
EBA Public

Decision of the European Banking Authority EBA/DC/499

of 26 July 2023

concerning the settlement of a disagreement on the transfer of contributions between deposit guarantee schemes

Addressed to:

**Fondo de Garantía de Depósitos de Entidades de Crédito
(Deposit Guarantee Fund for Credit Institutions)
And**

**Fonds de garantie pour les services financiers / Garantie fonds voor financiële diensten
(Deposit Guarantee Fund for financial services)**

The Board of Supervisors

Having regard to 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/EC¹ (the '**EBA Regulation**' and the '**EBA**'), in particular Article 19(3) thereof,

Having regard to Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes² (the '**DGSD**'), in particular the second subparagraph of Article 14(5) thereof.

Whereas:

Parties and subject-matter

- (1) This Decision is addressed to the Spanish Fondo de Garantía de Depósitos de Entidades de Crédito (the '**ES DGS**') and to the Belgian Fonds de garantie pour les services financiers / Garantie fonds voor financiële diensten (the '**BE DGS**') (together the '**Parties**').
- (2) As both Parties are bodies which administer deposit guarantee schemes ('**DGSs**'), they fall under the definition of competent authorities set out in point (iv) of Article 4(2) of the EBA Regulation.

¹ OJ L 331, 15.12.2010, p. 12.

² OJ L 173, 12.6.2014, p. 149.

- (3) The dispute concerns a disagreement about the contributions that the BE DGS transferred to the ES DGS, in accordance with the first subparagraph of Article 14(3) of the DGSD, in relation to the transfer of a credit institution from the BE DGS to the ES DGS.

Background of facts

- (4) Belgian legislation provides that each credit institution licensed by the authority responsible for prudential supervision on 1 January each year must pay the regular contribution for that year to the BE DGS. This contribution is paid to the BE DGS with value date 1 July and is definitively and fully acquired by the BE DGS³. According to the BE DGS, to calculate BE DGS member credit institutions' contributions, covered deposits held on 31 December and their individual risk indicators of the previous year must be taken into account. In practice, no later than 20 January, credit institutions must communicate the amount of covered deposits held on 31 December. The National Bank of Belgium is responsible for calculating the individual risk indicators, and these are communicated to the BE DGS during March or April. The BE DGS invoices at the end of May, the credit institutions must pay by the end of June.
- (5) On 1 January 2020 the credit institution was a member of the BE DGS. Accordingly, the credit institution was due to pay the regular annual contribution for 2020. The contribution was calculated on the basis of the covered deposits held on 31 December 2019 and the risk indicators for 2019. On 25 May 2020 the BE DGS issued an invoice to the member credit institution for that annual 2020 regular contribution for EUR 329 899.11. This contribution amount was paid on 8 July 2020.
- (6) On 1 January 2021 the credit institution remained a member of the BE DGS. Accordingly, the credit institution was due to pay the regular annual contribution for 2021. The contribution was calculated on the basis of the covered deposits held on 31 December 2020 and the risk indicators for 2020. Although it had ceased to be a member of the BE DGS on 5 March 2021 because of a merger, on 25 May 2021 the BE DGS issued an invoice for the annual 2021 regular contribution for EUR 479 134.52. The BE DGS subsequently recalculated this contribution, issuing an additional invoice on 2 June 2021 for EUR 297 979.37. Both amounts totaling EUR 777 113.89 were paid by the credit institution's legal successor on 28 June 2021. At this point the credit institution was no longer a member of the BE DGS, the legal successor being a member of the ES DGS.
- (7) For the purposes of Article 14(3) of the DGSD, by e-mail dated 23 February 2022, the ES DGS requested the BE DGS to transfer the contributions that had been made to the BE DGS by the credit institution prior to the merger that took place on 5 March 2021.
- (8) By e-mail dated 13 April 2022, the BE DGS informed the ES DGS that the contributions to the BE DGS amounted to EUR 329 897.54. The BE DGS informed the ES DGS that these contributions were equivalent to the contributions paid in the 12-month period prior to the merger and

³ Article 24 Royal Decree 16 March 2009.

transfer of business (i.e. between 5 March 2020 and 5 March 2021). On 5 August 2022, the BE DGS transferred this amount to the ES DGS.

