EFDI. EUROPEAN FORUM OF DEPOSIT INSURERS

EFDI Non-Binding Guidance Paper

COVERED DEPOSITS IN THE EU: DEFINITION AND SPECIAL CASES

For approval by the EFDI EU Committee

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SUMMARY

- The Deposit Guarantee Scheme Directive[1] (DGSD) further harmonises the definition of covered deposits across the European Union, as well as the precise scope of the coverage in specific, less usual cases. Articles 5 and 6, mainly, set the necessary rules for all Deposit Guarantee Schemes (DGSs) in that matter. The purpose is not only to define a standard protection ("€100,000 per bank and per depositor for the total amount of his/ her deposits"), it is also to adapt the protection to various life events (for example with the temporary high balances regime) and to diverse contractual relationship between a bank, an account holder and third parties (for instance through the beneficiary account regime).
- Further adaptation is permitted by the DGSD for some cases, so that Member States could also marginally individually design the protection at the national level. National specificities, both in terms of banking products and markets should be considered, as well as the need to appropriately combine the protection features with various requirements of non-EU harmonised laws outside the scope of financial regulation: as an illustration, inheritance regime and civil law as a whole.
- European DGSs have actively engaged themselves in the implementation of the DGSD since 2014 and have set the necessary processes for meeting with the prescriptions, including for the new cases and rights identified by the DGSD. DGSs have been quite consistent in the implementation of the definition and scope of coverage. As a whole, the diversity of banking products, as well as the options open by the DGSD, led to rather rich an implementation landscape.
- This EFDI note provides a short, but detailed review of this landscape, which may, in compliance with the EU regulatory framework, support European DGSs in the definition and execution of their policy in that matter. It outlines a set of recommendations in that field, from the analysis to be pursued for special cases to communication issues and stress-testing. It also suggests further exchanges of views and deepening on several provisions of the DGSD, including temporary situations, structured deposits and beneficiary accounts.

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[1] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

1. INTRODUCTION

1. **The scope of coverage constitutes a key feature of any deposit guarantee scheme.** It sets the extent of depositors' compensation in case of a failure of their bank. Ahead of any crisis event, depending on its characteristics, the scope of coverage has also a direct impact, along with the statutory coverage level, on the confidence depositors will put in the protection they benefit from. Last, it largely determines the complexity of the operations DGSs must face within a crisis, and then, the swiftness and efficiency of the payout process they build to ensure a short and timely repayment to depositors.

2. **The scope of coverage has been further harmonised across the European Union by the DGSD, leading to a more common definition of deposits, while setting the features of various "special cases" DGSs shall cover.** Requirements by legislators have become significantly more ambitious, especially spreading across all EU jurisdictions the principle of temporary high balances (THBs) coverage, among several other cases. Principle 8 of the revised IADI Core Principles for Effective Deposit Insurance Systems that were agreed upon in November 2014 has also put the light on the importance of an unambiguous definition of covered deposits for both better preventing bank runs and avoiding hampering payout operations.

3. **Not limited to a definition issue, the scope of coverage give rise for DGSs to a process issue, as their operations must be fully aligned with their mandate and with the regulatory requirements.** Any change in the definition of coverage implies correlative changes, quite often complex, in deposit guarantee operations. The changes have to be reflected in the Single Customer Views (SCVs) files required from all member banks in the DGS jurisdiction, which means that all member banks may have to amend their IT operations, or even the way they report and collect the operations made by their customers. Downstream, DGSs shall adapt their own collection and treatment processes. They also need to amend their public awareness policy and their communication channels accordingly. When the new definition of coverage leads to the emergence of cases to be handled separately from the main 7-day[2] payout process, DGSs have to build additional handling processes, test them and train their internal or external operators to those new cases.

4. **EFDI launched the DGSD2 Implementation Initiative ("D2I") to identify the main challenges and issues DGSs are facing in the implementation of the DGSD.** The D2I aims at developing non-binding guidance and best practice in regard to technical topics such as the definition of covered deposits and the handling of special cases. The development of such non-binding guidance is supported through surveys among the EFDI membership and operational workshops to discuss the technical topics among practitioners[3]. As part of this initiative, an *EFDI Workshop on Definition of Deposits and Treatment of Special Cases* was held on 18 and 19 June in Prague, Czech Republic, organised by the Financial Market Guarantee System, the Czech deposit

[2] i.e. 7 days at the latest in 2024.
[3] The power to issue non-binding guidance is laid down in article 3.2 of the statutes of EFDI.

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insurer. The workshop helped to stress out that, starting from the same provisions set by the DGSD, DGSs protect "core" deposits and special cases in a consistent way across the Union, with detailed implementation features enriched by the diversity of non-core or more complex banking products, by the options opened by the DGSD and, as the case may be, by the need to articulate deposit protection with other national laws and regulations.

