



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

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Opinion 22/2023

on the Proposal for a Directive
on deposit protection, cross-
border cooperation and
transparency

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3) ‘...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’.*

This Opinion relates to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency (COM(2023) 228 final). This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposal that are relevant from a data protection perspective.

Executive Summary

On 18 April 2023 the European Commission issued a Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency.

On 7 December 2022 the European Commission issued a Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law. The Proposal aims to improve the protection of depositors in cases of bank failures in the Union, while also protecting important financial interests of the Union and its Member States.

The Proposal sets out to achieve said goals by offering depositors a robust level of protection, increasing the convergence in the practices of Depositor Guarantee Schemes (DGS), and improving national cross-border cooperation between DGSs, and between the latter and member credit institutions and Financial Intelligence Units (FIU). This entails aligning Directive 2014/49/EU with the existing and upcoming EU rules on anti-money laundering and countering the financing of terrorism (AML/CFT).

The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 19 April 2023 pursuant to Article 42(1) of EUDPR. The EDPS recommends to add a reference to this consultation in the Recitals of the Proposal.

The Proposal would entail the sharing of personal data of depositors or other persons related to suspected money laundering or terrorism financing offences between FIUs, designated authorities, and DGSs. This Opinion takes into account the risks to the fundamental rights and freedoms of data subjects that could arise from these data exchanges and addresses recommendations in relation to the different scenarios of data sharing pursuant to the Proposal. In this regard, the EDPS makes a number of recommendations.

In particular, the EDPS recommends to define the categories of data subject to the processing, the data subjects concerned, as well as to clearly lay down the purpose(s) for the processing.

The EDPS also wishes to draw attention of the Commission to the need to consult the EDPS before the adoption of any delegated acts validating draft regulatory technical standards developed by the European Banking Authority (EBA) that would imply the processing of personal data.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 18 April 2023 the European Commission issued a Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency² ('the Proposal').
2. According to the European Commission's Impact Assessment ('the IA'), the Deposit Guarantee Schemes (DSG) Directive ('the DGSD')³ has been broadly effective in improving the level of depositor protection across the EU, which is an important objective of the Banking Union. However, the IA reveals that the application of the DGSD safeguards remains uneven among national DGSs, highlighting both the needs for harmonized rules to address divergences that have adverse impacts on depositors, and to clarify the coverage for certain types of depositors.⁴ Therefore, the objective of the Proposal is to improve the depositor protection framework to ensure a coherent application of rules and a better level playing field, while protecting financial stability and enhancing depositors' confidence. This entails clarifying the scope of depositor protection, settling divergent interpretations of conditions for the use of Deposit Guarantee Schemes (DSG) funds in the Union, and improving the operational effectiveness, cross-border cooperation, and efficiency in the way DGSs work⁵.
3. To achieve these objectives, and further specifying requirements set out under the DGSD⁶, the Proposal includes provisions that would require credit institutions, DGSs, and

¹ OJ L 295, 21.11.2018, p. 39.

² COM(2023) 228 final.

³ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast) Text with EEA relevance OJ L 173, 12.6.2014, p. 149–178.

⁴ SWD(2023) 226 final.

⁵ See Explanatory Memorandum, pages 1 and 3.

⁶ See [EDPS Opinion on the Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes \(recast\)](#), issued on 9 September 2010, para. 7.

designated authorities⁷ to process personal data related to depositors who are natural persons or potentially to representatives of depositors which are legal persons. In particular:

- a. Credit institutions may not know the clients entitled to repayments of deposits held in the client accounts, or be able to check and record individual data of those clients.⁸ Therefore, a new **Article 8b** introduced by the Proposal would enable credit institutions to assess whether client funds deposits are covered by the DGSs by allowing them to collect certain personal data about their clients. The categories of personal data to be processed for this purpose would be specified in draft regulatory technical standards developed by the European Banking Authority (EBA) outlining the technical details related to the identification of clients for the repayment in accordance with Article 8 of the DSGD.
 - b. When reimbursing depositors, DGSs may encounter situations that give rise to money laundering concerns and thus the European Commission proposes that DGSs should withhold the payout to a depositor when notified that a financial intelligence unit (FIU) has suspended a transaction, a bank or payment account in accordance with the applicable anti-money laundering (AML) rules.⁹ A new Article **8c(1)** under the Proposal would oblige authorities designated at Member State level as administrators of a DGS to inform the DGS about strictly necessary information received from financial supervisors about the outcome of customer due diligence measures carried out in accordance with the AML regime. Additionally, according to **paragraph 3** of the same Article, FIUs would notify DGSs about their decision to act against a depositor pursuant to AML rules as amended by the Proposal for a new AML Directive ('AMLD 6 Proposal')¹⁰. In case DGSs receive such a communication, Article 8c(3) of the Proposal would require them to suspend the repayment to the depositor for the same duration of the measure imposed by the FIU.
 - c. The new **Article 16a** advanced by the Proposal would replace current Articles 4(8) and 14(4) of the DSGD, that currently entitle DGSs to receive from their member credit institutions upon request and share with DGSs in other Member States all information necessary to prepare for a repayment of depositors, including so-called 'markings'¹¹.
4. The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 19 April 2023 pursuant to Article 42(1) of EUDPR. The EDPS recommends adding a reference to this consultation in the Recitals of the Proposal.

⁷ According to Article 2(18) of the DSGD, 'designated authority' means a body which administers a DGS pursuant to this Directive, or, where the operation of the DGS is administered by a private entity, a public authority designated by the Member State concerned for supervising that scheme pursuant to this Directive,

⁸ Recital (14) of the Proposal, specifying Article 8b.

⁹ Recital (15) of the Proposal, specifying Article 8c.

¹⁰ Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, COM/2021/423 final.

¹¹ [Opinion on the Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes \(recast\)](#), of 9 September 2010, para. 9.

2. General remarks

5. The EDPS welcomes the Commission's Proposal, which serves the important aim of protecting depositors in cases of bank failures in the Union, while also protecting important financial interests of the Union and its Member States. The Proposal sets out to achieve said goals by *inter alia* addressing identified national discrepancies to offer EU depositors a harmonised and robust level of protection, increasing the convergence in DGS practices and among authorities; and improving national cross-border cooperation between DGSs, and between the latter and member credit institutions and FIUs.¹²
6. In this regard, the EDPS recalls that he has previously issued recommendations to the EU legislators in the context of the AMLD reform¹³, the most recent of which as a member of the European Data Protection Board (EDPB)¹⁴. The EDPS believes that processing operations concerning information on possible offences arising from financial transactions should as a rule remain within the competence of competent authorities and not be shared with private entities.
7. The EDPS notes that the Proposal would entail the sharing of personal data of depositors or other persons related to suspected money laundering or terrorism financing offences between FIUs, designated authorities and DGSs. This Opinion takes into account the risks to the fundamental rights and freedoms of data subjects that could arise from these data exchanges and addresses recommendations in relation to the different scenarios of data sharing pursuant to Article 8c of the Proposal.
8. The EDPS notes that the Proposal does not make reference to compliance with fundamental rights to privacy and to the protection of personal data, and it does not specify that the processing of personal data in accordance with the Directive shall be subject to Regulation (EU) 2016/679 ('the GDPR')¹⁵, Directive (EU) 2016/680 ('the LED')¹⁶ and the EUDPR, as applicable. Therefore, the EDPS recommends the EU legislator to include such reference in a recital.

¹² See Explanatory Memorandum, pages 1 and 3.

¹³ See for instance [Opinion 5/2020 on the European Commission's action plan for a comprehensive Union policy on preventing money laundering and terrorism financing](#), of 23 July 2020, and [Opinion 12/2021 on the anti-money laundering and countering the financing of terrorism \(AML/CFT\) package of legislative proposals](#), of 22 September 2021.

¹⁴ https://edpb.europa.eu/news/news/2023/edpb-adopted-letter-eu-institutions-data-sharing-amlcft-purposes_en.

¹⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016.