- (9) The ES DGS received supplementary information from its member, the legal successor to the credit institution, that it had made additional payments to the BE DGS than those reported by the latter. The ES DGS considered that those additional payments should also be transferred since they were invoiced once the credit institution had ceased to exist and its assets and liabilities, including covered deposits, had already been taken over by its legal successor which was a member of the ES DGS. As a result of that, on 28 April 2022 the ES DGS asked the BE DGS to clarify why those amounts were not to be transferred to the ES DGS.
- (10) On 2 May 2022 the BE DGS informed the ES DGS that such amounts had been invoiced and paid after the effectiveness of the merger and, for this reason, they fell out of the scope of Article 14(3) of the DGSD. Subsequent exchanges of correspondence took place between the Parties. By letter dated 28 July 2022 the BE DGS informed the ES DGS, amongst others, that it had not been informed of the credit institution's merger before the ES DGS's email of 23 February 2022 and that *'Belgian legislation provides that each credit institution licensed by the authority responsible for prudential supervision on January 1st of the year must pay the annual contribution stipulated in article 8, § 1, first paragraph, 1^o, or 1^o bis of the Royal Decree of 14 November 2008; this contribution is paid to the Guarantee Fund with value date July 1 and is definitely and fully acquired by the Guarantee Fund (article 24 of the royal decree of 16 March 2009). Because the value date is regulated by law, we, do not have the option to choose when the invoice for the annual contribution is paid'*.

Procedural history

- (11) On 28 December 2022, the ES DGS requested the mediation of the EBA (the **'Request'**) in reaching an agreement with the BE DGS in accordance with point (a) of Article 19(1) of the EBA Regulation in conjunction with the second subparagraph of Article 14(5) of the DGSD.
- (12) Point (a) of Article 19(1) of the EBA Regulation establishes that in cases specified in the legislative acts referred to in Article 1(2) [*such as the DGSD*] (...), the Authority may assist the competent authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4 of this Article (...) at the request of one or more of the competent authorities concerned where a competent authority disagrees with the procedure or content of an action, proposed action, or inactivity of another competent authority. The second subparagraph of Article 14(5) of the DGSD states that if DGSs cannot reach an agreement⁴ or if there is a dispute about the interpretation of an agreement, either party may refer the matter to EBA in accordance with Article 19 of the Regulation and the EBA shall act in accordance with that Article. The ES DGS and BE DGS have both subscribed to a cooperation agreement under Article

⁴ The first subparagraph of Article 14(5) requires DGSs to have written cooperation agreements in place to facilitate effective cooperation between DGSs with particular regard to, amongst others, transfers of contributions between DGSs in accordance with Article 14(3) DGSD.

- 14(5) of the DGSD (the '**Cooperation Agreement**')⁵ Part III of which covers transfer of DGS contributions.
- (13) The rules of the mediation proceedings have been laid down in the Decision of the EBA of 22 January 2020 concerning rules of procedure for the settlement of disagreements between competent authorities (EBA/DC/2020/313) (the '**Rules of Procedure**')⁶.
- (14) Following the EBA's receipt of the Request submitted by the ES DGS and of the BE DGS written statement of position and supporting documentation, the EBA held a conciliation meeting between the Parties on 20 February 2023 with a view to settling their dispute within the conciliation period set by the EBA Chairperson in accordance with the third subparagraph of Article 1(2) of the Rules of Procedure. The conciliation period ended on 7 March 2023.
- (15) The Parties failed to reach an agreement within the conciliation period. Therefore, in accordance with Article 19(3) of the EBA Regulation in conjunction with the second subparagraph of Article 14(5) of the DGSD, the EBA is empowered to take a decision (the '**Decision**') requiring the Parties to take specific action or to refrain from certain action in order to settle the matter and ensure compliance with Union law, with binding effect for the competent authorities concerned.
- (16) In the absence of a settlement of the disagreement between the Parties and in accordance with Article 41(3) of the EBA Regulation and Article 2(1) of the Rules of Procedure, the Chairperson proposed to convene an independent panel (the '**Panel**') which was tasked with proposing the Decision for adoption by the EBA's Board of Supervisors. Following an open call for participation and after consulting the EBA's Management Board, the EBA's Board of Supervisors approved the proposed composition of the Panel on 24 May 2023.
- (17) Upon request to the Parties for the purposes of proposing the Decision, the Parties provided further written submissions for the Panel's consideration and were heard by the Panel on 16 June 2023. The Panel also heard European Commission staff on the Commission's views of the requirements of the relevant provisions of the DGSD, in particular Article 14(3).
- (18) In accordance with Article 39(2) of the EBA Regulation and Article 3(1) of the Rules of Procedure, on 28 June 2023 the Panel informed the Parties of its intention to propose a Decision. Having regard to the urgency, complexity and potential consequences of the matter, the Panel set a time limit of five (5) working days within which the Parties could express their views on the subject-matter of the Decision.
- (19) On 13 July 2023, having considered the Parties' views, the Panel proposed a decision to the EBA's Board of Supervisors for adoption.

