the Commission’s intention to reduce the DGS’s regulatory and administrative burden by removing certain national options and discretions. In this spirit, and considering the broad support for this provision, the Presidency suggests not to include optionality in this regard.
2. **Assessment of DGS membership**: Regarding paragraph 5, a Member State asked which criteria should be used when designated authority assess “*whether the institution still fulfils the conditions for a continued membership of the DGS*”. The Presidency, however, understands that the Commission does not intend to regulate all obligations of credit institutions towards the DGS, nor how a DGS assesses compliance with such obligations. The Presidency therefore suggests not specifying such criteria.
3. **Legal basis to revoke DGS membership**: One Member State also feared that the proposed amendments would result in the removal of the legal basis under which the DGS can exclude one of its members. The Presidency believes that the amendments to paragraphs 4, 4a, 5 and 6 do not intend to provide DGSs with a self-standing membership exclusion power. Instead, membership exclusion in paragraph 6 is structured as the automatic consequence of a credit institution losing

its authorisation under Article 18 CRD. As such, this proposal assumes that transposition of the CRD provides competent authorities with the required sanctioning grounds under national law. It also assumes that once informed about DGSD non-compliance, the national supervisor can consider such non-compliance as part of its supervisory duties and assign certain consequences thereto (including a license revocation). Considering the above and the broad support for the Commission's proposal, the Presidency suggests adhering in this regard to the Commission's proposal, as amended in the Spanish Presidency's Progress Report.

4. 'statutory interest rates' instead of 'pecuniary sanctions': With respect to Recital 2, the Spanish Presidency replaced the reference to 'pecuniary sanctions' with a reference to 'statutory interest rates' in response to concerns that (i) in most Member States pecuniary sanctions can only be imposed by competent authorities and not DGSs or designated authorities, and (ii) additional administrative penalties and other administrative measures would be adopted. One Member State would like to also include a reference to pecuniary sanctions since its DGS can impose conditional fines. The Presidency, however, believes that removing the reference to pecuniary sanctions is warranted since not all DGSs are administrative authorities competent to impose 'sanctions'. The Presidency suggests adhering to the Spanish text proposal in Recital 2, with a minor change regarding who notifies the competent authority in case of DGS obligation infringements. This adjustment intends to align Recital 2 with the changes proposed in paragraphs 4 and 4a of Article 4.

Drafting suggestion

Recital 2 would be amended as follows:

*The failure to comply with the obligations to pay contributions to DGSs or to provide information to depositors and DGSs could undermine the objective of depositor protection. DGSs, or where relevant, designated authority can ~~apply pecuniary sanctions~~ **charge statutory interest rate on the amount of contributions due** for late payment of contributions. It is important to improve coordination between DGSs, designated and competent authorities to take enforcement actions against a credit institution that does not comply with its obligations. Although the application of supervisory and enforcement measures by the competent authorities against credit institutions is regulated under national laws and Directive 2013/36/EU of the European Parliament and of the Council, it is necessary to ensure that **DGSs, or where relevant,** designated authorities inform the competent authorities in time about any infringement of obligations of credit institutions under deposit protection rules.*

Article 4 paragraph 4 would be replaced by the following:

*Members States shall ensure that where a credit institution does not comply with its obligations as a member of a DGS, that DGS, **or where relevant, the designated authority** shall immediately notify the competent authority of that credit institution thereof. Member States shall ensure that the competent authority, in cooperation with that DGS, **or where relevant, the designated authority,** uses the supervisory powers laid down in Directive 2013/36/EU, and promptly takes all measures to ensure that the credit institution concerned complies with its obligations, including where necessary by imposing administrative penalties and other administrative measures in accordance with the national laws adopted in addition to the ~~implementation of~~ provisions of Title VII, Chapter 1, Section IV, of Directive 2013/36/EU.*

In Article 4, the following paragraph 4a would be inserted:

*Members States shall ensure that where a credit institution fails to pay the contributions referred to in Article 10 and Article 11(4) within the timeframe specified by the DGS, that DGS **or where relevant, the designated authority** shall, for the period of the delay charge statutory interest rate on the amount due.*

Article 4, paragraph 5 would be replaced by the following:

Member States shall ensure that the DGS, or when appropriate the designated authority, informs the competent authority, designated authority where the measures referred to in paragraphs 4 and 4a fail to restore compliance by the credit institution. Member States shall ensure that the DGS or when appropriate, the designated authority assesses whether the institution still fulfils the conditions for a continued membership of the DGS and inform the competent authority of the outcome of that assessment.