2. BACKGROUND AND STATE OF PLAY

2.1. LEGAL AND CONTEXTUAL BACKGROUND

5. As an element of general context, in its Core Principles, IADI states an overarching goal of clarity in the definition of the level and scope of the coverage (Core Principle 8). Essential Criterion 1 of Core Principle 8 urges for a clear and public definition in law. It also requires that ineligible deposits or depositors are *"clearly specified, easily determined and do not affect the speed of reimbursement"*. This underlines a combined need and challenge: to deal with possibly complex coverage scope, to build efficient processes and to comfort public awareness and public confidence.

6. In a different legal framework, and led by an objective of enhanced harmonisation, the EU DGSD offers a common definition of deposits. According to Article 2 (Definitions) of the DGSD, deposit means "*a credit balance which results from funds left in an account […] and which a credit institution is required to repay under the legal and contractual conditions applicable, including a fixed-term deposit and a savings deposit.* This straightforward definition uses the key concepts of "repayable funds" and of "accounts". It also lightens the fact that deposits can only be held by a (licensed) credit institution.

However, this definition is made more complex by an addition and an exclusion. Is equally considered as a deposit "*a credit balance which results […] from temporary situations deriving from normal banking transactions".* Conversely, is not considered as a deposit "*a credit balance where:*

a. *its existence can only be proven by a financial instrument as defined in Article 4(17) of Directive 2004/39/EC of the European Parliament and of the Council, unless it is a savings product which is evidenced by a certificate of deposit made out to a named person and which exists in a Member State on 2 July 2014;*
b. *its principal is not repayable at par;*
c. *its principal is only repayable at par under a particular guarantee or agreement provided by the credit institution or a third party."*

7. The extent of the coverage provided by DGSs is ascertained by Articles 5, 6 and 8-9 of the DGSD. Article 6 sets a harmonised €100,000 coverage limit across the Union (while creating on top of this a specific regime for temporary high balances - see

below). In short, Article 5 delivers a list of exclusions and inclusions/ re-inclusions. It excludes from depositor protection deposits made by professional financial players (credit institutions, investment firms, financial institutions, insurance companies, pension funds…), with the exceptions of collective accounts held by credit institutions on behalf of their clients (Article 5-1 (a)) and, optionally, deposits by some small pension schemes (Article 5-2 (a)). It also discards coverage for public authorities, while deposits connected to money laundering activities or held by unidentified holders are excluded as well.

Various provisions in Article 5 and 8-9 further shape the scope of coverage for the following cases:

- **Small local authorities deposits** (Article 5-2 (b) – national option): "*deposits held by local authorities with an annual budget of up to € 500,000*" may be included up to the coverage level.

  All public authorities were previously excluded from coverage, on the basis that they could benefit from insider information and, as in the case of financial players, have the professional capacity to assess their own risks. The DGSD has acknowledged that not all public authorities should be regarded in an identical way and, in particular, that "small" local authorities can hardly be seen as conflicted in that matter.

- **Guarantee deposits** (Article 5-3 – national option)**:** deposits that guarantee the paying off of "*a loan on private immovable property*" may be excluded from coverage.

  This provision protects the liquidation estate, distinguishing deposits supposed to be available to the depositors under contractual terms, on one hand, and deposits which are earmarked as a security to guarantee the reimbursement of a loan, and therefore are unavailable under contractual terms, on the other hand. Reimbursing those deposits at the time of the failure of the bank would actually breach the contractual terms and undermine the quality of assets to be recovered by the liquidator.

- **Dormant de minimis accounts** (Article 8-9 - mandatory): no payout shall be made for deposits with no record of "*transaction […] within the last 24 months*" and a balance "*lower than the administrative costs that would be incurred by the DGS in making*" the repayment.

  This provision aims at saving time and money to DGSs when there is little reason to think that depositors really care about being compensated. However, the assessment of the costs, combined with the condition of no transaction within a two-year period, may raise legal and practical issues for DGSs (see below).

8. Beyond the overall definition of deposits and list of inclusions/ exclusions, Articles 6 and 7 of the DGSD also define, on a mandatory or optional basis, specific coverage features adapted to numerous special cases (to be handled within the 7-day payout period or not, as the case may be). Those cases relate to the functioning of the account, the account balance or the specific nature of the account holder.

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- **Temporary high balances** (Article 6-2 – mandatory, precise features left at national discretion): deposits made before the failure of the bank, up to three to twelve months (national option) before the event, are protected above the €100,000 coverage limit, in an extent set at national level, provided that: (a) they "*result from real estate transactions relating to private residential properties*"; (b) they "*serve social purposes laid down in national law and are linked to particular life events of a depositor such as marriage, divorce, retirement, dismissal, redundancy, invalidity or death*"; (c) or they "*serve purposes laid down in national law and are based on the payment of insurance benefits or compensation for criminal injuries or wrongful conviction*".

  This regime – introduced by the DGSD – thus recognises specific situations where depositors receive unusually large amounts of money prior to the default with little time to reallocate their assets. Options allow to craft at the national level, according to local specificities and needs, the extent of the additional protection in terms of content, length of time and amount. Given its importance and the diversity of its implementation features and challenges, EFDI plans to investigate further on the THB regime with a specific workshop and guidance.

