

# FIT FOR FUTURE Platform Opinion

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<b>Topic title</b>	Completing the Banking Union  <a href="#">2021 AWP</a>  <a href="#">Directive 2014/59/EU</a> , <a href="#">Regulation (EU) No 806/2014</a> , <a href="#">Directive 2014/49/EU</a>  <i>Legal reference</i>
<b>Date of adoption</b>	10 December 2021
<b>Opinion reference</b>	2021/SBGR3/11
<b>Policy cycle reference</b>	<input checked="" type="checkbox"/> Contribution to (ongoing) legislative process  CWP 2021, <a href="#">Annex I</a> , Revision of the bank crisis management and deposit insurance framework  <i>Commission work programme reference</i>  The EU bank crisis management and deposit insurance framework lays out the rules for handling bank failures. The framework was established after the global financial crisis and it consists of three EU legislative texts (the Bank Recovery and Resolution Directive (BRRD), the Single Resolution Mechanism Regulation (SRMR) and the Deposit Guarantee Schemes Directive (DGSD), acting together with relevant national legislation. The three legislative texts contain clauses mandating the Commission to review their application.  This review is also part of the agenda for the completion of the Banking Union, according to President von der Leyen's <a href="#">Political Guidelines</a> . The main purpose of the review is to increase the efficiency, proportionality and overall coherence of the framework to manage bank crises in the EU as well as enhance the level of depositor protection, including through the creation of a common depositor protection mechanism in the Banking Union.  <input checked="" type="checkbox"/> Contribution to the (ongoing) evaluation process  Revision of the bank crisis management and deposit insurance framework ( <i>evaluation and impact assessment are carried out in parallel - back to back</i> )  <i>Title of the (ongoing) evaluation</i>

The evaluation will focus on areas such as measures for preparing for and preventing bank failures, as well as those applicable once a bank has been declared failing or likely to fail (e.g. the overall incentive set-up in bank crisis management, the availability of specific tools, the level of depositor protection). The three legislative texts will have been in force for over 3 years at the time of the review and the evaluation will cover the entire period of implementation and functioning.

A [public consultation](#) took place between February 25 – May 20, 2021.

Included in Annex VI of the Task force for subsidiarity and proportionality

No

Other

No

**Have your say: Simplify!**

*No relevant suggestions on this topic were received from the public.*

**Commission follow up**

- REFIT Scoreboard: [Banking Union: Review of the bank crisis management and deposit insurance framework and EDIS](#)
- Have your say portal: [Banking Union – review of the bank crisis management & deposit insurance framework \(DGSD review\)](#)
- Annual Burden Survey: [The EU's efforts to simplify legislation](#)

## FIT FOR FUTURE PLATFORM'S SUGGESTIONS SUMMARY

<b>Suggestion 1:</b>	<b>Broadly merging of supervisory and early intervention (EIM = Early Intervention Measures) powers</b>
<b>Suggestion 2:</b>	<b>Clarification of Article 16 DGSD – Periodic information on deposit protection</b>
<b>Suggestion 3:</b>	<b>Revision of Article 32b BRRD – clarification of legal provisions to provide more legal certainty about the management of failed banks for which there is no public interest for resolution</b>
<b>Suggestion 4:</b>	<b>Article 32 (5) BRRD – Improve legal clarity concerning the assessment of the public interest for resolution</b>
<b>Suggestion 5:</b>	<b>Improve the consistency between the DGSD, Payment Services and E-Money Directives and increase the protection of client funds of e-money institutions (EMIs) and payment institutions (PIs)</b>

## SHORT DESCRIPTION OF THE LEGISLATION ANALYSED

In response to the financial crisis, the European Commission pursued a number of initiatives to create a safer financial sector for the single market. These initiatives form a single rulebook for financial actors in the 27 EU countries. They include: stronger prudential requirements for banks, improved protection for depositors and rules for managing failing banks. This single rulebook is the foundation for the banking union.

### Further sources of information

[Have your Say entry page](#)

[Legislation framework webpage](#)

[Inception impact assessment and feedback](#)

[Public consultation](#)

## PROBLEM DESCRIPTION

*The Commission suggests in its inception impact assessment the following issues:*

Experience with the application of the bank crisis management and deposit insurance framework until now seems to indicate that there may be a need to devise sufficiently proportionate and consistent solutions to manage effectively the failures of all categories of banks, regardless of their size or business model. Likewise, there may be the need to improve outcomes for creditors and depositors for certain types of banks, especially small and medium-sized banks that are mainly deposit funded.

First, the framework currently appears to contain incentives towards using tools outside of resolution (e.g. preventive uses of the DGS or other measures in insolvency, including alternative

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uses of DGS liquidation aid), driven mainly by the different conditions to access funding within and outside of resolution and, particularly in the context of the banking union, by a restrictive approach to the public interest assessment as the entry gate to resolution.