⁵ [EFDI H2C Cooperation Agreement - Official version - September 2016 .docx - Google Drive](#)

⁶ [EBA DC 313 - Binding mediation RoP amended \(consolidated version\).pdf \(europa.eu\)](#)

Position of the parties

a) The position of the ES DGS

(20) In its submissions to the Panel, the ES DGS alleges that the BE DGS has proceeded against the purpose of the DGSD especially the first subparagraph of Article 14(3) thereof, the established principles of paragraph 75 of the EBA Guidelines on cooperation between DGSs under the DGSD (the '**EBA Guidelines**')⁷ and Article 18(4) of the Cooperation Agreement, which is to compensate for the transfer of the risk of payment of covered deposits from one DGS to another.

(21) In this respect the ES DGS stresses the provisions of paragraph 75 of the EBA Guidelines which state that *'(...) the transfer of contributions from one DGS to another should happen on the same day on which the member credit institution leaving one DGS joins the other DGS. Arranging the transfer on the same day also removes the risk of the transferring DGS using the funds contributed by this institution in a payout or resolution after the member credit institution has left the transferring DGS.'*

(22) According to the ES DGS, the application of Article 14 of the DGSD by the BE DGS, leads to a reasoning whereby if the contributions had been paid within the 12 months preceding the end of the membership, this amount would have been transferred to the ES DGS (as the BE DGS did with the 2020 regular annual contributions for the amount of EUR 329 897.54). As the 2021 contributions were paid after the merger, the transfer to the ES DGS did not take place. However, the new risk borne by the ES DGS has been transferred and the actions of the BE DGS have limited the compensation mechanism established in the DGSD, EBA Guidelines and Cooperation Agreement because the transfer of risk to the ES DGS was not accompanied by the transfer of the contributions paid after the merger.

(23) The ES DGS also considers that the BE DGS's application of Article 14(3) of the DGSD leads to an undesirable uneven playing field among member States. Allowing transferring DGSs to retain contributions could lead to a situation where they could decide to establish the payment of contributions on the day after a merger becomes effective leaving the transfer of the risk established in the legislation uncompensated.

(24) Moreover, the ES DGS argues that the practice followed by the BE DGS also hinders the harmonisation of the provisions applicable to DGSs in the EU, favouring the emergence of disputes amongst them. On this point, they note that the DGSD only imposes a time restriction in the period prior to the exit of an entity from a DGS but does not impose any restriction on contributions made to the transferring DGS after that period.

(25) Under the rules governing the ES DGS⁸, if the absorbed entity were to be the entity leaving (from the ES DGS to the BE DGS, the ES DGS would not have been entitled to claim the regular

⁷ [EBA-GL-2016-02 GL on DGS cooperation agreements EN.pdf \(europa.eu\)](#)

⁸ Article 5(4) of Royal Decree-Law 16/2011.

contribution once the merger had already taken place. The ES DGS explains that its national legislation prescribes that regular contributions accrued by an entity leaving the ES DGS must be paid before its exit, which sometimes results in the entity paying more than one contribution in the 12-month period prior to leaving the ES DGS which have to be transferred to another DGS.

(26) Against this background, the ES DGS would consider it a good practice not to have charged a contribution once the credit institution ceased to be a member of the BE DGS.

(27) Further, the ES DGS refers to paragraph 76 of the EBA Guidelines backed by Article 18(4) of the Cooperation Agreement referring to the timing of transfers of contributions to illustrate that the BE DGS could have offered to the ES DGS an agreement on the deadline for the transfer of the contributions but that it did not do so.

(28) The ES DGS considers that if the 2021 contribution is not transferred to the ES DGS, the BE DGS is unduly enriched since it has collected contributions to cover for the risk of bank failure and subsequent use of DGS funds to reimburse depositors, when such risk no longer existed because the credit institution was no longer a member of the BE DGS.

(29) According to the ES DGS, it did not collect 2021 contributions from the legal successor of the credit institution in relation to the covered deposits transferred. As a result of that, it considers that if the BE DGS transferred the contributions paid in 2021 as well, the ES DGS would not be unduly enriched by as the ES DGS would not receive double contribution on the transferred covered deposits.

