EBA/GL/2015/09

28 May 2015

Guidelines

on payment commitments under Directive 2014/49/EU on deposit guarantee schemes

Contents

1. Executive Summary

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (Directive 2014/49/EU), provides that the available financial means to be taken into account, in order to reach the target level required under Article 10 of Directive 2014/49/EU, may include payment commitments as defined Article 2(1)(13) of that Directive.

Under Article 10(3) of Directive 2014/49/EU, the EBA is required to issue guidelines on payment commitments, in order to ensure consistent application of the Directive.

These guidelines have to be issued in accordance with Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council, of 24 November 2010 (the EBA Regulation).

The main aspects covered by these guidelines are set out below:

- the main terms to be included in contractual or statutory arrangements for the provision of payment commitments by credit institutions to a deposit guarantee scheme (DGS).
- the powers of the DGS, at the occurrence of an enforcement event, to realise or appropriate the low-risk assets provided as collateral.
- the terms of the delivery of the low-risk assets provided as collateral by the credit institution to the DGS, which should be credited to a securities or cash account enabling the registration of such collateral.
- the criteria enabling the DGSs to verify that the low-risk assets provided by credit institutions as collateral of the payment commitment are unencumbered by third-party rights.
- the criteria for eligibility and management of the collateral in order to meet the requirement of Directive 2014/49/EU that schemes can only accept low-risk assets as collateral to secure payment commitments. As a result, these guidelines include provisions requiring DGSs and designated authorities to determine appropriate criteria on the eligibility of the collateral, taking into account, for example, credit and market risks of the issuers of the low-risk assets and the liquidity of those assets. In line with the principle of proportionality, the guidelines allow relaxing the level of diversification and correlation with payment events required from collateral posted by smaller institutions provided the overall levels of diversification are maintained within the DGS's collateral portfolio.
- provisions that specify that DGSs and designated authorities should always apply a haircut to the value of the low-risk assets provided as collateral. This implies that the value of the underlying asset is calculated as the market value of the asset less a certain percentage (haircut). For this purpose, and without prejudice to other schedules or

procedures, the haircut schedules for assets eligible for use as collateral by the European Central Bank (ECB) or national central banks of the European Union are offered as a possible reference.

- requirement on the competent authorities to mitigate any potential advantage that could stem from the prudential treatment of payment commitments as compared to contributions paid in cash.

2. Background and rationale

Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes (Directive 2014/49/EU), was published in the Official Journal of the European Union on 12 June 2014.

Directive 2014/49/EU aims to 'harmonise the methods of financing of DGSs'[1], via a mix of *ex-ante* and *ex-post* contributions. As provided in recital 34 of that Directive, in order to guarantee that the available financial means of deposit guarantee schemes (DGSs) reach the target level, 'It should be possible for the available financial means of DGSs to include cash, deposits, payment commitments and low-risk assets, which can be liquidated within a short period of time'.

Pursuant to Article 10(3) of Directive 2014/49/EU, the available financial means to be taken into account in order to reach the target level of the DGS may include payment commitment not exceeding 30% of the total amount of available financial means raised in accordance with that Article.

The European Commission services have interpreted this provision as laying down an obligation for Member States to provide the DGSs or designated authorities with the ability, through a power, to accept or to allow the DGSs to accept payment commitments up to 30% of the available financial means. In any event, national authorities are bound to implement EU law in an objective and non-discriminatory way and, therefore, those principles should also underpin the application to banks of criteria for the admissibility of payment commitments. This does not mean that no difference can be made between banks but such differences should be linked to objective criteria.

Under Article 2(1)(13) of Directive 2014/49/EU, payment commitments are defined as 'payment commitments of a credit institution towards a DGS which are fully collateralised providing that the collateral: (a) consists of low risk assets; and (b) is unencumbered by any third-party rights and is at the disposal of the DGS'. In order to ensure consistent application of the previously mentioned provisions, Article 10(3) of Directive 2014/49/EU mandates the EBA to issue guidelines on payment commitments.

The concept of payment commitments is new in the EU regulatory framework on deposit guarantee schemes as well as in most Member States.

It is important to ensure that, on the one hand, DGSs and designated authorities follow the compulsory requirements envisaged under Directive 2014/49/EU when deciding whether, and to what extent, to include payment commitments within the available financial means of DGSs, and, on the other, that consistency in the criteria and procedures is achieved in order to establish a level playing field, prevent regulatory arbitrage and promote legal clarity.

[1] Recital 27 of Directive 2014/49/EU.

Accordingly, these guidelines endeavour to provide guidance on the legal instruments which should be entered into by DGSs and credit institutions, providing for the terms and conditions for the inclusion of payment commitments within the available financial means of the DGS, so that it is guaranteed, for instance, that the DGS has an irrevocable right to claim those payments on demand, and that the collateral is unencumbered by any third-party rights and is at the disposal of the DGS. These guidelines also aim to provide criteria on the eligibility and management of the collateral regarding, for example, the valuation haircuts which should be applied in the valuation of underlying assets.

3. EBA Guidelines on payment commitments under Directive 2014/49/EU on deposit guarantee schemes

Status of these guidelines

This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (the EBA Regulation). In accordance with Article 16(3) of the EBA Regulation, competent authorities and financial institutions must make every effort to comply with the guidelines.

Guidelines set out the EBA's view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. The EBA therefore expects all designated authorities and deposit guarantee schemes (DGSs) to whom these guidelines are addressed to comply with them. Designated authorities and DGSs to whom these guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their processes).

Reporting Requirements

According to Article 16(3) of the EBA Regulation, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by [two months after publication of the final translation]. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form provided in Section 5 of these guidelines to compliance@eba.europa.eu with the reference 'EBA/GL/2015/09. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.

Notifications will be published on the EBA website, in line with Article 16(3) of Regulation (EU) No 1093/2010.

Title I - Subject matter, scope and definitions

1. Article 10(3), subparagraph 2, of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes mandates the EBA with the task of issuing guidelines on payment commitments. For this purpose, these guidelines provide terms to be included in the contractual or statutory arrangements under which a credit institution provides payment commitments to a DGS, as well as the criteria for eligibility and management of the collateral.
2. These guidelines are addressed to:
    a) DGSs and designated authorities, as defined in point (1) and (18) respectively of Article 2(1) of Directive 2014/49/EU;
    b) resolution authorities as defined in Article 4(2)(iv) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council establishing the European Supervisory Authority (European Banking Authority) as subsequently amended (EBA Regulation); and to
    c) competent authorities within the meaning of Article 4(2)(i) of Regulation (EU) 1093/2010 insofar as the prudential treatment of payment commitments is concerned.

    These guidelines apply in accordance with the national legal framework providing DGSs or designated authorities with the power to accept payment commitments within the available financial means to be taken into account in order to reach the target level.
3. If the operation of the DGS is administered by a private entity, designated authorities should verify that, according to the law governing such arrangement, the DGS enjoys the creditor's protection afforded by Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.
4. Resolution authorities should inform designated authorities that when exercising their powers in accordance with Articles 69, 70 and 71 of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, they shall give due consideration to ensuring effective creditor protection to the DGS.
5. For the purpose of these guidelines the following definitions apply:
    i. 'payment commitments' means payment commitments as defined in point (13) of Article 2(1), of Directive 2014/49/EU;
    ii. 'low-risk assets' means low-risk assets as defined in point (14) of Article 2(1) of Directive 2014/49/EU. The low-risk assets for the purpose of collateral in these guidelines may consist of financial instruments or cash;
    iii. 'payment commitment arrangement' means the arrangement to be entered into between the DGS and the credit institution, providing for the terms and

conditions for the inclusion of payment commitments of a credit institution within the available financial means of a DGS, and in particular (i) the indication by the DGS of the payment commitment amount and (ii) the credit institution's irrevocable and collateralised obligation towards the DGS to pay the Payment Commitment Amount at the DGS's request within the deadline set in the arrangement;

iv. 'payment commitment amount' means the share and the monetary amount of the contribution to the DGS as required by the DGS, which the credit institution undertakes to provide by means of the payment commitment under the terms and conditions of the payment commitment arrangement;

v. 'security financial collateral arrangement', in line with the definition set out in Article 2(1)(c) of Directive 2002/47/EC, means an arrangement, governed by the law transposing Directive 2002/47/EC, under which the credit institution secures the obligations undertaken in the payment commitment arrangement by providing collateral made up of low-risk assets by way of security to the DGS, where the full ownership of the low-risk assets provided as collateral remains with the credit institution when the security right is established;

vi. 'title Transfer Financial Collateral Arrangement', in line with the definition set out in Article 2(1)(b) of the Financial Collateral Directive, means an arrangement, governed by the law transposing the Financial Collateral Directive, under which the credit institution secures the obligations undertaken in the payment commitment arrangement by transferring the full ownership of the low-risk assets to the DGS;

vii. 'Financial collateral arrangement' means a security financial collateral arrangement or a title transfer financial collateral arrangement;

viii. 'enforcement event', means an event entailing the acceleration of the obligation to pay the payment commitment amount so that it becomes immediately due. Under the terms of the Financial Collateral Arrangements and in line with Article 2(1)(l) of Directive 2002/47/EC or by operation of law, the occurrence of an enforcement event entitles the DGS to realise the low-risk assets collateral provided by the credit institution by way of sale or of appropriation without the need of prior jurisdictional notice or authorisation;

ix. 'winding-up proceedings' means winding-up proceedings as defined in Article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions;

x. 'reorganisation measures' means reorganisation measures as defined in Article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions;

xi. ‘early intervention measures’ means measures taken by competent authorities pursuant to Articles 27 to 30 of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms;

xii. ‘crisis management measures’ means crisis management measures as defined in Article 2(102) of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