- **Joint accounts** (Article 7-2): as stated by the Directive, "*the share of each depositor in a joint account shall be taken into account in calculating*" the €100,000 limit, while "*in the absence of special provisions, such an account shall be divided equally among the depositors*".

  The legal regime for joint accounts, ahead of any failure of the bank, varies along the jurisdictions. In some legal frameworks, the recognised property of joint accounts follows a legally predefined and not challengeable split; in other jurisdictions, the legal regime is a presumed and rebuttable split – at any time, each depositor may provide evidence to substantiate a claim on a specific share of the joint account. In both cases, this split may be an equal split between the co-holders (by default) or set by the contractual terms signed by them with the bank (e.g. 60%/ 40%).

  The provision set by the DGSD acknowledges that it is neither the responsibility of the failing bank, nor the one of the DGS, especially within 7 working days, to interfere in the relationship between co-holders. For the record, this way of proceeding may nevertheless raise further difficult questions, especially when the joint account has been fed by a temporary high balance in the name of one of the co-holders.

  Joint accounts may also raise other problems, for instance when frozen or seized. In such cases, and whether the seized amount relates either to the account (all depositors) or one of the depositors, how should the reimbursement be calculated? Does the full seized amount affect all depositors' reimbursement or the part that is attributed to each? Similar questions can be raised when applying the THB regime to joint accounts.

  As for THBs, EFDI plans to address those issues with a specific guidance later in the review process.

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- **Business partnerships, associations or groupings of a similar nature** (Article 7-2 – national option): close to, but different from joint accounts, deposits held by persons "*entitled as members of a business partnership, association or grouping of a similar nature, without legal personality, may be aggregated and treated as if made by a single depositor*".

  Simply put, this provision recognises that the same person may have several separate, non-fungible estates recognised by law. This is especially the case with the "undivided co-ownership" scheme where, without any preset legal personality, for business purposes or not, various persons jointly own an estate independently from their personal estate. Depending on the jurisdictions, this could be the case for a business partnership (lawyers, consultants…); for the community of heirs before a deceased person's estate, including banking accounts, could be distributed; or even by the opening of a specific banking account. For instance, some legal frameworks make the difference between the account of "William Smith **or** Kate Doe", which is a joint account, and the account of William Smith **and** Kate Doe", which is an undivided co-owned account, belonging to a separate estate than William's one and Kate's one, with potentially three separate reimbursements instead of two.

- **Beneficiary accounts** (Article 7-3 – mandatory): this generic term refers to bank accounts where the account holder (depositor) and the person who is absolutely entitled to the sums held in an account (beneficiary) fall apart (e.g. fiduciary accounts, escrow accounts). Those beneficiaries "*shall be covered by the guarantee*" provided that they have been or could be identified before the date of the failure. "*Where several persons are absolutely entitled*", the share of each beneficiary *"shall be taken into account when the"* €100,000 coverage limit *"is calculated".* In other words, beneficiary accounts are handled "looking through" the named holder of the account.

  In accordance with national legal frameworks, beneficiary banking accounts are used in a significant variety of cases, especially for some regulated activities: e.g. by investment services firms to collect and segregate their clients' money; by lawyers, notaries, court bailiffs, curators or other judicial officers to receive funds due to clients in enforcement of an agreement or of a court order; by property developers to hold the pre-financing of their works etc.

  The real time identification of all concerned beneficiaries and compensations due may be out of reach, since they are usually not recorded in the IT system of the bank. As a matter of fact, beneficiaries themselves are quite often unaware of the bank and account they are indirectly linked to. On those accounts, only the named holder has the capacity to provide the needed identification at the desired time.

- **Set-off** (Article 7-5 – national option): to the extent permitted by the contract between the depositor and the bank, "*the liabilities of the depositor to the credit institution*" may be "*taken into account when calculating the repayable amount where they have fallen due on or before the date*" of the failure.

  As above for guarantee deposits, this optional set-off regime facilitates the liquidation process, clearing away the need for claiming afterwards the liabilities unpaid by

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depositors at the date of the failure. However, it requires a close cooperation with the failed bank to clarify the set-off amount within a short time period before the payout; some disputes with the creditors over the set-off amount could also arise.

- **Social purposes deposits** (Article 7-8 – national option): beyond the €100,000 coverage, "*certain categories of deposits fulfilling a social purpose defined by national law*" and held in the same defaulting bank, may be covered by a third-party guarantee, provided that this guarantee "*complies with State aid rules*" and is limited to €100,000.

  In this situation, banks collect clients' money on behalf of a third-party (e.g. a public entity) and transfer the money in full or in part to this third-party. The guarantee is therefore separate.