(30) The ES DGS notes that the 2021 invoices were issued after the merger took effect, i.e. they were addressed to an entity that did not exist at the time they were issued. The 2021 invoices were finally paid by the credit institution's legal successor, an entity adhered to the ES DGS and not to the BE DGS. The ES DGS considers that any contributions should have been paid by the credit institution prior to the merger and, if the payment was made afterwards, the BE DGS should have transferred the contributions to the ES DGS.

(31) In summary, the ES DGS considers that the BE DGS has acted contrary to the purpose of the DGSD and to that established in the EBA Guidelines and the Cooperation Agreement, which is to compensate for the transfer of the risk of payment of deposits from one DGS to another. For these reasons, the ES DGS requests that the EBA adopts a decision declaring that the BE DGS must transfer to the ES DGS the 2021 annual regular contribution (in addition to the 2020 annual regular contribution already transferred) in the amount of EUR 777 113.89.

b) The position of the BE DGS

(32) The BE DGS refers to the notion of '*reference period*', consisting of the 12-month period preceding the transfer of activities, referred to in Article 14(3) of the DGSD, starting on 5 March 2020 and ending on 5 March 2021. The only contribution paid within that period was the contribution paid on 8 July 2020 and is thus the only contribution to be transferred to the ES

DGS. Accordingly, the BE DGS considers that it could only comply with the DGSD, as transposed into national law, by transferring the contributions paid on 8 July 2020.

(33) In relation to the ES DGS's claims for contributions that became due before the termination of the membership and that were collected after the termination of membership, the BE DGS argues that:

(34) First, the DGSD did not harmonise any details with respect to the contribution cycle, except from the provision of its Article 10(1) which states that "*DGSs shall raise the available financial means by contributions to be made by their members at least annually*".

Therefore, the Belgian legislator established that each credit institution licensed by the authority responsible for prudential supervision on 1 January of the year must pay the annual contribution; this contribution is paid to the Guarantee Fund with value date 1 July and is definitively and fully acquired by the Guarantee Fund.

Accordingly, the BE DGS considers that the contribution paid by the institution after the merger thus has a solid legal basis in Belgian law, without contradicting the DGSD.

(35) Second, against this background, the Belgian legislation read in conjunction with article 14(3) of the DGSD, clearly replicates the intention of the EU legislator, namely that the transfer of contributions refers only to one full contribution cycle that equals twelve months or one year.

The ES DGS's demand that the contribution that became due on 1 January 2021 should also be added to the reference period would have the effect of transferring contributions that relate to two contribution cycles or two years.

Therefore, the BE DGS considers this demand to be contrary to (i) the intent of the DGSD and (ii) the reference period of 12 months provided for in the DGSD.

(36) Third, if the BE DGS took into account, on the one hand, the contributions paid during the 12 months preceding the transfer and, in addition, the contributions that became due during the same time period, the number of contributions to be transferred would depend on the date of the end of the membership.

They explain that a termination of the membership in the first half of a calendar year would trigger a transfer of contributions that relate to 2 contributions cycles (the contributions paid and due), while a termination of the membership in the second half of a calendar year would trigger a transfer of contributions that relate only to 1 contribution cycle (the contributions paid).

They consider that this example shows that a system that equates the words '*paid*' and '*due*' thus creates undesirable effects. Hence, they consider that the EU legislator foresaw this undesirable effect and gave preference to the '*contributions paid*' during the reference period.

Thus, they state that although it may sometimes seem counterintuitive at first glance, only a strict application of the DGSD can currently preserve the level playing field.

(37) Fourth, the BE DGS considers that the ES DGS clearly links the transfer of contributions to the transfer of the risk of failure. The BE DGS agrees in principle but considers that one should see the contribution as a compensation rather than an amount proportional to the risk transferred. Accordingly, had the EU legislator's intent been focused on the transfer of risk, the DGSD would have explicitly stated that the transfer should be equal to a certain percentage of the transferred covered deposits and taking into account the risk profile of the institution.

(38) The BE DGS argues that this is not the case with the current DGSD provision, since the contribution paid to the DGS also depends on DGS specific or sector specific features, e.g. the target level of the DGS, the amount of available financial means of the DGS and the risk scores of the other institutions affiliated to the DGS. It notes that had the Belgian legislator chosen to stop collecting contributions after the DGS had reached the minimum target level of 0.8%, the BE DGS would not have collected any contributions from the credit institution during the relevant period and therefore would not have been required to make any transfer to the ES DGS.

(39) The BE DGS concludes that purely economic reasoning is insufficiently convincing and not a good explanation for the choices and thus the intentions of the EU legislator and that it respected the DGSD and its own national legislation. They consider the ES DGS's demand as non-compliant with the requirements of the DGSD, especially as it would lead to undesirable effects.