2.3. Article 5(1) on eligibility of deposits

a) Article 5(1), introductory wording

For the sake of completeness, the Presidency notes that the Spanish Presidency found broad support to delete point (i) of the amending DGSD text regarding the amendments to the introductory wording of Article 5(1).

Drafting suggestion

Article 1(4)(a)(i) of of the Directive amending the DGSD regarding the introductory wording of Article 5 paragraph 1 would be deleted:

~~***‘the introductory wording is replaced by the following:***~~

~~***‘1. The following shall be excluded from any repayment by a DGS:’***~~

b) Article 5(1), point (c) on the exclusion of deposits related to criminal convictions

The Commission’s proposal for Article 5(1), point (c) deletes the reference to Article 1(2) of Directive 2005/60/EC, which provides a definition of money laundering.

One Member State suggested specifying which deposits to be excluded. The Presidency, however, understands that the Commission intentionally omitted such specification, aiming to avoid limiting the scope of targeted deposits given the various ways in which deposits can be involved in criminal convictions.

In light thereof, the Belgian Presidency suggests maintaining the Commission’s wording.

c) Article 5(1), point (d) on deposits made by financial institutions

For the sake of completeness, the Presidency notes that the Spanish Presidency found broad support to amend Article 5 paragraph 1, point (d) as follows. This amendment is not included in the Commission’s proposal.

Drafting suggestion

Article 5(1), point (d) would be amended as follows (marked against the current text of the DGSD):

(d) deposits made by financial institutions as defined in point (26) of Article 4(1) of Regulation (EU) No 575/2013 on their own behalf and for their own account;

d) Article 5(1), point (f) on unidentified deposit holders

The Spanish Presidency proposed to make the following changes to Article 5(1) point (f): “*deposits the holder of which has never been identified pursuant to Article 16 of Regulation (EU) ... [please insert short reference – proposal for Anti-Money Laundering Regulation - COM/2021/420 final], where those deposits have become unavailable, except where a holder requests payout and proves that the lack of*

identification was not caused by his or her action. **In this case, the identity of the depositor should be verified before the payout;**”

One Member State questioned the usefulness of this provision, since DGSs are already under the obligation to verify the identity of depositors in case of payout. Another Member State, however, questioned the feasibility of such a verification. For the Presidency, concerns about the usefulness and feasibility, while legitimate, do not exclude adding the proposed wording. Considering the explicit support of several Member States, the Presidency suggests maintaining the proposed changes.

One Member State requested it be clarified to which part of the previous sentence “*in this case*” refers to. The Presidency suggests doing so as indicated below.

Drafting suggestion

Article 5(1), point (f) would be amended as follows:

*deposits the holder of which has never been identified pursuant to Article 16 of Regulation (EU) [please insert short reference – proposal for Anti-Money Laundering Regulation - COM/2021/420 final], where those deposits have become unavailable, except where a holder requests payout and proves that the lack of identification was not caused by his or her action. **In case such a request is made, the identity of the depositor should be verified before the payout;***

2.4. Article 6(2) on temporary high balances

a) Article 6(2), introductory wording

In the spirit of harmonisation, the Commission has proposed amending Article 6(2) whereby temporary high balances (‘THB’) would be covered for six months and for an amount of at least EUR 500,000.

This proposal has received broad support, although some Member States find the period too long, while others consider it too short. The six-month timeframe appears to strike a compromise, maintaining respect for the temporary nature envisaged. Concerning the chosen amount, opinions diverge, with some Member States finding it excessive and others finding it insufficient. Again, the proposed amount seems to strike a compromise.

One Member State requested clarification on the meaning of “*from the moment when such deposits become legally transferable*”. The Presidency believes that, given the differences in this regard across Member States, this question is best left to national discretion.

Considering the above, the Presidency suggests adhering to the Spanish Presidency’s text as proposed in its Progress Report.