2.2. COMPLEMENTARY OBSERVATIONS

9. The specific coverage features mentioned above result from the willingness to design a better, fairer and more comprehensive protection to depositors, as well as to make the EU framework suitable with various national specificities and prior protections or exclusions. Those features shape a much more detailed and extensive coverage than the summarised picture usually given ("*€100,000 for all deposits of a given holder*"). As an illustration, not even considering the THB regime, the provision specific to business partnership and related accounts in jurisdictions where it applies, shows that the same person may be entitled, through different legal angles, with different estates and rights to compensation, and then be reimbursed, on one hand, as a direct holder of various accounts, and, on the other hand, as a member of a partnership or a grouping without any legal personality.

10. Unsurprisingly, all European Union and European Economic Area (EEA) DGSs have adjusted or reshaped their processes to cope with the definitions made by the DGSD and the transposition texts. Most of the European DGSs have introduced a national THB regime, a rare phenomenon before the DGSD. If that improvement has been quite visible for the public and for the authorities, numerous other adjustments, less apparent, have been undertaken at the national level by DGSs, to cope with the needed specific coverage features mentioned above, for instance for structured deposits, deceased depositors' accounts, beneficiary accounts, set-off operations etc.

In that matter, DGSs have to deal with requirements coming from national laws beyond the scope of financial regulation, and usually unharmonised at the EU level, such as:
- civil law, especially in the case of inheritance regimes;
- consumer protection law, e.g. for dormant accounts;
- tax law, e.g. to avoid double seizure of assets against clients of a defaulting bank;
- commercial law, for instance for partnerships;
- bankruptcy/ insolvency law, with specific set-off provisions etc.

As a whole, their mission is to meet both those requirements and the DGSD

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expectations, offering a fast payout to depositors, in an operationally manageable way.

2.3. STATE OF PLAY IN THE EEA

11. The D2I workshop held by EFDI in June 2018 gave the opportunity to share the technical solutions developed by European DGSs to implement the DGSD requirements – inclusions/ exclusions (par. 12 below) and special cases (par. 13) - within their own legal framework; as well as to share some questions about the extent of various provisions of the DGSD. Those solutions and questions may differ from one jurisdiction to another, depending on the existing local framework, on the services proposed by the various banking markets and on the options selected by public authorities to offer wider or narrower coverage within the limits of the DGSD. Examples below are not exhaustive and are limited to countries for which the needed detailed information was available. Their inclusion in this note does not imply an appreciation, nor a recognition by others.

12. The <u>definition of covered deposits</u> with its inclusions and exclusions has been consistently transposed in local legal frameworks by all DGSs. The core definition of covered deposits, for the bulk of banks' clients, has not raised any interpretation or implementation issue. Still, some variations or difficulties have been highlighted at the above-mentioned workshop, in relation with the coverage of non-official currencies, the actual extent of the coverage of so-called "temporary situations", as well as with the exact scope of the exclusion applied to non-repayable-at-par deposits and to dormant de minimis accounts, among other cases.

- **Currency coverage:** as stated by the DGSD, the coverage is extended regardless of the currency which the accounts are denominated in. However, while most definitions of covered deposits implicitly or explicitly refer to official currencies issued by States[4], a few of them[5] leave the possibility to also cover "exotic currency" denominated accounts, if they only exist: financial gold, regional currencies and alike.

- **Temporary situations deriving from normal banking transactions:** The scope of this provision of the DGSD is unclear (which temporary situations does it refer to? What is a "normal" banking transaction?). Some DGSs also incorporate in-flight transactions here, others include certified draft cheques.
    - **In-flight transactions:** One of the most difficult tasks for DGSs, banks or liquidators at the time of the declaration of the unavailability of deposits, is to assess (and stop) all transaction flows between the failing bank and its environment (clients and counterparties), across all possible channels (physical, electronic, postal…): payments, cheques, cash withdrawals, credit and payment cards, FX and securities transactions, interbank market, clearing and settlement systems. Transactions must be either completed, or interrupted, and sometimes reversed (e.g. flows of cheques deposited at the bank but not handled yet). A first

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[4] e.g. Greece, Iceland, Malta, Norway, Poland
[5] e.g. Denmark, Finland, Italy

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exchange of views among EEA DGSs has shown that most, if not all of them declare the unavailability of deposits at a time that could allow a proper closing and minimise the difficulties, generally end of the business day. EFDI plans to investigate further on this issue with a specific workshop and guidance.

- **Certified draft cheques:** Those cheques are used for various large transactions initiated by customers, for instance when buying a car or a real estate property. The bank draws the money from the account of the customer and remits this customer a "certified draft cheque" directly issued by the bank on its name for the adequate amount. This cheque can then be given by the buyer to the seller, with no risk for the latter on the former. In case the bank defaults during the transaction, the seller or the buyer becomes a creditor of the bank (depending on whether the transaction has been accomplished or not). However, the "temporary transactions deriving from normal banking transactions" regime may be used to secure those kinds of transactions: by remittance of the certified cheque to the DGS, either the seller benefits from the payout as if he were a depositor, or the buyer benefits from a complementary payment within the total coverage limit.