EBA Assessment

(40) The EBA's role is to settle the disagreement between the Parties. At the root of the disagreement is a difference in approach to how to apply the DGSD's requirements in relation to the transfer of contributions between DGSs when (part of) a credit institution leaves one DGS and joins a DGS in another member State. It is therefore necessary for the EBA to determine a transfer amount that is appropriate in the circumstances of this case and consistent with Union law, in particular the DGSD. While the EBA's decision should be aimed at resolving the particular disagreement the solution should, so far as possible, be able to be applied in similar cases in order to ensure consistent, efficient and effective application of the DGSD in the EU.

(41) Article 10(1) of the DGSD states that '(..) *The available financial means of DGSs shall be proportionate to those liabilities. DGSs shall raise the available financial means by [regular] contributions to be made by their members at least annually (...)*' and Article 13(1) of the DGSD establishes that that '*the contributions to DGSs referred to in Article 10 shall be based on the amount of covered deposits and the degree of risk incurred by the respective member*'.

(42) It follows that credit institutions pay contributions to the DGSs to cover the risk their failure poses to the DGS. For that reason, as pointed out by recital (36) of the DGSD, contributions are

based on credit institutions' covered deposits (the liability to the DGS), and the degree of risk incurred by them (the probability that that liability materializes).

(43) It also follows from Article 10(1) of the DGSD that the DGS is financed by the contributions due at least annually from its members.

(44) Consistent with the principle catering for the financing of DGSs as set out in Article 10(1) of the DGSD, in order to provide some compensation for the transfer of financial risk resulting from a credit institution ceasing its membership of one DGS and joining another DGS, and to facilitate the smooth transfer of the liability, the first subparagraph of Article 14(3) of the DGSD requires the transfer of the contributions paid by a credit institution during the 12-month period preceding the end of membership to the receiving DGS: *'If a credit institution ceases to be member of a DGS and joins another DGS, the contributions paid during the 12 months preceding the end of the membership, (...), shall be transferred to the other DGS'*.

(45) In the EBA's view, first, the legislature clearly intended to ensure that such compensation would take place through the transfer of an amount corresponding to the contributions relating to the last annual regular contribution period.

(46) That was also reflected in the original Commission's proposal for a Directive on DGSs recast of 12 July 2010⁹, which stated in section 7.6 (Cross-border cooperation) of its Explanatory Memorandum that *'Banks reorganizing themselves in a way that causes their membership of one DGS to cease and entails membership in another DGS will be reimbursed their last contribution so that they can use these funds to pay the first contribution to the new DGS'*. The term *'reimbursed'* was eventually replaced by *'transferred'* to the other scheme.

(47) Therefore, where a credit institution restructures its activities and the restructuring involves the transfer of responsibility for covered deposits to the DGS of another Member State, the last 12 months of payments are also transferred to that DGS.

(48) In the present case, if Article 14(3) of the DGSD were to be interpreted literally as meaning that only contributions actually *'paid'* during the contribution period were to be transferred, the ES DGS would receive an amount of funds related to the risk posed by the credit institution, and paid, in 2020, and not the more recent, and thus more relevant, 2021 calculation and payment. The present case shows the importance of this distinction: contributions in 2021 were more than double the contributions in 2020, due to significant increase in covered deposits over that period and therefore risk posed to the DGS. According to the BE DGS, the amount collected from the credit institution was much larger in 2021 than in 2020 because of an increase in the amount of covered deposits held by the credit institution, an increase of its average risk weight and a general increase of the adjustment coefficient for the whole banking sector in the member State.

⁹ COM (2010) 368 final.

- (49) Secondly, in the present case, if Article 14(3) of the DGSD were to be interpreted literally as meaning that only contributions actually *'paid'* during the contribution period were to be transferred, the amount to be transferred would be heavily dependent on the precise date that payments are made and of DGS membership changing. In the present case, changing the merger date by a few months could lead to the 2020, the 2021 or both payments being transferred. This example exacerbates the arbitrariness of the amount of contributions to be transferred as the DGSD subjects the timing of transfer to national procedures and shows the asymmetrical approaches that could be taken by different member States, because it is dependent on the dates of the invoicing, dates of payment of the contributions and even the frequency of contributions.
- (50) Thirdly, this literal interpretation could create market distortions and obstacles to the freedom of establishment within the internal market, since the DGS receiving the credit institution without receiving the latest contribution made could be incentivized to request an *'entry contribution'*, to compensate for not receiving the most recent contribution paid and so not covering any recent increase in risk. This exposes the concerned entity to potential double payment of contributions for the same coverage period.
- (51) Following a literal interpretation, the BE DGS would have an undue advantage, since it would retain the contributions paid for a period for which it is not financially responsible for the guaranteed deposits; at the same time, the ES DGS would have an improper disadvantage.
- (52) Therefore, in the EBA's view, any interpretation which focuses on dates that actual payments are made could have serious consequences for the internal market and would undermine confidence in the DGSs and cooperation between the competent authorities of the member States.
- (53) The European Commission also considers that the period for which the contributions are collected, rather than the actual dates of payments of contributions, should be decisive for the determination of which contributions should be transferred.
- (54) The second subparagraph of Article 14(4) of the DGSD states that *'If a credit institution intends to transfer from one DGS to another in accordance with this Directive, it shall give at least six months' notice of its intention to do so. During that period, the credit institution shall remain under the obligation to contribute to its original DGS in accordance with Article 10 both in terms of ex-ante and ex-post financing'*. In the EBA's view, it is clear that this means that credit institutions cannot be required to contribute after transferring to another DGS.
- (55) Paragraphs 75 and 76 the EBA Guidelines (replicated in Article 18(4) of the Cooperation Agreement) also state that *'75. (...) In addition, the receiving DGS must be able to meet its obligations towards the depositors of the member credit institution from the first day. Therefore, a credit institution's transfer of membership should happen seamlessly. This implies that the transfer of contributions from one DGS to another should happen on the same day on which the member credit institution leaving one DGS joins the other DGS. Arranging the transfer*

on the same day also removes the risk of the transferring DGS using the funds contributed by this institution in a payout or resolution after the member credit institution has left the transferring DGS. 76. Where the receiving DGS is willing to take the risk of accepting the new member credit institution without receiving the transfer on the same day, it should agree the deadline for the transfer with the transferring DGS’.

- (56) Therefore, the process outlined in the EBA Guidelines assumes that the credit institution informs its original and/or new DGS about its intention to change DGS membership 6 months in advance, and that the DGSs then inform each other effectively, to make sure the transfer of the contributions happens, at the latest, on the same day when the entity leaves its original DGS. For this to happen, the EBA Guidelines assume that the contributions to be transferred have been paid by the credit institution before leaving the DGS. If this were not the case, for example because contributions are due but the process for calculating and paying the contribution extends beyond the date that the credit institution leaves the DGS, the DGS are able to agree bilaterally the transfer date of the relevant contributions.
- (57) Both the ES DGS and the BE DGS have notified compliance with the EBA Guidelines. In this regard, it must be recalled that the European Court of Justice¹⁰ has stated that, although EBA guidelines are non-binding, competent authorities must make every effort to comply with them, otherwise they are obliged to give reasons for non-compliance.
- (58) The BE DGS collects contributions on an annual basis, with contributions being due from a credit institution under the Belgian transposition of DGSD in that annual contribution cycle if it is licenced as a credit institution in Belgium on 1 January.
- (59) In the EBA’s view, in order to settle the disagreement, the contribution notified by and paid to the BE DGS in 2021 should be treated as the contribution paid in the twelve months prior to the credit institution leaving the BE DGS and therefore the amount to be transferred from the BE DGS to the ES DGS in accordance with the first subparagraph of Article 14(3) of the DGSD.
- (60) The invoices sent on 25 May 2021 and 2 June 2021 for EUR 479 134.52 and EUR 297 979.37 respectively, totaling EUR 777 113.89 were the last annual contribution that the credit institution was obliged to pay during the 12-month period preceding the end of its membership of the BE DGS for the purposes of the first subparagraph of Article 14(3) of the DGSD. The delay between the contribution becoming payable on 1 January 2021 and it being paid does not change this assessment. Indeed, if these contributions are not treated as being paid within the last 12 months of membership, then they should not have been paid at all since no contributions should be payable after a credit institution ceases to be a member of a DGS.
- (61) Following this approach, the contribution paid in 2020 and which arose on 1 January 2020 does not fall within the 12-month period preceding the end of the credit institution’s membership of the BE DGS.

¹⁰ Case C-911/19, *FBF v ACPR* (paragraphs 69 to 71).

(62) Accordingly, the ES DGS should not have received the 2020 contribution from the BE DGS and should return it to the BE DGS. This amount (EUR 329 897.54) should be set off against the 2021 contribution which the BE DGS should transfer to the ES DGS (EUR 777 113.89), resulting in a net transfer from the BE DGS to the ES DGS of EUR 447 216.35.