Title II - Guidance on Payment Commitments

Part 1 – General considerations

6. Directive 2014/49/EU aims to ‘harmonise the methods of financing of DGSs’[2], via a mix of ex-ante and ex-post contributions.

7. Pursuant to Article 10(3) of Directive 2014/49/EU, the available financial means to be taken into account in order to reach the target level of the DGS may include payment commitments, provided the total share of payment commitments does not exceed 30% of the total amount of available financial means raised in accordance with that Article.

8. This provision implies an obligation for Member States to provide the designated authorities or the DGSs with the power to accept payment commitments up to 30% of the available financial means. However, Article 10(3) of Directive 2014/49/EU should not be read as an automatic right for credit institutions, enforceable against the DGS, to provide their contributions in the form of payment commitments. The DGS should implement this mechanism on the basis of non-discriminatory criteria. In particular, DGSs should not accept more than 30% of a given member’s ex-ante contributions in the form of payment commitments.

9. Designated authorities should verify that Payment Commitment Arrangements and Financial Collateral Arrangements entered into by the DGS and the credit institution are consistent with these guidelines.

Part 2 – The Payment Commitment Arrangement

10. The admissibility of payment commitments should be conditional upon the conclusion of individual written Payment Commitment Arrangements between the DGSs and their member institutions. A new Payment Commitment Arrangement should be concluded each time new ex-ante contributions are called for. Alternatively, an existing master arrangement should be amended or supplemented each time to take into account new calls for ex-ante contributions.

11. The Payment Commitment Arrangement should at least include the following elements:

[2] Recital 27 of Directive 2014/49/EU.

a) the payment commitment amount;

b) the irrevocable obligation for the credit institution to make the promised cash payment of the payment commitment amount at any time, upon the request of the DGS, without undue delay and at any rate no later than two working days from the receipt of the notice made pursuant to letter (c) below. The DGS should at least call part or all of the irrevocable payment commitments where, due to a use of available financial means, the share of irrevocable payment commitments in the available financial means exceeds the maximum threshold set by the scheme according to Directive 2014/49/EU and in line with paragraph 8 of these guidelines. The payment period should be reduced to one working day if early intervention or crisis management measures are applied to the credit institution by the competent or resolution authority. The arrangement should preclude any reduction in the payment commitment amount, or any termination of the payment commitment arrangement, without the consent of the DGS;

c) The provision of a notice by the DGS to the credit institution by any effective means of communication ensuring receipt, whenever the DGS claims the cash payment of the payment commitment amount;

d) The obligation for the credit institution to immediately inform the DGS of any event affecting the institution's ability to honour its obligations, or the DGS's ability to enforce its rights, under the payment commitment arrangement or the financial collateral arrangement, including downgrades of the institution by external credit rating agencies and any material prudential or business changes or any deterioration in the value of the low-risk assets provided as collateral;

e) The conclusion of a security financial collateral arrangement or a title transfer financial collateral arrangement between the DGS and the credit institution securing the obligations undertaken by the credit institution in the payment commitment arrangement, by way of provision by the credit institution to the DGS of low-risk assets collateral, that are unencumbered by any third-party right and are put at the disposal of the DGS.

12. These guidelines are without prejudice to the possibility that, in accordance with national law, their content is partly or fully implemented via statutory provisions, including provisions of the payment commitment arrangement and the financial collateral arrangements, provided that the statutory provisions achieve outcomes at least equivalent to those set out in contractual arrangements between a DGS and its members as regards, among other things: the fulfilment of the credit institution's obligation to pay the payment commitment; the delivery by the credit institution to the DGS of the collateralised low-risk assets securing the payment commitment so that they are at the disposal of the DGS; the immediate realisation of the low-risk assets by the DGS upon the occurrence of an enforcement event; and consistency with the

requirements, including the timeframe, set out in Directive 2014/49/EU and in any other applicable EU law provision.

Part 3 – The Financial Collateral Arrangement

13. In order to safeguard the DGS's creditor position, a Financial Collateral Arrangement should explicitly include the following terms:

a) the credit institution undertakes to substitute the low-risk assets provided as collateral when they fall due, when they no longer comply with the requirements laid down in Part 6 and 7 of these guidelines or in other specific cases agreed upon with the DGS, so that the payment commitment is permanently secured by appropriate collateral.

b) in the case of a security financial collateral arrangement, the credit institution is not allowed to dispose of the collateral (e.g. sale, encumbrance).

c) the credit institution is required to top-up the low-risk assets provided as collateral upon request of the DGS, in the event that the value of the underlying collateral asset, after the haircut provided for in Part 7 of these guidelines, or in consideration of the applicable exchange rate for cash collateral, falls below the payment commitment amount.

d) The provision of at least the following enforcement events:

(i) failure by the credit institution to pay the payment commitment amount within the period provided under the payment commitment arrangement when required to do so by the DGS;

(ii) failure by the credit institution to replace the low-risk assets provided to the DGS when they fall due, when they no longer comply with the requirements laid down in Part 6 or Part 7 of these guidelines or in other specific cases agreed upon with the DGS;

(iii) failure by the credit institution to top up its collateral when required to do so by the DGS, in the event of a breach of the coverage level, as laid down in Part 7 of these guidelines;

(iv) withdrawal of the credit institution's authorisation;

(v) if the credit institution is subject to reorganisation measures other than early intervention or crisis management measures, or is subject to winding-up proceedings.

Where an institution ceases to be a member of the DGS without meeting any of the above-mentioned enforcement events, the DGS should choose the course of action most suitable to preserve the availability of the committed funding.

To that end the DGS may either:

(1) enforce the commitment;

(2) accept that the institution which no longer is a member of the DGS that terminates its membership remains bound by the commitment and enforce it, at the latest, when reaching the maturity of the commitment as provided in the payment commitment arrangement, unless the payment commitment arrangement is rolled over; or

(3) accept that the commitment is transferred to another entity in the context of a merger or acquisition.

Where a credit institution ceases to be a member of a DGS and joins another DGS, the original DGS should ensure that the financial means corresponding to the 12 months preceding the end of the membership are transferred to the other DGS, either by enforcing the commitment and transferring the proceeds to the receiving DGS, or by reassigning the payment commitment arrangement to the receiving DGS in agreement with the latter and the credit institution.

Where the change of DGS membership is the result of the application a resolution measure, the DGS should consult the resolution authority prior to its decision concerning payment commitments, taking into account resolution objectives, including the protection of depositors[3].

e) At the occurrence of an Enforcement Event, the DGS should realise or appropriate the low-risk assets provided as collateral in accordance with the terms of the financial collateral arrangement.

f) The DGS should release and return the low-risk asset collateral upon cash payment by the credit institution of the payment commitment amount.

g) The party which is entitled to the proceeds (interests, dividends, etc.) of the low-risk assets collateral should be determined (either the DGS or the member institution).

[3] Article 31 of Directive 2014/59/EU, OJ L 173/190 of 12.06.2014.

Part 4 – Delivery of the collateral by the collateral provider to the DGS

14. Under the financial collateral arrangement, the DGS should ensure that the credit institution delivers the low-risk assets to the DGS in accordance with one of the modalities provided in Directive 2002/47/EC, so that the low-risk assets are in the possession or under the control of the DGS.

