

Consultation Response

EBA consultation on Regulatory Technical Standards on DGS payouts of client fund deposits

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Q1: Do you have comments on Articles 1 and 2 of the draft RTS, in particular their suitability for the identification of clients for the purpose of repayment in accordance with Article 8 DGSD3?

We fully acknowledge the objective of Directive 2026/804/EU (DGSD3) to protect client fund deposits, subject to clients being identified or identifiable, and meeting the eligibility requirements set out under Article 8b(1). However, we have serious concerns with Articles 1 and 2 of the draft Regulatory Technical Standards (RTS). We ask that the EBA remove the new requirements provided for under these Articles as these would wrongly place extensive and onerous requirements on credit institutions and significantly exceed the requirements in DGSD3. The proposed approach does not align with the simplification and competitiveness agenda.

We emphasise that RTS may supplement, but may not create, new obligations beyond those provided for in the basic legislative act (as per Article 290 TFEU). The review of the validity of an RTS (adopted on the basis of a delegation under Article 290 TFEU) is not limited to verifying that the measure pursues the same general objective as the basic act. It is also necessary to verify that each of its provisions remains within the content and scope of the delegation defined by the legislator, without introducing a normative choice that was not entrusted to Level 2. RTS are technical in nature and their content is delimited by the legislative acts on which they are based (Article 10 of Regulation (EU) No 1093/2010).

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The EBA has recognised that its proposal is a default option due to alternatives not being identified. We encourage the EBA to give further consideration to other options (including potential recommendations to amend the DGSD 3) and set out possible approaches below.

We strongly object to the current proposal due to the following concerns:

- **Exceeding the requirements of DGSD3:** the identification of clients by financial institutions is a condition for the protection of client fund deposits. However, DGSD3 does not entail a new requirement for credit institutions in this respect, let alone a requirement as onerous as ensuring credit institutions' new and existing contractual agreements with financial institutions include a clause obliging the transmission of relevant client information. This is an important point of principle which justifies a review of the EBA's proposed approach which risks placing credit institutions in an unwarranted *de facto* intermediary or even supervisory role. The requirement for extensive repapering of client contracts also raises important questions concerning feasibility, liability and escalation processes.
- **Feasibility of new contractual arrangements:** financial institutions may object to the required terms for a number of reasons (for example, related to the handling of commercially or client sensitive information, or the additional costs and burden that the contractual clauses would impose on financial institutions). It is unclear from the draft RTS how the EBA would expect credit institutions to handle instances where a financial institution objects to the proposed contractual arrangements. If the EBA does not revise its proposed approach, credit institutions should not be considered non-compliant where they have taken steps to amend existing contracts but completion of the repapering process remains dependent upon agreement from the relevant financial institution.
- **Unclear liability and escalation processes:** in cases where the contractual arrangements are in place, beyond informing the DGS if a financial institution fails to submit the relevant information or to rectify and resubmit the transmission, it remains unclear from the draft RTS whether the credit institution would be expected to carry out any further steps. Credit institutions should not be held responsible for delays in transmission to the DGS where such delays arise because a financial institution has failed to provide complete, accurate or timely information. This is a clear dependency risk.
- **Lack of transitional provisions:** as the EBA proposes that the RTS should apply from the same date as the implementation deadline for the DGSD3, credit institutions may not receive sufficient notice about Member States' approaches. In particular, whether Member States intend to legislate to require financial institutions to transmit the relevant information, or to impose an obligation on credit institutions to ensure receipt of that information (should any Member States choose to pass relevant legislation, noting that this is likely to fall outside most Member States' approaches to transposition given it is not a national option or discretion under the DGSD3). This means credit institutions risk having to begin the repapering process unnecessarily given the extensive timelines associated with repapering. Even if Member States do not introduce requirements on financial institutions, more time is likely to be required for the repapering of existing contractual arrangements.
- **Outstanding information needed from DGSs:** Articles 1 and 2 refer to a number of DGS processes which are as yet unspecified, such as the timeframe and format for transmitting information to the DGS. We query the basis on which these powers can be delegated to DGSs and note that without additional detail, it is difficult to identify further practical challenges associated with the requirement. However, divergent reporting frameworks may increase operational complexity, implementation costs and the risk of data inconsistencies. There could be real feasibility and operational challenges to incorporating underlying client beneficiary lists into the Single Customer View (SCV) files within the statutory timelines in a payout event or DGS stress test.