- **Structured deposits**: Many banking systems in the EEA offer structured deposits to their customers. Those deposits, sometimes complex, combine features of both a deposit and an investment product. They have received a legal definition from Article 4-1 par 43 of the MIFID II (2014/65/EU) Directive, as deposit as defined in the DGSD (Article 2-1), benefitting from an interest rate or premium calculated according to a formula involving various factors and indices, excluding interest rates directly linked to index such as Euribor or Libor. Whether those structured deposits should be considered as DGSD-protected or unprotected deposit (due to the exclusion of products which principal is not reimbursable at par or reimbursable at par under a specific guarantee – Art. 2), is actually a pending question in a court case in at least one of the EU jurisdictions[6]. It is under close examination in various countries[7]. Some others cover those structured deposits[8], exclude them from coverage[9] or cover some of them, depending on their characteristics[10].

- **Small local authorities' deposits**: While justified and applied in various jurisdictions[11], this coverage option may bump on various practical hurdles for DGSs as it leads to offer different treatments for depositors which are of not identified as different in the SCVs transferred to the DGS. The different legal structures of local public entities also make the identification of local authorities sometimes complex. Last, the budget criterion may be difficult to check, while being neither totally relevant, nor comprehensive if the objective is to mitigate conflicts of interest and foster risk assessment. In the end, the identification issue and the condition laid down

[6] Sweden
[7] e.g. Belgium, Germany, Greece
[8] e.g. Iceland, Ireland, Malta, Poland, the UK
[9] e.g. Italy
[10] e.g. Austria, Norway
[11] e.g. the UK and other jurisdictions below

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on the annual budget may imply that the concerned DGS, rather than the member banks, establishes specific IT access to tax and administrative data with various public entities[12]. In some national frameworks[13], to obtain the coverage for the upcoming year, small local authorities have to provide banks with the proof that the amount of the budget (tax revenues) did not exceed the legal limit the year before.

- **Dormant de minimis deposits**: Implemented to the letter, the DGSD provision for those accounts (Art. 8-9) may raise difficult issues for practitioners: how to compare the balance of account with a payout administrative cost which may depend on the payment method that the depositor may choose, not the DGS? Are those costs measurable? Should they be adjusted for each payout event, depending on their total size? In the end, are administrative costs of handling the exclusion of those dormant de minimis accounts higher or lower than the administrative costs of a full payout? In light of those numerous and complex interpretations, should that exclusion of reimbursement be mandatory?

  In practice, various EEA DGSs have considered their administrative costs as equal or close to zero (on a marginal basis) and the costs of handling the exclusion higher than the possible savings on non-refunded accounts. The de minimis provision, then, becomes inoperant. Some others did set a fixed administrative cost for their payout. The issue for them is then an operational one: how to build a manageable and efficient process within the legal limitations and not unduly limiting depositor protection? In Sweden for instance, the fixed administrative cost that has been set triggers a cut-off in the reimbursement function of the DGS for all (dormant **and** non-dormant) deposits, with no payment made. Depositors nevertheless receive an information on this process from the DGS and may contact it for a repayment. After analysis, a compensation is paid if the account may be considered as active. Finland, Germany, Ireland and Italy for instance have also set specific processes to exclude the compensation of dormant de minimis deposits.

  Consumer laws in some jurisdictions may also have established a protection regime specific for dormant accounts which may interact with the DGSD provision. In France for example, all banks must transfer dormant banking accounts to a public entity after a period of time, regardless of their amounts, so not to keep those accounts in their balance sheet or even appropriate them, while leaving depositors a chance to get a reimbursement. The failure of the bank potentially introduces misadjustments in this protection regime.

13. On top of the definition of coverage, the <u>handling of special cases</u> has mobilised a lot of attention and efforts on the EEA DGSs side. Those cases are not only complex; they are of utmost importance in regard of the DGSs' objective to ensure a fair, adequate and swift compensation in all situations, especially in some of the desperate cases that a banking failure can create. As a result, based on in-depth analysis of their national legal framework, they have built specific manual and IT processes and

[12] e.g. in Croatia
[13] e.g. Czech Republic

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solutions to best handle those cases. Along the specificities of their environment, the following cases illustrate the scope of their concerns, efforts and solutions.

- **Deceased depositors**: More than others, regimes for deceased depositors need to be deeply entrenched with local civil laws. In case the depositor dies after the failure of the bank, the compensation follows the usual process and coverage rules, even if the DGS may have to pay special attention to the persons whom the compensation is sent to. But in case the death occurs before the failure, depending on the jurisdictions, either legal successors are individually considered as depositors[14]; or, as long as the estate has not been liquidated, the community of heirs is seen as an undivided co-ownership, with a separate compensation[15]. As the case may be, where it is enforced, this undivided co-ownership regime may apply to a community of one heir, with a compensation separate from the one the same person may also get as a depositor. This acknowledges the fact that the heir has no control and maybe no knowledge of the estate before its liquidation.

  In other countries[16] , repayment may be deferred according to Art. 8(5) of DGSD to prevent any "double" compensation in those cases where the succession in the estate of the deceased depositor has not been completely clarified.

