

EBA-Op-2019-01

1 March 2019

Opinion of the European Banking Authority on deposit protection issues stemming from the withdrawal of the United Kingdom from the European Union

Introduction and legal basis

1. The competence of the European Banking Authority (EBA) to deliver an opinion is based on Article 29(1)(a) of Regulation (EU) No 1093/2010¹ (the EBA Regulation), and part of the EBA's objective is to promote a consistent approach in the area of deposit guarantees to ensure a level playing field and the equal treatment of depositors across the European Union (EU).
2. This opinion also fulfils the EBA's statutory objective, set out in Article 1(5) of the EBA Regulation, to contribute to the stability and effectiveness of the financial system and its tasks set out in Articles 8(1)(h) and 26(1) of that Regulation to foster depositors' protection and contribute to strengthening the European system of national deposit guarantee schemes (DGSs) by ensuring the correct application of the Deposit Guarantee Schemes Directive² (DGSD), including ensuring that national deposit guarantee schemes are adequately funded and provide a high level of deposit protection to all depositors in a harmonised framework throughout the Union.
3. In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors, the Board of Supervisors has adopted this opinion.
4. This opinion is addressed to competent authorities, as defined in Article 4(2)(iii) of the EBA Regulation. The opinion is also addressed to the national competent authorities of the EEA-

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

² Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

EFTA states, Iceland, Liechtenstein and Norway as per the European Economic Area Agreement to the extent that deposit-taking branches of credit institutions headquartered in the United Kingdom (UK) are established in their countries, and are therefore currently protected by the UK DGS. This opinion concerns the activities of credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013.³

Background

5. On 29 March 2017, the UK notified the European Council of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union (TEU). The withdrawal will take place on the date of entry into force of a withdrawal agreement or, failing that, 2 years after the notification, on 30 March 2019. The UK's decision to withdraw from the EU includes the UK leaving the European Single Market.⁴
6. The EBA is issuing this opinion in response to this unprecedented situation, considering the potential impact on deposit-taking branches of UK credit institutions located in the EU and their customers if their deposits are not adequately protected. This opinion also considers other deposit protection-related issues in the context of the UK's withdrawal from the EU, such as depositor information, the issue of double coverage and the relevance of any changes in DGS affiliation with regard to the currently required transfers of previous DGS contributions. While acknowledging that the materiality of these issues is likely to be low, the objective of this opinion is to ensure that depositors are protected and fully aware of any potential changes to the guarantee arrangements that may affect them. To that end, and without prejudice to the provisions stemming from EU and national law or specific policies related to the case of the UK's withdrawal from the EU, more specifically, the opinion aims to:
 - i) make the competent authorities aware that, if no equivalent protection is provided by the UK at the point of withdrawal from the EU, deposit-taking branches of UK credit institutions established in the EU should be required to join a DGS operating within the EU;
 - ii) recommend to the competent authorities and the credit institutions when depositors should be informed about impending changes following the UK's withdrawal from the EU;
 - iii) remind the competent authorities of the applicable provisions regarding transfers of previous DGS contributions where a credit institution changes its DGS affiliation; and
 - iv) make the competent authorities aware of the potential issues associated with deposits in some branches being protected by two DGSs.

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁴ See HM Government's White Paper, The United Kingdom's exit from, and new partnership with, the European Union, February 2017.

Issues addressed in this opinion

7. On 30 March 2019, in the event of the departure of the UK from the EU without a withdrawal agreement, the UK will become a third country for the purposes of the EU's legal framework. In that scenario, the UK will not benefit from rights under EU law, or be subject to its obligations, including the DGSD. Consequently, once the UK leaves the EU, and barring any transitional arrangements that are specified in the ratified withdrawal agreement, branches of UK credit institutions in the EU, and branches of EU-27 credit institutions in the UK, will become third country branches.⁵ This has a number of implications for competent authorities, credit institutions and depositors.
8. The DGSD framework does not contain provisions covering cooperation with third country authorities, nor does it set out how cross-border payouts involving a third country branch established in the EU should be carried out. The currently applicable DGSD provisions governing, inter alia, cooperation between DGSs within the EU, including how cross-border payouts should be carried out⁶ and transfers of previously paid DGS contributions between EU DGSs,⁷ as well as requirements for informing depositors of changes to their institutions' DGS membership,⁸ will no longer apply to the UK.
9. However, the first subparagraph of Article 15(1) of the DGSD requires Member States to 'check that branches established in their territory by a credit institution which has its head office outside the Union have protection equivalent to that prescribed' in the DGSD. The second subparagraph of Article 15(1) then stipulates that 'if protection is not equivalent, Member States may [...] stipulate that branches established by a credit institution which has its head office outside the Union must join a DGS in operation within their territory.' Finally, the third subparagraph of Article 15(1) of the DGSD states that, when performing the equivalence check, Member States shall at least check that depositors benefit from the same coverage level and scope of protection as provided for in the DGSD.

⁵ This opinion mainly concerns branches of UK credit institutions in the EU and branches of EU-27 credit institutions in the UK that will become third country branches. Credit institutions can also choose to follow other strategies such as, for example, converting branches of UK credit institutions into subsidiaries or transferring the activity carried out by the branches of UK credit institutions in the EU to another EU Member State.

⁶ Article 14(1) of the DGSD provides that DGSs 'shall cover the depositors at branches set up by their member credit institutions in other Member States'. In addition, Article 14(2) of the DGSD provides that depositors at branches set up by EU credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State.

⁷ Article 14(3) of the DGSD then stipulates that 'if a credit institution ceases to be a 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'. These provisions apply to credit institutions changing their DGS affiliation within the EU.

⁸ Article 16(6) of the DGSD requires that depositors should be informed at least 1 month before a merger, conversion of subsidiaries into branches or similar operations takes legal effect (unless the competent authority allows a shorter deadline on the ground of commercial secrecy or financial stability). In such cases, depositors should also be given a 3-month period following notification to withdraw or transfer to another credit institution, without incurring any penalty, their eligible deposits insofar as they exceed the coverage level at the time of the operation. Moreover, Article 16(7) of the DGSD requires Member States to ensure that, if a credit institution withdraws or is excluded from a DGS, the credit institution must inform its depositors within 1 month of such withdrawal or exclusion.

Coverage of branches of UK credit institutions located in the EU and equivalence assessments of the protection granted to such branches

10. In October 2018, the UK's Bank of England published a consultation paper, which proposes that EEA branches of UK credit institutions will no longer be protected by the UK DGS.⁹ This would be in line with the UK's current policy of not covering branches of UK credit institutions in third countries. The consultation closed on 2 January 2019, and on 28 February 2019 the Bank of England confirmed their intentions in the 'near-final' post-exit rules and standards¹⁰.
11. The UK's intended approach, as outlined in the above-mentioned consultation paper, means that, in the absence of any action taken by the competent authorities, depositors at branches set up by UK credit institutions in the EU will lose coverage, unless these branches join a local DGS in the EU.
12. Therefore, assuming that the UK chooses not to protect branches of UK credit institutions in the EU, such branches should be required to join a local (EU) DGS subject to the requirements of the national law,¹¹ making use of the option granted under the second subparagraph of Article 15(1) of the DGSD. This is based upon the assumption that, if no protection is provided to these branches by the UK DGS, that would clearly mean that their protection is not equivalent to the protection offered by the DGSD, and so no further checks of equivalence would be needed.
13. Furthermore, the competent authorities are advised to make preparations before the UK's withdrawal from the EU, so that the membership of the local DGS starts at the point of withdrawal, or, in exceptional cases, as soon as possible thereafter, taking into account the requirement for that branch to secure authorisation¹² and on the basis that the authorisation is obtained, so that there is seamless transition of coverage from the UK DGS to the local (EU) DGS. Preparations would include active and prompt engagement with the relevant branches of UK credit institutions to ensure that their applications to become members are received in time.

⁹ See pp.22-23 in the Bank of England's consultation paper: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2018/cp2618-complete.pdf?la=en&hash=2A1C385C5C157974FDDE36FC5D72F515AD667AA1>

¹⁰ See pp.32-33 in the Bank of England's amendments to financial services legislation under the European Union (Withdrawal) Act 2018* <https://www.bankofengland.co.uk/-/media/boe/files/paper/2019/the-boes-amendments-to-financial-services-legislation-under-the-eu-withdrawal-act-2018.pdf?la=en&hash=1B26AA88A7DCA56C731498A74DB2B688EC79CD58>

¹¹ Where national legislation does not envisage third country branches joining the local DGS, and where there currently are branches of UK credit institutions, the authorities should consider ways to meet the DGSD's aim of ensuring that depositors are protected and fully aware of the guarantee arrangements that affect them, as per recital 11 of the DGSD.

¹² As previously communicated to the competent authorities in the Opinion of the European Banking Authority on issues related to the departure of the United Kingdom from the European Union published on 12 October 2017 (<https://eba.europa.eu/documents/10180/1756362/EBA+Opinion+on+Brex+Issues+%28EBA-Op-2017-12%29.pdf>) and further Opinion of the European Banking Authority on preparations for the withdrawal of the United Kingdom from the European Union (<https://eba.europa.eu/documents/10180/2137845/EBA+Opinion+on+Brex+preparations+%28EBA-Op-2018-05%29.pdf>).

14. Should the UK policy change and should the UK DGS provide depositor protection to branches of UK credit institutions in the EU after Brexit, Article 15(1) of the DGSD would require Member States to at least check that depositors in the UK branches in the EU would benefit from the same level of coverage and scope of protection as provided for in the DGSD. The EBA considers that, in order to maintain depositors' confidence in the protection of deposits held with third-country credit institutions operating in the EU, the level of coverage and the scope of protection should be considered necessary but not the only elements of a more holistic check of the deposit protection system established under the law of the relevant third country and how it ensures protection of deposits in the branches established in the EU.

Depositor information

15. The EBA recalls that the DGSD states that 'credit institutions should make available to actual and intending depositors the information necessary for the identification of the DGS of which the institution and its branches are members within the Union'.¹³ Furthermore, the DGSD states that, in the event of 'merger, conversion of subsidiaries into branches or similar operations', depositors shall be informed at least 1 month before the operation takes legal effect (unless the competent authority allows a shorter deadline on the grounds of commercial secrecy or financial stability).¹⁴ The DGSD also says that depositors shall be given a 3-month period following the notification of such an operation to withdraw their eligible deposits, including all accrued interest and benefits insofar as they exceed the coverage level without incurring any penalty.¹⁵ The DGSD also states that 'Member States shall ensure that if a credit institution withdraws or is excluded from a DGS, the credit institution shall inform its depositors within one month of such withdrawal or exclusion.'¹⁶

16. In the light of the above-mentioned framework and given the unprecedented case of a Member State leaving the EU, the EBA recommends that, in order to ensure that depositors are clearly informed which DGS protects and will protect their deposits, if they have not already done so, competent authorities should promptly engage, directly or indirectly through the relevant national supervisory authorities, with DGS member institutions and:

- In the event that it is already known which DGS the institution will be joining and when, request that institution to inform depositors about it as soon as possible, but at least 1 month before the end of their current DGS affiliation, including any actions the institution is taking to prevent any detriment to the depositors.
- In the event that it is not yet known which DGS the institution will be joining or when, allow that institution, on the ground of financial stability, to inform depositors less than 1 month before the end of their current DGS affiliation or at the point of the UK's withdrawal from the EU, whichever is earlier.

¹³ Article 16(1) of the DGSD.

¹⁴ Article 16(6) of the DGSD.

¹⁵ Second subparagraph of Article 16(6) of the DGSD.

¹⁶ Article 16(7) of the DGSD.

17. The EBA also recommends that the competent authorities should, directly or indirectly through the relevant national supervisory authorities, request the relevant DGS member institutions to provide the depositors in the branch with a depositor information template as per Annex 1 of the DGSD, which should include information about the prospective DGS protection or, where it is not confirmed yet, inform the depositors that they will receive information about the new DGS protecting their covered deposits as soon as the information becomes available.
18. Where depositors are no longer protected by a DGS, the EBA recommends that, subject to provisions of EU and national law, conditions should be created that would allow depositors to withdraw or transfer to another credit institution, without incurring any penalty, their eligible deposits, including all accrued interest and benefits.
19. Any information provided to depositors should be clear and written in plain language, with next steps expressed simply, advice on what action to take where applicable and realistic timelines. The communication should be in the language that was agreed by the depositor and the credit institution when the account was opened or in the official language or languages of the Member State in which the branch is established. Depositors should be told who to contact for further information.
20. The EBA recommends that credit institutions should be requested by the respective competent authorities to inform the competent authorities in the UK and the relevant competent authority in the Member State where the branch operates of their communication with depositors, including providing those authorities with the text of the messages that they are conveying.
21. The EBA also recommends that all relevant EU DGSs in Member States where there are deposit-taking branches of UK credit institutions should publish a press release clearly explaining any changes to DGS affiliation and what it means for depositors' protection.

Transfers of DGS contributions

22. Depending on whether a credit institution changes its DGS affiliation from the UK DGS to an EU DGS, or vice versa, and, if so, whether it does so before or after the UK's withdrawal from the EU, requirements concerning the transfer of that institution's DGS contributions will or will not apply.
23. The EBA recalls that, if such a change of DGS affiliation were to happen before the UK's withdrawal, that institution's new DGS should receive a transfer of DGS contributions paid by that institution in the preceding 12-month period. However, if the change of affiliation happens after the UK's withdrawal, no such transfer will be required, as the DGSD provisions on such transfers will no longer apply to changes of affiliation from an EU DGS to a third country DGS, and vice versa.

Coverage of branches of EEA institutions in the UK

24. The already-mentioned consultation paper by the UK's Bank of England has also sought views on the proposal to automatically require branches of EEA credit institutions operating in the UK to become members of the UK DGS. The consultation closed on 2 January 2019, and on 28 February 2019 the Bank of England confirmed their intentions in the 'near-final' post-exit rules and standards¹⁷.
25. Where an EU DGS covers branches in third countries, that branch may be covered by both the UK DGS and an EU DGS, resulting in double coverage. Although this issue might not have a material impact in the short run, nevertheless it poses a number of potential challenges, such as lack of clarity in relation to each DGS's liabilities and obligations in the event of a payout, confusion on the part of depositors, an impact on that institution's DGS contributions, or potentially costly IT adjustments to comply with any UK requirements, which ought to be addressed in the future.

This opinion will be published on the EBA's website.

Done at London, 28 02 2019

[signed]

Jo Swyngedouw

Interim Chairperson

For the Board of Supervisors

¹⁷ See pp.32-33 in the Bank of England's amendments to financial services legislation under the European Union (Withdrawal) Act 2018* <https://www.bankofengland.co.uk/-/media/boe/files/paper/2019/the-boes-amendments-to-financial-services-legislation-under-the-eu-withdrawal-act-2018.pdf?la=en&hash=1B26AA88A7DCA56C731498A74DB2B688EC79CD58>