



EBA/GL/2015/09

11.09.2015

Guidelines

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

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Status of these guidelines

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

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

Reporting Requirements

According to Article 16(3) of the EBA Regulation, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by 11.09.2015. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form provided in Section 5 of these guidelines to compliance@eba.europa.eu with the reference 'EBA/GL/2015/09. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.

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

Title I - Subject matter, scope and definitions

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

These guidelines apply in accordance with the national legal framework providing DGSs or designated authorities with the power to accept payment commitments within the available financial means to be taken into account in order to reach the target level.

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

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

- iv. 'payment commitment amount' means the share and the monetary amount of the contribution to the DGS as required by the DGS, which the credit institution undertakes to provide by means of the payment commitment under the terms and conditions of the payment commitment arrangement;
- v. 'security financial collateral arrangement', in line with the definition set out in Article 2(1)(c) of Directive 2002/47/EC, means an arrangement, governed by the law transposing Directive 2002/47/EC, under which the credit institution secures the obligations undertaken in the payment commitment arrangement by providing collateral made up of low-risk assets by way of security to the DGS, where the full ownership of the low-risk assets provided as collateral remains with the credit institution when the security right is established;
- vi. 'title Transfer Financial Collateral Arrangement', in line with the definition set out in Article 2(1)(b) of the Financial Collateral Directive, means an arrangement, governed by the law transposing the Financial Collateral Directive, under which the credit institution secures the obligations undertaken in the payment commitment arrangement by transferring the full ownership of the low-risk assets to the DGS;
- vii. 'Financial collateral arrangement' means a security financial collateral arrangement or a title transfer financial collateral arrangement;
- viii. 'enforcement event', means an event entailing the acceleration of the obligation to pay the payment commitment amount so that it becomes immediately due. Under the terms of the Financial Collateral Arrangements and in line with Article 2(1)(l) of Directive 2002/47/EC or by operation of law, the occurrence of an enforcement event entitles the DGS to realise the low-risk assets collateral provided by the credit institution by way of sale or of appropriation without the need of prior jurisdictional notice or authorisation;
- ix. 'winding-up proceedings' means winding-up proceedings as defined in Article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions;
- x. 'reorganisation measures' means reorganisation measures as defined in Article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions;

- xi. 'early intervention measures' means measures taken by competent authorities pursuant to Articles 27 to 30 of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms;
- xii. 'crisis management measures' means crisis management measures as defined in Article 2(102) of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

Title II - Guidance on Payment Commitments

Part 1 – General considerations

- 6. Directive 2014/49/EU aims to 'harmonise the methods of financing of DGSs'¹, via a mix of ex-ante and ex-post contributions.
- 7. Pursuant to Article 10(3) of Directive 2014/49/EU, the available financial means to be taken into account in order to reach the target level of the DGS may include payment commitments, provided the total share of payment commitments does not exceed 30% of the total amount of available financial means raised in accordance with that Article.
- 8. This provision implies an obligation for Member States to provide the designated authorities or the DGSs with the power to accept payment commitments up to 30% of the available financial means. However, Article 10(3) of Directive 2014/49/EU should not be read as an automatic right for credit institutions, enforceable against the DGS, to provide their contributions in the form of payment commitments. The DGS should implement this mechanism on the basis of non-discriminatory criteria. In particular, DGSs should not accept more than 30% of a given member's ex-ante contributions in the form of payment commitments.
- 9. Designated authorities should verify that Payment Commitment Arrangements and Financial Collateral Arrangements entered into by the DGS and the credit institution are consistent with these guidelines.

Part 2 – The Payment Commitment Arrangement

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

¹ Recital 27 of Directive 2014/49/EU.

- a) the payment commitment amount;
 - b) the irrevocable obligation for the credit institution to make the promised cash payment of the payment commitment amount at any time, upon the request of the DGS, without undue delay and at any rate no later than two working days from the receipt of the notice made pursuant to letter (c) below. The DGS should at least call part or all of the irrevocable payment commitments where, due to a use of available financial means, the share of irrevocable payment commitments in the available financial means exceeds the maximum threshold set by the scheme according to Directive 2014/49/EU and in line with paragraph 8 of these guidelines. The payment period should be reduced to one working day if early intervention or crisis management measures are applied to the credit institution by the competent or resolution authority. The arrangement should preclude any reduction in the payment commitment amount, or any termination of the payment commitment arrangement, without the consent of the DGS;
 - c) The provision of a notice by the DGS to the credit institution by any effective means of communication ensuring receipt, whenever the DGS claims the cash payment of the payment commitment amount;
 - d) The obligation for the credit institution to immediately inform the DGS of any event affecting the institution's ability to honour its obligations, or the DGS's ability to enforce its rights, under the payment commitment arrangement or the financial collateral arrangement, including downgrades of the institution by external credit rating agencies and any material prudential or business changes or any deterioration in the value of the low-risk assets provided as collateral;
 - e) The conclusion of a security financial collateral arrangement or a title transfer financial collateral arrangement between the DGS and the credit institution securing the obligations undertaken by the credit institution in the payment commitment arrangement, by way of provision by the credit institution to the DGS of low-risk assets collateral, that are unencumbered by any third-party right and are put at the disposal of the DGS.
12. These guidelines are without prejudice to the possibility that, in accordance with national law, their content is partly or fully implemented via statutory provisions, including provisions of the payment commitment arrangement and the financial collateral arrangements, provided that the statutory provisions achieve outcomes at least equivalent to those set out in contractual arrangements between a DGS and its members as regards, among other things: the fulfilment of the credit institution's obligation to pay the payment commitment; the delivery by the credit institution to the DGS of the collateralised low-risk assets securing the payment commitment so that they are at the disposal of the DGS; the immediate realisation of the low-risk assets by the DGS upon the occurrence of an enforcement event; and consistency with the

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

Part 3 – The Financial Collateral Arrangement

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

- a) the credit institution undertakes to substitute the low-risk assets provided as collateral when they fall due, when they no longer comply with the requirements laid down in Part 6 and 7 of these guidelines or in other specific cases agreed upon with the DGS, so that the payment commitment is permanently secured by appropriate collateral.
- b) in the case of a security financial collateral arrangement, the credit institution is not allowed to dispose of the collateral (e.g. sale, encumbrance).
- c) the credit institution is required to top-up the low-risk assets provided as collateral upon request of the DGS, in the event that the value of the underlying collateral asset, after the haircut provided for in Part 7 of these guidelines, or in consideration of the applicable exchange rate for cash collateral, falls below the payment commitment amount.
- d) The provision of at least the following enforcement events:
 - (i) failure by the credit institution to pay the payment commitment amount within the period provided under the payment commitment arrangement when required to do so by the DGS;
 - (ii) failure by the credit institution to replace the low-risk assets provided to the DGS when they fall due, when they no longer comply with the requirements laid down in Part 6 or Part 7 of these guidelines or in other specific cases agreed upon with the DGS;
 - (iii) failure by the credit institution to top up its collateral when required to do so by the DGS, in the event of a breach of the coverage level, as laid down in Part 7 of these guidelines;
 - (iv) withdrawal of the credit institution's authorisation;
 - (v) if the credit institution is subject to reorganisation measures other than early intervention or crisis management measures, or is subject to winding-up proceedings.

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

To that end the DGS may either:

- (1) enforce the commitment;
- (2) accept that the institution which no longer is a member of the DGS that terminates its membership remains bound by the commitment and enforce it, at the latest, when reaching the maturity of the commitment as provided in the payment commitment arrangement, unless the payment commitment arrangement is rolled over; or
- (3) accept that the commitment is transferred to another entity in the context of a merger or acquisition.

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

Where the change of DGS membership is the result of the application a resolution measure, the DGS should consult the resolution authority prior to its decision concerning payment commitments, taking into account resolution objectives, including the protection of depositors².

- e) At the occurrence of an Enforcement Event, the DGS should realise or appropriate the low-risk assets provided as collateral in accordance with the terms of the financial collateral arrangement.
- f) The DGS should release and return the low-risk asset collateral upon cash payment by the credit institution of the payment commitment amount.
- g) The party which is entitled to the proceeds (interests, dividends, etc.) of the low-risk assets collateral should be determined (either the DGS or the member institution).

² Article 31 of Directive 2014/59/EU, OJ L 173/190 of 12.06.2014.

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

14. Under the financial collateral arrangement, the DGS should ensure that the credit institution delivers the low-risk assets to the DGS in accordance with one of the modalities provided in Directive 2002/47/EC, so that the low-risk assets are in the possession or under the control of the DGS.
15. Such delivery by the credit institution to the DGS should be fulfilled by means of crediting the collateral as follows:

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

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

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

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

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

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

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

17. The assets provided under a financial collateral arrangement must be legally realisable without prior claims over the assets concerned. It should not be possible for third parties to intervene and successfully claim the assets pledged or any rights attached to them.
18. For that purpose, the financial collateral arrangement should provide that credit institutions undertake and warrant that no low-risk asset provided as collateral is being simultaneously encumbered or used as collateral in favour of any third party or to secure another already existing obligation towards the DGS, and undertake that no asset used under the security financial collateral arrangement will be given as collateral to any third party.

Part 6 – Criteria for eligibility and management of collateral

19. Pursuant to Directive 2014/49/EU, DGSs should only accept low-risk assets as collateral to secure the payment commitment amount. DGSs and designated authorities should determine appropriate criteria on the eligibility of the collateral, taking into account credit and market risks of the issuers of the low-risk assets and the liquidity of those assets, as a way to avoid illiquid assets. They should also take into account the concentration and currency risks. In principle, the criteria on eligibility of collateral posted to the European Central Bank (ECB) or national central banks of the European Union should be deemed compliant with the requirements laid down in this Part 6 of the guidelines.
20. DGSs or designated authorities should also provide exposure limits, ensuring that for each credit institution, there is a high diversification of the assets with regard, at least, to issuer and maturity. For small institutions which are not able to deliver low-risk assets compliant with the requirements regarding diversification and exposure limits, the level of diversification of the low-risk assets delivered as collateral may be lower as long as a high overall level of diversification of low-risk assets within the DGSs' collateral portfolio is still met.
21. DGSs should limit their exposure to debt, whether public or private, the value of which is highly correlated to events where the DGS would have to repay depositors or contribute to resolution and, therefore, might have to call the payment commitment. However the currency of denomination of the debt should not be considered for this purpose as it would place excessive constraints on the ability to provide collateral. Moreover, in line with the principle of proportionality, for small institutions which are not able to deliver assets as collateral compliant with this requirement, the level of correlation may be higher, as long as the overall level of correlation within the DGSs' portfolio remains low.
22. In addition, DGSs and designated authorities should address in an adequate manner the differences, where they exist, between the currency of denomination of the collateral and the currency of denomination of the covered deposits of the DGS.

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

Part 7 – Haircut

24. DGSs or designated authorities should always apply a haircut to the value of the low-risk assets provided as collateral, unless collateral is provided in cash in the same currency as the payment commitment. This implies that the value of the underlying asset is calculated as the market value of the asset less a certain percentage (haircut).
25. DGSs or designated authorities should ensure that the haircut reflects the credit, market and liquidity risk arising from the exposure value of each asset. For that purpose, different haircuts should be determined having regard to the type of issuer and the credit quality thereof, as well as to the maturity of the assets and the currency of denomination.
26. The application of haircuts should also be based on a quantification of expected losses and the expected time delay before the sale of the assets.
27. While a variety of haircutting schedules and methodologies are possible, the haircut schedule for assets eligible for use as collateral by the ECB or national central banks of the European Union offers a sound solution.
28. DGSs or designated authorities should ensure that the value of the low-risk assets is marked-to-market on a regular, and possibly daily, basis.
29. Furthermore, the haircut-adjusted market value of the low-risk assets provided as collateral should be maintained over time. This implies that if the value of the underlying assets marked-to-market on a regular basis falls below a certain threshold and no longer complies with the coverage ratio resulting from the application of the haircut, the credit institution should be required to supply additional low-risk assets or replace the relevant part of the payment commitment with cash.
30. In any event, DGSs or designated authorities are not precluded from imposing on member institutions additional reporting and notification requirements.

Part 8 – Prudential Treatment

31. The prudential treatment of payment commitments should aim to ensure there is a level playing field and mitigate the procyclical effect of such commitments depending on their accounting treatment.
32. Where the accounting treatment results in the payment commitment being fully reflected on the balance sheet (as a liability), or results in the collateral arrangement being fully reflected in the profit and loss statement, there should be no need to apply an ad-hoc prudential treatment to mitigate the procyclical effects.

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

Title III- Final Provisions and Implementation

Date of application

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