Drafting suggestion

In Article 6, paragraph 2, the introductory wording would be replaced by the following:

*2. In addition to paragraph 1, Member States shall ensure that the following deposits are protected as a minimum to an amount of EUR 500 000 for 6 months after that amount has been credited or from the moment when such deposits become legally transferable **for each of the following cases;***

b) Article 6(2), point (a)

With respect to Article 6(2), point (a), the Spanish Presidency suggested in its Progress Report to amend the wording as follows:

*(a) deposits by **natural persons** ~~resulting from real estate transactions~~ **relating to a sale or purchase of private residential properties and deposits intended for such transactions, provided that those transactions are concluded in the short term by a natural person, and provided that that natural person can provide documents proving such transaction;***

The Presidency understands that the Commission aimed to protect only those THBs that are intended for a purchase of real estate to be concluded within a short period of time. The Spanish Presidency's proposal does not capture this short-term aspect anymore.

In this regard, the main concern of Member States seemed to be the lack of clarity on what 'short term' means for an upcoming real estate purchase. Real estate procedures, however, differ across Member States. Therefore 'short term' might be interpreted differently per jurisdiction. The proposal should aim to harmonise this. The Presidency therefore suggests clarifying in this provision that 'short term' is to be interpreted according to national law.

In addition, a Member State asked whether the Commission's proposal only means to cover deposits that have been newly credited within the six-month period. The Presidency understands that the Commission's proposal is indeed intended to be restricted to such newly credited deposits. The Presidency, however, believes that the Commission's text proposal is sufficiently clear in this regard. The same Member State also asked whether the THB protection only covers purchases of a main residence, or also other private residential purchases. The Presidency believes that the Commission's proposal is not intended to restrict THB coverage only to the main residence.

Given the above, the Presidency suggests reverting to the Commission's wording, but with the changes indicated below.

Drafting suggestion

Article 6(2) point (a) would be replaced by the following:

*deposits resulting from real estate transactions relating to private residential properties and deposits intended for such transactions, provided that those transactions are concluded in the short term **as defined by national law** by a natural person, and provided that that natural person can provide documents proving such transaction;*

2.5. Article 7(5) on the possibility to net the repayable amount with liabilities

In its proposal the Commission proposed to delete Article 7, paragraph 5. The Spanish Presidency, however, saw broad support for reintroducing this option.

The Belgian Presidency agrees but believes the provision should clarify from which deposit base a liability that is due and payable can be deducted. It also seems necessary to specify that only the instalment that has fallen due should be deducted, rather than the entire liability amount.

Drafting suggestion

Article 7, paragraph 5 would be reinserted with the following amendments, marked against the current text of the DGSD:

*Member States may decide that **the part of** the liabilities of the depositor to the credit institution ~~are taken into account when calculating the repayable amount where they have~~ **that has** 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) **is deducted from the total amount of that depositor's eligible deposits** to the extent the set-off is possible under the statutory and contractual provisions governing the contract between the credit institution and the depositor.

Depositors shall be informed prior to the conclusion of the contract by the credit institution **whether such** ~~where their~~ liabilities towards the credit institution are taken into account when calculating the repayable amount.

2.6. Article 7(7) on the accrual of (negative) interests on deposits to be repaid

Article 7, paragraph 7 concerns the accrual of interests on deposits to be repaid by the DGS. The Presidency notes that the Commission's proposal, as adjusted in the Spanish Presidency's Progress Report has widespread support.

One Member State would like to clarify that national law should have the option to prohibit negative interest rates on deposits. The Presidency, however, believes that the wording as suggested by the Spanish Presidency, does not exclude this. Several Member States also explicitly endorse the possibility of applying negative interest rates.

Considering the support for the Spanish Presidency's proposal, this Presidency suggests adhering to these amendments.

Drafting suggestion

Article 7, paragraph 7 would be replaced by the following:

*Member States shall ensure that the DGS reimburses **the principal amount at par and the interest on deposits which has accrued until, but has not been credited or debited at,** the date on which a relevant administrative authority makes a determination as referred to in Article 2(1), point (8)(a), or a judicial authority makes a ruling as referred to in Article 2(1), point (8)(b). The coverage level laid down in Article 6(1) or, in the circumstances referred to in Article 6(2), the coverage level laid down in that paragraph, shall not be exceeded.*

2.7. Article 8(3) on longer repayment periods for certain deposits

In Article 8, paragraph 3, the Commission proposes a twenty-day repayment period following receipt of complete information by DGSs in case of THBs¹, beneficiary accounts² and client funds deposits³.

One Member State was concerned that twenty days would not be enough and sought to clarify what complete information entails and who should provide the information in case of beneficiary accounts. This last concern was shared by another Member State.