  The civil law specific to the jurisdiction may affect further the payout process in Member States. In some cases[17], a provision of dispositions of funds in case of death, with a list of pre-set beneficiaries and within a statutory limit, established by the depositor beforehand, shall be compensated in the first place. Identically, the claim upon covering the costs of funeral, if submitted before the failure and even though it formally emanates from a creditor, not a depositor, shall be compensated by the DGS before any repayments, in various steps, to the legal successors of the deceased following the rules of Civil Law.

- **Business partnership and entrepreneurs accounts**: Under this regime, when conditions are fulfilled, depositors may be considered both as natural persons and as legal persons, with separate estates[18]. The legal person category may cover[19]: self-employed natural persons, natural persons carrying out economic activities independently, exercising liberal professions or whose economic activity is regulated by law, individual enterprises or family enterprises. Therefore, such regime quite helpfully allows the payment of a compensation to a craftsman, a shopkeeper or a physician independently from his compensation as a natural person. It acknowledges the banking needs and activities related to the business activities of the depositor, besides his banking needs for his personal or family life.

  However, in other jurisdictions[20], business partnerships, associations or groupings of a similar nature (i.e. two or more persons) may be considered as a separate estate but

[14] e.g. Czech Republic, Greece, Ireland, Italy, Malta
[15] e.g. Austria, Iceland, Norway, the UK
[16] e.g. Germany
[17] e.g. Poland
[18] e.g. Italy, Malta, Romania
[19] Here in Romania
[20] e.g. Austria, Germany

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entrepreneur accounts (of only one natural person) are part of the natural person`s estate.

- **Beneficiary accounts:** In that field, practitioners have to determine how and to which extent beneficiaries can be considered as identifiable at the date of the failure of the bank, as well as the share that should be allocated to each of them. This may involve the failing bank's record-keeping system; a recognised professional record-keeping system, i.e. a system administered by an entity holding funds on behalf of its customers, and itself regulated in the jurisdiction – investment companies, payment institutions, financial enterprises, notaries, execution authorities, property managers and developers etc[21] –; or no specific limitation to such acknowledged record-keeping systems[22]. Those deposits may include transactions proceeds being temporarily immobilised in such accounts.
  - Various processes have been built to calculate the eligible amount for each beneficiary. In one approach[23], beneficiaries are seen as the actual depositors of the beneficiary account. Their eligibility is therefore checked along the usual criteria of the DGSD and the share of each beneficiary is compensated on top of other possible deposits of that person in the defaulting bank – usually at a later stage when the needed information has been obtained from the account holder in name. The additional compensation is paid within the margin left between the coverage limit and other deposits already compensated to the depositor. This additional compensation may be sent directly to the beneficiaries[24] – leaving it up to the institution holding the previous account to reconstitute the funds by its clientele –, or to the institution holding the account[25].
  - Another approach[26] recognises the specificity of the relation of the beneficiary with the failing bank: the beneficiary is an "indirect depositor" with no control on the management of the account; he usually has no indication about the bank the account is being held with and therefore cannot manage his other assets in this bank accordingly. As a consequence, a beneficiary regime specific to indirect depositors, is set beside the direct depositor regime: the beneficiary is regarded as a person different from the direct depositor, with a separate coverage; eligibility criteria are not applied either, as the beneficiary cannot be considered as conflicted or seen as a professional manager. All compensations due to the beneficiaries are then paid to the account holder so to help this institution to restore in full or in part the relationship with its clients and maintain its business operations.

[21] e.g. in the Czech Republic, France or the Netherlands
[22] e.g. in Belgium, Denmark, Finland or Poland
[23] e.g. in Belgium, Denmark, Ireland, the Netherlands
[24] e.g. the Netherlands, Norway where another option would be against the law
[25] e.g. Czech Republic, Denmark, Finland or, in various cases, the UK
[26] e.g. France

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- **Fiduciary accounts**, as a subset of beneficiary accounts, require specific care by DGSs. Those accounts are held for the account of a third-party (the "beneficiary"). in one holder's own name (the "fiduciary" - a trustee, a lawyer, a bank, a real estate agent etc., with no ownership interest in the deposit). The beneficiary regime[27], or, as the case may be, the undivided co-ownership approach[28], may be applied to this type of accounts along various approaches. In Liechtenstein for example, the implementation of the beneficiary regime is driven by Anti-Money Laundering provisions. On the standard case ("disclosed fiduciary accounts") where beneficiaries are fully identified at any time by the bank, beneficiaries are those seen as depositors and a look-through approach is applied. If not ("undisclosed fiduciary accounts", used under special situations determined by law), fiduciaries are those seen as the depositors and accordingly compensated; the beneficiary regime could be applied at a later stage, providing that beneficiaries identify themselves.