(63) The EBA considers that a further cause of the disagreement is deficiencies in cooperation and information sharing between the DGSs concerned, their affiliated credit institutions and the relevant competent authorities within their jurisdictions, and that in order to settle the disagreement it is therefore necessary to require the DGSs to take actions in this area.

(64) In accordance with Article 10(1) of the DGSD, DGSs must have in place *'adequate systems to determine their potential liabilities'*. Article 14(6) of the DGSD states that *'Member States shall ensure that appropriate procedures are in place to enable DGSs to share information and communicate effectively with other DGSs, their affiliated credit institutions and the relevant competent and designated authorities within their own jurisdictions and with other agencies on a cross-border basis, where appropriate'*.

(65) In line with Article 14(3) and (4) of the DGSD, paragraph 63 of the Guidelines states that *'The provision of accurate data is a key step in ensuring an effective transfer of information from one DGS to another. Cooperation agreements should specify the deadline for the DGS which the member credit institution is leaving (transferring DGS) to notify the DGS the member credit institution in question wants to join (receiving DGS) about the intention of the member credit institution to join the receiving DGS or, where a member credit institution communicates to the receiving DGS its intention to become a member credit institution of such DGS, to notify the transferring DGS of such circumstance. The deadline referred to above should begin from the date on which:*

- *the member credit institution notifies the transferring DGS of its desire to join another DGS, where the transferring DGS knows which DGS the institution intends to join; or*
- *the member credit institution notifies the receiving DGS of its desire to join.'*

(66) Both the BE DGS and the ES DGS should have had systems in place to monitor information on deposit flows, including as a result of restructuring operations, of the credit institution and its legal successor as members of the respective DGS. This should have been done either directly by the DGS or in cooperation with the relevant competent and designated authorities, with information shared between the DGS.

(67) The EBA understands that the credit institution did not inform either DGS of its intention to change its DGS membership. However, it also appears that neither DGS identified the existence of the restructuring operation until the ES DGS contacted the BE DGS with its e-mail dated 23 February 2022. This indicates a lack of appropriate cooperation and information exchange with the respective prudential supervisor.

(68) In order to restore cooperation and trust between the DGS and so resolve the disagreement, the EBA considers that the DGS need to take action to review their current systems of cooperation and information exchange in order to comply effectively with the requirements set out in the EBA Guidelines. What is needed will depend on the current arrangements in place at the DGSs and therefore the decision should require the DGSs to each review their existing arrangements and adopt a plan for making improvements within a defined time period. This may include, for example, measures to enhance the traceability and specific risk management processes of covered deposits, communication with their national competent authorities to ensure they receive information about restructuring operations and cross-border transfers of their member institutions and prospective members, systems and procedures of communication with other DGS.

Views of the parties on above assessment

(69) On 3 and 5 July 2023, the BE DGS and the ES DGS, respectively, replied to the Panel's invitation to express their views on the proposed Decision in accordance with Article 39(2) of the EBA Regulation and Article 3(1) of the Rules of Procedure.

(70) The ES DGS confirmed its view that, according to a literal reading of Article 14(3) of the DGSD, as the merger took place on 5 March 2021 and the 2020 annual contribution to the BE DGS was paid on 8 July 2020, i.e. within the 12 months preceding the end of membership of the credit institution, the ES DGS is entitled to receive the 2020 contribution as well. In the same vein, the ES DGS is of the view that Article 14(3) of the DGSD does not exclude the transfer of multiple contributions, provided they are paid within the 12 months preceding the end of membership. According to its view, neither the EBA Guidelines nor the Cooperation Agreement preclude such multiple transfer. Moreover, it considers that there is no rule stating that only one or the last contribution must be transferred, nor any mention of a '*reference period*' or '*contribution period*' in the current framework, which only sets a time limit. In its opinion, the EU legislator never endorsed any reference to the '*last contribution*' or the '*last annual contribution period*'. They also reiterated that the transfer by the BE DGS of the requested amount would not imply that the ES DGS receives a double contribution in 2020 or 2021 for the covered deposits transferred, as it did not include these deposits in the calculation of the absorbing entity's 2020 or 2021 contributions. Finally, they referred to the fact that the BE DGS voluntarily transferred the 2020 contributions and at no point in the proceedings did the BE DGS consider it acted incorrectly. In relation to the above, the EBA notes that this Decision refers indistinctly to '*contribution*' or '*contributions*', the decisive factor being that they relate to the '*last annual regular contribution period*', as clearly stated in paragraphs (45) and (60) above. Regarding the reference to a '*contribution period*' or '*reference period*', the EBA further reiterates (see paragraphs (43) to (47) above) its view that the DGSD provision on transfer of contributions in case of a change of a DGS membership was fully synchronised and aligned with the requirement for collection of regular contributions.