The Presidency notes that most Member States support the clarifications proposed by the Spanish Presidency and suggests adhering to their proposal. Regarding completeness of information and when the twenty-day period exactly starts running, the Presidency suggests leaving those elements to national discretion.

¹ Article 6(2) DGSD.

² Article 7(3) DGSD.

³ Article 8b DGSD.

Drafting suggestion

Article 8, paragraph 3 would be replaced by the following:

By way of derogation from paragraph 1, Member States shall allow DGSs to apply a longer repayment period for the deposits referred to in Article 6(2), Article 7(3) and Article 8b, which shall not exceed 20 working days from the date on which those DGSs received the complete information or documentation they requested ~~from a depositor~~, to examine the claims and verify that the conditions for repayment are met.

2.8. Article 8(5), point (c) on dormant accounts

For the sake of completeness, the Presidency notes that the Spanish Presidency found broad support for the clarification in Article 8(5)(c) indicated below regarding what constitutes a dormant account.

Drafting suggestion

Article 8, paragraph 5, point (c) would be replaced by the following:

by way of derogation from paragraph 9, there has been no transaction relating to the deposit within the last 24 months (the account is dormant), except where a depositor also has deposits on another account with the same credit institution that is not dormant

2.9. Article 8(9) on administrative costs threshold for dormant accounts

The Commission's proposal for Article 8, paragraph 9 would allow for DGSs to set a threshold for administrative costs that would be incurred in the repayment of deposits of dormant accounts. Under this proposal, DGSs would not be obliged to take active steps in the repayment of these accounts below such a threshold.

A few Member States oppose the possibility of the DGSs not to take active steps below this threshold. Another Member State would prefer a standard rule stating that deposits below such a threshold are either always or never compensated. Another Member State would like to expand to non-dormant accounts the option of setting such a threshold.

The Presidency notes that small deposits are not by default excluded. Instead, the proposal gives DGSs the option not to take active steps below a certain threshold. DGSs are also not required to set such a threshold. It is merely an option left at their discretion.

Considering these elements, and the fact that most Member States support this provision, the Presidency suggests adhering to the Commission's text.

2.10. Article 8a on credit transfers for DGS payments above EUR 10,000

The Spanish Presidency suggested a technical amendment to the Commission's proposal, which introduced the requirement that depositors with balances over EUR 10,000 be paid through credit transfers. This amendment suggests referring to Directive 2015/2366 for the definition of a credit transfer. Some Member States have requested flexibility regarding the payment methods for reimbursing depositors, as alternative methods are more common in certain jurisdictions.

The Presidency, however, believes that it is important to maintain consistency with the AML regulations. In this regard, the Presidency notes that the proposal applies the same threshold as the AML package.

The Presidency also believes that other payment instruments, such as cheques, do not provide the level of traceability required for AML purposes. As a result, the Presidency is in favour of maintaining the adjustments to Article 8a suggested by the Spanish Presidency.

Drafting suggestion

Article 8a would be amended as follows:

Member States shall ensure that when amounts to be reimbursed exceed EUR 10 000, DGSs shall reimburse depositors via credit transfers as defined in Article 4 point 24 2(20) of Directive 2015/2366 2014/92/EU of the European Parliament and of the Council.

2.11. Article 8c on suspending repayments in case of AML or terrorist financing concerns

The newly introduced Article 8c stipulates more stringent rules regarding the DGSs' AML responsibility. In this respect, many Member States noted the lack of information at DGS level and called for more cooperation between the different authorities. The Commission also indicated in the CWPs that this article would need to be amended based on the agreement reached on the AML package.

The amendments proposed below relate to the exchange of information between authorities and the information to be shared by the financial supervisor with the DGS. The information is specified via reference to Article 48(4) AMLD. The Commission's initial proposal referred to the authority that needed to share AML information with the DGS as the 'designated authority'. In the DGSD, however these terms generally refer to the DGS itself. To avoid any confusion, the Presidency suggests using 'financial supervisor' in this provision in line with the terms used in Article 48(4) AMLD.

In Article 8c paragraph 2, the Presidency suggests clarifying that only ML/TF offences are covered, instead of also including predicate offences.

In addition, the Presidency suggests clarifying in Article 8c, paragraph 3 that the full amount to be reimbursed to a depositor should be suspended, as requested by a Member State. This paragraph now also reflects that information on suspensions may come from credit institutions and financial supervisors. Article 48(4) AMLD provides for an obligation for financial supervisors to provide this information to DGSs in case of increased risk of deposits becoming unavailable or upon request.