Second, there are currently differences across Member States in the availability and actual use of tools in insolvency. In some jurisdictions, insolvency proceedings provide tools similar to those available in resolution. Since insolvency proceedings play a role as a counterfactual to resolution, this situation creates discrepancies, even among jurisdictions participating to the banking union. All the elements mentioned above raise doubts as to the ability of the crisis management and deposit insurance framework in its current form to ensure adequate and proportionate solutions for all types of banks while preserving financial stability and overall consistency and respecting the subsidiarity principle.

Third, the legal certainty and predictability of the current framework is sub-optimal, particularly in a cross-border context (e.g. decision-making on whether to use resolution, triggers for resolution and insolvency, and differences in the hierarchy of liabilities in insolvency, availability of backstop arrangements).

Fourth, the framework could foster further market integration and hence resilience and efficiency, in particular in the Banking Union. However, several elements seem to impair this objective, among other things, the lack of agility in the management of resources at central level for cross-border banking groups and the misalignment between liability (i.e. who bears the costs of bank failures) and supervisory control (i.e. who is in charge of preventing and handling of such failures) in the safety nets of the Banking Union. Similarly, differences are observed in the functioning of national DGSs and their ability to handle adverse situations, as well as some practical difficulties (e.g., when a bank transfers its activities to another Member State and changes the affiliation to a DGS).

Fifth, discrepancies in depositor protection across Member States in terms of the scope of statutory protection and pay-out processes are observed and may undermine the confidence in the financial safety nets. For example, depending on the Member State, some depositors might be entitled to different level of statutory protection or even not eligible for protection in various specific circumstances (e.g. public authorities and agencies distinct from the government, or clients whose funds are held through the intermediary of non-bank financial institutions as payment or e-money service providers). The standard 7-day period for repayment is sometimes substituted by a longer waiting time (if banks have gathered insufficient information on their clients or in the event of pay-outs with concerns related to money-laundering and terrorist financing). The main consequences of these problems are un-level playing field and barriers to the single market, persisting risks to financial stability, adverse effects on depositor confidence, inefficient outcomes of handling bank failures in liquidation leading to excessive loss of franchise value; all of the issues may result in persisting risks of financial instability, taxpayer exposure and (in the worst case-scenario) adverse impact on the stability of government finances.

(Source: [inception impact assessment](#))

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**The Fit for Future Platform has acknowledged the issues raised by the legislation concerned as follows:**

*Regarding: modernisation and future proofing of existing laws, including via digitalisation, the efficient labelling, authorisation and reporting obligations, the simplification of EU legislation:*

- Modifications of the legislation and their effects should be weighed and analyzed carefully, considering the diversity of the national legal systems and the complexity of some of the points of the consultation
- The fact that the banking market is a very diversified one, which includes banks of different size and different business models, e.g. there are many small banks and their specific role should be taken into consideration in a proportional manner, to respect differences between banks and their important role for the EU economy, also taking into account potential impact on depositors' confidence, leading to indirect financial stability implications;
- The European banking legislation certainly consists of a significant number of acts and regulatory articulations that are not easy to approach. The rapid succession of regulatory changes also does not help the goal of simplifying the system and promoting its understanding. It is indeed true that this legislation is aimed at a highly qualified professional audience and that it is ultimately necessary for financial stability, a complex objective in itself, however it is essential to factor in also a proper time for allowing the market and the public authorities to deploy the regulation correctly;
- The processes underlying the aforementioned legislation involve national and European public administrations (national Resolution Authorities, Single Resolution Board) and banking companies, which have already started a deep digitization process for some time. Therefore, the margins for further extension in this sense appear limited and should ultimately be left to the regulative powers of these authorities.

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## SUGGESTIONS

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**Suggestion 1: Broadly merging of supervisory and early intervention (EIM = Early Intervention Measures) powers**

**Description:** Regarding the main potential improvements, the platform supports broadly merging of supervisory powers and EIM under the Capital Requirements Directive (CRD), in order to ensure that measures do not overlap but complement each other, and thus to reduce administration and time costs. Only a selection of measures – i.e. those that are more intrusive, that require detailed implementing provisions to fit with domestic civil and corporate laws and for which public disclosure could not be easily delayed – should remain available as early intervention powers in the BRRD. Further analysis is necessary to define how the implementation of the new allocations of powers would work. Moreover, it should also be ensured that application of EIM does not pose legal uncertainties relating to conditions, legal basis and interaction with other laws,

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especially with regard to the application of the Market Abuse Regulation (MAR) which requires public disclosure.