(71) The ES DGS also considered that Article 2(1) of the proposed Decision exceeds the scope of the mediation request and explained that credit institutions adhered to the ES DGS are obliged to report to the ES DGS on the data of covered and eligible deposits and depositors at branches

located in other EU member States. While the EBA considers this measure useful to cases where the ES DGS must reimburse depositors in another member State or to assess what would be the impact on the ES DGS if that branch was to turn into a subsidiary, the case under review is different, as it concerns a merger between two separate credit institutions, and so if the ES DGSs wanted to monitor the potential impact of the merger on itself, it should have liaised closely with its national supervisor to receive information about the restructuring operation.

(72) Similarly, the ES DGS considered that Article 2(2) of the Decision exceeds the scope of the mediation request and explained that in case of business transformations of Spanish entities with change of affiliation to other DGSs, there is a communication procedure between the credit institution, the competent authority and the ES DGS which ensures that the ES DGS is aware of such situations. In relation to this point, the EBA finds this explanation not entirely convincing as the credit institution's deposits were transferred to the Spanish credit institution and under the protection of the ES DGS in March 2021, while the ES DGS only contacted the BE DGS in February 2022. This suggests that either the ES DGS was not aware of the merger and only realised what had happened when collecting covered deposits data in early 2022 or, if they were aware of the merger, they did not approach the BE DGS in a timely manner. Therefore, the EBA considers it is necessary that the ES DGS reviews its internal systems to monitor information on deposit flows, especially as a result of restructuring operations of credit institutions, and the communication procedures with its national authorities, member institutions and other DGSs in relation to such operations, to ensure a consistent, efficient and effective application of the DGSD.

(73) The BE DGS considered that the proposed Decision was too far reaching and did not sufficiently cater for the current text of the DGSD. It also considered that the amount to be transferred depends mainly on country-to-country variables and only partially on the institution's latest risk profile and different relevant data. The BE DGS also stressed that the Commission's consideration in paragraph (53) above on the relevance of the period for which the contributions are collected rather than the actual dates of payments of contributions does not provide sufficient legal certainty. Finally, the BE DGS also considered that the proposed Decision contradicts national legislation as it would prevent collection of contribution from a DGS member who is no longer a member when the invoice is sent. In relation to these comments, the EBA reiterates that a pure literal interpretation of Article 14(3) of the DGSD has its limitations and that the legislative intent of the DGSD should be favored as it allows for a better consideration of the risks to be covered under the scheme enabling transfer of contributions to occur in a timely manner.

(74) The EBA considers that the foregoing replies from the Parties do not affect the position of the EBA as set out in the assessment set out in paragraphs (40) to (68) above.

Has decided as follows:

Article 1

The BE DGS shall transfer to the ES DGS EUR 447 216.35 by 27 August 2023.

Article 2

1. The BE DGS and the ES DGS shall review their internal systems to enhance the traceability and specific risk management processes of covered deposits.
2. The BE DGS and the ES DGS shall review their communication procedures with their respective national competent authorities, member credit institutions, and with other DGSs and adopt and implement a plan designed to ensure that they receive timely information about any potential restructuring operations of their member credit institutions involving transfers of all or some of their activities to another member State.

Article 3

1. The BE DGS and the ES DGS shall cooperate with each other to ensure that this Decision is complied with in a coordinated and efficient manner for the purposes of Article 1.
2. The ES DGS and the BE DGS shall report to the EBA on the steps taken to comply with Articles 1 and 2. They shall make their first report within one month from the date of adoption of this Decision and subsequently on a quarterly basis until completion of the plans adopted in accordance with Article 2.

Article 4

The EBA shall make this Decision public and shall state the identity of the competent authorities concerned and the main content of this Decision.

Article 5

This Decision shall enter into force on the day following its adoption.

Either addressee may appeal against this Decision to the Board of Appeal of the European Supervisory Authorities in accordance with Article 60 of the EBA Regulation. The appeal, together with a statement of grounds, shall be filled in writing within 3 months of the date of notification of this Decision. The appeal shall not have suspensive effect, but the Board of Appeal may, if it considers that circumstances so require, suspend the application of this Decision.

Done at Paris,

[Signed]

José Manuel Campa
Chairperson

For the Board of Supervisors