- **E-money issuers:** As a protection offered against their possible failure to their customers, e-money issuers are requested either to obtain a third-party guarantee (probably rare), or to segregate customers money in a specific dedicated banking account. Though protective, this measure raises an issue in case the bank which holds the account goes itself bankrupt. The DGSD set a specific regime for beneficiary accounts (Art 7-3) but does not explicitly open this possibility to e-money issuers under a mere financial institution statute (Art 5) – though it is quite likely that such an exclusion from the payout will also lead to the failure of the e-money issuer. In practice, some EEA DGSs exclude such a coverage of clients' e-money issuers[29], others recognise to e-money issuers the benefit of the beneficiary account regime[30], contingently on the basis of a specific legislative provision and provided that an adequate contribution is calculated accordingly. In all cases, those accounts also raise a public awareness and consumer protection issue, as e-money issuers' clients can be inappropriately led to believe they benefit from the DGSD deposit guarantee (€100,000 – 7-day payout) in case of a failure of the issuer.

- **Set-off provisions**: Some jurisdictions[31] apply this DGSD option, provided that the conditions are fully fulfilled – the depositor has been informed by the bank prior to the conclusion of the contract, the depositor liabilities are offset pursuant legal or contractual provisions (e.g. arrears on loans, overdraft of credit lines, interest and account maintenance fees) and those liabilities are due prior or on the day of the failure event. Given those elements, a set-off will be possible for instance in regard of a loan instalment which has fallen due, but not for an authorised overdraft staying within the contractual limits. Obviously, the implementation of the set-off provision

[27] e.g. in Denmark, Greece, Ireland, Liechtenstein, Poland
[28] e.g. France
[29] e.g. Belgium, Finland, Germany, Italy, Spain
[30] e.g. Austria, Czech Republic, the Netherlands, the UK
[31] e.g. Austria, Belgium, Greece, Iceland, Norway

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implies additional communication with the failed bank within its SCV or with the bank's liquidator (and later on with depositors), so that the DGS can meet the required 7-day time limit.

- **Creditors' rights**: Quite often, under various circumstances, the tax administration (or other public creditors and, as the case may be, private creditors) can block a depositor's account and obtain a forced debit within a given time period. In case the money has been segregated from the depositor's account and not yet transferred to the tax office, the failure of the bank interrupts the payment to the administration: neither the depositor, nor the administration still has access to the funds and the tax authority can then launch a second seizure process on other assets to obtain a payment. To solve such potentially hopeless situations, some[32] reinstate the seized amount in the calculation of the global compensation due to the depositor; the compensation is then directly paid for a part to the depositor (up to the actual balance after seizure), and the remaining part is paid to the creditor on behalf of the depositor. The DGS is then subrogated to the rights of both the depositor and the creditor over the bank.

  The issue of creditors' rights is under review among a number of countries[33]. A legal issue is also raised[34] to determine whether seized accounts can be considered as deposits given the definition provided in Article 2-1 (3) of the DGSD[35] and since the depositor has no access to such funds.

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3. NON-BINDING GUIDANCE

14. EFDI observes that DGSD requirements and definitions for covered deposits and special cases offer adequate and manageable overall prescriptions to EEA practitioners. The corresponding provisions define an appropriate framework for providing harmonisation across the EEA, in a way that allows for the adjustments needed at the national level. While leading this implementation review and elaborating this guidance note, EFDI has nevertheless identified several topics that not only could deserve elements of guidance (par. 15 et seq below), but also might lead to further examination and debate at the EU level in the context of the 2019 review by the European Commission and the European Banking Authority, such as the following ones:

- **Temporary situations deriving from normal banking transactions**: In that matter, further contacts and discussions with EU authorities might be helpful to better assess the scope and implications to be drawn from that definition.

[32] e.g. France, Hungary
[33] including Germany, Iceland, Malta and Norway
[34] e.g. in Greece
[35] a credit balance "*which the credit institution is required to repay under the legal and contractual conditions applicable*".

- **Structured deposits**: The development of those complex products observed across EEA jurisdictions, as well as the interactions between the DGSD and EU regulations on investment products, would advocate for deepening the analysis, or even for additional practical guidance.

- **Deposits non-repayable at par:** Possibly in link with the previous topic, the precise scope of those deposits might be helpfully further reviewed and illustrated.

- **Small local public authorities**: The implementation of this provision leaves some discomfort because of both operational difficulties and questions about the adequacy of the targeting. Further consideration might be given on this targeting and on the parameters of the provision.

- **Dormant de minimis accounts:** In light of the EEA DGSs' experience, the mandatory requirement thus set by the DGSD looks difficult to implement and not adequately justified. An optional status in the DGSD might look appropriate, if not a deletion.

- **Beneficiary accounts by other financial institutions**: While accounts held by credit institutions on behalf of their clients are formally included as beneficiary accounts in the deposit protection coverage, investment firms, e-money issuers and other financial institutions' clients do not benefit from such an explicit provision. Evolutions in the financial retail markets might lead to give a renewed consideration to the wording of the relevant provisions.

EFDI stands ready to contribute with additional technical data, research and advice in the discussions that European authorities might be willing to hold on those matters.

15. On top of those considerations, this non-binding guidance aims at taking stock of the analyses and experiences of EEA DGSs and at providing an appropriate framework to help DGSs to meet with their mission and objectives. The note suggests that DGSs adopt a structured approach along several steps, from prior analysis and communication issues, up to stress-testing. The extent and significance of this non-binding guidance of course depends on the mandate of each DGS.

16. EEA DGSs should identify the different relevant categories of accounts used by banks with their customers and the caveats imposed by these cases (see for instance a possible indicative list in paragraph 17). While the DGSD provides with prescriptions related to the functioning of some accounts (e.g. "beneficiary accounts") or to the identity of some holders (e.g. "public authorities"), a comprehensive and ex ante review of all relevant categories of accounts will ensure DGSs that the most likely cases have been explored by them ahead of any failure event and can then be adequately categorised. The above shall apply against the backdrop that a variety of cases will be detected during every day work and cannot be anticipated prior a payout event.

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17. Given the requirements of the DGSD and what DGSs should do, this identification may be made along two criteria: the specificities of the functioning of the account on one hand, the specificities of the holder of the account on the other hand. The following lists offer a non-exhaustive illustration of the scope to be considered, depending on local market and conditions.

<table>
<tr><th>Specific functioning</th><th>Specific holder</th></tr>
<tr><td>

Structured deposits
Guarantee deposits
Temporary situations deriving from normal banking transactions (e.g. certified draft cheques etc. – tbd)
Dormant accounts
Joint accounts
Collective accounts
Beneficiary accounts, including:
Fiduciary accounts
Escrow accounts
Accounts with set-off provisions
Accounts with dismemberment of the right of ownership
Accounts seized
Social purpose deposits
…

</td><td>

All non-eligible holders
Small local public authorities
Small pension schemes
Deceased depositors
Partnership
Entrepreneurs
Undivided co-ownership
Regulated activities authorised to open beneficiary accounts (e.g. lawyers, notaries, travel agencies, real estate managers and developers etc.)
…

</td></tr>
</table>

18. Such an identification should be led by the objective to be in a position to swiftly identify for each relevant category of account in a payout situation the contractual relationship between the bank, the named holder of the account, any third beneficiary including possible creditors, over the account cycle-life. **DGSs should also make a review of the main relevant provisions in those of their national laws** (inheritance law, civil law, consumer law, tax law, anti-money laundering law, corporate law etc.) which appear in relation with the concerned cases and accounts.

19. In light of this identification, DGSs should technically characterise the various relevant categories of accounts along the cases laid down in the DGSD to determine the appropriate treatment for each of them. For cases not explicitly laid down in the DGSD, DGSs should aim at developing a consistent approach consistent with the DGSD explicit cases and situations. Through this whole process, they will also strive at best addressing the needs of depositors and compensating them in the shortest possible delay.

20. On the basis of the above analysis, DGSs should establish a procedural guide that displays the relevant organisational, legal and technical steps. This guide should be developed consistently ahead of a failure. Such a procedural guide may set, inter alia:

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- whether the case should be and could be handled within the 7-day period;
- the information and documents the DGS will need to handle the concerned case when time comes;
- which information should be and could be collected within the Single Customer Views (SCVs) required from the banks, and which marking should be accordingly introduced within the SCVs;
- which information could be and should be collected after the failure through further exchanges with the failing bank and its former customers.

21. While setting those processes, DGSs should give special care to public awareness and communication issues. As far as relevant, depositors should be informed in advance on the way main specific categories of accounts might be handled, e.g. if set-off provisions could apply, a separate compensation is served to an entrepreneur or whether a structured deposit is covered. When a failure occurs, they need to understand:

- what information or which documents they may be requested to send;
- why a special treatment is applied;
- what the content and extent of this special treatment are;
- how long the treatment could take.

In all situations, communication should be as straightforward as possible to be clearly understood by depositors and to limit further litigation risks. DGSs should also work on identifying relevant situations where depositors could be put in difficult situations (e.g. double seizure of assets by the tax administration). Fixing those situations not only gives DGSs' efforts for better depositor protection their full meaning; it also avoids that the DGS's reputation, and then depositors trust, could be deteriorated during a crisis.

22. DGSs should determine the resources they need and the knowledge they have to build for handling the treatment of special cases. The support of a referent external lawyer, a referent notary or adviser may be helpful for the treatment of complex cases and, then, should be organised ahead of any crisis event. Those internal and external resources have also to be trained to the kind of environment and cases they could be facing.

23. Stress-tests performed by DGSs should consider including regular exercises specific to the identified special cases in the appropriate extent. Even if a case is handled beyond the 7-day limit, DGSs should make their best efforts to ensure the effectiveness, efficiency and speed of the process, and that internal and external operators could handle it in a safe and reasonable way, with an appropriate level of accuracy.

24. Additionally, DGSs might check whether the bases used to calculate contributions could need to be adjusted to incorporate the adjustments brought to the scope of coverage. For setting the contributions, DGSs might for instance take the whole amount of a beneficiary account when it appears that the total compensation of the account is very likely to be close to its balance.

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