¹⁶ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

3. Identity checks by credit institutions on clients for the repayment of deposits

The Proposal assumes that DGS should be able to avoid the risk of double repayment by checking the identity of the clients to be reimbursed prior to the date on which a relevant administrative authority or court determines or rules that: (i) the credit institution concerned appears to be unable for the time being to repay the deposit; (ii) the rights of depositors to make claims against the credit institution are suspended given the financial circumstances of the latter.

9. Although the Proposal does not define categories of personal data related to the clients or their representatives (in case clients are legal persons) that DGSs would be entitled to process pursuant to the Proposal, Article 8b(4)(a) would mandate the EBA to develop draft regulatory technical standards to specify the technical details related to the identification of clients for the repayment of deposits, which shall then be submitted to the Commission and published as a Commission delegated act¹⁷. In this regard, the EDPS reminds the Commission of its obligation pursuant to Article 42(1) of the EUDPR to consult the EDPS when preparing delegated acts that would impact on the protection of individuals' rights and freedoms with regard to the processing of personal data.
10. The EDPS wishes to remind in this context that the categories of personal data to be processed by DGSs for client identification in the context of deposit repayments should be limited to the adequate, relevant and strictly necessary for pursuing the envisaged purpose, in line with the data minimization principle¹⁸.

4. Suspension of repayments by DGSs to counter potential money laundering or financing of terrorism

11. As noted in Recital (15) of the Proposal, when reimbursing depositors under the DGSD, DGSs may encounter situations that give rise to money laundering or terrorism financing concerns. Therefore, the Proposal seeks to align the DGSG framework with the rules set out in the Anti-money laundering directive (AMLD)¹⁹ through the establishment of a structured cooperation and exchange of information between DGSs and FIUs, with a view to mitigate the risk that DGSs reimburse depositors involved in money laundering and terrorist financing activities.
12. In that context, the new Article 8c of the Proposal would require DGSs to suspend repayments to a depositor where:

¹⁷ Recitals (41) and (42) of the Proposal.

¹⁸ Article 5(1)(c) GDPR.

¹⁹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, (Text with EEA relevance) OJ L 141, 5.6.2015, p. 73–117.

- a. They are informed by their designated authority about the outcome of the customer due diligence (CDD) measures under the AML Regulation Proposal²⁰, which designated authorities would obtain from the competent financial supervisor under the AMLD 6 Proposal²¹ (Article 8c(1) of the Proposal) - ‘**scenario 1**’;
 - b. A depositor or any person entitled to sums held in his or her account has been charged with an offence arising out of, or in relation to, money laundering or terrorist financing, pending the judgment of the court (Article 8c(2) of the Proposal) - ‘**scenario 2**’; or
 - c. They receive information from FIUs that the latter have decided to act against that depositor (e.g., by suspending a transaction) pursuant to their powers under the AMLD 6 Proposal (Article 8c(3) of the Proposal) - ‘**scenario 3**’.
13. The three different scenarios outlined above have different implications from the point of view of the fundamental right to data protection - given the different levels of interference of the envisaged data processing operations and the various actors involved in such processing -, and the EDPS recommends addressing them as described below.
 14. In **scenario 1**, designated authorities would inform DGSs about the outcome of CDD measures which would be applied under the AML Regulation Proposal. According to Article 16(1) of the latter, such CDD measures would include: the identification and verification of the client’s, beneficial owners’ and their respective representatives’ identities; obtaining information on the purpose and intended nature of the business relationship; and ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of the business relationship. Paragraph 2 of that Article states that where obliged entities identify an increased risk of money laundering or terrorist financing they shall take enhanced due diligence measures²².
 15. Article 8c(1) of the Proposal adds that information exchanged between the designated authority and the DGS should be limited to the information that is strictly necessary for the exercise of the DGS’ tasks and responsibilities. The EDPS welcomes this reference, which is aligned with the key principles of data minimization and data protection by default²³. Moreover, the EDPS invites the legislator to assess whether the reference to compliance with Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the ‘Database Directive’) in Article 8c(1) is correct.
 16. Additionally, the EDPS recommends to amend Article 8c(1) of the Proposal to further ensure that the sharing of personal data between financial supervisors and designated authorities, and subsequently between the latter and DGSs, pursuant to Article 8c(1) is limited to what is strictly necessary to enable DGSs to decide about whether they should suspend the repayment of deposits in case of concerns about money laundering or terrorist financing. Specifically, the EDPS believes that sharing with DGSs only of the information that obliged entities under the AML Regulation Proposal have identified an increased risk of money laundering or terrorist financing in relation to a specific client or beneficial owner

²⁰ Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, COM/2021/420 final, Article 15(4).