- **Unclear scope of requirements:** as drafted, the obligations appear to apply even if financial institutions are not established in the EU or are otherwise not subject to segregation obligations under EU law within the scope of Article 8b. We invite the EBA to clarify the drafting of the RTS in this respect. The requirements should not apply unless the financial institution is established in the EU as only deposits placed by EU regulated entities can benefit from Article 8b of DGSD3, in principle. Article 8b(1)(b) of the DGSD3 limits its scope to cases where financial institutions hold client funds on deposit “in compliance with safeguarding requirements laid down in Union law” (and the safeguarding requirements in EU law only apply to EU entities). Article 8b(4)(b)(b) requires the EBA to take account of the specific requirements of the applicable Union law regulating the activities of the financial institutions referred to in Article 5(1), point (d), for the treatment of client funds. Similarly, the requirements imposed by the draft RTS should not apply unless the financial institution holds the client funds deposits in compliance with safeguarding requirements laid down in EU law. Financial institutions may hold accounts with client funds deposits which are not segregated in compliance with safeguarding requirements in EU law. However, banks may not always know the legal basis on which financial institutions hold client funds deposits and may need clients to confirm this.
- **Operational ineffectiveness and lack of proportionality:** in our view, the RTS should recognise that, in most client funds arrangements, the financial institution is the source of truth for the underlying client records, client entitlements and allocation of balances. While the credit institution holds the client funds account and related account-level information, it will often neither possess nor control the detailed client data required for repayment purposes. Requiring credit institutions to obtain, process, validate, store and manage financial institution-originated client-level datasets is therefore not always the most proportionate or operationally effective approach.

It is unclear which alternative options have been considered by the EBA to avoid the exceeding of Level 1 requirements and other challenges highlighted above. We urge the EBA to consider more alternative options and to carry out additional engagement with industry and DGSs to identify a more suitable approach. Factors and options which we believe should be reviewed further include:

- **Existing mechanisms in Member States** that may already require financial institutions to transmit relevant information and the extent to which these can inform the EBA’s approach, without imposing such mechanisms.
- **The institutions most suited to requesting and transferring the information to be provided,** notably whether, for stress-testing purposes, proportionate alternatives of test or synthetic data and/or sample-based testing approaches designed to validate operational readiness without requiring the routine transfer of complete beneficiary datasets would be appropriate.
- **The timing** of when to assess whether client funds are protected by a DGS. The eligibility conditions for deposit protection under Article 8b(1)(c) of DGSD3 are that the underlying eligible clients are “identified or identifiable by the financial institution holding the account on behalf of those clients prior to [the date of the bank’s failure]”. It is therefore unclear that financial institutions should carry out the actual identification in advance of a bank failure. Demonstrating the capability to do so should be sufficient and further clarity around the application and meaning of ‘identifiable’ would be helpful to avoid divergent interpretations.

If the EBA does not revise its overall approach, we encourage the EBA to consider the following at a minimum:

- The lack of transitional provisions and the unclear scope, as mentioned above.

- The introduction of a simple notification process whereby credit institutions should notify financial institutions of the information financial institutions should make available to their clients or for the transmission to the DGS. As part of this process, credit institutions should retain a record of the notification (but not be required to amend contractual arrangements). If the EBA does not consider this alternative approach suitable, we urge the EBA to amend the RTS to clarify that the benefits of deposit protection are only passed through to the underlying clients if the credit institution and the financial institution agree the required contractual terms, but without imposing an obligation on the credit institution to ensure that financial institutions agree to those terms. At a minimum, exceptions should be provided for, permitting credit institutions not to amend existing contractual arrangements, or to include the required contractual clauses, in cases where the financial institution confirms that the client funds would not be eligible for DGS protection (similarly, the notification requirement proposed as an alternative to requiring changes to contractual arrangements would not apply in these cases).
- Ensuring that DGSs are required to provide clarity on the processes envisaged by Articles 1 and 2 in good time before credit institutions must comply with the new requirements (if the delegation to DGSs, which we question, is retained).
- To remove from Article 1(2), point (b), of the draft RTS, the obligation for contractual terms to require financial institutions to provide "other information the DGS deems necessary to fulfil its mandate". This will lead to lack of harmonisation and difficulties for credit institutions when seeking to agree terms with financial institutions which may not be able to identify what information they have to provide. In addition, this provision effectively delegates rulemaking powers to DGSs, which would appear to go beyond any mandate.
- To explicitly address the issues that will be faced by payment institutions and e-money institutions in identifying underlying clients and the relevant amount of deposits at any moment (particularly where their client funds are held across several banks or partially in the form of other assets). Regarding electronic money tokens (EMTs), we note, for example, the challenges raised by the European System of Central Banks (ESCB) in its response to the Commission's targeted consultation on MiCAR and draw attention to the position of the ESCB for "Indirect deposit insurance coverage of crypto-asset issuance and services via the concept of 'client fund deposits'" (section 4.2.1 of the ESCB's response to the Commission).
- To clarify in Article 1(5) of the draft RTS whether the relevant national law is the law of the Member States in which the financial institution is established (if different from the Member State in which the credit institution is established).
- To clarify the information that the financial institution must be able to provide on request. The cross-reference to the information required by the draft ITS on exchange of information is unhelpful. In addition, Article 1(3), point (c), of the draft RTS should make clear what a credit institution must require from financial institutions to ensure that "the requirements necessary to enable the credit institution to fulfil its obligations under [DGSD], national rules and the procedures, format and templates required by the DGS are complied with".
- To clarify the exemption in Article 1(4) of the draft RTS which allows the credit institution to agree arrangements such that it is not able to decrypt "either the amount of client funds deposits held on behalf of a single client or the client's contact details, including datapoints which allow contacting individual clients, excluding names". We also ask that the EBA review the overly restrictive conditions under which those arrangements can be agreed to.