**Expected benefits:** Since both of those powers have a same goal, i.e. to prevent the failure of a bank we believe that broadly merging of supervisory powers and EIM would allow supervisors to have a better toolset, thus increasing the consistency of EIM and its overall usage.

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**Suggestion 2: Clarification of Article 16 DGSD – Periodic information on deposit protection**

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**Description:** It should be clarified in Article 16 DGSD (depositor information) that the depositors shall be provided with the information referred to in Article 16(1) DGSD at the beginning of the business relationship with the institution, and this should be repeated only where deposit protection legislation amendments are done, or the nature of business relationship or the depositor itself changes. Reiteration of the depositor information in other cases should be reconsidered.

**Expected benefits:** We therefore recommend adjusting the wording of Article 16 DGSD, which could lead to a reduction of the administrative burden.

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**Suggestion 3: Revision of Article 32b BRRD – clarification of legal provisions to provide more legal certainty about the management of failed banks for which there is no public interest for resolution**

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**Description:** National insolvency proceedings are not harmonised across the EU Member States. One difference concerns the triggers to initiate an insolvency proceeding, which, in some Member States, are not aligned with the FOLTF triggers in the BRRD. This may give rise to a situation where a failing bank for which there is no public interest in using resolution, can also not be placed in insolvency because the trigger to initiate the proceedings is not met (the so called “limbo” situations).

Clarifications in the legal provisions of the BRRD could be useful to clarify that the failed banks exit the market immediately after the above mentioned conditions are met or, in any case, in a very short timeframe, so as to avoid these “limbo” situations where FOLTF banks de facto continue to operate on the market, despite being failed. Finally, while the formal withdrawal of the licence may need some time after the FOLTF, it should however be ensured that the bank, immediately after the declaration of the FOLTF, ceases to put in place new operations and runs only limited routine operations.

Moreover, the term used consistently throughout the BRRD to define national insolvency proceedings is "normal insolvency proceeding" (NIP). The definition of NIP should be crafted in a sufficiently encompassing way, in order to include all applicable insolvency procedures under national law, which may entail a mandatory “winding up” of the bank. Consistency between these procedures and interactions with the notion of “normal insolvency proceedings” should be ensured, to provide more legal certainty regarding the management of banks that are not resolved and ensure their exit from their market.

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Clarity is also needed between the legal acts concerning the withdrawal of the license by the supervisor and the FOLTF determination, in this respect. It is important, in particular, to ensure that the supervisor is able to withdraw the license when a bank has been declared FOLTF. The supervisor should be granted reasonable discretion whether to apply this power. In this case a better articulation between the supervisory and resolution objectives and a high level of collaboration of the respective authorities and other stakeholders is also needed.

**Expected benefits:** Legal clarity and legal consistency. Prevention of the above-mentioned “limbo” situations and arbitrary judgement when to commence the national insolvency procedure, hence more legal certainty enabling the swift dealing with banks for which resolution would not be deemed in public interest.

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**Suggestion 4: Article 32 (5) BRRD – Improve legal clarity concerning the assessment of the public interest for resolution**

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**Description:** BRRD Art 32 (5) sets out the criteria for the Public Interest Assessment in a fairly generalist way. We believe that the current wording leaves large room for interpretation and therefore creates legal uncertainty. On the other hand some flexibility is necessary and should be kept as well although the terms of its application should be clearly defined and not lead to decreased legal certainty of the framework. The criteria should thus be clarified in order to apply resolution regime in a more consistent and predictable way. Furthermore, consistency between these rules and the state aid framework should be ensured to have an appropriate and consistent application of the Public Interest Assessment and the resolution framework.

Moreover, further clarity on the roles of the actors involved in the process is needed,

While legal certainty is a key element, the Platform is also of the opinion that each case of a bank failure is different and some flexibility should be kept as well. The Banking system in EU is not homogenous. The discussions on the approach to public interest and possible adjustments should take into consideration characteristics of national financial markets, which differ within EU in terms of size, complexity, interconnectedness and number of entities, as well as categories of entities/banks and their banks’ business model and already existing scheme which protect institutions and in particular ensure their liquidity and solvency to avoid bankruptcy when necessary (Art 113(7) CRR). Due consideration should be paid to proportionality and the sustainability of the MREL requirement for small and medium-sized banks that pass the PIA and that, however, are unable to tap capital markets to raise MREL-eligible instruments due to their size and business model.

**Expected benefits:** Increased legal clarity and enhanced proportionality regarding the framework for the Public Interest Assessment.

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**Suggestion 5: Improve the consistency between the DGSD, Payment Services and E-Money Directives and increase the protection of client funds of e-money institutions (EMIs) and payment institutions (PIs)**

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**Description:** Client funds of non-bank financial institutions such as EMIs and PIs are credited to an account of these institutions at a credit institution on behalf of their clients. Currently, there are inconsistent approaches to the DGS protection of such client funds across Member States and a lack of sufficient consistency with the sectoral legislation applicable to investment firms, payment systems and e-money institutions. While safeguarding requirements have been put in place under the Payment Services Directive 2 (PSD 2)<sup>5</sup> (article 10) and the E-money Directive, which require electronic money institutions (EMI) and payment institutions (PIs) to safeguard their clients' funds by depositing them in banks, investing them in low risk and liquid assets, or securing the funds with insurance policies, these do not offer a full protection to consumers' funds in the case of the failure of the credit institution. DGSD could be clarified to ensure that client funds placed by credit institutions, payment institutions, e-money institutions, and investment firms on behalf of their clients with credit institution are DGS protected in case that credit institution were to fail. Although the funds deposited in banks constitute bank deposits and they should be clearly separated from the EMI's or PI's own funds, under current legislation, the precise moment when client funds become a deposit and merit a protection from the DGS varies depending on the product. In particular, while investment firms are required to safeguard such funds promptly, payment and e-money institution are required to do so, no later than by the end of the business day following the day when the funds were received. This may result in a sub-par protection by the DGS of the EMI's or PI's client funds, should the underlying bank become insolvent.

However, it should be made clear that client funds deposited with a credit institution by payment institutions or e-money institutions are covered by a DGS in case the credit institution holding client funds were to fail, as long as:

- such deposits are placed on behalf of clients who are not themselves excluded from coverage under Article 5(1) DGSD;
- such deposits are placed on a separate account as required by law;
- such clients are identifiable;
- it is easy to determine the amount of the client's guaranteed funds.

Consumers may not realise that there is a different degree of protection depending on whether their funds are held in a bank deposit, in a payment account, or an e-money account. As such, we believe that the protection of the funds deposited by PIs and EMIs in banks on behalf of their clients subject to safeguarding requirements in the sectoral legislation would benefit from more convergence with respect to the moment when such client funds benefit from DGS protection.

It is important to stress, that the protection of funds by DGS required details information about ultimate beneficiaries of such funds. Since banks usually do not have this information, PIs and



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EMIs must be obliged to collect the relevant information that is required under the DGSD. EMIs and Pls must be obliged to provide such information to banks and DGS at any time on short notice.

If EMIs and Pls are not able to provide such information, the deposit protection of clients is at risk and could have significant detrimental effect on financial stability in general. In this respect, the legal obligations that ensure the protection of deposits that apply to bank should also apply to EMIs and Pls as they benefit from the existing deposit protection framework.

**Expected benefits:** This would increase coherence of EU legislation. In addition, it supports consumer protection of deposits, increasing public trust in digital payment services offered by non-banks and making this field future proof.

## ABSTENTIONS

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- 2 Member States

## DISSENTING VIEWS

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*Rationale for dissenting views on the suggestions:*

### **1. Suggestion 2: Clarification of Article 16 DGSD – Periodic information on deposit protection**

**Comment on the Description of Suggestion 2 on page 6:** A Member State/A Member of the Platform does not support the deletion of the text „the deposit amount exceeds the protection available under the law“ in the first sentence of the Description.

The reason for this is that it is quite possible in an environment of normal or higher interest rates that a depositor may not know the exact amount of his deposit at any time and may incorrectly assume that it is fully protected by a guarantee scheme, as it has been before, but this could be no longer the case.

### **2. Suggestion 4: Article 32 (5) BRRD – Improve legal clarity concerning the assessment of the public interest for resolution**

**Comment on the Description of Suggestion 4 on page 7:** The new part of the third sentence of the first paragraph that is suggested to replace the expression „while overly framing restricting the margin of discretion of the resolution authorities should be avoided“ considerably changes the meaning.

The rationale behind this comment is that the expression emphasizing the need to give discretion to the resolution authorities in the assessment of the public interest in restructuring has been removed, but one Member State is of the opinion that it should be maintained and considers it important to follow the previous approach and to leave a margin of discretion to the resolution authorities.

### **3. Suggestion 5: Improve the consistency between the DGSD, Payment Services and E-Money Directives and increase the protection of client funds of e-money institutions (EMIs) and payment institutions (PIs)**

**Comment on the Description of Suggestion 5 on page 8:** The final version of the fourth sentence of the Description introduces details that can be perceived as full support for the proposal the DGS to bare the risk of the EMIs and PIs business, which is not the case. A Member State insists to adhere to a neutral position on this issue.

In its previous versions the opinion was more neutral, while the latest changes with their specificity tend to support the proposal to expand the protection from deposit guarantee schemes to client funds deposited by payment institutions and electronic money companies

in banks. We have a principled disagreement with the model and we are afraid that the introduction of details in the Description strongly supports this model.