15. Such delivery by the credit institution to the DGS should be fulfilled by means of crediting the collateral as follows:

    a. In the case of a security financial collateral arrangement, the low-risk assets provided as collateral should be credited on a securities or cash account (i) maintained with custodians or intermediaries that are identified by the designated authority or by the DGS and are able to provide complete, accurate and up-to-date information regarding both the credit institution and the low-risk assets; and (ii) enabling the registration of low-risk assets delivered as collateral by credit institutions pursuant to the security financial collateral arrangement.

       In this case, DGSs or designated authorities should only identify custodians or intermediaries that ensure full segregation and protection of the low-risk assets and enable the DGSs' prompt access upon request in order to prevent any losses to the credit institution or to the DGS due to the default or insolvency of the custodian. They should also make sure that custodians are not allowed to dispose of the low-risk assets provided as collateral and that they have contractually waived any retention right or right of pledge they may otherwise have over the low-risk assets.

    b. In the case of a title transfer financial collateral arrangement, there should be a transfer to the DGS on a securities or cash account held by the DGS enabling registration of low-risk assets delivered as collateral by credit institution pursuant to the title transfer financial collateral arrangement. The designated authority or the DGS should ensure that custodians are not allowed to dispose of the low-risk assets provided as collateral and that they have contractually waived any retention right or right of pledge they may otherwise have over the low-risk assets.

       If a DGS is entitled to receive cash deposits from members, cash collateral may be deposited directly with the DGS by the credit institution.

Part 5 – Criteria to verify that the collateral is unencumbered by any third-party rights

16. Point (13) of Article 2(1) of Directive 2014/49/EU provides that the collateral must be unencumbered by any third-party rights. Accordingly, the DGSs and the designated

authorities should not accept any low-risk assets which are already encumbered or collateralised by means of pledges or other security arrangements.

17. The assets provided under a financial collateral arrangement must be legally realisable without prior claims over the assets concerned. It should not be possible for third parties to intervene and successfully claim the assets pledged or any rights attached to them.

18. For that purpose, the financial collateral arrangement should provide that credit institutions undertake and warrant that no low-risk asset provided as collateral is being simultaneously encumbered or used as collateral in favour of any third party or to secure another already existing obligation towards the DGS, and undertake that no asset used under the security financial collateral arrangement will be given as collateral to any third party.

Part 6 – Criteria for eligibility and management of collateral

19. Pursuant to Directive 2014/49/EU, DGSs should only accept low-risk assets as collateral to secure the payment commitment amount. DGSs and designated authorities should determine appropriate criteria on the eligibility of the collateral, taking into account credit and market risks of the issuers of the low-risk assets and the liquidity of those assets, as a way to avoid illiquid assets. They should also take into account the concentration and currency risks. In principle, the criteria on eligibility of collateral posted to the European Central Bank (ECB) or national central banks of the European Union should be deemed compliant with the requirements laid down in this Part 6 of the guidelines.

20. DGSs or designated authorities should also provide exposure limits, ensuring that for each credit institution, there is a high diversification of the assets with regard, at least, to issuer and maturity. For small institutions which are not able to deliver low-risk assets compliant with the requirements regarding diversification and exposure limits, the level of diversification of the low-risk assets delivered as collateral may be lower as long as a high overall level of diversification of low-risk assets within the DGSs' collateral portfolio is still met.

21. DGSs should limit their exposure to debt, whether public or private, the value of which is highly correlated to events where the DGS would have to repay depositors or contribute to resolution and, therefore, might have to call the payment commitment. However the currency of denomination of the debt should not be considered for this purpose as it would place excessive constraints on the ability to provide collateral. Moreover, in line with the principle of proportionality, for small institutions which are not able to deliver assets as collateral compliant with this requirement, the level of correlation may be higher, as long as the overall level of correlation within the DGSs' portfolio remains low.

22. In addition, DGSs and designated authorities should address in an adequate manner the differences, where they exist, between the currency of denomination of the collateral and the currency of denomination of the covered deposits of the DGS.

23. The management of collateral may be performed by the DGS itself, or by a third party as part of a tripartite collateral management service as long as the requirements laid down in these guidelines are met.

Part 7 – Haircut

24. DGSs or designated authorities should always apply a haircut to the value of the low-risk assets provided as collateral, unless collateral is provided in cash in the same currency as the payment commitment. This implies that the value of the underlying asset is calculated as the market value of the asset less a certain percentage (haircut).

25. DGSs or designated authorities should ensure that the haircut reflects the credit, market and liquidity risk arising from the exposure value of each asset. For that purpose, different haircuts should be determined having regard to the type of issuer and the credit quality thereof, as well as to the maturity of the assets and the currency of denomination.

26. The application of haircuts should also be based on a quantification of expected losses and the expected time delay before the sale of the assets.

27. While a variety of haircutting schedules and methodologies are possible, the haircut schedule for assets eligible for use as collateral by the ECB or national central banks of the European Union offers a sound solution.

28. DGSs or designated authorities should ensure that the value of the low-risk assets is marked-to-market on a regular, and possibly daily, basis.

29. Furthermore, the haircut-adjusted market value of the low-risk assets provided as collateral should be maintained over time. This implies that if the value of the underlying assets marked-to-market on a regular basis falls below a certain threshold and no longer complies with the coverage ratio resulting from the application of the haircut, the credit institution should be required to supply additional low-risk assets or replace the relevant part of the payment commitment with cash.

30. In any event, DGSs or designated authorities are not precluded from imposing on member institutions additional reporting and notification requirements.

Part 8 – Prudential Treatment

31. The prudential treatment of payment commitments should aim to ensure there is a level playing field and mitigate the procyclical effect of such commitments depending on their accounting treatment.

32. Where the accounting treatment results in the payment commitment being fully reflected on the balance sheet (as a liability), or results in the collateral arrangement being fully reflected in the profit and loss statement, there should be no need to apply an ad-hoc prudential treatment to mitigate the procyclical effects.

33. Where, in contrast, the accounting treatment results in the payment commitment and the collateral arrangement remaining off balance sheet, within the supervisory review and evaluation process (SREP), competent authorities should assess the risks to which the capital and liquidity positions of a credit institution would be exposed, should the DGS call this institution to pay its commitment in cash, and exercise the appropriate powers to ensure that the procyclicality effect is mitigated by additional capital/liquidity requirements.

Title III- Final Provisions and Implementation

Date of application

34. DGSs and designated authorities should implement these guidelines by incorporating them in their practices by 31 December 2015. Thereafter, DGSs and designated authorities should ensure that these guidelines are applied effectively. The same implementation timeframe applies to resolution authorities and to competent authorities insofar as they are addressees of these guidelines.

4. Accompanying documents

4.1 Cost-Benefit Analysis / Impact Assessment

Introduction

Article 10(3) of Directive 2014/49/EU requires the EBA to develop guidelines on payment commitments.

As per Article 16(2) of the EBA Regulation, any guidelines developed by the EBA shall be accompanied by analysis of 'the potential related costs and benefits'. This analysis should provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.

This annex therefore presents an impact assessment (IA) with cost-benefit analysis of the provisions included in these guidelines. Given the nature of the guidelines, the IA is high-level and qualitative in nature.

Problem definition and the baseline scenario

Under Article 10(3) of Directive 2014/49/EU, the available financial means raised by a deposit guarantee scheme (DGS) may include payment commitments. Under Article 2(1), point 13, of Directive 2014/49/EU, the payment commitments of an institution towards a DGS must be fully collateralised and the collateral must consist of unencumbered low-risk assets. The total share of the payment commitments should not exceed 30% of the total amount of available financial means of the DGS.

Currently, the financing of DGSs is not harmonised. As a result many DGSs are only financed ex-post. Where DGSs already rely on ex-ante financing, their available financial means may include cash, deposits, and low-risk assets which can be liquidated within a short period of time, but a minority of Member States have instruments similar to payment commitments.

Directive 2014/49/EU requires Member States to provide DGSs or their designated authorities with the power to accept payment commitments as part of the financing modalities of the DGSs. If the provisions of Directive 2014/49/EU on payment commitments were not transposed and implemented in a similar and consistent manner across Member States, the variations might lead to differences and an uneven playing field for institutions and DGSs, and so damage fair competition in the EU banking sector. For example, if the timeframe in which institutions have to make the cash payment for their commitments varies across jurisdictions then the institutions operating under a system which allows a longer timeframe would have an advantage over their competitors subject to a shorter timeframe. Similarly, if comparable collateral underlying low-risk

assets is treated differently across jurisdictions, for example, in terms of the application of haircuts, then this may create an uneven playing field. The same is true if the provisions regarding the Enforcement Events and the rights for the creditor arising therefrom are not harmonised across Member States. Inconsistent application of enforcement provisions when institutions are in breach of contract or of the provisions related to payment commitments may undermine market discipline.
Consistent and harmonised implementation of payment commitments is a necessary condition in the EU banking sector with significant cross-border dimension.

Objectives

In line with Article 16 of the EBA Regulation, these guidelines aim to establish consistent, efficient and effective practices, and ensure there is common, uniform and consistent application of the provisions of Directive 2014/49/EU related to payment commitments.

Payment commitments are a component, albeit optional, of the policy mix envisaged by Directive 2014/49/EU for the financing of deposit guarantees. Therefore, these guidelines should be consistent with and support the objectives underpinning the financing provisions of Directive 2014/49/EU as illustrated by the aims outlined in recital 27:

- harmonising financing methods of DGSs;
- ensuring that the costs of financing are in principle born by credit institutions themselves and that the financing capacity of the DGS is proportionate to its liability;
- ensuring that there is a similarly high level of protection for depositors in all Member States.

These objectives stress the need for common standards in the implementation of the DGS framework across Member States. Hence, the guidelines aim to introduce a set of common fundamental rules that the DGS and the designated authorities across Member States can use as a benchmark when they design their Payment Commitment Arrangements. More precisely, these guidelines aim to provide a common framework for the payment commitment and financial collateral arrangements entered into by the DGSs and the credit institutions, as well as the criteria for eligibility and management of the collateral.

A common framework is expected to enhance cross-border transactions and competitiveness in the EU banking sector.

Technical options

In line with the problem definition, the following alternative approaches in the development of these guidelines were considered:

a. Financial Collateral Arrangement

- option 1a: introducing the security financial collateral arrangement;
- option 1b: option to use security financial collateral or title transfer collateral arrangements

b. Haircut schedule for the value of collateral

- option 2a: defining a specific haircut schedule;
- option 2b: providing an option to the DGSs and the designated authorities to adopt the haircut schedule for assets eligible for use as collateral adopted by the ECB or national central banks of the European Union.

Assessment of the technical options

a. Collateral arrangement

Introducing a specific contractual arrangement within the scope of payment commitments would be more effective in achieving the harmonisation objectives. A specific contractual arrangement would also be expected to contribute to the consistency in the implementation of provisions related to payment commitments. Not specifying any collateral arrangements would leave the choice to Member States' discretion and fail to address the problems identified.

In this context, referring to the security financial collateral arrangement has three main advantages. First, the contractual arrangement was introduced by the European Directive (2002/47/EC) and the transposition of the Directive is already completed. Therefore, Member States are expected to achieve high net benefit from the implementation of the security financial collateral arrangement in the framework of payment commitments.

Second, under the security financial collateral arrangement the position of the DGS as creditor and collateral-taker is improved thanks to special rules on close-out netting and winding-up proceedings and reorganisation measures affecting the collateral provider. More precisely, the Directive 2002/47/EC on financial collateral arrangements provides that a financial collateral arrangement, including pledges and the right arising there shall be valid from the start and during the winding-up proceedings and reorganisation measures against a collateral provider.

Third, under the security financial collateral arrangement, DGSs and credit institutions may agree on some important elements of the contract such as the right of use, the right of sale or appropriation of the financial collateral on the occurrence of an enforcement event. Such contractual provisions may not be valid under a normal pledge arrangement designed under national laws. For example, in some Member States, the creditor does not have the right to realise the pledged assets on the occurrence of an Enforcement Event.

An alternative to the security financial collateral arrangement is the title transfer financial collateral arrangement, whereby full ownership of financial collateral would be transferred to the

DGS. In the context of the payment commitments, such title transfer offers more direct access to the collateral for the DGS. On the other hand, the securities will feature on the balance sheet of the DGS which will have to sustain possible fluctuations in value (until offset by further posting of collateral or cash compensation by the institution). In addition, the impact is high for the credit institution which loses the ownership of the collateral and the rights to its proceeds. Therefore, the advantage of a payment commitment collateralised through title transfer might be seen as significantly reduced and no different from cash payments.

On balance, these guidelines maintain the option to implement payment commitments in the form of security financial collateral arrangements or title transfer financial collateral arrangements.

b. Haircut schedule for the value of collateral

The guidelines provide that the DGS should always apply haircuts to the value of the collateralised low-risk assets and the criteria on the haircut should reflect, at least, the credit, market and liquidity risk that these assets are exposed to. This suggests that different haircut levels should be set and applied according to the type of issuer, its credit quality, the maturity of the assets and the currency of the denomination.

The IA considered the following technical options: (a) designing provisions on haircut schedules specific to current guidelines; and (b) providing an option to DGSs and designated authorities to adopt the haircut schedules used by the ECB or national central banks of the European Union. [4]

The cost of introducing haircut schemes specific to these guidelines is expected to be high and the marginal benefit of this approach is expected to be negligible, if positive at all. This is mainly due to the existence of a well-established ECB haircut scheme in the EU banking sector. Other haircut schemes, such as market haircuts, margin call and haircuts for ‘repo’ with central banks, are also available at the EU level. These schemes are expected to be very volatile, hence difficult to implement in the DGS framework.

The application of the ECB or national central banks of the European Union haircut schedules would represent a useful practical reference as to how the haircut should be applied. Credit institutions of Member States in the Eurozone and at least some DGSs (via central banks) are familiar with the ECB haircut schedule.

Given these arguments, the preferred option is to offer the haircut schedule with the schedule adopted by the ECB or national central banks of the European Union as an indicative compliance method.

Table 1 presents an overview of the advantages and disadvantages of the technical options considered in the IA.

[4] Haircut schedule that is used in monetary policy.

Table 1 Overview of the main advantages and disadvantages of the technical options

Policy area	Technical options	Advantages	Disadvantages
Collateral arrangement	Option 1a: Introducing the Security Financial Collateral Arrangement	- Familiarity with the current practice in the EU - Harmonised framework - Low transition cost - Standardised contract increases transparency - Simple method of handling cases	- Less flexibility
	Option 1b: option to use Security Financial Collateral or Title Transfer Collateral arrangements	- No compliance cost - Flexibility	- Lack of harmonised framework
	Option 1c: Introducing the Title Transfer Financial Collateral Arrangement.	- More direct access to the collateral for the DGS - Familiarity with the current practice in the EU - Harmonised framework - Low transition cost - Standardised contract increases transparency - Simple practice to handle cases	- DGS bears the risk of fluctuations in the value of the collateral on its balance sheet (until offset by further posting of collateral or cash compensation by the institution) - Less flexibility - Potential disadvantages for credit institutions related to transfer of full ownership of the financial collateral
Haircut schedule for the value of collateral	Option 2a: Defining a specific haircut schedule	- Full harmonisation - Haircut scheme that is fit for purpose	- Costly to design new scheme - Regulatory burden for the institutions and for the DGSs/designated

			authorities
	Option 2b: Expressly provide the option to adopt the haircut schedule used by the ECB or national central banks of the European Union.	- Alignment with other practices in the EU framework - Familiarity with the current practice in the EU - Harmonised framework - Low transition cost - Less volatile with respect to other schemes	- some DGSs and NCA outside the Eurosystem not familiar with the method - Cost of implementation for non-euro banks

4.2 Views of the Banking Stakeholder Group (BSG)

Summary of the BSG Opinion

The BSG stressed that the terms of payment commitment arrangements should be ‘consistent with the intended ex-ante nature of this form of financing’.

The BSG agreed that Article 10(3) of Directive 2014/49/EU does not imply an automatic right for credit institutions to provide contribution in the form of payment commitments, but rather a discretionary power of DGSs to accept payment commitments, provided that a level playing field among deposit institutions is guaranteed.

Regarding the 30% limit on payment commitments, the BSG observed that the limit provided under Article 10(3) of Directive 2014/49/EU relates to the overall amount of payments to be accepted by the DGS rather than to be applied to individual banks. BSG also considered that the 30% limit should be understood as referring to the final target level to be reached in 2024 and should not apply throughout the build-up phase.

The BSG supported the option for a DGS to choose between security financial collateral arrangements and title transfer financial collateral arrangement, in line with the financial collateral directive, and considered that the option should be given to credit institutions.

The BSG suggested that the guidelines should provide that the choice of the custodians is a decision of each DGS and remain silent about the other requirements.

On collateral eligibility, the BSG considered that a pragmatic and reasonable approach would be to use the eligibility criteria set by central banks for ‘repo’ transactions, and considered that the margin of discretion left to the DGS or the designated authority in interpreting notions such as ‘illiquid assets’, ‘high diversification’ and ‘low correlation’ required EBA monitoring to ensure consistency in practice and possibly more detailed EBA guidelines in the future. Credit institutions should retain the ability to choose which assets are delivered as collateral. Considering the recent Commission Delegated Act on the liquidity coverage ratio, which recognises the liquidity of certain high quality securitisation assets, those assets should be allowed as collateral.

The BSG agreed that the currency of denomination of debt should not be considered when determining whether a debt instrument’s value is correlated with a payout event, noting that a different treatment inside or outside the euro area would give rise to risks of discrimination.

On haircuts, the BSG agreed with the criteria provided in the guidelines and pointed out that the guidelines should build on, and not disturb, existing market practices that operate effectively.

On the prudential treatment, the BSG highlighted the need to remain consistent with the objective of payment commitments as means of providing credit institutions with a degree of flexibility in reaching the target for ex-ante financing. In particular, payment commitments, unlike cash, are subject to haircuts, and this feature needs to be factored into prudential requirements in such a way as not to give a preference to cash.

EBA feedback on the BSG's opinion

The EBA welcomes the opinion of the BSG and provides feedback on the main points raised by the groups in the following section together with the feedback on the public consultation.

4.3 Feedback on the public consultation

The EBA publicly consulted on the draft version of these guidelines.

The consultation period started on 25 September 2014 and ended on 2 January 2015. The EBA received 19 responses, of which 15 were published on the EBA website. A public hearing took place on 21 November 2014.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and actions taken to address them, if deemed necessary.

Where several industry bodies made similar comments, the EBA's comments, and analysis are included in the section of this paper where EBA considers them most appropriate.

Changes to the draft guidelines have been incorporated as a result of the responses received during the public consultation and the public hearing.

Summary of key issues and the EBA's response

The main points raised by the respondents with regard to the draft guidelines are as follows:

30% limit on payment commitments

Some respondents, including the BSG, noted that the 30% limit provided under Article 10(3) of Directive 2014/49/EU relates to the overall amount of payment commitments to be accepted by the DGS rather than to be applied to individual banks.
EBA response:
The EBA considers that in order to ensure there is a level playing field and a non-discriminatory treatment between institutions it is essential to limit to 30% the share of payment commitments of any member's ex-ante contributions.

Unconditional right of the DGS to call for payment in Directive 2014/49/EU

Many respondents opposed the DGSs' power to request payment upon simple and unconditional request and suggested specifying further the circumstances that may trigger a call on a payment commitment or collateral, introducing contingency upon a future determinable event for which the likelihood of its occurrence can be assessed. Some stakeholders expressed doubts whether the unconditional right to claim payments is in line with a prohibition of arbitrary public administrative action. The responses also referred to the approach adopted in the Council Implementing Act on contributions to resolution funds, which envisages that payment commitments should be terminated and collateral returned in situations where a credit institution leaves the DGS, thereby reducing the risk exposure of the DGS.

EBA response:

The EBA has carefully assessed the call for refining the definition of triggering events, while avoiding a definition that would change the nature of the payment commitment to an ex-post contribution. For example, a trigger whereby a DGS faces a payout exceeding the available cash contributions before it can enforce pending payment commitments would in fact requalify payment commitment as ex-post funding. Drawing on these elements, the final guidelines provide that payment commitments should be called where, due to a disbursement, the DGS has to restore the 30% share of payment commitments in its available financial means. In addition, the final version of the guidelines takes into account Article 14(3) of Directive 2014/49/EU on the transfer of the last year's contributions if an institution leaves a DGS and joins another one. This possibility should be also available for payment commitments subject to the conditions on the admissibility of commitments at the receiving DGS.

Accounting and prudential treatment of payment commitments

Respondents noted that the terms and conditions specified in the draft guidelines seemed to point in the direction of an inevitable full provisioning of these items in the balance sheet, and claimed that it is not in line with the spirit of Directive 2014/49/EU. In principle, the criteria on eligibility of collateral posted to the ECB or national central banks of the European Union should be deemed compliant with the requirements laid down in Part 6 of these guidelines. Respondents also rejected the prudential neutrality principle suggested in the guidelines and considered that payment commitments should benefit from a preferential prudential treatment, when compared to cash contributions, or there would be no point or advantage in using them.

EBA response:

The EBA has sought consistency with the objectives of Directive 2014/49/EU rather than securing a particular accounting treatment. Directive 2014/49/EU aims to ensure that there is robust funding for DGSs, and under Article 10 of that Directive, that payment commitments are clearly included in the ex-ante financial target level. Finally, the EBA remains of the opinion that the guidelines should recommend ensuring there is equivalent prudential treatment of cash and payment commitments, in order to mitigate the procyclicality inherent in liquidating collateral at the triggering point. This will ensure there is consistent treatment across the internal market, and mitigate divergences in accounting treatment.

Criteria for eligibility and management of collateral

A few respondents pointed out that some DGSs have a high concentration of government securities as collateral and warned against sending out wrong messages in respect of the rating and value of sovereign securities. Some respondents also suggested that the guidelines, instead of specifying criteria for eligibility and management of collateral, should only make a reference to the appropriate criteria adopted by the ECB and central banks for REPO transactions.

EBA response:

The guidelines have been amended to recommend that DGSs should limit their exposure to debt, whether public or private, the value of which would be highly correlated to events where the DGS would have to repay depositors or contribute to resolution. With regard to eligibility criteria for collateral, the EBA supports a reference to criteria adopted by central banks for 'repo' transactions and has amended the final version of the guidelines accordingly.

Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
Definition of low-risk assets	One respondent recommended that low-risk assets definition should also include items contained within the definition of High Quality Liquid Assets (HQLA) developed for the purpose of the Liquidity Coverage Ratio.	Directive 2014/49/EU already provides a definition of low-risk assets which makes a reference to specific assets enlisted in the CRR. Directive 2014/49/EU also allows the competent or designated authorities to consider other assets as similarly safe and liquid. The guidelines should not introduce another definition of low-risk assets. Nevertheless, the fact that assets meet the criteria for the definition of HQLA could constitute a sound indication that these assets are indeed low risk.	*No amendment*
Disposal of the collateral by member institutions with prior consent of the DGS	One respondent recommended that paragraph 12(b) of the guidelines is amended to enable the credit institution to dispose of the collateral with the prior consent of the DGS.	The institution should not have any right to dispose of collateral, but Financial Collateral Arrangement may be cancelled or amended, in agreement with the DGS, in order to replace collateral or replace payment commitment with cash.	*No amendment*
Clarification regarding the moment when payment commitments become due	One respondent stated that the EBA should clarify in the guidelines that payment commitments on eligible deposits are due on a specified date each year, and this would avoid having to book the entire provision upfront.	Payment commitments constitute a part of ex-ante contributions that an institution needs to provide to a DGS at least annually. Each year, or more frequently, the DGS would determine the amount of individual ex-ante contributions, inform its member institutions about the amount they need to pay, and specify a date by which individual contributions should be made. This date will determine the moment when the institution's obligation to make the ex-ante	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		contributions to the DGS will become due (including the payment commitments part of the contribution), which in turn will influence the timing of recording these obligations in the institution's financial statements. Specifying a date when payment commitments or cash contributions to the DGS are due is outside of the scope of these guidelines.	
Clarification regarding the concept of 'reorganisation measures'	Three respondents stated that the reference to unspecified 'reorganisation measures' should be appropriately curtailed. For instance, a link to Article 51 of Directive 2014/59/EU could be an appropriate limitation in terms of these guidelines. Any other reorganisation should be subject to further negotiations and dialogue between the DGS and the institution. These respondents also stated that if the definition is not clarified than any private reorganisation decision taken for common business reasons could become a trigger event**.**	In order to avoid misunderstanding, the definition of 'reorganisation measures' is amended to clarify that this definition arises from Directive 2001/24/EC on the reorganisation and winding-up of credit institutions.	Paragraph 12(d)(v) is amended as follows: if the credit institution is subject to reorganisation measures other than early intervention or crisis management measures, or ~~is being wound up.~~ **is subject to winding-up proceedings.**
Cash delivered as collateral	One respondent recommended that the guidelines should allow cash transfers to be delivered not only in Title Transfer Financial Collateral Arrangement but also in Security Financial Collateral Arrangement.	The EBA welcomes the suggestion and clarified the wording of the guidelines. The definitions of Security Financial Collateral Arrangement and Title Transfer Financial Collateral Arrangements under the guidelines are made with reference to Directive 2002/47/EC on financial collateral arrangements, which clearly provides that cash can be delivered as collateral both in Security Financial Collateral Arrangement and in Title Transfer Financial Collateral Arrangements (cf. Recital 18 and Article 1(4) of the Directive 2002/47/EC).	Paragraph 5(ii) is amended as follows: ii. 'Low-risk assets' means low-risk assets as defined in point (14) of Article 2(1) of Directive 2014/49/EU. **The low-risk assets for the purpose of collateral in these guidelines may consist of financial instruments or**

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
			cash;
Proceeds from assets delivered as collateral	Two respondents recommended that the guidelines should provide that the credit institution should be able to retain the proceeds from low-risk assets delivered as collateral under the Payment Commitment Arrangement and the Financial Collateral Arrangement.	The EBA is sensitive to the concern raised in this recommendation and takes the opportunity to clarify this point in the guidelines. The DGS and the credit institution should agree on the beneficiary of the proceeds under the Financial Collateral Arrangement.	A new provision (g) shall be added to paragraph 12 of the guidelines : **(g) The party which is entitled to the proceeds (interests, dividends, etc.) of the low-risk assets collateral should be determined (either the DGS or the member institution).**
Accounting treatment of payment commitments	Six respondents expressed their concerns about the fact that provisions proposed in the draft guidelines would require banks to reflect the nominal amount of yearly payment commitments in their profit and loss statement (P&L) and to make full on-balance sheet provisions for these commitments. Many stakeholders pointed out that two main reasons for such accounting treatment are (i) an unconditional right of a DGS to call a bank to pay its payment commitments in cash at any time, and (ii) inevitable obligation to settle its payment commitments in cash when the bank ceases to be a member of the DGS. Two respondents supported the EBA in not explicitly imposing an accounting treatment of payment commitments in the guidelines.	The EBA has sought consistency with the objectives of Directive 2014/49/EU rather than securing a particular accounting treatment. Directive 2014/49/EU aims to ensure there is robust funding for DGSs, and under Article 10 of Directive 2014/49/EU payment commitments are clearly included in the ex-ante financial target level. Finally, the EBA remains of the opinion that the guidelines should recommend a prudential treatment catering for the risks to which the capital and liquidity positions of a credit institution would be exposed should the DGS call this institution to pay its commitment in cash. This will ensure consistent treatment across the internal market, ensure there is level playing field between cash and payment commitments, and mitigate divergences in accounting treatment.	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Responses to questions in Consultation Paper EBA/CP/2014/27			
Question 1: Apart from the admissibility requirements suggested in the present guidelines, which objective criteria do you think could be applied, notably in order to determine the overall amount of payments to be accepted in a given year, or to be applied to individual banks applying for the option?	Three respondents stated that, in order to establish a level playing field, a DGS should be obliged to accept payment commitments if all requirements specified in the guidelines are met.	Article 10(3) of Directive 2014/49/EU cannot be read as an automatic right for credit institutions, opposable to the DGS, to provide their contributions in the form of payment commitments. In contrast, this provision implies an obligation for Member States to provide the designated authorities or the DGS with the power to accept payment commitments up to 30% of the available financial means.	The paragraph 8 shall be amended as follows: 8. This provision implies an obligation for Member States to provide **the designated authorities or the DGSs** with the power to accept payment commitments up to 30% of the available financial means.
	Seven respondents, including the BSG, supported a flexible approach which allows the DGS to both overshoot and undercut the 30% limit during the build-up phase, as long as the 30% target is met in 2024. One respondent added that DGSs should be obliged to define, at the start of the build-up phase, clear-cut criteria for the use and distribution of payment commitments. Three respondents stated that each DGS should be allowed to split the use of payment commitments among its members, applying clear and objective criteria, as long as the overall limit of 30% is adhered to.	The EBA observes that Article 10(3) of Directive 2014/49/EU is clear on the point that the total share of payment commitments shall not exceed 30% of the total amount of available financial means. This provision applies from the entry into force of the Directive, and should, therefore, be met at all times and not only in 2024. In principle, this rule ensures that DGSs cannot frontload payment commitments and delay cash payments. The EBA considers that in order to ensure a there is level playing field and a non-discriminatory treatment of institutions, the 30% limit should apply to each institution's ex-ante contributions.	*No amendment*
	Many respondents opposed the ability of the DGS to request payment upon simple and unconditional request	While more clarity on triggering events appears reasonable, these events should never change	The paragraph 11(b) is

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	and suggested specifying further the circumstances that may trigger a call on a payment commitment or collateral, introducing contingency upon a future determinable event for which the likelihood of its occurrence can be assessed. Some stakeholders expressed doubts whether the unconditional right to claim payments is in line with the prohibition of arbitrary public administrative action. The responses also called for consistency with the approach adopted in the Commission delegated act on contributions to resolution funds, which envisages that payment commitments should be terminated and collateral returned in situations where a credit institution leaves the DGS and thereby reduces the risk exposure of the DGS. BSG pointed out that the irrevocable right of the DGS to claim payment on demand at any time should be in addition to the other situations where the obligation of the credit institution to pay the Payment Commitment Amount is accelerated so it becomes immediately due.	the nature of the payment commitment to an ex-post contribution. For example, a trigger whereby a DGS faces a payout exceeding the available cash contributions before it can enforce pending payment commitments would in fact requalify payment commitment as ex-post funding. Drawing on these elements the final guidelines provide that payment commitments should be called where, due to a disbursement, the DGS has to restore the 30% share of payment commitments in its available financial means. In addition, the final version of the guidelines takes into account Article 14(3) on the transfer of the last year's contributions if an institution leaves a DGS and joins another one. This possibility should be also available for payment commitments subject to the conditions on the admissibility of commitments at the receiving DGS.	amended as follows: The irrevocable obligation for the credit institution to make the promised cash payment of the Payment Commitment Amount at any time, upon simple ~~and unconditional~~ request of the DGS, without undue delay and at any rate no later than 2 working days from the receipt of the notice **made** pursuant to letter (c) below. **The DGS should at least call part or all of the irrevocable payment commitments at least where, due to a use of available financial means, the share of irrevocable payment commitments in the available financial means exceeds the maximum threshold set by the scheme according to Directive 2014/49/EU and in line with paragraph 8 of these guidelines.**

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Question 2. Do you agree with these provisions to be included in Payment Commitment Arrangements? **Do you think other provisions should be provided?**	Three respondents suggested that the guidelines should provide that multilateral or statutory arrangements should also be deemed sufficient.	The Executive summary and paragraphs 1 and 10 of the guidelines already address this concern.	*No amendment*
	One respondent suggested that the request of the DGS for cash payment should be in a written form.	Paragraph 11(c) of the guidelines already addresses this concern.	*No amendment*
	Some respondents stated that payment within two working days is challenging and that an extension of this deadline should be considered, especially because the DGS has seven working days to ensure that the repayable amount of deposits is available. Three respondents, including the BSG, agreed that a credit institution should pay in cash the Payment Commitment Amount, when its obligation becomes due, within two working days at the latest. Two respondents recommended that the guidelines should stipulate liquidation within two days, though the manner of liquidation should be left to the DGS, because it can either wait for the payment in cash or realise the collateral.	One of the main objectives of Directive 2014/49/EU is the protection of depositors and ultimately repayment of deposits within seven working days. If the DGS requests the payment of the Payment Commitments Amount, it has to notify the relevant institutions, which have two working days to meet their obligation. If the firms do not provide requested funds within this period, the DGS has the right to realise the collateral. The EBA is still of the opinion that two working days for credit institutions to pay in cash the Payment Commitment Amount, when requested to do so by the DGS, is reasonable and adequate. The rationale behind payment commitments is that institutions provide funds quickly upon the DGS's request.	*No amendment*
	BSG agrees with allowing the DGS the option to enter into a Security Financial Collateral Arrangement or a Title Transfer Financial Collateral Arrangement, however considers that this flexibility should be granted to credit institutions instead of the DGS.	The EBA believes that it should be up to the DGS or the designated authority to decide whether the Payment Commitment Arrangement should include the conclusion of a Security Financial Collateral Arrangement or a Title Transfer Financial Collateral Arrangement. Thus, it does not agree to provide under the guidelines that flexibility should be granted to	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		credit institutions.	
Question 3. Do you agree that a credit institution should pay in cash the Payment Commitment Amount, when its obligation becomes due, within 2 working days at the latest?	Six respondents prefer the Security Financial Collateral Arrangement as means for the management of collateral. One respondent prefers a Title Transfer Financial Collateral Arrangement. Four respondents agreed with allowing the DGS the option to enter into a Security Financial Collateral Arrangement or a Title Transfer Financial Collateral Arrangement, even though it should be noted that the Title Transfer Financial Collateral Arrangement is very demanding for institutions because the property of the assets is transferred to the DGS.	The EBA considers that an option to enter into a Security Financial Collateral Arrangement or a Title Transfer Financial Collateral Arrangement should be left to the DGS.	*No amendment*
	One respondent did not agree with adoption of the Financial Collateral Arrangement concept because smaller banks will be obliged to have payment commitments even though they do not offer sophisticated services or provide services on capital markets.	Neither the Level 1 text nor these guidelines provide that payment commitments should be compulsory for all institutions. It is up to the DGS to accept payment commitments when institutions want to enter into a Payment Commitment Arrangement.	*No amendment*
	The BSG suggested that the guidelines should only provide that the choice of the custodians is a decision of each DGS and be silent about the other requirements.	The EBA's view is that the requirements provided under the guidelines regarding the choice of custodians are essential to provide guidance to the DGSs regarding the choice of collateral, namely those which concern full segregation, provision of information and protection of the assets delivered as collateral.	*No amendment*
	One respondent stated that the provision of information by custodians on credit institution should be limited to contact details and not include credit-worthiness or other analysis	The EBA's view is that the provision of relevant information is essential to guarantee the requirements laid down in Directive	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	relating to the credit institution.	2014/49/EU regarding the low-risk assets which are delivered as collateral and to provide adequate guarantees that a credit claim of the DGS is, at all times, properly collateralised. The EBA thinks that these guidelines do not interfere with the general rules on custodian's activity.	
Question 4. Do you agree with the option left to the DGS to enter into a Security Financial Collateral Arrangement (full ownership remains with the credit institution) or a Title Transfer Financial Collateral Arrangement (full transfer of ownership)?	One respondent pointed out that if the low-risk assets are maintained in jurisdictions outside of Europe, then custodian protection will need to be aligned with local regulations on asset protection and segregation.	Paragraph 15 of the guidelines already states that the DGSs or the designated authorities should ascertain that custodians ensure full segregation and protection of low-risk assets. This applies irrespective of the jurisdiction where the low-risk assets are maintained.	*No amendment*
	Two respondents recommended that it should be clarified if the expression 'full segregation' means that: 1) the interest of the particular credit institution or DGS must be noted at each sub-custodian or central securities depository (i.e. throughout the custody chain) or, 2) in the books of the custodian/collateral manager, the low-risk assets are segregated from the assets of the custodian/collateral manager and from the assets of other clients of the custodian/collateral manager, and that higher up the custody chain there is segregation in the books of any securities account provider between the client and the proprietary assets of the securities account provider including through the use of omnibus account structures.	As provided under the guidelines, the goal of introducing a requirement for a full segregation is to prevent credit institutions' or DGSs' losses due to the default or insolvency of the custodian. Thus, the concept of full segregation provided under the guidelines should be interpreted in the light of that main goal.	*No amendments*
	One respondent stated that when the low-risk assets remain as property of the credit institution, but are held in favour of the DGSs as collateral to support the Payment Commitment Amount, a custodian/collateral manager	The guidelines should not explicitly address the rights of custodians, since they are not in the scope of these guidelines.	*No amendments*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	would typically retain a security interest in the unallocated assets held by the custodian/collateral manager, on behalf of the credit institution (in this case), to cover unpaid fees, expenses and any extensions of credit by the custodian/collateral manager to the credit institution (generally restricted to 'operational/settlement' credit purposes). Such an interest would not be applied over the assets allocated in favour of the DGS, but would only be applied over the excess inventory that a credit institution leaves with the collateral manager (Triparty Agent) to cover collateral substitutions and margin calls. Therefore, the usual security interests and rights of collateral managers (over securities that have not been allocated to the DGS) should not be considered as a 'third-party right' in the context of Directive 2014/49/EU or the guidelines.	The EBA notes that the definition of payment commitments under the Directive provides that the collateral must be unencumbered by third-party rights and at the disposal of the DGS, and does not make any distinction between different third parties.	
Question 5: Do you think other requirements about the choice of the custodians should be provided under these guidelines?	Two respondents recommended that a custodian/collateral manager may be a party to a Financial Collateral Arrangement as defined under a tripartite Collateral Management (TCM) Agreement.	The EBA welcomes the suggestion made regarding the TCM and approves the inclusion of this possibility under the guidelines, since the parties to the contract – the DGS and the credit institution – agree on the conclusion of a TCM and as long as it meets all the requirements laid down in the guidelines, in particularly regarding the prohibition of the disposal of the assets by the custodians, the prompt access of the DGS to the financial instruments and the requirement about the full segregation.	A new paragraph 24 within Part 6 shall be added as follows:**(24) The management of collateral may be performed by the DGS itself, or by a third party as part of a tripartite collateral management service, as long as the requirements laid down in these guidelines are met.**
	One respondent recommended that the criteria for the choice of a custodian/collateral manager should be primarily based on considerations of legal protection and	Paragraphs 14 and 15 of the guidelines already address these aspects.	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	service.		
	One respondent pointed out that the task of ensuring that collateral is unencumbered is not for the DGS but more likely for the custodian which is managing the collateral through the TCM contract.	Paragraphs 16-18 provide that the DGSs should not accept low-risk assets that are already encumbered or collateralised, so the DGSs should promote all necessary measures, including gathering the relevant information, to ensure that they are not accepting, under a Payment Commitment Arrangement and the Financial Collateral Arrangement, an asset which is already encumbered.	*No amendment*
	One respondent suggested that central banks, or other established market solutions such as TCM providers, should be used to manage the collateral.	The EBA cannot impose on central banks the management of collateral. Therefore, it should be up to DGSs to choose the custodians in line with the requirements provided.	*No amendment*
	Two respondents agreed with the requirements provided concerning the choice of the custodians.	-	*No amendment*
	One respondent recommended that the definition of the low-risk assets will need to be cognisant of asset type, currency, concentration, liquidity and correlation risk.	Paragraphs 19-21 of the guidelines already provide those requirements.	*No amendment*
	In respect of paragraphs 20 and 21, one respondent suggested that if smaller institutions are unable to support the collateral diversity and exposure limits anticipated by the DGSs, then the haircut applied to their collateral should be higher compared with the one applied for the larger institutions, which are able to support the diversity and exposure requirements.	Paragraphs 20 and 21 address concerns regarding small institutions through the adoption of the principle of proportionality. Thus, the EBA does not support the introduction of any additional requirement based on the application of higher haircuts for the assets delivered by those smaller institutions that do not meet the concentration or diversification requirements.	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Some respondents pointed out that some DGSs have a high concentration of government securities as collateral and warned against sending wrong messages in respect of the rating and value of sovereign securities.	The guidelines have been amended to recommend that DGSs should limit their exposure to debt, whether public or private, the value of which would be highly correlated to events where the DGS would have to repay depositors or contribute to resolution.	Paragraph 22 shall be amended as follows: 22. Notably, DGSs should limit their exposure to debt, whether public or private, the value of which is highly correlated to events where the DGS would have to repay depositors or contribute to resolution and, therefore, might have to call the payment commitment.
	Five respondents, including the BSG, recommended that the guidelines should provide that the criteria regarding the eligibility of the collateral should be those of European Central Bank or the relevant central bank for REPO transactions and the relevant clearing house, in order to avoid different treatments among Member States. Additionally, respondents think that no other criteria should be defined (thus, points 20, 21 and 22 should be deleted) Furthermore, one of these respondents also recommended, that a reference should be made to the criteria introduced under CRD IV for the Liquidity Coverage Ratio, in the case of high-quality liquid assets.	The EBA agrees the guidelines should provide that the criteria adopted by the central banks for REPO transaction regarding the eligibility of the collateral may be used. This is allowed because the low-risk assets are defined in the Level 1 text with reference not only to Regulation (EU) No 575/2013 but also to other assets which competent or designated authorities find similarly safe and liquid.	Paragraph 19 is complemented as follows: In **principle, the criteria on eligibility of collateral posted to the European Central Bank (ECB) or national central banks of the European Union should be deemed compliant with the requirements laid down in this Part 6 of the guidelines.**
	Regarding the exclusion of asset-backed securities provided under the guidelines, BSG commented that the recent	The EBA agrees that not all asset-backed securities should be considered illiquid and,	Paragraph 19 shall be amended as follows:

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Commission delegated act on Liquidity Coverage Ratio which recognises the liquidity of certain High Quality Securitisation assets should be considered. Consequently, those assets should not be disregarded as collateral to secure payment commitments.	therefore, ineligible for the purpose of payment commitments.	Pursuant to Directive 2014/49/EU, DGSs should only accept low-risk assets as collateral to secure the Payment Commitment Amount. DGSs and designated authorities should determine appropriate criteria on the eligibility of the collateral, taking into account credit and market risks of the issuers of the low-risk assets and the liquidity of those assets as a way to avoid illiquid assets ~~such as asset backed securities~~. They should also take into account the concentration and currency risks.
Question 6. Do you agree on the abovementioned requirements? **Would you suggest other limits on concentration in exposures?**	One respondent recommended the establishment of mark-to-market policy in order to provide the highest standards of protection for funds available to DGSs.	Paragraph 27 of the guidelines already addresses this issue.	*No amendment*
	Two respondents, including the BSG, agreed that the currency of denomination of debt should not be considered for this purpose, noting that different treatment inside or outside the euro area would give rise to concerns over discrimination.	Respondents agreed with the EBA approach.	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Three respondents, including the BSG, supported the application of the concept of proportionality in this context.	Respondents agreed with the EBA approach.	*No amendment*
	Two respondents indicated that the collateral requirements (e.g. limits on concentration, currency etc.) are too restrictive and complex. They recommended aligning collateral requirements under Directive 2014/49/EU with a common, generally accepted marketable securities definition, in order to reach consistency. One respondent agreed with the criteria on the eligibility of the collateral.	The guidelines aim to achieve consistency in the application of the Directive among Member States and, in the EBA's view, the requirements provided under the guidelines in Part 6 are adequate and necessary to ensure that uniformity.	*No amendment*
	Three respondents stated that the haircut treatment should be deleted from the guidelines, since they seem particularly disproportionate in cases where low-risk assets are provided as collateral and do not consist of debt securities as defined in Article 336 of Regulation (EU) No 575/2013, but of assets that are not affected by market risks. Additionally, some respondents stated that a potential mismatch could emerge between low-risk assets accepted as collateral for payment commitments, and the low-risk assets in which the DGS invests its cash contributions.	The guidelines provide criteria on the haircut collateral which are commonly used by the ECB and central banks. The EBA's view is that the application of haircuts to the low-risk assets delivered as collateral in the Payment Commitment Arrangements is specified in order to ensure an adequate risk protection of the DGS – which holds that collateral – in situations where it needs to sell the assets in order to fulfil its credit claim.	*No amendment*
Question 7: Is it in your view appropriate not to consider the currency of issuance when determining whether a debt instrument's value is	Five respondents stated that, except for the ECB criteria or those of the relevant central bank governing the acceptable collateral for REPO transactions, no other criteria should be defined.	Paragraph 26 of the guidelines already address this concern by providing that the haircut schedule for assets eligible for use as collateral by central banks offers a sound solution, even though the EBA maintains the position regarding the requirements laid down in Part 7, in order to ensure some consistency between	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
correlated to an event of DGS pay-out, be it inside or outside the euro area?		Member States.	
	One respondent does not agree with paragraph 27 because, in their view, this method will cause high costs of collateral management for the DGS purpose.	Even though the EBA is sensitive to the arguments stating that the requirements provided under the guidelines are complex, they are deemed necessary and adequate in order to ensure that the payment commitments can be included in the available financial means of the DGS.	*No amendment*
Question 8: Do you consider that the proposed wording correctly applies the concept of proportionality, or whether some limits to concentration should be envisaged also for smaller, locally operating banks?	BSG agreed with the provided criteria and that no other requirements should be determined.		*No amendment*
Question 9: Do you agree with the criteria on the eligibility of the collateral provided in this Part 6? **Do you think other requirements should be provided in these guidelines on this**	Seven respondents disagreed with the proposed prudential treatment of payment commitments which is based on the principle of prudential neutrality (i.e. equal prudential treatment of cash contributions and payment commitments). A few stakeholders argued that without any advantages stemming from more favourable accounting and prudential treatment, there would be no reason for banks to use payment commitments instead of making cash payments to DGS funds. They also argued that a proposed approach may result in removing the flexibility granted to	Neither the recitals nor the articles of Directive 2014/49/EU provide that the purpose pursued by EU co-legislators when introducing the payment commitments was to benefit the credit institutions through a mechanism that allows preferable accounting treatment of DGS contributions. It should be also noted that, in contrast to making cash contributions to DGS funds, a credit institution may benefit from payment	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
issue?	banks under Directive 2014/49/EU in making ex-ante contributions by both cash and payment commitments, and can lead to limiting the use of payment commitments, which would be against the level 1 text. A few respondents also claimed that a motivation for introducing the concept of payment commitments into Directive 2014/49/EU was to make it easier for banks to meet their DGS obligations in respect of DGS contributions. Two respondents, despite disagreeing with the principle of prudential neutrality, supported the approach proposed by the EBA under which the competent authorities should assess under SREP the risks to which the capital and liquidity positions of the credit institution would be exposed should the DGS called upon it to pay the payment commitments, and exercise the appropriate powers. Two respondents fully supported the proposed prudential treatments based both on the SREP assessment and the principle of prudential neutrality.	commitments by retaining the proceeds of the low-risk assets delivered as collateral if the institutions agrees with the DGS that the institution can retain the proceeds. In addition, payment commitments offer credit institutions preferable liquidity treatment (reflected in the cash flow statement). Apart from ensuring there is a level playing field, the proposed prudential treatment would also mitigate a potential procyclical effect of payment commitments. Specifically, in a stress situation, when there is a need for a DGS financial intervention, credit institutions might be called to settle in cash some or their entire accumulated amount of payment commitments towards a DGS. Without reflecting the payment commitments in the financial statements (provisions) or holding higher capital to absorb potential losses related to materialisation of the payment commitments obligations, such DGS calls might lead to a domino effect and the deterioration of institutions' financial position. For this reason, the EBA considers that the competent authorities, while performing the SREP assessment, should assess the risks related to payment commitments in order to mitigate the procyclicality problem.	
Question 10: Do you agree with the criteria on the haircut provided in this Part	Four respondents claimed that the application of the principle of prudential neutrality might in fact disadvantage banks using payment commitments due to the fact that, unlike cash payments, payment commitments are subject to: (i) collateral management costs; (ii) haircuts imposed on	The guidelines recommend that competent authorities assess the risks to which the capital and liquidity positions of a credit institution would be exposed should the DGS call this institution to pay its commitment in cash, and	*No amendment*

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
7? **Do you think there are other requirements which should be provided under these guidelines about this issue?**	the assets provided as collateral; and (iii) increased level of asset encumbrance.	exercise the appropriate powers to ensure that the pro-cyclicality effect is mitigated by additional capital/liquidity requirements. In doing so, competent authorities will be able to take into account other factors mitigating the risk (e.g. haircuts or increased level of asset encumbrance).	
	Four respondents acknowledged the need for introducing a consistent prudential treatment of payment commitments, irrespective of the accounting rules applied by banks; however they stated that the treatment of the payment commitments should be different from the treatment of cash contributions to the DGSs funds. Three of these respondents proposed the following harmonised prudential treatment: payment commitments should be risk-weighted as an unrated institution under the standardised approach (i.e. 100%) and a credit conversion factor of 20% should be applied to them, which the respondents deem to be quite conservative given the low probability that the payment commitment is called. One respondent suggested that the prudential treatment of payment commitments should reflect the likelihood of the DGS calling payment commitments and the potential net losses stemming from the DGS intervention (i.e. reflecting potential recoveries from the bankruptcy estate of the failed institution).	Payment commitment is a liability of the bank, not a liability of the obligor; therefore the credit risk treatment established in the Regulation (EU) No 575/2013/Directive 2013/36/EU should not be applied to the payment commitments.	

5. Confirmation of compliance with guidelines and recommendations

Date:	
Member/EEA State:	
Competent authority	
Guidelines/recommendations:	
Name:	
Position:	
Telephone number:	
E-mail address:	

I am authorised to confirm compliance with the guidelines/recommendations on behalf of my competent authority: ☐ Yes

The competent authority complies or intends to comply with the guidelines and recommendations: ☐ Yes ☐ No ☐ Partial compliance

My competent authority does not, and does not intend to, comply with the guidelines and recommendations for the following reasons[5]:

Details of the partial compliance and reasoning:

Please send this notification to compliance@eba.europa.eu

[5] In cases of partial compliance, please include the extent of compliance and of non-compliance and provide the reasons for non-compliance for the respective subject matter areas.