Finally, the Presidency suggests technical adjustments to Article 8c, paragraph 4 to reduce repetitions between the first and last paragraph of Article 4.

Drafting suggestion

Article 8c would be amended as follows:

Suspension of repayments in case of concerns about money laundering or terrorist

1. *Member States shall ensure that the ~~designated authority~~ **financial supervisor** informs the DGS within 24 hours from the moment the ~~designated authority~~ **financial supervisor** received the information referred to in Article 48(4) of [please insert reference – proposal for a Anti-Money Laundering Directive repealing Directive (EU) 2015/849 - COM(2021) 423 final] ~~about the outcome of the customer due diligence measures referred to in Article 15(4) of Regulation (EU) [please insert short reference – proposal for Anti-Money Laundering Regulation – COM/2021/420 final].~~ Member States shall ensure that the information exchanged between the ~~designated authority~~ **financial supervisor** and the DGS is limited to the information that is strictly necessary for the exercise of the DGS' tasks and responsibilities under this Directive and that such exchange of information respects the requirements laid down in Directive 96/9/EC of the European Parliament and of the Council***

2. Member States shall ensure that DGSs suspend the ~~repayment referred to in Article 8(1)~~ **reimbursement of the repayable amount** where a depositor or any person entitled to sums held in his or her account has been charged with ~~a~~ **an offence arising out of, or in relation to, money laundering or terrorist financing offence**, pending the judgment of the court. Member States should ensure that the information is communicated by the court to the DGS.
3. Member States shall ensure that DGSs suspend the **reimbursement of the repayable amount** ~~repayment~~ referred to in Article 8(1) for the same duration as laid down in Article 20 of [please insert short reference – proposal for a Anti-Money Laundering Directive repealing Directive (EU) 2015/849 - COM(2021) 423 final] where they **are informed by the credit institution or financial supervisor** notified by the ~~Financial Intelligence Unit referred to in Article 32 of Directive (EU) [please insert reference – proposal for a Anti-Money Laundering Directive repealing Directive (EU) 2015/849 – COM(2021) 423 final]~~ that **the Financial Intelligence Unit referred to in Article 32 of Directive (EU) [please insert reference – proposal for a Anti-Money Laundering Directive repealing Directive (EU) 2015/849 - COM(2021) 423 final] Unit has decided to suspend any transaction, account or business relationship related to the concerned depositor.** ~~a transaction or to withhold consent to proceed with such a transaction, or to suspend a bank or a payment account in accordance with Article 20(1) or (2) of Directive (EU) [please insert reference – proposal for a Anti-Money Laundering Directive repealing Directive (EU) 2015/849 – COM(2021) 423 final].~~
4. Member States shall ensure that DGSs are not held liable for any suspension ~~measures~~ **undertaken** in accordance with **paragraph 3** ~~instructions of the Financial Intelligence Unit.~~ ~~DGSs shall use any information received from the Financial Intelligence Unit for the purposes of this Directive only.~~

2.12. Article 9(2) on DGS claims

For the sake of completeness, the Presidency notes that the Spanish Presidency found broad support for the amendments to Article 9 paragraph 2 indicated below.

Drafting suggestion

In Article 9, paragraph 2 would be replaced by the following:

*Without prejudice to rights they may have under national law, DGSs that make 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 the DGSs payments made to depositors. DGSs that make a contribution in the context of the resolution tools referred to in Article 37(3), point (a) or (b), of Directive 2014/59/EU, or in the context of measures taken in accordance with Article 11(5) of this Directive, shall have a claim against the residual credit institution for ~~any loss incurred as a result of any~~ **such** ~~contributions made to resolution pursuant to Article 109 of Directive 2014/59/EU or to the transfer made pursuant to Article 11(5) of this Directive in connection to losses which depositors otherwise would have borne. That claim shall rank at the same level as deposits under national law governing normal insolvency proceedings.~~*

2.13. Article 9(3) on the maximum period to claim unpaid deposits

In line with the EBA's opinion on DGS payouts⁴, the Commission proposed to harmonise the period during which depositors can claim the repayment of their deposits.

⁴ Opinion of the European Banking Authority on deposit guarantee scheme payouts, 30 October 2019.