Q2: Do you have any specific comments on how to limit the burden of sharing information in going concern, while still allowing DGSs to prepare for DGS payouts in order to protect clients and prevent contagion of the financial institution?

As set out above, we have serious concerns with the burden that would be placed on credit institutions if the EBA proceeds with its proposed approach. It is unclear why the EBA considers that credit institutions are best placed to require financial institutions, through contractual clauses, to provide the relevant information to determine client funds' eligibility for DGS protection. We consider the proposal to overstep the mandate provided for by DGSD3. We encourage the EBA to engage further with industry and DGSs to identify alternative options.

In addition, we highlight specific data security and privacy concerns, including how the transmission of the data from financial institutions should be encrypted, handled, stored and retained; how in practice the use of concealing certain datapoints such that they cannot be decrypted by the credit institution as part of regular stress testing submissions would operate; the obligation placed on credit institutions to assess the eligibility of financial institutions' clients for DGS protection on whose behalf the account is opened, noting that *'where any inaccuracies or deficiencies are detected, ensure that such information is rectified without undue delay in order to safeguard the interests of the account holder and their underlying clients'*; and the inter-section with GDPR and privacy obligations.

We also question the cost and feasibility of imposing responsibility on credit institutions for the processing and validation of data provided by financial institutions, as this would likely require un-encryption of third-party data files and pose significant feasibility issues for credit institution's ability to meet DGS stress testing timelines / file submission timelines. If the requirement for credit institutions to handle this third-party data is to remain, the only feasible approach would be for credit institutions to pass the encrypted financial institution data directly to the DGS without processing or validation. A credit institution cannot reasonably be expected to bear responsibility for data quality, completeness or transmission accuracy where portions of the relevant dataset are intentionally concealed from it. The RTS should provide clearer protections permitting credit institutions to rely on information supplied by financial institutions without assuming responsibility for independently verifying information that remains outside their control.

Greater clarity is also needed on liability allocation in the event of cyber incidents, incomplete transfers, system outages, data corruption or data quality issues, particularly where the underlying information originates from a third-party financial institution.

Overall, if the EBA does not withdraw the new requirements that will be imposed on credit institutions under the proposed approach, our recommendation is that the RTS set out that the credit institution will act in a "pass-through" capacity with respect to the data from financial institutions to DGSs with no additional obligation to process or validate the data. This would limit the risk and liability to the credit institution with respect to the handling of third-party data for which it has no control, whilst maintaining the credit institution's ability to submit 'going concern' and stress scenario data to the DGS within the timeframe required.

Alternatively, the RTS could explicitly introduce an option allowing direct transmission of client-level information from the financial institution to the DGS, or to a secure DGS-controlled environment. In such a model: 1) the credit institution would remain responsible for identifying and appropriately marking client funds accounts and providing account-level information necessary for reconciliation. 2) The financial institution would remain responsible for maintaining accurate client-level records and providing these directly to the DGS. 3) The DGS would validate the information, request corrections where necessary and manage the repayment process. This optional approach would better align responsibilities with the party that controls the relevant information.

Q3: Do you have comments on the proposals in Article 3 on the criteria under, and the circumstances in which, the repayment is to be made to the account holder for the benefit of each client or to the client directly?

We do not have any comments on the proposals in Article 3.

Q4: Do you have any comments on the proposed Article 4, in particular to avoid multiple claims for payouts to the same beneficiary?

We encourage the EBA to share clearer guidance on how beneficiary balances should be determined, including the relevant balance snapshot, valuation point and treatment of post-insolvency activity. This would support a consistent, operationally workable approach for beneficiary-account structures, particularly given intraday and real-time payment activity.

Q5: Do you have comments on the proposed application date of 24 months after entry into force?

As referenced in our response to Question 1, the proposed application date may pose significant challenges if the EBA's approach is not comprehensively revised. Notably, if Member States choose to legislate to require financial institutions to transmit the relevant information, or to impose an obligation on credit institutions to ensure receipt of that information, this legislation may not be finalised until the RTS are about to apply. This means credit institutions risk having to begin the repapering or notification process unnecessarily. Even if Member States do not introduce requirements on financial institutions, more time is likely to be required for the repapering of existing contractual arrangements, or to implement the notification process outlined in our response to Question 1. If the EBA's proposals are retained even in revised form, we would encourage the introduction of a transitional provision to mitigate this risk.

We also reiterate our earlier comments that without the detail of DGSs' timeframes and processes, and relevant formats for transmitting information, it is difficult to identify and address other practical challenges that may arise.

Q6: Do you have any other comments on the proposed RTS?

In conclusion, we urge the EBA to comprehensively review its proposed approach, particularly with regards to Articles 1 and 2. We would welcome further engagement with the EBA to assist with the identification of alternative options.

In addition, as a more general point of observation, we note that this consultation paper specifically targets client funds, but does not capture other requirements related to client funds which are raised separately in other consultations in the EBA's consultation package on depositor protection. It would be more efficient for all items on this topic to be covered in the one consultation, and we encourage the EBA to take this into account for future consultation processes.