

EBA/Op/2020/19

11 December 2020

Opinion of the European Banking Authority on the interplay between the EU Anti-Money Laundering Directive and the EU Deposit Guarantee Schemes Directive

Introduction and legal basis

1. In October 2019 the EBA published the Opinion of the European Banking Authority on deposit guarantee scheme payouts, which outlines several proposals regarding deposit guarantee scheme (DGS) payouts for which there are money laundering (ML) and/or terrorism financing (TF) concerns, for the Commission to take into account when revising the Deposit Guarantee Schemes Directive (DGSD) and Anti-Money Laundering Directive (AMLD)¹. The Opinion also stated that a number of topics will require further analysis, indicating that the EBA would be well placed to contribute to this endeavour, and that such work would benefit from expertise in both deposit insurance and anti-money laundering (AML), including through the involvement of national DGS practitioners.
2. The separate EBA Opinion on the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes, which the EBA published in August 2019, also touched on the interplay between the AMLD and the DGSD². More specifically, in that Opinion, the EBA made proposals on the cooperation between deposit guarantee scheme designated authorities (DGSDAs)/DGSs and AML/counter-terrorist financing (CFT) authorities and deposits the holder of which was never identified.

¹ https://eba.europa.eu/sites/default/documents/files/document_library//EBA%20Opinion%20on%20DGS%20Payouts.pdf

² <https://eba.europa.eu/sites/default/documents/files/documents/10180/2622242/324e89ec-3523-4c5b-bd4f-e415367212bb/EBA%20Opinion%20on%20the%20eligibility%20of%20deposits%20coverage%20level%20and%20cooperati%20between%20DGSs.pdf>

3. Separately, and independently of the aforementioned EBA Opinions, on 28 February 2020 the EU Commission issued a call for advice to the EBA to ‘defin[e] the scope of application and the enacting terms of a Regulation’ to be adopted in the field of preventing AML/CFT. The Commission also asked the EBA to assess whether other EU law should be adjusted to ensure greater synergies between other relevant legislation under EBA competence and the AML/CFT framework. On 10 September 2020, the EBA published a comprehensive response to that call for advice, noting that, where sufficiently comprehensive advice could not be provided within the given time frame, the EBA would carry out additional work to advise the Commission³.
4. This Opinion is the outcome of the additional analysis announced in the aforementioned publications. From the areas addressed in the EBA Opinions on the implementation of the DGSD, the EBA selected two main topics. The first topic covers the roles and responsibilities of different authorities in mitigating ML/TF risks, which includes cooperation between the authorities and information gathering and exchange. More specifically, the EBA looked at the collection of information on AML/CFT for DGS payouts, which entails information collection by credit institutions (CIs) as part of their day-to-day operations in going concern, and the preparation of a single customer view (SCV) file by a CI for the gone concern, which contains the individual depositor information necessary to prepare for repayment by a DGS, including the aggregate amount of eligible deposits for every depositor.
5. The second topic follows up on the proposal made in the 2019 Opinion on deposit guarantee scheme payouts, namely to explore further whether 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 financial intelligence unit (FIU) to instruct a DGS, the insolvency practitioner or the CI under bankruptcy proceedings to suspend a payout in such cases – and mindful of relevant confidentiality provisions in the AMLD).
6. This Opinion therefore focuses on the provision of information to depositors linked to a DGS payout, based on real-life experiences of DGS interventions where there were AML/CFT concerns. Although the EBA is aware of only one real-life resolution case where there were AML/CFT concerns, the issues and proposals identified in this Opinion may also be relevant to other intervention scenarios. In addition, there may be other challenges that are deliberately not included in the scope of this Opinion, for example in relation to restoring the viability of the failed CI.
7. The Opinion outlines the methodology used for the assessment, which is then followed by 11 proposals, of which seven are addressed to the Commission, as they require changes to the current EU legal framework, and four are addressed to the national competent authorities (NCAs) for the intervening period until those changes are introduced and can be implemented under the current legal framework of the DGSD and AMLD within 12 months of the publication of this Opinion. Under Regulation (EU) No 1093/2010, the definitions of competent authorities include in point (2)(iv) of Article 4 of that regulation ‘with regard to deposit guarantee schemes, bodies

³ <https://eba.europa.eu/eba-calls-eu-commission-establish-single-rulebook-fighting-money-laundering-and-terrorist-financing>

which administer deposit-guarantee schemes pursuant to Directive 94/19/EC, or where the operation of the deposit-guarantee scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive and relevant administrative authorities as referred to in that Directive'. The Opinion also includes summaries of the results of the survey conducted among the authorities, which served as the basis for the proposals.

8. The EBA's competence to deliver an opinion is based on Articles 9a(1)(c) and 16a(1) of Regulation (EU) No 1093/2010, as the topic of the correct application of the DGSD, including with regard to issues relating to DGS payouts in connection with the AMLD, is in the EBA's area of competence, as per Article 1(2) and (5)(h), Article 8(1)(h), (i) and (l), Article 9a(1) and Article 26 of that Regulation, and on Article 29(1)(a) of Regulation (EU) No 1093/2010, as part of the EBA's objective to play 'an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union'.
9. In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors⁴, the Board of Supervisors has adopted this opinion, which is addressed to the Commission as well as to competent authorities referred to in point (2)(iv) of Article 4 of Regulation (EU) No 1093/2010.
10. Under Article 29(1)(a), the EBA has to, where appropriate, conduct open public consultations and cost-benefit analysis (CBA) and request advice from the Banking Stakeholder Group (BSG). Consultation/CBA must be proportionate to the scope, nature and impact of the opinion. In this instance, the EBA has not conducted an open public consultation and CBA and has not requested advice from the BSG because of the need to provide the proposals to the Commission urgently, for the purpose of the review of the AMLD and DGSD. In relation to the proposals addressed to the national competent authorities, they would mainly impact the authorities that have already contributed to the development of this Opinion, and so there was no need to seek their views through an open public consultation.

Methodological approach

11. To conduct further analysis on the topics identified in the EBA Opinions on the implementation of the DGSD, 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 Opinion — the EBA used a survey as the main source of information.
12. The survey was sent to the DGSDAs and anti-money laundering competent authorities (AMLCAs). The EBA received 63 responses from 30 EU/EEA Member States, including from DGSDAs, DGSs, AMLCAs, FIUs and entities that have several of these roles in parallel.
13. The period covered by the survey was the period after the transposition of the DGSD in 2014. However, in case DGSs had experienced any real-life payout events before the implementation of

⁴ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

the DGSD that would be relevant for the survey, they had the opportunity to include such experiences in their answers to the survey questions.

14. The survey was complemented by individual interviews conducted by EBA staff with DGSDAs/DGSs and in some cases AML/CFT authorities of Member States that had experience with real-life DGS payouts where there was an indication that the CI failed to systematically tackle ML/TF risks. The interviews covered the real-life cases. There have been a number of such real-life cases, and each one has its own specificities related to how the ML issue came to light; whether such concerns have led to a DGS payout, resolution or controlled release of frozen funds; the customer base; and, importantly, the different roles and responsibilities of national authorities in different Member States and, in consequence, the cooperation between the authorities. Despite the idiosyncrasies, the interviews revealed a number of common themes and issues:
 - quality of the data in the SCV files in DGS payouts;
 - additional checks performed by the relevant authorities in real-life cases;
 - real-life experiences with deferred, suspended and excluded depositors; and
 - informing depositors about their situation.
15. For each topic, the EBA analysed two different scenarios as part of the gone concern situation:
 - scenario 1: DGS payouts where there are no indications that the CI systematically failed to tackle ML/TF risks; and
 - scenario 2: DGS payouts where there are indications that the CI systematically failed to tackle ML/TF risks.
16. Scenario 1 covers all the 'normal' DGS payouts where there is, ahead of and at the start of the intervention, no indication that the CI systematically failed to tackle ML/TF risks. This scenario might also include cases where the DGS or other authorities observe at a later stage that the CI systematically failed to tackle ML/TF risks, but this information was not known at the start of the intervention.
17. Scenario 2 includes cases where there is an indication that the CI systematically failed to tackle ML/TF risks. The DGS is aware of this indication ahead of or at the start of the DGS intervention, for example via the prudential supervisor, AML/CFT authority or third-country authority. In this scenario the indication may be publicly known, for example when public statements are made by (third-country) authorities or reputable media. This scenario includes cases where the CI failed because of its systematic failure to tackle ML/TF risks, as well as cases where the reason for failure was (initially) not directly linked to the CI's systematic failure to tackle ML/TF risks.
18. The EBA analysed and compared both scenarios to investigate the role of the information provided by CIs for a DGS intervention and the difference in communication with depositors. In scenario 2, where there is an indication that the CI systematically failed to tackle ML/TF risks, there may be serious doubts about the quality of the information included in the SCV file, which may have a significant impact on the adequate and timely reimbursement of depositors⁵. In addition, in that scenario, there may be challenges with regard to informing depositors about exclusions,

⁵ See also Sections 3.2.1 and 3.2.2 of the 2019 EBA Opinion on DGS payouts.

suspensions and deferrals of DGS payouts because of the interaction with the AMLD's 'no-tipping-off' principle⁶.

19. In this Opinion, the term 'AML/CFT authority' is used to encompass authorities designated as competent under the AMLD, FIUs and law enforcement agencies (LEAs). Such a generic term is used because it is not possible to consistently specify for all EU Member States whether a particular task or requirement applies to the authority under the AMLD, the FIU or the LEA in the case of a DGS payout, as responsibilities and practices differ among Member States. The above term therefore mirrors the flexibility that EU law grants for EU Member States to decide which of the AML/CFT authorities should be responsible for a certain task.

Proposals addressed to the Commission

20. This section of the Opinion outlines the proposals addressed to the Commission on how to change the current EU legal framework in order to address the issues identified by the EBA. The proposals fall under three broad areas: (1) cooperation and collecting and sharing of information, (2) improving the process of DGS payouts and (3) depositor information.

21. The proposals outlined in this section are intended to provide further clarity on those areas in the AMLD and the DGSD, while respecting the DGSD's fundamental requirement for DGSs to proceed with reimbursing depositors within 7 working days unless deposits are excluded from DGS eligibility or payout is deferred/suspended according to the DGSD, or the DGS is instructed to defer the payout, as the EBA previously recommended in the EBA Opinion on deposit guarantee scheme payouts.

Cooperation and collecting and sharing of information

22. The survey asked Member States a number of questions related to the information collected by the CIs, the AML/CFT authorities and the DGSs, in going concern and in preparation for a DGS payout. The survey also asked questions related to how the information held by different stakeholders is exchanged between them.

23. In relation to the information collected by the CIs, the survey asked authorities to indicate if there is a national standard or if there are any national legal requirements imposed in their jurisdiction to ensure that CIs regularly take into consideration deposits or depositors in relation to which the CI identifies the following five situations when fulfilling their customer due diligence (CDD) and/or reporting obligations:

- a. detection of atypical transactions/activities;
- b. filed suspicious transaction reports (STRs);
- c. charges for offences arising out of or in relation to ML;
- d. convictions for ML; and

⁶ See also Section 3.2.3 of the 2019 EBA Opinion on DGS payouts.

- e. restrictive measures imposed by national governments or international bodies.

24. Article 13.1 of the AMLD provides that CDD files must be kept up to date, and the EBA's analysis suggests that the frequency of updates varies between CIs based on the respective risks they have identified. As per the CDD requirement, when there is suspicion of ML, as required in Article 11(e) of the AMLD and the ongoing monitoring requirement of Article 13.1(d), CIs must carry out event-driven reviews for the aforementioned cases and raise the risk profile of the customer accordingly. Answers to the survey show that:

- CIs tend to collect information on customers as soon as an atypical activity arises, which provides further useful information in addition to the information on depositors who have been charged with ML offences and those convicted of such offences;
- only in very few countries are charges and convictions accessible via public databases;
- only in two Member States is information-sharing on customers possible between CIs through shared databases; and
- currently a number of FIUs provide feedback to CIs about further dissemination to law enforcement and judicial authorities for criminal investigations, but information on charges and convictions resulting from STRs is very seldom reported back to the CIs.

25. The survey then asked questions about the information available to the DGSs, more specifically if DGSs have taken any steps in (preparation for) payouts or other DGS interventions and what the role of AML/CFT authorities is regarding:

- depositors or any person entitled to, or interested in, sums held in an account who have been charged with an offence arising out of, or in relation to, ML as defined in Article 1(3) of the AMLD, for which payouts may be suspended (Article 8(8) of the DGSD);
- deposits arising out of transactions in connection with which there has been a criminal conviction for ML as defined in Article 1(3) of the AMLD, which should be excluded from DGS payouts (Article 5(1)(c) of the DGSD);
- deposits subject to restrictive measures imposed by national governments or international bodies because of which DGS payouts could be deferred (Article 8(5)(b) of the DGSD); and
- the exclusion from DGS payouts of deposits the holder of which has never been identified pursuant to the AMLD.

26. DGSs from only eight MSs reported such cases and thus there is limited real-life experience to draw on. Most DGSs have markings in place in their SCV files for such cases, which triggers a 'manual handling' process whereby the DGS carries out further analysis, requests information from the depositor, contacts relevant AML/CFT authorities or waits for a verdict on the case. Although almost all DGSs rely on the information that is provided by the CI, some DGSs perform extra checks. For example, one DGS that experienced a real-life case reported that it received a list of persons convicted of ML and cross-checked this list with the SCV file data that it uploaded in its electronic payout system.

27. In most of the real-life cases under scenario 1, the AML/CFT authorities did not play a role. The responses suggest that there are a number of reasons for this:

- limited occurrence of the four ML/TF-related cases;

- DGSs rely primarily on the information provided by the CI in such cases, and there were no indications that this information was not correct under scenario 1 because there was no indication that the CI systematically failed to tackle ML/TF risks;
- it is not always legally permitted for AML/CFT supervisors and FIUs to exchange information with DGSs, as DGSs are neither AML-related authorities nor supervisors.

28. In relation to the real-life cases under scenario 2⁷, authorities from seven MSs indicated that, in general, they have not experienced issues in relation to cooperation between relevant authorities. However, when dealing with AML-related cases, they also stressed the importance of good cooperation between the DGS and/or the liquidator and the FIU. They also all stressed the challenges involved in assessing suspicious cases quickly.

29. Based on the results of the survey, the EBA is of the view that the current EU legal framework does not provide full clarity on what relevant pieces of information should be exchanged between CIs, AML/CFT authorities and DGSDAs, and how that exchange should happen. In addition, in some instances, the said lack of clarity in the legal framework means that it may not be possible for the authorities to share such information between them. Thus, in the following sections of this Opinion, the EBA provides proposals to clarify how such cooperation and exchange should happen between:

- the AML/CFT authorities and the DGSDAs (proposals 1 and 2);
- the CIs and the AML/CFT authorities (proposal 3); and
- the CIs and the DGSDAs (proposal 8 in the section outlining the proposals addressed to the NCAs).

Cooperation and exchange of data between the AML/CFT authorities and the DGSDAs

30. The EBA observed that, if DGSs and AML/CFT authorities were already in a position to exchange information on a business-as-usual basis (i.e. the going concern), DGSs would be in a better position to prepare themselves for a potential DGS payout while at the same time taking into account potential ML/TF risks. This would facilitate making the funds available within 7 working days, as required by the DGSD.

Proposal 1: Establish a legal basis for cooperation and information exchange in the going concern between DGSs and AML/CFT authorities

31. In order to address the above issue, the EU legal framework should be amended such that it strengthens the legal basis for cooperation and information exchange between DGSDAs and AML/CFT authorities (i.e. AML/CFT supervisors, LEAs and FIUs) for business as usual (going concern) and in particular in the period leading up to a potential DGS payout (or other DGS interventions). For example:

⁷ Seven DGSs from seven Member States reported that they have experienced one or more real-life payout cases under scenario 2 since the implementation of the DGSD, or cases that took place before that implementation but are relevant for the purpose of this Opinion. In all these cases, there was a high number of non-resident depositors, often from third countries. In all cases, there was a high share of legal persons among the depositors – including financial institutions – including cases where there were almost no general retail depositors. Finally, the challenges for the DGSs were compounded by the fact that the legal persons were often from third countries, and/or raised other concerns, such as, for example, being associated with investment scams or being linked to the gambling industry.

- AML supervisors should be able to exchange with the DGSDA relevant general information on the extent to which CIs perform(ed) their AML/CFT obligations in the going concern, including if any deficiencies exist regarding the CIs' CDD. This information will help DGSDAs assess the quality of the data received on the three ML/TF-related cases already included in the DGSD, deposits the holder of which has never been identified, and deposits/depositors with a high-risk profile.
- FIUs should be able to exchange with DGSs typologies on ML/TF risks, including geographical risks and cross-border risks, and assessments of the quantity and quality of suspicious transaction reports received from institutions, in an aggregated manner, such as per sector, and in respect of individual institutions.
- When there is an indication that the CI systematically failed to tackle ML/TF risks, DGSs should be informed of that situation ahead of the potential intervention by the DGS.
- Conversely, upon request by the AML/CFT authorities, the DGSs should be able to exchange with the AML/CFT authorities the outcomes of the SCV file tests, from the perspective of information relevant for the AML/CFT authorities.
- Finally, once the EBA has set up the central AML database that it is mandated to develop through two Technical Standards, the DGSDAs could send requests for information on material weaknesses and measures taken by supervisors.

32. The EU legal framework should allow such cooperation and information exchange at any point in time, and there seems to be no need to prescribe when it should happen. The DGSDAs and the AML/CFT authorities are best placed to decide when there are grounds to contact the other authorities. While the purpose of this proposal is to enable cooperation and exchange of information on a legally sound basis, the authorities need to be mindful of relevant confidentiality requirements as set out in EU and national legal frameworks. Enhanced cooperation could help to address issues related to data quality and ML/TF-related deferrals and exclusions. Therefore, the EBA proposes the following:

Proposal 2: Establish a legal basis for cooperation and information exchange between DGSs and AML/CFT authorities during DGS payouts

33. DGSDAs/DGSs and AML/CFT authorities (the latter of which comprise AML/CFT supervisors, FIUs and LEAs) should be required to cooperate and exchange information during DGS payouts. This is to ensure that additional checks on duly identified cases of known or suspected proceeds of criminal activity or TF can be performed by those AML/CFT authorities, so that the FIU or other relevant AML/CFT authority (depending on which authority is empowered to instruct the DGS and what information can and should be exchanged) can analyse the information and is eventually in a position to instruct the DGS to defer the payout to certain depositors. The necessary cooperation should be subject to the relevant confidentiality requirements as foreseen in EU and national legal frameworks.

Cooperation and exchange of data between CIs and AML/CFT authorities and the DGSDAs

34. The EBA observed that the existing provisions in the DGSD relate to the following cases:

- depositors or persons charged with an offence;

- deposits arising out of transactions in connection with which there has been a criminal conviction for ML; and
- deposits subject to restrictive measures imposed by national governments or international bodies.

35. The DGSD does not specify how relevant authorities should, in a DGS payout, treat cases for which the CI detected atypical transactions/activities or filed suspicious transaction reports (STRs). Thus, the 2019 Opinion on deposit guarantee scheme payouts proposed that ‘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 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’⁸.

36. The EBA reflected on this topic further and concluded that the identification of atypical transactions (i.e. unusual, complex, unusually large or without an apparent economic or lawful purpose, as per Article 18.2 of Directive (EU) 2015/849⁹) by a CI increases the risk profile of a depositor. However, those atypical transactions do not lead immediately to the filing of an STR to the FIU. In turn, a higher risk profile leads to enhanced due diligence measures by the CI. Furthermore, the filing of an STR also raises the risk profile of a customer. Both atypical transactions and STRs are reflected in the risk profile of the depositor in the CI’s administrative systems.

Proposal 3: Require CIs or the insolvency practitioner to share with the FIU information on depositors with a high-risk profile

37. In light of these observations, the EBA proposes that the EU legal framework should be amended such that, in a DGS payout, the failed CI or the insolvency practitioner should be required to share with the FIU information regarding depositors with a high-risk profile to ensure that the authorities are aware of cases where there are concerns but an STR has not yet been filed.

38. The submission of this information to the FIU is expected to speed up the process of further investigations by the FIU. The FIU could then either instruct the DGS to suspend a payout to depositors with a high-risk profile or instruct the DGS or the agent bank (depending on the payout method) to share details about the recipient of the payout (i.e. to which bank account the DGS reimbursement was paid) so that the competent authorities can track the flow of money.

39. Given that the proposed requirement would apply only in case of a bank failure, it is expected that it will not significantly increase the burden on the CIs or the insolvency practitioners or the FIU.

⁸ https://eba.europa.eu/sites/default/documents/files/document_library//EBA%20Opinion%20on%20DGS%20Payouts.pdf

⁹ In its Report on the future AML/CFT framework in the EU as a response to the Commission’s call for advice on defining the scope of application and the enacting terms of a regulation to be adopted in the field of preventing ML and TF, published on 10 September 2020, the EBA considers that the Commission, in consultation with FIUs, should explore the costs and benefits of requiring financial institutions to identify and report suspicious activity in addition to the existing requirement to identify and report suspicious transactions:
https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2020/931093/EBA%20Report%20on%20the%20future%20of%20AML%20CFT%20framework%20in%20the%20EU.pdf

However, the EBA invites the Commission to conduct a detailed impact assessment before the proposal is implemented to assess if the information would lend itself to useful processing, including whether the number of depositors with high-risk profiles is too high for the CIs, the insolvency practitioners or the FIU to process, and to assess if the FIUs across the Member States would be legally allowed to use such information.

40. The EBA then considered whether or not there could be merit in including the CI's information on the depositor's risk profile in the SCV file that is provided by the CI to the DGS. The EBA concluded that there is no clear merit in introducing such a requirement in the EU legal framework.

Improving the process of DGS payouts

Traceability of funds reimbursed in a DGS payout

41. The survey asked if there are any mechanisms and/or legal provisions in place at a national level that ensure traceability when funds are reimbursed in a DGS payout process. The background to this question is that, when countering ML and TF in the going concern, in accordance with Article 13.4 of the AMLD, the CI must have appropriate measures in place in view of the risks of ML/TF that have been identified. In general, there are no national legal provisions regarding traceability, but it is often partly ensured through the DGS's payout method (especially when electronic transfer is used). Only a few DGSs have explicit procedures in place to ensure traceability, such as allowing for repayment via a credit transfer only to an account held in the depositor's own name, or to a new account at a domestic or EU CI instead of a third-country CI¹⁰.
42. The EBA considered different potential approaches to ensuring traceability, as follows:
- Require DGSs to disallow DGS reimbursement to certain types of bank accounts, account holders or countries where accounts are held (for example non-EEA countries), a strategy that has been employed by a number of DGSs in real-life cases where there were ML/TF concerns. However, if used as a general policy applicable to all cases, depending on the circumstances such an approach could undermine the goal of depositor protection, as there can be many perfectly legitimate reasons why a depositor may request reimbursement to, for example, a third-country bank account or an account in another person's name. For example, if reimbursement can be made only to a bank account in the name of the depositor entitled to the funds, this may slow down or impede DGS reimbursements to members of the same family who wish to be reimbursed on the account of one of the family members, or in case a depositor who is represented by a guardian. On the other hand, such a provision could also be introduced according to a risk-based approach (for example only for covered deposits above a certain covered amount, for certain types of customers or for reimbursements to third countries where there is a high-risk of ML/TF) and/or only in some instances, for example where there are concerns about whether the CI has been performing the necessary CDD checks.

¹⁰ 'Credit transfer' means a national or cross-border payment service for crediting a payee's payment account with a payment transaction or a series of payment transactions from a payer's payment account by the payment service provider that holds the payer's payment account, based on an instruction given by the payer, from Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009.

- Ensure that CIs to which the reimbursement is made (the 'receiving CI') are informed of the risk profile of a depositor, for example by the failed CI or the FIU (see proposal 3), to facilitate the continuation of such markings. However, the sharing of such information between CIs is currently not standard practice in the going concern, and there may be professional secrecy and data protection concerns or other legal constraints (although the information would not highlight whether an STR was or will be submitted, but rather would include only part of the CDD – the risk profile).
- Ensure that the receiving CIs and/or agent banks are given the possibility to request information on the depositor's risk profile from the FIU. Such an option would require transparency that the funds are stemming from a DGS payout case because the CI has to be aware of this information to be able to contact the FIU and inquire about any ML concerns prior to the payout. In this way, the receiving CI can determine the origins of the funds, as it is required to do as an obliged entity under the existing AML/CFT framework. In this approach, it would need to be considered further if and how CIs headquartered in third countries could take advantage of such a solution.
- Finally, a more generic option would be to require that DGSs have in place a repayment process that allows for traceability, such as performing payouts by means of bank transfers and recording where funds have moved to.

Proposal 4: Ensure traceability of funds in DGS payouts

43. The EU legal framework should be amended such that a provision is introduced in the DGSD to ensure traceability of funds reimbursed to depositors in DGS payouts. This means having in place a method to trace where the DGS funds are being transferred to and for the CI receiving the funds to know where they have come from, and for this to be available for each depositor if needed. The EBA analysed multiple options for how such a traceability requirement could be implemented in practice but has not identified one single method that would be best in all cases and all circumstances. The law should therefore be changed such that there is flexibility for Member States to determine how such a traceability requirement will be implemented in practice for a given case. It could be either decided by a relevant authority (including the possibility that it could be decided by a DGS designated authority) or based on relevant national law. Such flexibility should also allow for the introduction of a reasonable threshold below which traceability is not necessary in a given case based on a risk-based approach.

Atypical or suspicious requests for reimbursement during a DGS payout

44. The survey then asked if, in a DGS payout, (1) there are types of transactions that DGSs currently consider as atypical or suspicious for which the DGSs would refuse the payout or would report it to AML or other authorities and (2) the DGSs have experienced any cases where they refused a payout to be performed in a particular way because they considered the transaction to be atypical or suspicious.

45. Of the DGSs that experienced real-life cases under scenario 1 (CI failures where there were no indications of the CI systematically failing to address ML risks), none reported having experience with such cases. However, a number of DGSs reported that they consider requests for

reimbursements to certain countries with a high ML/TF risk¹¹ or to accounts that are not accounts of individuals as 'red flags'. In such instances, the DGS would request the depositor to submit an alternative bank account for receiving the DGS reimbursement, including by opening a bank account at an EU bank.

46. The survey then asked if the DGSs have experienced any scenario 2 cases (CI failures where there were indications of the CI systematically failing to address ML risks) where they have refused a payout to be performed in a particular way because they considered the transaction (to perform the DGS payout) atypical or suspicious, and how they acted. The DGSs reported the following cases where they refused to perform payouts in a particular way:

- because of insufficient proof of the verification of depositors/persons absolutely entitled to the sums held in the account;
- because of the type of bank account at which the depositor wanted to be reimbursed (such as non-bank payment service provider, correspondent bank or account in the name of a different person);
- because of the country of the bank account at which the depositor wanted to be reimbursed (non-resident/non-EU/certain countries with a high ML/TF risk); and
- because clients did not provide the additional information that was required to perform the payout.

47. In the last case, the authority, in its capacity as AML/CFT supervisor, reported that, where they had a suspicion that the client was trying to conceal something, they informed the FIU. Another DGS reported that the AML/CFT supervisor, in cooperation with the DGS, informed the FIU as a consequence of on-site inspections and documents submitted by the depositor for the purpose of the assessment of the eligibility of legal persons.

48. The responses to the survey revealed no experience of examples of the DGSs reporting what they considered atypical or suspicious transactions to AML/CFT authorities. This can be explained by a number of reasons: such cases did not occur, DGSs are not under an obligation to report such transactions under the AMLD, DGSs do not consider that they are responsible for such reporting or DGSs are not allowed to exchange such information.

Proposal 5: Define steps that DGSs should take when encountering ML risk factors

49. The EBA considers that the Commission should explore clarifying in the EU framework what actions the DGS should take in the rare cases where it encounters what it would consider to be an unusual/atypical/suspicious situation during a DGS payout that could be linked to ML risk factors (for example a request from a depositor to be reimbursed to an account in a high-risk country). Such a clarification could, for example, require the DGS to:

¹¹ Such as the EU list of high-risk third countries having strategic deficiencies in their regime on anti-money laundering and counter-terrorist financing and the EU list of non-cooperative jurisdictions for tax purposes.

- Consider the EBA risk factor guidelines for ML/TF¹² and any guidelines on ML/TF risk indicators prepared by national AML/CFT supervisors and FIUs when deciding what constitutes an unusual/atypical/suspicious situation during a DGS payout.
- Promptly inform the FIU (in a similar way to the way in which the AML supervisors promptly inform the FIU when encountering suspicious activities in the course of carrying out their supervisory tasks) if such an unusual/atypical/suspicious case arises, with a view to enabling the FIU to make a decision on whether or not it needs to instruct the DGS to suspend that payout.
- Request further information from the depositor and suspend the payout until the depositor provides the correct information (such as an alternative bank account for the purpose of the reimbursement) or until the suspension of the transaction runs its course and there is no further obstacle to the payout taking place (in case a DGS has informed the FIU in such cases). The DGS should cooperate closely with the FIU to make sure that where the FIU's decision is required it is made promptly and in any case no later than the applicable national deadline for the FIU to reach a decision.

When proposing the necessary clarification, the Commission should consider giving the DGS the power to defer the payout for the time necessary to take these actions. The provision of this information should not imply that the DGS itself is to be considered an obliged entity for the purposes of the AMLD. In other words, the DGS should not be liable where it does not detect an unusual/typical/suspicious transaction.

50. The possibility of detecting or identifying unusual/atypical/suspicious situations depends highly on the payout method, including factors such as the level of automation resulting from the payout method and the involvement of the agent bank. How these provisions would apply to different payout methods would need to be explored further as it would have an impact on the complexity of meeting the payout deadlines.
51. The survey also asked if DGSs had experienced cases of deposits the holder of which has never been identified. None of the DGSs that had experienced real-life cases under scenario 2 reported having any experience with such cases. Therefore, this Opinion does not put forward any more detailed proposals than what is included in the 2019 EBA Opinion on the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes.

Legal basis for suspending or deferring a payout

52. Another challenge that has occurred in real-life cases is the lack of a clear legal basis to defer payouts for deposits/depositors where there is a suspicion of ML/TF. Some authorities explained that they have used Article 8(5)(a) of the DGSD as the legal basis to defer the payout, but they would have preferred to have had a stronger legal basis.

¹² Guidelines under Articles 17 and 18(4) of Directive (EU) 2015/849 on customer due diligence and the factors CIs and financial institutions should consider when assessing the ML/TF risk associated with individual business relationships and occasional transactions ('the risk factor guidelines'), currently being updated.

Proposal 6: Establish a clear legal basis to enable DGSs to defer payouts in case of ML/TF suspicions

53. The EU legal framework should be amended such that there is a clear legal basis for the DGS to defer a payout in case the FIU (or any other AML/CFT authority) instructs the DGS to defer the payout for certain deposits/depositors because of ML/TF suspicions (as the EBA had previously recommended in the EBA Opinion on deposit guarantee scheme payouts) and until further instructions are received from the FIU or any other AML/CFT authority (within the existing applicable deadline on such authorities to make their decision). The DGSD should include a provision that requires the DGS to act upon such an instruction from the FIU (or any other AML/CFT authority). Furthermore, if drafted in a sufficiently broad way, such a legal basis would provide more legal certainty in case the DGS refuses to perform the payout when a depositor wants to receive the reimbursement in a particular way that creates suspicion.
54. When introducing such a provision, it should be taken into account that including in the DGSD the obligation to defer a payout explicitly linked to ML/TF suspicions (following the instructions of an FIU) could conflict with the no-tipping-off principle under the AMLD, in the case that a DGS is confronted with the need to provide the reason for the deferral to a depositor. Therefore, the provision would need to be applicable not only to cases where the DGS is instructed to defer the payout, but also to cases where the way that the depositor requests reimbursement raises ML/TF concerns (such as payouts that are unusual, complex, unusually large or without an apparent economic or lawful purpose, as per Article 18.2 of Directive (EU) 2015/849¹³). This provision may be introduced by adding a new case of payout deferral to the list under Article 8(5) of the DGSD.

Depositor information in DGS payouts

55. The survey asked about the way that DGSs communicate with the public and individual depositors in the context of a reimbursement. More specifically, it asked about the communication channels used, the events where the DGSs engage with the public and/or depositors, the frequency of the communication and how they communicate in cases when depositors are excluded from payout or their payout is suspended or deferred.
56. While methods for communicating with the general public seem to be broadly similar (DGS website, national media), in some MSs such methods are explicitly required under national law, while in others they are a matter of DGS procedure. Some DGSs use additional communication channels (such as social media, official journals) and some publish information on additional events (such as prior to the end of the reimbursement process).

¹³ In its Report on the future AML/CFT framework in the EU as a response to the Commission's call for advice on defining the scope of application and the enacting terms of a regulation to be adopted in the field of preventing ML/TF, published on 10 September 2020, the EBA considers that the Commission, in consultation with FIUs, should explore the costs and benefits of requiring financial institutions to identify and report suspicious activity in addition to the existing requirement to identify and report suspicious transactions:
https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2020/931093/EBA%20Report%20on%20the%20future%20of%20AML%20CFT%20framework%20in%20the%20EU.pdf

Proposal 7: Commission to consider further the need to amend the DGSD to explicitly require DGSs to inform depositors about DGS payouts

57. Based on the results of the survey, the EBA concluded that there are no indications that any one approach to providing the general public with general information about a DGS payout is better than any other. Nevertheless, the EBA has observed that, in general, the DGSD does not include provisions about communication with depositors in the context of a reimbursement.
58. The EBA has not arrived at an agreed view but proposes that the Commission should decide whether to amend the DGSD to require the DGSs to provide general information about a DGS payout to the general public (such as publishing information on the DGS website). Arguments in favour of such an option are to bring the legal requirements in line with current practices and to provide clarity on what depositors can expect in a payout. Furthermore, given the nature and importance of deposit protection, it is sensible to draw on current best practices and enshrine them in law, instead of waiting for an issue to arise before a straightforward and seemingly uncontroversial basic requirement is put in place. Finally, Article 14(2) of the DGSD already provides some provisions on informing depositors, but refers only to a cross-border payout and not to domestic payouts.
59. On the other hand, the EBA acknowledges the argument that no issue has been observed in real-life cases and so there may be no need to explicitly introduce such a requirement in the DGSD as the risk of detriment to depositors is low. Furthermore, it could be argued that introducing a requirement can by itself be the source of issues in real-life cases – examples here might include instances where the DGS would consider that publishing information about a payout on its website would, in some circumstances, be undesirable as it could cause panic.

Proposals addressed to national competent authorities

60. This section of the Opinion outlines proposals addressed to the NCAs. The proposals fall under two broad topics: (1) information provision by CIs to DGSs and (2) depositor information.

Information provision by CIs to DGSs

61. As explained earlier in the section on proposals addressed to the Commission, the survey asked about the information collected by DGSs in the going concern in relation to the following three cases already covered in the DGSD (thereafter referred to as ‘three relevant cases’):
- depositors or any person entitled to, or interested in, sums held in an account have been charged with an offence arising out of, or in relation to, ML as defined in Article 1(3) of the AMLD, for which payout may be suspended (Article 8(8) of the DGSD);
 - deposits arising out of transactions in connection with which there has been a criminal conviction for ML as defined in Article 1(3) of the AMLD, which should be excluded from DGS payout (Article 5(1)(c) of the DGSD); and
 - deposits subject to restrictive measures imposed by national governments or international bodies, because of which DGS payouts could be deferred (Article 8(5)(b) of the DGSD).

62. The majority of DGSs are informed of such cases, mostly via an appropriate field in the SCV file and sometimes by means of a separate file. This information is mostly used by DGSs as an indication that, in a DGS payout scenario, such deposits or depositors require ‘manual handling’ instead of following standard payout procedures. Manual handling means that the DGS performs a further investigation before reimbursing the depositor, often by liaising with the depositor to obtain additional information, and potentially by contacting relevant AML/CFT authorities, or waiting for a verdict on the case.
63. Some DGSs use a dedicated appropriate field in the SCV file for each specific above-mentioned case and other DGSs use one field or marking that indicates a ‘blocking for standard payout procedure’ for all three cases (and potentially other reasons for such blockings).
64. Among the DGSs that do not receive information on the above-mentioned three cases from the CIs, it seems that the CIs often do have the information but do not provide it to the DGSs. For example, in some Member States, CIs do not include in the SCV files the deposits arising out of transactions in connection with which there has been a criminal conviction for ML/TF because they are excluded from DGS payout. A disadvantage of not including the three cases in the SCV file is that DGSs are not aware which depositors/deposits are excluded or may be subject to a payment delay or suspension from the SCV file.
65. This makes it difficult for DGSs to check whether or not a CI rightfully excluded such depositors/deposits or whether they may delay or suspend payments and to provide further information to such depositors in case they reach out to the DGS. In other cases, some DGSs reported that CIs cannot exchange information on one or more of the three cases listed in paragraph 61 with DGSs because national requirements prohibit the sharing of such information, for example because of the application of the General Data Protection Regulation (GDPR).
66. The survey asked to what extent DGSs were able to use and had to verify SCV files and had to complete any gaps and correct any data. The DGSs reported that they were able to partially use the SCV files. Although basic data such as account balances and contact details of depositors were mostly accurate, and the SCV files were generally compliant with the technical requirements, the confidence in the eligibility assessment performed by the CIs and the ML/TF markings included in the SCV files was low. The eligibility assessment includes assessing whether or not a deposit or depositor falls into any of the categories listed in Article 5(1) of the DGSD, such as determining whether or not a depositor is a financial institution or not, and identifying the persons absolutely entitled to the amounts held in the account.
67. In the responses to the survey and during the individual interviews conducted by the EBA, the authorities shared that they had several additional checks in place, based on a risk-based approach. For example, one authority, in its capacity as AML supervisor – the authority is also the DGS – required the failed bank to update the CDD checks when these were not up to date and then performed additional checks for high-risk customers; finally, before paying out, the agent bank performed checks against the sanctions list and to identify the depositors (including ultimate beneficiaries).

68. The challenge with data quality is that inaccuracies in eligibility and ML/TF markings (type II errors, such as, for example, erroneously excluded depositors) and in the identification of persons absolutely entitled to the account (if included in the SCV file according to the DGS's requirements) are inaccuracies that rarely come to the surface when a DGS performs its regular SCV files tests in the going concern because DGSs generally neither have the capacity nor are legally empowered under the national provisions transposing the DGSD to perform in-depth checks of the CI's underlying systems and administrations¹⁴. Therefore, in the going concern, the AML/CFT supervisor is better placed to detect problems in the CI's CDD and know your customer (KYC) processes.

Proposal 8: NCAs are advised to ensure that DGSs receive key information from CIs

69. The EBA proposes that NCAs should ensure that as a minimum the DGSs receive information from CIs on the following three cases included in the DGSD (when cases are known to the CIs):

- depositors or persons charged with an ML offence;
- deposits subject to restrictive measures imposed by national governments or international bodies; and
- other deposits or depositors that should be excluded from DGS protection either by including specific fields/markings in the SCV file or by means of a separate file (depending on the payout processes of the DGS). Member States should decide whether the information on such exclusions should also provide the reason for the exclusion – such as deposits arising out of transactions in connection with which there has been with a criminal conviction for ML.

70. Proposal 8 would help DGSs to deal with the issues that were experienced in real-life cases because of CIs excluding depositors who should not have been excluded. This proposed solution would provide less uncertainty over whether a CI has included all the eligible depositors. Including in the SCV file the information on excluded depositors and those whose payout should be suspended or deferred would also facilitate cooperation between relevant authorities, as there would be one single source of information about depositors.

71. The responses to the survey did not provide a clear indication as to which authority is responsible for engaging with depositors who are not included in the SCV file. It would appear that the most logical source of information in a payout would be the DGS, but in some circumstances it could be another authority or an agent bank¹⁵. Regardless of who is responsible, the CI having all cases in one SCV file would seem to be a logical way to facilitate any cooperation.

Depositor information in DGS payouts

DGSs' engagement with depositors in DGS payouts

72. The results of the survey show that some DGSs use proactive, individual communication with depositors, others use individual channels only when approached by individual depositors and

¹⁴ SCV file testing focuses on reducing type I errors, avoiding the risk of no exclusion of or delay in the repayment of eligible depositors.

¹⁵ Payout via an agent bank can be performed through multiple approaches, such as payout in cash, transfer or opening a new bank account at the agent bank.

some are not allowed to communicate directly with depositors. This seems to depend at least partially on the payout method – where there is an agent bank, the agent bank is in at least some instances the primary source of information for depositors. The limited data collected in this survey do not indicate that one approach is clearly better than the other in relation to individual engagement with depositors, even though logic would suggest that providing personalised messages about an issue as important as a payout would be preferable. The results of the survey also do not suggest whether sending letters, emails or messages via online platforms is preferable from a communication perspective. The DGSD could indicate that, when providing individual information, it could also be accomplished by means of electronic messages.

73. The survey also asked about the approach to communicating about deferrals and suspensions. The results show that there are different approaches across the EU: some DGSs proactively engage with depositors who have been excluded or whose payouts have been suspended or deferred, some engage only upon the request of depositors and some publish general information about such cases on their websites; others do not publish general information on their websites either because it is provided individually or because it is provided only when relevant cases arise.
74. With regard to the engagement with depositors in different circumstances, such as in the case of exclusions and deferrals, including specifically those related to ML/TF charges and convictions, in general most DGSs had not experienced such cases. Among the ones that had, about half provided depositors with some information about the case. The information generally related to the basis for the exclusion/suspension/delay and information about next steps, including possible appeals. However, ML/TF cases provided particular difficulties because of the no-tipping-off provisions. The other half of the respondents highlighted that they did not engage with such depositors, including because such cases would not be included in the SCV files and therefore the DGS had no information to provide to them. From the survey it is not clear which authorities engaged with such depositors and whether a process for dealing with such cases was established.
75. The survey separately asked a similar set of questions in relation to cases where there was an indication that the CI has systematically failed to address the ML/TF risks. Only a few DGSs had experienced such cases. Among those with such experiences, the communication channels used did not differ from the communication channels used by those without such experiences – press releases, engagement with the media and individual messages (letters, telephone calls, emails). However, it would seem that cases under scenario 2 generate more interest from the media and the depositors themselves, as in most cases the ML/TF concerns are in the public domain.
76. No DGS had experience of dealing with depositors convicted of ML/TF, and only one DGS had experienced cases of depositors charged with such offences. Only two DGSs had experience of dealing with depositors excluded from payout – mainly financial institutions – and only two had experience of deferrals.
77. Those that did have experience of such cases faced difficulties in terms of informing depositors about their situation while respecting the no-tipping-off provisions under the AMLD – they could not inform a depositor that the FIU was investigating their case as there is no established mechanism or legal provisions on what to say in such cases. Three respondents who faced such issues reported asking depositors for further information on their situation. Two DGSs reported

that such an approach is particularly necessary when dealing with legal persons, for which in general there is more information to be assessed than in relation to natural persons.

78. Based on the above-mentioned observations stemming from the survey and the interviews with relevant authorities, the EBA has arrived at the following proposals:

Proposal 9: NCAs (for example DGSDAs) should ensure that DGSs publish on their websites general information on exclusions, suspensions and/or deferrals

79. The DGSD requires in Article 16(3) that all relevant information is available on DGS websites, and so it is necessary to provide some information about exclusions/suspensions/deferrals. Thus, all DGSs should include such information on their websites.

Proposal 10: NCAs (for example DGSDAs) should ensure that DGSs clearly inform depositors about the potential exclusion, suspension and/or deferral of their payouts

80. Ahead of the start of the reimbursement procedure, depositors should be informed about the possibility of their exclusion from the payout or of the suspension or deferral of their payout. This can be done by:

- explaining the reasons for potential exclusions and/or suspensions and/or deferrals as part of the general communication addressed to the public following the determination of the unavailability of deposits; or
- contacting relevant depositors individually when they are excluded or their payout is suspended or deferred.

81. From a practical perspective, such communication is not expected to be burdensome for DGSs, especially as the numbers of such cases tend to be very small (based on experience from real-life cases). Thus, the cost and effort implications should be low. When engaging with depositors individually (both when the DGS chooses to proactively contact depositors individually or when depositors contact the DGS with a request for information), the depositors should be provided with:

- an explanation of their case;
- the legal basis for the exclusion/suspension/deferral; and
- the possibility to appeal/challenge the decision.

82. On the other hand, such individual communication could be seen as compromising the no-tipping-off provisions (in relation to ML/TF-related suspicions only, as depositors would be aware of any charges or convictions in relation to ML/TF). For that reason, this proposal should be considered alongside proposal 6, which recommends the provision of a clear and sufficiently general legal basis in the DGSD to avoid tipping off such depositors.

83. Based on the results of the survey, the EBA concluded that there is no indication that a vastly different communication method is needed in cases where there are indications that the institution has systematically failed to adhere to the obligations under the AMLD, but at the same time the general recommendations such as requiring clear communication in cases of exclusions,

deferrals and suspensions, or capturing such cases in the SCV files, would be particularly pertinent in such cases.

Coordination of communication between different stakeholders in a DGS payout

84. In the survey, respondents indicated that different authorities are involved in communicating with depositors in cases where there have been indications of ML/TF concerns (AML/CFT authorities, competent authorities, resolution authorities). The survey did not ask explicitly about the role of the failed CI in engaging with the depositors. However, one DGS reported being aware that the failed bank engaged extensively with depositors' inquiries because the failed bank's front office remained open during the DGS intervention. This may have contributed to depositors not coming forward to claim their deposits, as they may have been advised by the CI to wait and see if the CI was liquidated or if it continued to operate (because the determination that funds are unavailable can happen before the CI is formally liquidated). One DGS reported engaging with the failed institution to provide it with information to be shared with the depositors, but it considered it beyond its control to ensure that the CI did not deliver a different message.

Proposal 11: Improving cooperation between the DGS, other authorities and the failed CI in delivering consistent messages to depositors

85. In light of the observations outlined above, it would appear logical to further strengthen the cooperation between the DGS and other authorities (e.g. AML/CFT authorities, prudential supervisors and resolution authorities) to ensure that they deliver a consistent message and share resources to deal with inquiries. Otherwise, depositors may approach various authorities and there is a risk that they are provided with inconsistent information, which is harmful to the depositors and opens the door to legal challenges. It could also be considered whether the DGSs and relevant authorities should coordinate with the failed CI on how to communicate with the depositors (and, failing that, impose on the CI how to communicate) to avoid the CI, consciously or inadvertently, undermining the messages delivered by the authorities.

Period in which the national competent authorities should implement the proposals addressed to them

86. Proposals 8-11 are addressed to the national competent authorities, as the EBA is of the view that they could be implemented by the NCAs without the need for amending the DGSD. Moreover, the EBA arrived at the agreed view that such proposals should be implemented by the authorities within 12 months of the publication of this Opinion.

Conclusions

87. The 11 proposals outlined in this Opinion are a result of the EBA's further analysis of the topics previously addressed in the EBA Opinion on the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes (published in August 2019) and the EBA Opinion on deposit guarantee scheme payouts (published in October 2019). Thus, they should be read alongside the recommendations made in those two Opinions, as well as in the EBA Opinion on the future AML/CFT framework in the EU, published on 10 September 2020. The EBA advises the

Commission to take into account the views and proposals outlined in this Opinion when developing proposals for amending the AMLD and the DGSD.

88. This Opinion will be published on the EBA's website.

Done at Paris, 11 December 2020

[Signed]

José Manuel Campa

Chairperson

For the Board of Supervisors