Most Member States support such harmonisation, while two Member States prefer to retain national discretion. With respect to the proposed claim period, one Member State calls for a longer period as it is concerned that this might not be adequate for cases, where e.g., ownership of deposits depends on a court decision. Two Member States call for a shorter claim period instead. In line with most Member States, the Presidency suggests retaining the five-year period as proposed by the Commission, as it strikes the balance between providing sufficient opportunity for DGSs to claim their deposits and avoiding operational issues for DGSs of a case open in perpetuity. The five-year period is also sufficiently long to reflect the need of DGSs to still be able to subrogate in the rights of depositors as part of insolvency proceedings.

The adjustments to the Commission's proposal suggested by the Spanish Presidency in its Progress Report are meant to meet the concerns of two Member States requesting to clarify the starting point of the five-year period.

This Presidency suggests retaining the Spanish Presidency's proposal.

Drafting suggestion

In Article 9, paragraph 3 would be replaced by the following:

*Member States shall ensure that depositors whose deposits have not been repaid or acknowledged by the DGS by deadlines laid down in Article 8(1) and (3) can claim the repayment of their deposits within a period of 5 years **from the date that a relevant administrative authority has made a determination as referred to in Article 2(1), point (8)(a), or a judicial authority has made a ruling as referred to in Article 2(1), point (8)(b).***

2.14. Article 10(2), subparagraph 3 on the speed of DGS replenishments

The Commission's proposal for Article 10 paragraph 2, third subparagraph states that, after the DGS has reached its target level for the first time, when the AFM are reduced to less than two thirds of the target level following a disbursement of funds, DGSs shall set the regular contribution at a level allowing for the target level to be reached within six years.

Some Member States want to include a replenishment requirement when the AFMs fall less than one third of the target level. Two Member States want this provision to also cater for situations where the reduction below the target level is caused by a growth of deposits. Another Member State has proposed replacing the reference to Article 8, paragraph 1 with a reference to Article 8.

Regarding reductions in DGS funds of one third or less compared to the target level, the Presidency notes that DGSs are technically never at their exact target levels. Imposing replenishment requirements for small fund shortages risks to unduly increase the administrative burden for DGSs. In this regard, Article 10(2) subparagraph 2 also states that "*where the financing capacity falls short of the target level, payment of contributions shall resume at least until the target level is reached again*". In light of this paragraph, the EBA considered clarifying replenishment requirements in case of AFM reductions above the two thirds threshold. It concluded that, while ambiguity would persist in such situations, it would offer little benefit to strive for greater precision in instances where the decrease in DGS funds is not significant.

In line with the EBA advice, the Commission's proposal does not include a specific timeframe for replenishments in case of such AFM reductions. In addition, the Commission's proposal includes in Article 10, paragraph 12(b) an EBA mandate to develop regulatory technical standards detailing the process to reach the target level after the DGS has used AFMs in accordance with Article 11 (which

regulates the use of DGS funds). These RTSs could include a timeline for DGS replenishment in case of shortages above the two-thirds threshold.

Finally, the Presidency underlines that the DGSD provides full flexibility in raising contributions at or above target levels, and the periodicity thereof.

Considering these elements, and the support of most Member States for the Commission's proposal, the Presidency suggests retaining the wording mostly as is, and only adjusting the reference to Article 8.

Drafting suggestion

The third subparagraph of Article 10(2) would be amended as follows:

Where, after the target level referred to in the first subparagraph has been reached for the first time and the available financial means, following a disbursement of DGS's funds in accordance with Article 8(1), and Article 11(2), (3), and (5), have been reduced to less than two-thirds of the target level, DGSs shall set the regular contribution at a level allowing for the target level to be reached within 6 years.

2.15. Article 10(7a) on placing DGS means on segregated accounts at national treasuries or central banks

In Article 10, paragraph 7a, the Commission introduced the explicit option for DGSs to place their AFMs with their national central bank or treasury, provided that these funds are kept on a segregated account.

Following remarks of certain Member States, the Commission informed the Presidency that the proposed text does not adequately reflect their intentions nor the EBA's advice on the matter. The EBA only indicated that placing funds on segregated accounts at a national treasury or central bank is allowed, despite the requirement to ensure sufficient diversification⁵. The Commission's intention was never to oblige Member States to provide DGSs with this option.

The Presidency agrees with the Commission's observations and suggests amending Article 10(7a) as indicated below.

Drafting suggestion

In Article 10, the following paragraph 7a would be amended as follows:

7a. Where DGSs are allowed to ~~Member states shall ensure that DGS may place all or part of their available financial means with their national central bank or national treasury., provided that those Member States shall ensure that those available financial means are kept on a segregated account and that they are readily available for use by the DGS in accordance with Articles 11 and 12.~~

2.16. Articles 14(1) on coverage of 'freedom of services depositors'

The Presidency understands with respect to Article 14, paragraph 1 that the Commission aims to ensure DGS coverage for (i) depositors at branches in other Member States of a particular member credit institution, as well as (ii) depositors at member credit institutions exercising the freedom to provide services, regardless of which Member State those depositors are situated in. In other words, all depositors of member credit institutions must be covered by the home DGS of that credit institution.

⁵ Opinion of the European Banking Authority on deposit guarantee scheme funding and uses of deposit guarantee scheme funds, 23 January 2020, p. 8.

While agreeing in principle, two Member States would like “*depositors located in Member States*” to be clarified. In line with these comments, the Presidency suggests the amendments below.

Drafting suggestion

Article 14 paragraph 1 would be amended as follows:

Member States shall ensure that DGSs cover the depositors at branches set up by their member credit institutions in other Member States and depositors at their member credit institutions exercising the freedom to provide services as referred to in Title V, Chapter 3, of Directive 2013/36/EU where these depositors are located in a different Member States ~~where their member credit institutions exercise the freedom to provide services as referred to in Title V, Chapter 3, of Directive 2013/36/EU.~~

2.17. Article 14, paragraphs 2, 2a and 2b DSGD on reimbursements to ‘freedom of services depositors’

a) Article 14(2) on direct reimbursements by home DGS

The Commission proposes to add a new subparagraph to Article 14 paragraph 2 enabling the home DGS to repay depositors at branches located in other Member States directly when certain conditions apply.

One Member State objects to this option, fearing it would undermine the role of national DGSs in the Banking Union. Another Member State considers that the prior consent of the host DGS is necessary for the home DGS to proceed with the direct repayment to the depositor.

With respect to these concerns, the Presidency underlines that the home DGS remains liable for the payout of covered deposits, under the current Article 14(2), subparagraph 2. The Commission’s proposal only allows for the repayment to occur directly by the home DGS, where certain conditions are met.

More specifically regarding the suggestion to require the host’s consent, the Presidency believes this concern is covered by the inclusion of Article 14, paragraph 2b. This new paragraph would require host and home DGSs to conclude an agreement setting out the payout modalities, including on compensation of costs, contact points, timelines and payment methods, before a direct cross-border repayment by the home DGS can occur.

b) Article 14(2a) on host DGS to act as point of contact

The proposed Article 14(2a) introduces the possibility for the host DGS to act as point of contact for depositors at credit institutions that exercise the freedom to provide services. One Member State was concerned about the complexity hereof since DGS procedures are governed by national laws. The Presidency, however, underlines that this remains an option, and requires an agreement between host and home DGSs. In addition, Article 14(2b) also applies to this provision.

c) Proposed way forward

In light of the above, the Presidency suggests retaining the Commission’s proposals for Article 14 paragraph 2, subparagraph 3, and Article 14 paragraph 2a. For the sake of completeness, the Presidency did not note any particular objections to Article 14, paragraph 2b.

2.18. Article 15 on DGS membership of branches of third country credit institutions

Under the amended Article 15, Member States shall require branches of third country credit institutions to join a DGS within their territory before such branches are allowed to take eligible deposits.

In this regard, one Member State fears the unpredictable effects on DGS recovery rates and lack of control over supervisory practices in third countries. In this regard, the Presidency refers to the EBA opinion indicating that the vast majority of branches of third country credit institutions are already members of an EU DGS.⁶ By requiring all such branches to join an EU DGS before taking eligible deposits, the Commission's proposal seeks to offer equivalent protection to all depositors.

Considering the broad support among Member States, the Presidency suggests adhering to the Commission's proposed wording.

2.19. Article 15a on DGS coverage of deposits at branches in third countries

With Article 15a, the Commission specifies that Member States should only extend DGS coverage to depositors at branches that have been set up in third countries by their member credit institutions if those DGSs have raised corresponding contributions.

One Member State opposes this provision, asserting that branches in third countries are not legally distinct from member credit institutions. Consequently, these institutions must already raise contributions in relation to the deposits placed at these branches. The Commission has acknowledged that their initial wording was ambiguous and clarified that it intended the DGS coverage itself to be subject to Member State approval, and not the raising of contributions. Raising appropriate contributions remains compulsory and should be merely a pre-condition to DGS coverage of third country deposits. The Presidency believes the amendments to Article 15a suggested below should meet these concerns.

Another Member State requested that the EBA develops guidelines specifying the circumstances in which designated authorities should approve the coverage of depositors at third country branches. The Presidency, however, believes most Member States prefer national discretion in this matter, without relying on EBA guidelines. A third Member State fears the risk of double coverage, and the resulting increased costs for banks with third country branches. This Member State prefers maintaining the current equivalence-based approach. While acknowledging this risk, the Presidency must also consider that this provision (i) aims to shield DGSs from third country economic and financial risk, and (ii) enjoys broad support. As a result, the Presidency suggests adhering to the Commission's proposal, with the added clarifications.

Drafting suggestion

Article 15a would be amended as follows:

Member States shall ensure that DGSs do not cover depositors at branches that have been set up in third countries by their member credit institutions, ~~except where, subject to the approval of the designated authority, those DGSs raise corresponding contributions from the credit institutions concerned.~~

In derogation of the first subparagraph, Member States may provide that DGSs cover depositors at branches that have been set up in third countries by their member credit

⁶ Opinion of the European Banking Authority on the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes, 8 August 2019, p.93.

institutions under the condition that those DGSs raise corresponding contributions from the credit institutions concerned and subject to the approval of the designated authority.

2.20. Article 16(2) on depositors' acknowledgment of receipt of information

Article 16 aims to harmonise and enhance information banks are required to provide their depositors with. The Commission's proposal enjoys broad support, except for the acknowledgement of receipt of the information sheet by depositors in paragraph 2. Due to concerns shared by most Member States about the administrative burden, usefulness, and practicality of such acknowledgment, the Spanish Presidency proposed to delete this requirement altogether.

The Presidency, however, sees merit in maintaining a one-time acknowledgement when depositors enter into their contract, and deleting subsequent annual acknowledgements. Such an acknowledgment should not constitute a heavy administrative burden. In addition, the exclusion of this initial acknowledgment of receipt might have been an unintended consequence of deleting the burden of a repeating annual acknowledgment.

Drafting suggestion

Article 16 paragraph 2 would be amended as follows:

*Member States shall ensure that credit institutions provide the information sheet referred to in paragraph 1 before they enter into a contract on deposit-taking, and subsequently annually. ~~Depositors shall acknowledge the receipt of that information sheet.~~ **Credit institutions shall require that depositors acknowledge the receipt of that information sheet when they enter into a contract.***

2.21. Technical amendment to Article 16a on the exchange of information between credit institutions and DGSs

For the sake of completeness, the Presidency notes that the Spanish Presidency found broad support for the technical amendment to Article 16a, paragraph 4, point (b) indicated below.

Drafting suggestion

The point (b) would be inserted in Article 16a, paragraph 4 as follows:

(b) whether any of the measures referred to in Article 11(2), (3) and (5) have been applied and the amount of funds used in accordance with Article 8 ~~(4)~~ and Article 11(2), (3) and (5), and, where applicable and once available, the amount of funds recovered, the resulting cost for the DGS and the duration of the recovery process.

3. Selected topics based on the Commission's proposal

In view of the absence or very limited nature of the comments received so far, Member States are invited to submit in writing their views and/or drafting suggestions, if any, on the following provisions of the Commission's proposal.

- Article 1 DGSD, paragraph 2, point (d)
- Article 2 DGSD
- Article 4 DGSD, paragraphs 6 and 13, and the deletion of paragraph 8
- Article 5 DGSD, paragraph 1, deletion of point (e)
- Article 6 DGSD, paragraph 2a
- Article 7 DGSD, deletion of paragraph 5
- Article 7a DGSD

- Article 8 DGSD, deletion of paragraph 5, point (d) and paragraph 8
- Article 10 DGSD, paragraphs 3, 4, 7 and 10 to 13
- Article 14 DGSD, paragraphs 3, 3a and 9
- Article 16 DGSD, except for paragraph 2 (discussed in section 2.)
- Article 16a DGSD, except for paragraph 4 (discussed in section 2.)
- Deletion of Annex I
- Article 2 of the Directive amending the DGSD 'Transitional Provisions'
- Article 3 of the Directive amending the DGSD 'Transposition'
- Article 4 of the Directive amending the DGSD 'Entry into force'