²¹ AMLD 6 Proposal, Article 48(4).

²² Which are listed under Section 4 of Chapter III of the AML Regulation Proposal.

²³ Article 25(1) GDPR.

- instead of sharing the undertaken CDD measures and the associated personal data themselves - could suffice to enable DGSs to decide whether to repay a deposit or not.

17. In **scenario 2**, Article 8c(2) of the Proposal seems to create a legal basis for law enforcement or judicial authorities to share personal data about depositors or other persons with DGSs. Nonetheless, it is unclear whether and how DGSs would be informed that a depositor or any person entitled to sums held in his or her account had been charged with - but not yet convicted of - an offence arising out of, or in relation to, money laundering or terrorist financing.
18. In this regard, the EDPS recalls the restrictions envisaged in Article 10 of the GDPR in relation to the processing of personal data relating to criminal convictions or offences - including criminal charges - determine that the processing of such types of personal data shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.
19. Thus, the EDPS recommends that, where Article 8c(2) of the Proposal deems to enable the sharing of personal data by law enforcement or judicial authorities with DGSs or to mandate DGSs to obtain data related to charges of money laundering or terrorism financing against depositors or other persons from other sources, the provision should include appropriate safeguards for the rights and freedoms of data subjects. As a minimum, the EDPS recommends laying down the categories of personal data to be shared with or obtained by DGSs, keeping in mind the need to limit such personal data sharing to what is necessary and proportionate. The EDPS also recommends laying down appropriate purpose limitation obligations (similar to the one stemming from Article 8c(4) of the Proposal), and an appropriate data storage period. Furthermore, the EDPS recommends specifying that DGSs should only obtain personal data related to charges under Article 8c(2) of the Proposal from reliable sources, to ensure DGSs comply with the GDPR accuracy principle²⁴.
20. Lastly, **scenario 3** in Article 8c(3) of the Proposal would admit the possibility of FIUs communicating directly to DGSs their decision to suspend a transaction or withhold the consent to proceed with such a transaction, or to suspend a bank or a payment account related to the depositor, pursuant to the AMLD 6 Proposal. In case they receive such a communication, DGSs would be required to suspend the repayment to the depositor for the same duration of the measure imposed by the FIU.
21. In this respect, the EDPS welcomes that the safeguards provided for in Article 20 of the AMLD 6 Proposal would also be applicable to depositors/data subjects at a stage before the communication of personal data by FIUs to DGSs under Article 8c(3) of the Proposal would take place. Such safeguards include the strict limitation of the period in which an account or transaction would be suspended and the possibility for affected persons to judicially challenge any suspension.

²⁴ Article 5(1)(d) GDPR.

22. In any case, the EDPS recommends specifying that the notification from the FIUs to the DGSs under Article 8c(3) of the Proposal would only take place in case of the failure of the client's or beneficial owner's credit institution, and not in all instances where FIUs decide to exercise their powers pursuant to Article 20 of the AMLD 6 Proposal. Furthermore, the EDPS recommends stating that FIUs shall only inform DGSs of measures taken against depositors to the extent that the involved personal data sharing is necessary and proportionate taking into account the impact on the rights and freedoms of the natural person concerned, as well as the need not to jeopardize ongoing AML/CFT investigations.
23. The EDPS notes that Article 8c(3) would create a legal obligation for FIUs to share personal data with DGSs, and for DGSs to subsequently process it in the context of the handling of deposit repayments, in the sense of Article 6(1)(c) of the GDPR. Therefore, the EDPS recommends that the provision is made as foreseeable as possible, by defining in particular the categories of data which would be subject to the processing and the data subjects concerned.²⁵

5. Information exchange between credit institutions and DGSs

24. Pursuant to Article 16a of the Proposal, credit institutions affiliated with a DGS should share with the latter, at any time and upon request, all information necessary to prepare for a repayment of depositors, in accordance with the identification requirement laid down in Article 5(4), including the information for the purposes of Articles 8b and 8c (as analysed above) Article 8(5) - i.e., for the evaluation of the reasons to defer repayments.
25. Pursuant to paragraph 2 of the Article, this would include information about depositors at branches of those credit institutions and depositors who are recipients of services provided by member institutions on the basis of the freedom to provide services. The EDPS notes that this may include personal data of depositors and possibly the representatives of depositors. Article 16a of the Proposal would replace - by specifying - Article 4(8) of the DSGD, which currently states generically that member credit institutions must share with their DSG, upon its request, "all information necessary to prepare for a repayment of depositors, including markings under Article 5(4)"²⁶. The sharing of information by credit institutions with DGSs - including any relevant personal data related to depositors or their representatives - would also take place in the context of the preparation of payouts by DGSs in instances of cross-border cooperation with other DGSs²⁷. This information would also be exchanged between DGS in different Member States to ensure fast and cost-efficient repayment of depositors in cross-border banking services²⁸.
26. The EDPS takes note that the categories of personal data - if any - that credit institutions would be required to share with DGS under Article 16a of the Proposal are not defined in

²⁵ Article 6(3) GDPR.

²⁶ Despite the fact that the Proposal does not specify what these markings should consist of, the EDPS recalls his remarks from its 2010 Opinion on the original Directive stating that said markings should not reveal more information than necessary about depositors, and that a simple mark stating that the deposit is not eligible for repayment would serve the purpose of the DSGD.

²⁷ Recital (39) of the Proposal and its proposed amendments to Article 14 of the DSGD.

²⁸ Recital (33) of the Proposal.

the provision, but would be developed by EBA in the form of draft implementing technical standards to be published by the Commission as a delegated act²⁹.

In this regard, the EDPS recalls the obligation of the Commission pursuant to Article 42(1) of the EUDPR to consult the EDPS when preparing delegated acts that would impact on the protection of individuals' rights and freedoms with regard to the processing of personal data.

6. Conclusions

27. In light of the above, the EDPS makes the following recommendations:

- (1) *including a reference to the fact that the entities covered by the Proposal should comply with the GDPR - and, if applicable, with the EUDPR and the LED - when implementing their obligations under the Proposal in an appropriate recital;*
- (2) *including a recital mentioning the consultation of the EDPS pursuant to Article 42(1) of EUDPR and to this Opinion;*
- (3) *consulting the EDPS before the adoption of the delegated act that would validate EBA's draft regulatory technical standards defining the categories of personal data that DGSs are legally entitled to process in the context of client identification for the purposes of deposit repayment, as per Article 8b of the Proposal;*
- (4) *assessing whether the reference to compliance with Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the 'Database Directive') in Article 8c(1) is correct;*
- (5) *amending Article 8c(1) of the Proposal to further ensure that the sharing of personal data between financial supervisors and designated authorities, and subsequently between the latter and DGSs is limited to what is strictly necessary to enable DGSs to decide about whether they should suspend the repayment of deposits in case of concerns about money laundering or terrorist financing;*
- (6) *including in Article 8c(2) of the Proposal appropriate safeguards for the rights and freedoms of data subjects, including the definition of the categories of personal data to be shared with or obtained by DGSs, the sources where such personal data should be obtained, appropriate purpose limitation obligations, and an appropriate data storage period;*
- (7) *specifying the categories of personal data and the data subjects concerned in the notifications from FIUs to DGSs under Article 8c(3) of the Proposal, and that such notifications would only take place in case of the failure of the client's or beneficial owner's credit institution, which should would only cover measures taken against depositors to the extent that the involved personal data sharing is necessary and proportionate to the envisaged aim of preventing repayments of depositors that FIUs acted against under the AMLD 6 Proposal;*

²⁹ Article 16a(7) of the Proposal.

(8) the Commission to consult the EDPS before the adoption of the delegated act that would validate EBA's technical standards defining such the categories of personal data that credit institutions would be required to share with DGSs for the purposes listed under Article 16a of the Proposal.

Brussels, 12 June 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKI