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THE SO-CALLED PAN-EUROPEAN DEPOSITORS' PROTECTION SCHEME

A Further Euro Own-Goal? A Critical Analysis of Directive 2014/49

PIERRE DE GIOIA-CARABELLESE* and CORRADO CHessa**

ABSTRACT

This article focuses on the legal provisions of Directive 2014/49 on deposit guarantee schemes (the DGS Directive) and focuses on how the national schemes financially support each another by offering a critical analysis to demonstrate that the new legal framework is far from satisfactory. This is because the new 'safety net', still hinged on depositors' protection schemes that operate at the national level, is fettered by the quantitative limits and legal constraints of mutual borrowing. This ultimately still leaves the EU/EEA depositors with an element of uncertainty.

This contribution also seeks to illustrate that the recent mass withdrawal from bank deposits in Greece (in June/July 2015) was an unsuccessful test case for the new legislation, which was ironically already in force at the time the crisis unfolded. This case study of Greece is coupled with the important Landslaki dictum which is given equal attention in this article. Together they give significant credibility to the view that the DGS Directive, seemingly not fully aware of the lessons to be learnt from the 2011 Eurozone crisis, is obsolete and should be amended as soon as possible.

Keywords: depositor's protection schemes; mutual borrowing

* Associate Professor of Business Law at Heriot Watt University, Edinburgh.

** Associate Professor of Private Law at the University of Cagliari.

§1. INTRODUCTION

One of the most significant pieces of EU legislation passed in recent years within the domain of banking and financial law is Directive 2014/49 (DGS Directive).¹ The DGS Directive is concerned with the ‘deposit guarantee schemes’ and encapsulates a variety of legal provisions. It contains a more perspicuous definition of ‘deposit’,² including ‘repayable deposits’ (current accounts and fixed terms/savings deposits)³ and the consequent exclusion of bonds and other structured products. The interest accrued on the covered deposit, which is not yet credited when the credit institution is no longer in a position to repay the money is nonetheless covered by the guarantee scheme, as long as it does not exceed the statutory threshold.⁴ The deposit guarantee schemes must automatically execute the payment of the money owed to the depositor within 7 working days⁵ without the depositor being obliged to complete a specific form.⁶ The new legislation also requires that over a ten-year period guarantee schemes accumulate enough funds to cover their risks vis-à-vis the protected depositors. More specifically, the target has been set in a figure, 0.8% of the eligible deposit liabilities of that deposit scheme.⁷

Amongst its most remarkable measures, the framework at stake ushers in a significant new principle: a pan-European system of protection afforded to the bank depositors. The essence of this new regime, in fulfilling the intention of the EU legislature, lies on the fact that a kind of harmonization in the area of depositors’ protection is the objective to be achieved.

The novel uniform harmonization is synthesized in Recital 6 of Directive 2014/49: ‘(...) [A] uniform level of protection should be provided for depositors throughout the Union while ensuring the same level of stability of DGSs’.

¹ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, [2014] OJ L 173/149. The DGS Directive is the outcome of a process started in 2010, when the Commission proposed an amended version of the previous Directive 1994/19 on deposit-guarantee schemes, [1994] OJ L 135/5. The final text is the result of a political agreement achieved on 18 February 2014 (Europa Rapid Press Release, *Deposit guarantee schemes – Council confirm agreement with EP*, 18 February 2014, 6562/2/14 REV 2). It is worth noting that, more in general, both the DGS Directive and the Directive on the Financial Crisis (Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, [2014] OJ L 173/190) are connected and an integral part of a unified action plan of the EU legislator. See, as regards the Bank Recovery and Resolution Directive, D. Busch and G. Ferrarini (eds.), *European Banking Union* (Oxford University Press, 2015).

² Article 2(1)(a) of the DGS.

³ C. Proctor, *The Law and Practice of International Banking* (2nd edition, Oxford University Press, 2015), p. 286.

⁴ Article 6(b) of the DGS.

⁵ The current 20 working days shall be phased out progressively by 2019.

⁶ Article 7 of the DGS.

⁷ Article 9 of the DGS.

The uniform harmonization replaces the minimum harmonization which had previously been in force under Directive 94/19.⁸ The latter Directive had stipulated that no country was permitted to fall below the floor of protection (at € 20,000), although each country was empowered to go beyond it.

Such a minimum harmonization had already been increased to € 50,000 in 2009 by way of Directive 2009/14,⁹ passed in the middle of the tumultuous financial crisis. Directive 2009/14 contained an automatic mechanism which secured an increase of the limit to € 100,000 by December 2010. The sole 'condition' which would thwart such an automatic increase of the limit rested on a Commission Report concluding that the increase was not appropriate. Given the absence of such a report, the new limit became effective as of 31 December 2010¹⁰ and is still in place.

In light of this legislative climate, the purpose of this contribution is to challenge the assertion that the statute at stake introduces a real pan-European system of depositors' protection. In order to do this, the methodology adopted is twofold: (a) a doctrinal one, concerned with an analysis of the new legal provisions, particularly those relating to the means by which the DGS fund themselves; (b) an empirical one, relating to the contemporaneous case of the Greek crisis.

Lastly, the scope of this paper does not stretch to account for the general, further legal provisions of the DGS Directive. Precepts such as the lowering of the repayment period (7 days after the bank is declared as unable to repay its deposits) and the possibility for a Member State to apply for a longer repayment period of up to 3 months to specified

⁸ Directive 94/19/EC.

⁹ Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the pay-out delay, [2009] OJ L 68/3. Directive 2009/14 entered into force on 16 March 2009, three days after its publication on the Official Journal of the European Union, according to Article 3 of the Directive itself. Starting from this date (16 March 2009) the level of protection has moved up from € 20,000 to € 50,000.

¹⁰ The rapid fluctuation in the level of protection occurred also in each EU country upon the onset of the effects stemming from the financial crisis. In Britain, for instance, where the collapse of Northern Rock in 2007 raised legitimate concerns over run to the bank deposits, effective from 1 October 2007 the level of protected deposits was increased to £ 50,000 per defined deposit account. This increase related to the deposit in its entirety. Prior to the aforementioned change, the first £ 2,000 was fully protected, whereas any additional sum above this, up to £ 33,000, was guaranteed at a percentage of 90%. In Britain, the current level of protection stands at £ 85,000, as from 3 July 2015 reduced to £ 75,000, as a result of the adjustment in the conversion rate of the pound against the Euro with the latter being the authoritative currency in setting the level of protection (€ 100,000).

For an overview of the current system of protection of the depositor in Britain, see I.G. MacNeil, *An Introduction to the Law of Financial Investment* (2nd edition, Hart Publishing, 2012), p. 241–244. More in general, as far as the notion of protection of the investor and the rationale behind it, see M. Andenas and I.H.Y. Chiu, *The Foundations and Future of Financial Regulation* (Routledge, 2014), p. 133–274. See also, more recently, A. Kern, 'European Banking Union: a Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', *40 European Law Review* (2015), p. 154–187, particularly p. 157.

accounts that are held by more than one depositor, are extraneous to this research and therefore fall outside its remit.¹¹

§2. THE RATIONALE BEHIND THE DEPOSITORS' SAFETY NET

From a legal point of view, there is no specific reason why the depositor must rely on a form of protection. The depositor enters into a contract with the bank and as a result of this *depositum irregulare* he becomes merely a creditor of the counterparty.¹² As a result he assumes all the consequences of the counterparty's default. However, from a broader perspective, the banking industry is so peculiar that it is becoming a tautological axiom that the depositor is expected to rely on safeguards that are higher than those bestowed upon an ordinary customer.¹³ According to this line of reasoning, the inability of the debtor to fulfil its obligations (bank insolvency) demands that, despite the possible distortions,¹⁴ the depositors rely on an explicit safety net.¹⁵ In turn this ensures that a crisis befalling a specific financial institution does not spark the collapse of the entire system,¹⁶ with a potential impact on the macroeconomic health of the country where that credit institution operates.¹⁷

From an economic point of view, any lack of, or an overly limited form of, protection afforded to the depositors could prompt them to withdraw their savings from their own financial institution. In the economic literature, this is synthesized as a bank run or incentive to run.¹⁸ On the other hand, an over generous safety net offered to the bank customer in order to neutralize the consequences of the insolvency of a financial

¹¹ For a brief description of the norms encompassed with the DGS Directive, see G. Baber, 'Deposit Guarantee and Bank Recovery: Leads from the Financial Crisis?', 36 *Company Lawyer* (2015), p. 83–84.

¹² Under common law, lately, *Evans & Associates v. Citibank Ltd* [2003] NSWSC 204. Among scholars, see W.P. Ellingers, E. Lomnicka and CV.M. Hare, *Ellinger's Modern Banking Law* (5th edition, Oxford University Press, 2011), p. 119–120.

¹³ A Devil's Advocate could also object that the depositor is not a normal creditor of the bank, as he gets a lower interest rate. This may warrant an additional protection.

¹⁴ A. Daripa, S. Kapur and S. Wright, 'Labour's Record on Financial Regulation', 29 *Oxford Review on Financial Regulation* (2013), p. 74.

¹⁵ In the economic literature, the explicit deposit insurance is identified as a form of protection based on 'legislation, such as the central bank law, banking law, or the constitution [...]' (A. Demirgüç-Kunt and T. Sobaci, 'Deposit Insurance around the World', 14 *The World Bank Economic Review* (2001), p. 482). In all other cases, the safety net is regarded as implicit.

¹⁶ B. Clarke, 'Deposit Guarantee Schemes', in M. Haentjens and B. Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing, 2015), p. 345–365; M. Haentjens and P. de Gioia-Carabellese, *European Banking and Financial Law* (Routledge, 2015), p. 124.

¹⁷ R. Goode, *Principles of Corporate Insolvency Law* (4th edition, Sweet & Maxwell, 2001), p. 46; Basel Committee on Banking Supervision, Consultative Paper Document. Report and recommendations of the Cross-Border Bank Resolution Group (September 2009).

¹⁸ G. Hoggart, P. Jackson and E. Nier, 'Banking Crises and the Design of Safety Nets', 20 *Journal of Banking and Finance* (2005), p. 145.

institution could be counterproductive in terms of the sound and prudent management of the credit institution. The depositor would not have an incentive to do his own due diligence. In this second scenario, a moral hazard risk would be encouraged which would result in the likelihood of financial crisis.¹⁹

The middle ground confers an adequate and balanced level of depositors' protection. Eventually the bank's liquidity would benefit from the trust of the depositors in the banking system. The liquidity of a bank is directly proportionate to the ability of the same financial institution to lend money to businesses and individuals. The higher the amount of money deposited with a bank, the higher the liquidity for the market.

It is well known that the US was the pioneer of depositor protection in 1934, and developed this in order to prevent the bank runs sparked by the Great Depression. In subsequent decades, other countries stepped into the shoes of their American counterpart,²⁰ although, on the other side of the Atlantic, apart from the isolated case of Germany where the protection was introduced as early as 1966, the notion was encapsulated into the national legal frameworks no earlier than the late 1970s²¹ and early 1980s.²²

In the specific case of the Member States of the European Union, this matter has been the subject of a harmonization process started in 1994.²³ In other words, the EU legislator has deemed the protection of the depositor to be one of the cardinal principles of the EU banking system. Therefore, the formation in each country of at least one scheme designed to safeguard bank depositors is not an optional measure left to the discretion of the Member State, but a mandatory process and, ultimately, a condition precedent for the same authorization of a bank.²⁴

It is worth noting that in the EU this protection is not reserved to the banking industry and for the benefit of the depositor, but has also been implemented for almost two decades in the investment sector and for the benefit of the investor.²⁵ Conversely, the insurance sector still lacks a coordinated framework of protection of the policyholders, despite deliberations in this matter which are becoming more and more recurrent.²⁶

¹⁹ A. Demirgüç-Kunt and E. Detragiache, 49 *Journal of Monetary Economics* (2002), p. 1373–1406.

²⁰ For commentaries on other countries and jurisdictions such as China and Singapore, see respectively H. Zhang, 'The Establishment of Deposit Insurance System in China: Effects and Defects', 30 *Journal of International Banking Law and Regulation* (2015), p. 516–520; J. Ong and Y. Wico, 'Singapore: Bank Deposit – Deposit Insurance', 30 *Journal of International Banking Law and Regulation* (2015), p. 17–19.

²¹ It is the case of Austria.

²² This is the case of the UK (1982), for example. A. Demirgüç-Kunt and E. Detragiache, 'Market Discipline and Deposit Insurance', 51 *Journal of Monetary Economics* (2004), p. 375–399, particularly 378–379.

²³ A. Campbell et al., *Deposit Insurance* (Palgrave MacMillan, 2007).

²⁴ B. Clarke, in M. Haentjens and B. Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, p. 345–365; M. Haentjens and P. de Gioia-Carabellese, *European Banking and Financial Law*, p. 125–126.

²⁵ The legislation to be referred to is Directive 97/9/EC on investor compensation schemes. [1997] OJ L 84/22.

²⁶ See the Commission White Paper on Insurance Guarantee Schemes COM(2010) 370.

§3. FROM 'MINIMUM' TO 'UNIFORM' HARMONIZATION: THE OSTENSIVE PHILOSOPHY OF DIRECTIVE 2014/49

Under the previous piece of legislation (Directive 1994/19), a requisite level of protection for the depositor was not imposed on each country by way of a fixed figure. 'Harmonization' represented merely a minimal sum of money that the depositor was entitled to claim from the national scheme in cases where the funds held by the relevant bank were unavailable. In such a scenario, each Member State was obligated to comply with this 'floor', although a country was fully entitled to afford to his depositors a higher level of protection than that required under the Directive.²⁷ The original version of Directive 94/19, under Article 7(1), fixed this floor at ECU 20,000 (European Currency Unit), a threshold later converted into € 20,000.²⁸

In the aftermath of the financial crisis of 2007/2008, the EU legislator elected to increase the minimum limit of protection. Such an alteration was enshrined within Directive 2009/14 which stipulated that the minimum limit should be € 100,000. More specifically, according to Article 1 of the latest piece of legislation, a significant amendment was made to Article 7(1) of Directive 1994/19, namely: '[b]y 31 December 2010, Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be set at Euro 100.000 in the event of deposits being unavailable'. The broad picture of amendments encompassed within Directive 2009/14 was completed with a further legal provision removing the previously optional final 10% of the minimal limit.

Bearing the above in mind, the DGS Directive has recently advanced a different approach to tackling the protection of the depositor. Rather than opting for the 'minimum harmonization', 'a uniform level of protection' is promoted.²⁹ To elaborate, in a clear departure from past arrangements, no country shall be permitted to increase the 'floor' of protection (currently € 100,000) although, for 'certain transactions, or serving certain social or other purposes', a Member State shall be entitled to increase the level of protection.³⁰

The reason for this radical shift in direction was the observation³¹ that the previous system of minimum harmonization had created, at the time of the financial crisis in

²⁷ For a brief commentary on Directive 1994/19, see among the others C. Proctor, *The Law and Practice of International Banking*, p. 265–268.

²⁸ The level of protection of the depositor is a separate concept from the velocity whereby the scheme repays the depositor, once the relevant conditions are met. This aspect is extraneous to the analysis of this contribution. In the literature, see J. Cariboni, E. Joossens and A. Uboldi, 'The Promptness of European Deposit Protection Schemes to Face Banking Failures', 11 *Journal of Banking Regulation* (2010), p. 191–209.

²⁹ Recital 6 of the DGS Directive.

³⁰ Recital 26 of the DGS Directive. These deposits are specified under Article 6(2) of the DGS Directive.

³¹ B. Clarke, in M. Haentjens and B. Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, p. 345–365.

2008, a number of significant distortions. Amongst these, of particular significance was the movement of depositors from countries where the level of protection was comparatively low to others where a greater deal of protection was offered. This exodus was indirectly, but unabashedly, facilitated by Directive 1994/19. Because the coverage level adopted by a specific country could have been unlimited, notwithstanding the floor of € 100,000, depositors would have been well disposed to open bank accounts in the country affording the most generous system of protection of depositors.³²

As the € 100,000 sum represents a uniform level of coverage across Europe and no potential distortion may arise, these two concepts are no longer applicable. Notwithstanding this, the DGS Directive establishes a transitional regime applicable to countries that on 1 January 2008 provided a level of coverage in excess of € 100,000. In such cases, these countries 'may reapply that higher coverage level until 31 December 2018'³³ although in the intervening period the limit would be capped at € 300,000, regardless of whether the coverage had previously been higher.³⁴

§4. FROM THE LOCAL TO THE PAN-EUROPEAN SCHEME: THE NEW RULES

In light of the new DGS Directive, and in line with the previous Directive 1994/19, each Member State must ensure two things. First a deposit protection scheme should be in place in that country. Secondly the scheme should guarantee the depositors of the bank not only in the country of authorization (the 'home country') but also in any other EU and EEA country ('host country'), in circumstances where a bank carried out operations either through branches or by way of a mutual recognition regime.³⁵ In theoretical and practical terms, in some countries, more than a single scheme may be in operation in the same jurisdiction, as long as it has been authorized by the local authority. This is the reason why Article 1 of the DGS Directive stipulates that the framework applies to (a) statutory DGSs; (b) contractual DGSs that are officially recognized as DGSs; (c) institutional protection schemes that are officially recognized as DGSs; and (d) credit institutions affiliated to the schemes.

Quite interestingly, under the previous legislation (Directive 1994/19), the scheme itself and the banking sector of that country behind the scheme was the final 'paymaster'

³² Therefore, the topping up has been eventually phased out. The export ban, existing in both Directive 1994/19 and in the ICD, lapsed in 1999. G. Walker and R. Purves, *Financial Services Law* (3rd edition, Oxford University Press, 2014), p. 125.

³³ Article 19(4) of the DGS Directive.

³⁴ This clause could be defined as 'German clause' as Germany used to be in past the country having a generous limit of protection, initially up to € 1,000,000, later increased to an unlimited amount.

³⁵ The failure to transpose in the national framework a depositors' protection scheme would spark the 'Francovich Rule', established in the seminal Joined Cases C-6/90 and C-9/90 *Francovich & Bonifaci v. Republic of Italy*, EU:C:1991:428.

of any claims lodged by the depositors of banks incorporated in that country, as well as their depositors located elsewhere. Accordingly, the schemes of other EU countries would not have borne the brunt of the inability of the national scheme to repay the depositors of that country. Empirically, this might have given rise to an obvious problem: the depositor of a country would have been protected exclusively in circumstances where the national scheme had sufficient money to prop up the claims. However, in cases where the financial conditions of the banking sector of that country had deteriorated too far, the national scheme would have been unable to rely on the financial assistance of the other schemes. In other words, in the previous scenario, there was an isolation of each national depositors' guarantee scheme. The lack of 'osmosis' meant that the exceptional but possible collapse of the entire banking system of that country would have meant, de facto, the impossibility of the local guarantee scheme to meet the requests of repayment lodged by both the local depositors and the depositors of the banks of that country existing elsewhere. Nor could the local depositors have relied on the benevolent assistance by the scheme of a further EU country, as there was no obligation to bail out the scheme of a different EU country.³⁶

The formation of the DGS Directive intended to change this scenario. As can be inferred from the *incipit*, this statute does aspire 'to eliminate certain differences between the laws of the Member States as regards the rules on deposit guarantee schemes (...) to which those institutions are subject'.³⁷ This legislative level playing field should make it easier 'to take up and pursue the business of credit institutions'.³⁸ Additionally, the DGS Directive emphatically spells out that DGSs of different Member States may merge or may even 'create separate cross-border schemes on a voluntary basis'.³⁹

Indeed, for the first time Article 12 of the DGS Directive heralds the concept of a link between deposit guarantee schemes through the mechanism of mutual borrowing. This reciprocal lending should translate into the possibility for a scheme, in cases where it lacked liquidity, to borrow money from one or more schemes existing in a different EU country.

According to Article 12(1) of the DGS Directive, some conditions must be met for the borrowing to take place:

- (a) 'the borrowing DGS is not able to fulfil its obligations (...) because of a lack of available financial means (...);
- (b) 'the borrowing DGS has made recourse to extraordinary contributions (...);
- (c) 'the borrowing DGS undertakes the legal commitment that the borrowing funds will be used in order to pay [the claims of the depositors];

³⁶ The default of the Icelandic DGS in 2008 is the most obvious example of this. See later Section 6.B.

³⁷ Recital 2 of the DGS Directive.

³⁸ Ibid.

³⁹ Recital 4 of the DGS Directive.

- (d) 'the borrowing DGS is not currently subject to an obligations to repay a loan to other DGSs (...);
- (e) 'the borrowing DGS states the amount of money requested';
- (f) 'the total amount lent does not exceed 0.5% of covered deposits of the borrowing DGS';
- (g) 'the borrowing DGS informs EBA without delay and states the reasons why the conditions [required under legislation] are fulfilled and the amount of money requested'.

Additionally, the DGS Directive takes pain to require each guarantee scheme to accumulate sufficient funding to cover their risks.⁴⁰ This funding shall be, by 3 July 2014, 0.8% of eligible deposit liabilities.⁴¹ Banks are required to make special contributions in connection with their level of risk. In other words, riskier activities taken by a bank should mean a request of higher contributions.

§5. THE MUTUAL BORROWING AMONG DEPOSITORS' PROTECTION SCHEMES: A LEGAL ANALYSIS AND A CRITICAL VIEW

In keeping with the intention of the EU legislature, this system of mutual borrowing, together with the risk-based contributions, should allow each national guarantee scheme in the EU to protect its depositors.⁴² However, upon a more in-depth analysis, the new regime appears to be far from satisfactory. The reasons are multifarious and are detailed below.

First and foremost, the way in which Article 12(1) of the DGS Directive is worded leaves room for perplexities and criticism: 'Member States may allow DGSs to lend to other DGSs within the Union on a voluntary basis, provided that [omitted].'

In this respect, two aspects of the novel legislation are immediately arguable. The auxiliary verb used, 'may', suggests that, in the new legislative framework, each EU Member State is merely entitled to permit its DGS to lend money to DGS of other EU countries. However, there is clearly no obligation to do so. Additionally, the expression 'on a voluntary basis' seems to accentuate the very weak nature of the mechanism under discussion. Even if the country authorized this *infra*-lending among non-domestic DGS (legislative opt-out), it would be determined by the bylaws of that deposit guarantee

⁴⁰ C. Proctor, *The Law and Practice of International Banking*, p. 287.

⁴¹ Article 10 of the DGS Directive.

⁴² A consultation draft on cooperation agreements between deposit guarantee schemes has been published. See European Banking Authority, 'EBA Consults on Draft Guidelines on Cooperation Agreements between Deposit Guarantee Schemes', www.eba.europa.eu/-/eba-consults-on-draft-guidelines-on-cooperation-agreements-between-deposit-guarantee-schemes.

scheme whether to adhere to the opportunity created by its own legislation (statutory opt-out).

To put it simply, a scenario may arise whereby an EU Member State arranges in its legislation for a DGS to lend money to another DGS. However, the DGS of that country could decide not to adhere to this. In that case, the bylaws of that DGS would clearly rule out any *infra*-lending. To clarify further, for the *infra*-borrowing between guarantee schemes of the EU, there is a double-caveat at national level: the first one is of a legislative nature (the home-country legislature permission); the second one is of a regulatory nature (the bylaws of the local scheme to allow such a lending). The first authorization, by the legislator, seems to be necessary for the second one, merely statutory, to be provided.

Secondly, a perplexity originates from the reading of the legislation under discussion. Quite controversially, the amount of each borrowing is subject to a legal limit: 0.5% of the covered deposits of the borrowing scheme.⁴³ The *ratio essendi* of the legal provision is not fully understandable as it may drive a coach and horses through the expected solidarity that should characterize the EU schemes. Empirically, this can be corroborated by an example. In assuming that, among the 28 EU countries, there is a scheme for each country,⁴⁴ in cases where a national scheme needed liquidity, the maximum global amount that the scheme would be entitled to borrow would be, at best, 13.5%. This is the result of 0.5% of the insured deposits of that scheme, times 27 – the number of the schemes of the other 27 EU countries.⁴⁵ It is obvious that 13.5% of the insured deposits as the maximum amount that the local scheme may rely on, in case of lack of liquidity or, even worse, of total insolvency, constitutes a far from attractive prospect.⁴⁶

Article 12(1)(f) of the DGS Directive would be worthy of even more criticism if its legal provision was interpreted in a way that *the total amount* borrowed by the deposit scheme in crisis, rather than the amount lent by each EU scheme, cannot exceed 0.5% of covered deposits of the borrowing deposit guarantee scheme. In this scenario, the average amount lent per each DGS would be 0.019%, which is 0.5% divided by 27. This interpretation, though, is not totally corroborated by the language of the EU legislator in the English version of the DGS, nor is it completely consistent with the rationale behind the DGS. As for the second aspect, such level of financial support (0.5% of the covered deposit of a scheme) would be an amount too low to prop up a national scheme on the brink of a financial collapse.

⁴³ Article 12(1)(f) of DGS Directive.

⁴⁴ It is merely an assumption. In reality, in each country it is legally feasible to have more than one depositor's guarantee scheme.

⁴⁵ Again, it is assumed that each country has just one deposit guarantee scheme, which is not necessarily the case.

⁴⁶ Those who, in that EU country, are mulling over the opening of a bank account would be discouraged from doing this. This hesitation should not ideally occur in a unified market, such as the EU, particularly within the Eurozone.

Concerning the first aspect, the English version seems to be straightforward: 'the total amount lent', not the total amount borrowed. However, the comparison between the English text, which is the subject of this analysis, with other official versions, certainly leaves room for doubt. For instance, based on the Italian version of Article 12 ('*l'importo totale preso a prestito non superi lo 0,5% dei depositi coperti dell'SGD mutuatario*') or, even more, on the French one ('*le montant total prêté ne dépasse pas 0,5% des dépôts garantis du SGD emprunteur*'), it would appear that the threshold shall refer to the overall borrowing of the DGS in need of financial assistance, therefore an overall limit of 0.5%.

Objectively, a more perspicuous tenor of Article 12(1)(f) of the DGS Directive is required and, *de lege ferenda*, it would be the following one: '(...) the total amount lent by each national scheme does not exceed 0,5% of covered deposits of the borrowing DGS'. Alternatively, if the view is that the overall amount of money borrowed by the DGS is 0.5% – a theory that in this contribution is not regarded as convincing – the English tenor should be adapted and aligned in the following way: 'the total amount borrowed by each national scheme does not exceed 0,5% of covered deposits of *that* borrowing DGS'.⁴⁷

Thirdly, in delving further into the analysis of the legal provisions of Article 12(2) of the DGS Directive, the perplexities are reinforced rather than dispelled. The EU legislature regulates in detail the terms and conditions of the loan. First and foremost, (a) the duration of the loan cannot be completely fixed by the parties (the lending scheme and the borrowing one); the duration shall have an upper limit fixed at five years. Secondly, (b) the legislator even enters the details of the terms and conditions of the repayment loan: it may be on annual basis ('in annual instalments') and the interest is due exclusively upon repayment ('at the time of repayment'). It appears that these rules negatively impact on the ability of the parties to enter into a contract. Considering the first aspect (a), it is not fully clear why the DGS Directive states that the borrowing scheme 'may repay the loan in annual instalments'. The clarification seems to be redundant as the two parties can contract a monthly, half-yearly or annual repayment. As far as the second aspect is concerned (b), although the norm seems to protect the borrowing scheme, seemingly in need for money because it is illiquid, in reality this may end up being detrimental to the scheme itself. A possible anticipated repayment of the loan, which would certainly be beneficial to the borrowing scheme, is ruled out by the pedantic wording of Article 12(2) of the DGS Directive.

Moreover, Article 12(2) of the DGS Directive does contain further controversial norms. Article 12(2)(b) of the DGS Directive stipulates that 'the interest rate set must be at least equivalent to the marginal lending facility rate of the European Central Bank during the credit period.' The provision seems to protect the lender, rather than the borrower. The EU legislator is seemingly concerned that the lender may be too generous in lending money to a 'sister' scheme, without charging interest at all. Therefore, the

⁴⁷ Emphasis added.

marginal lending facility rate of the ECB shall become a floor below which the scheme will not be permitted to negotiate. At first glance, the provision does not seem to be entirely in line with the principle of solidarity that should inform an integrated group of states, such as the EU.⁴⁸ Additionally, the norms seem to alert the depositor of a financially weak EU country, as it warns him of the financial instability of the national scheme, if bailed out, leading to a heavy cost to that system.

Lastly, the corollary of Article 12 of the DGS Directive is its final subsection 3. In this it is stipulated that ‘the contributions levied by the borrowing DGS are sufficient to reimburse the amount borrowed and to re-establish the target level as soon as possible’. The precept is not thoroughly perspicuous. A possible interpretation, although probably too rigorous, is that a scheme is not permitted to borrow from a further scheme, if the contributions are not adequate to facilitate repayment. An alternative interpretation, not perfectly supported by the tenor of the legal provision but more logical, is that the possible borrowing by a scheme may require the scheme to ask participants to increase their contributions, to make sure that the lending scheme may receive the repayment of the loan. In this respect, two observations are required. First, the norm entails that the possible *infra*-borrowing may make the contributions significantly more expensive. This may represent a double-whammy for the national scheme of that specific country. Not only shall the scheme face an illiquidity, but it will also ask the banks of that country to pay more expensive contributions. This vicious circle may in reality lead to a deterioration of the financial conditions of that depositors’ guarantee scheme, rather than relieving it. Second, the legislator seems to be more concerned about the repayment of the lending scheme (and its stability), rather than the protection of the national depositor and his expectation to be repaid.

§6. THE (DISSATISFACTORY) PAN-EUROPEAN SCHEME: THE EMPIRICAL ANALYSIS (GREECE) AND A JUDICIAL TEST (*LANDSBANKI*)

In light of the previous observations, a fundamental deficiency affects the new so-called pan-European system of protection of the depositors: this mainly relates to the way the national schemes lend to each other and, therefore, how the national scheme may be sustainable.

If the essential purpose of a depositor’s safety net is to ensure that, in cases of bank insolvency there is no run to the bank accounts, the new norms are far from securing this objective. It is obvious that, as things are, the EU depositor is still *de facto* ranked differently, according to whether the up-to € 100,000 deposit is located in a high risk

⁴⁸ However, for practical reasons, it could always be said that the depositors of the other DGSs need protection too.

EU country (with a risky banking system) rather than in a low risk EU country (with safe credit institutions). The deposit could theoretically be in a safe bank, because the financials of that bank are highly satisfactory. Yet, that bank could be in an EU country whose public finances are far from being satisfactory. It is obvious that in this case the collapse of that EU country would engender the collapse of that financial system and, with the latter, the demise of the local guarantee scheme.

In this unfavourable but not implausible scenario, it is possible to assume that the local guarantee scheme would not be in a position to repay the 'protected depositors'. It is troublesome to hypothesize that the local DGS may meet the requests of repayment of, seemingly, the depositors of all the – collapsed – banks of that country. Nor would the new rules of Article 10 of the DGS Directive be of any help: because the DGS is limited in the amount of money that can be borrowed from the other DGS, it is difficult to imagine how it can do a U-turn.

The EU small depositor, in mulling over the opening of a bank account, will certainly take on board this structural flaw, the financial isolation of the depositors' guarantee schemes existing in each country. The EU depositor's safety net, in the way the same has been recently shaped, is still de facto national and far from meeting the objective of a unified and integrated market.

A. THE EMPIRICAL CASE: GREECE

The example of Greece and the difficulties it is facing at the time of writing this paper are self-explanatory. It is worth recalling that the DGS Directive has been in force since 4 July 2014, as far as the directly applicable legal provisions of such a directive are concerned, including the legal provisions relating to the *infra*-funding.⁴⁹ Nevertheless, the remainder of the legal provisions of Directive 2014/49 have already been transposed in each Member State by 3 July 2015.⁵⁰

If the rationale behind the DGS Directive was corroborated, no bank depositors' haemorrhage had occurred in Greece in the summer of 2015. Given the existence of a national scheme 'communicating' with the other 27 counterparts, there should be no reason for protected depositors to panic and to withdraw money on an excessive scale. Admittedly, it can also be counter-argued that the reason for the deposit run in Greece was not the lack of adequate protection afforded by the local DGS, rather the Greek depositors' fear that their country would leave the Eurozone and, perhaps, the European Union.⁵¹ However, also in this case, the fears of leaving the Euro, even if true,⁵² ought to have been

⁴⁹ Article 22 of the DGS Directive.

⁵⁰ Article 20(1) of the DGS Directive.

⁵¹ This thesis stills needs a corroboration at the empirical level.

⁵² The issue, albeit fascinating, goes beyond the scope of this contribution. Nevertheless, see P. Athanassiou, 'Withdrawal and Expulsion from the EU and EMU Some Reflections' European Central Bank, *ECB Legal Working Paper* no. 10 (2009), www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf.

off-set by the protected depositors' reliance on the DGS Directive and, particularly, on its assuring words at its Recital 3⁵³ and Recital 33⁵⁴ of the DGS Directive. Nevertheless, this is not exactly what has transpired between June and July 2015, when the DGS Directive was already in force, where the run to the Greek banks reached a level so threatening to compel the local central bank to shut its local branches for more than a week.⁵⁵

B. THE JUDICIAL PRECEDENT: *LANDSBANKI*

The perplexities over the financial feasibility of the new DGS Directive can be traced to Landsbanki and the judicial case heard by the EFTA court, namely *EFTA Surveillance Authority v. Iceland*.⁵⁶ It is known that Landsbanki, an Icelandic legal entity, was a bank that, just before the outbreak of the 2008 financial crisis, had offered large amounts of bank accounts online⁵⁷ to depositors across the EU, particularly in Britain and the Netherlands.⁵⁸ Iceland, an EEA country, had transposed in its legislative framework a deposit guarantee scheme, offering a protection of € 20,887, therefore not below the then EU floor of € 20,000. However, the crisis which exploded in Iceland was so severe that not only the bank, but the entire banking system collapsed, and with it the same local guarantee scheme. The Icelandic Finance Minister, on 8 October 2008, in a symbolic declaration of defeat and, at the same time, of defiance, communicated to his British counterpart that, given the fact that the Icelandic depositors' guarantee scheme had literally run out of money, Iceland was not prepared to step in to the shoes of its beleaguered guarantee scheme. The announcement left the British depositors of the bank speechless.

C. *LANDSBANKI* AND BRITAIN: A BRIEF DISCUSSION OF A LEGAL SAGA

The British Government, for political reasons, eventually decided to assume the payment of the British depositors of the Icelandic bank, also for the part of the bank accounts

⁵³ 'This Directive constitutes an essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institutions, while increasing the stability of the banking system and the protection of depositors'. Recital 3 of the DGS Directive.

⁵⁴ 'The cost to credit institutions of participating in a DGS bears no relation to the cost that would result from a massive withdrawal of deposits not only from a credit institution in difficulty but also from healthy institutions, following a loss of depositor confidence in the soundness of the banking system.' Recital 33 of the DGS Directive.

⁵⁵ In June 2015, the amount of bank notes in circulation in Greece reached € 50.5 billion, with an increase of € 5 billion from the previous month. See HuffPost Greece, 'How Bad Was The Run On Greek Banks?', *HuffPost Greece*, www.huffingtonpost.com/entry/greek-bank-run_55ae757de4b0a9b948529aa6.

⁵⁶ Case E16/11, EFTA Ct Rep 213; [2013] 2 CMLR 41.

⁵⁷ Particularly saving accounts, called Icesave.

⁵⁸ In Britain, in October 2006, Landsbanki had opened a branch, whereas in the Netherlands the branch was opened and became operative on 29 May 2008.

(up to ISK 1,700,000, the Icelandic level of protection, correspondent to up to € 20,887) that, according to the EU rules, should have been honoured by the defaulted Icelandic guarantee scheme.⁵⁹ Conversely, as far as the part of the deposit exceeding € 20,887 is concerned, there was no question about the fact, nor did the British government object, that the British deposit guarantee scheme – and not the Icelandic one – was liable to pay a sum of up to £ 50,000 for each depositor. Because Landsbanki, in offering its banking products in Britain, had expressly opted in,⁶⁰ this part of the guarantee fell within the liabilities of the host depositors' scheme: in other words the British one.

It goes beyond the scope of this contribution to rehash the ensuing events, particularly the diplomatic battle between Iceland, on one side, and the UK, on the other.⁶¹ As far as the purely legal dimension is concerned, the principles spelled out by the court,⁶² in the controversy where the Republic of Iceland was sued by EFTA Surveillance Authority, are not caliginous and are certainly worthy of a mention, within the context of the discussion of the new DGS Directive. The Member State or, in dealing with Iceland, the EEA State, is under an obligation to implement in an internal legislative framework the depositors' guarantee fund. Nevertheless, there is no obligation for the country to honour the obligations of the national fund, in cases where the same was insolvent. The reasoning of the court mainly lies on the reading of Recital 24 of the then applicable Directive 1994/19.⁶³ This explicitly required the Member State to ensure that 'one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed by the Directive have been introduced and officially recognised'. Yet, once this has been

⁵⁹ C. Proctor, *The Law and Practice of International Banking*, p. 292.

⁶⁰ In other words, it had topped up. For an overview of the mechanisms of topping-up and export ban, see European Association of Public Banks, *European Banking and Financial Services Law* (3rd edition, Larcier, 2008), p. 3–5.

⁶¹ Britain applied the Anti-Terrorism Crime and Security Act 2001. This empowers the Treasury to make an asset freezing order in cases where '(...) action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons [...]', including 'the government of a country or territory outside the United Kingdom (...)'. The Landsbanki Freezing order 2008 (SI 2008/2688), amended on 21 October (SI 2008/2766), was eventually revoked on 15 June 2009 (Landsbanki Freezing (Revocation) order 2009 (SI 2009/1392), after an eventual settlement between the two contending countries. See, among scholars: J. Danielsson, 'The Saga of Icesave', *Centre of Economic Policy Research Policy Insight* No. 44 (2010), <https://cepr.org/pubs/policyinsights/PolicyInsight44.pdf>; W.H. Buijer and A. Sibert, 'The Icelandic Banking Crisis and What to do about it: the Lender of Last Resort Theory of Optimal Currency Areas', *Centre for Economic Policy Research Policy Insight* No. 26. (2008), <https://cepr.org/pubs/policyinsights/PolicyInsight26.pdf>. In Italian, see S. De Vido, 'Prime Conseguenze Internazionali della Crisi Finanziaria: la Controversia tra Islanda e Regno Unito', 26 *Diritto del Commercio Internazionale* (2012), p. 109–130.

⁶² Case E16/11, EFTA Ct Rep213.

⁶³ This principle is now contained, *mutatis mutandis*, in Recital 45 of the DGS Directive: 'This Directive should not result in the Member State or their relevant authorities being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in their Directive have been introduced and officially recognised'.

fulfilled by the Member State, '(...) this would preclude any further liability on the part of the Member State and its authorities'.⁶⁴

§7. A (REINFORCED) PROPOSAL

From the observations of the preceding two sections it is possible to confirm that the DGS Directive and its mutual borrowing among DGSs is far from securing in the EU the uniformity and trust of depositors as expected in a common banking market. *A contrario*, if the assumption of the DGS Directive had been correct, the average Greek depositor would have continued keeping his money in the Greek banks.⁶⁵

In order to move on from this impasse, two hypotheses are possible.⁶⁶

In hypothesis A, the deposit guarantee schemes in each EU country are still envisaged as an independent body but they provide one another with mutual assistance. To achieve this scenario, already acknowledged by forward-looking scholars at the height of the financial crisis,⁶⁷ the current legislation is far from being satisfactory. Significant amendments are required to ensure that the borrowings among deposit schemes are made mandatory and not optional as they are currently. The bylaws of each DGS shall be updated accordingly. In this same scenario, it shall be stipulated that, as regards the amount of the borrowing, this shall be unlimited and mandatory for all the other DGS. The insolvency of the deposit guarantee scheme represents an event so catastrophic that it cannot be attributed to the scheme itself or to the lack of ability of their banks to lend money, but to circumstances of a macro-economic nature, a force too great to be manageable by any national scheme.⁶⁸

In hypothesis B, which in this paper is regarded as the ideal one, a stronger but still realistic model is proposed:⁶⁹ the creation of a unified EU scheme of depositor's protection, entirely replacing the national ones.

It is possible to highlight the main reasons for backing this pan-European unified protection scheme (hypothesis B). First, by putting into force a unified EU DGS, the

⁶⁴ For an in-depth discussion of this court decision, see M. Hanten and M. Plaschke, 'EU Law Impact on Deposit Protection in the Financial Crisis: Icesave', 51 *Common Market Law Review* (2014), p. 295–309.

⁶⁵ L. Noonan and P. Jenkins, 'With Cash Fast Running Out, Greek Bank Failures Loom' *CNBC* (2015), www.cnbc.com/2015/07/11/greek-banks-to-run-out-of-money-by-monday-without-ecb-help.html.

⁶⁶ A further third hypothesis was put forward in the past: an additional DGS, operating parallel to the national ones. This would be a sort of solar system where the single national guarantee systems operate as satellite and operational subsidiaries of the main EU one. See R. Ayadi and R.M. Lastra, 'Proposals for Reforming Deposit Guarantee Schemes in Europe', 11 *Journal of Banking Regulation* (2010), p. 220.

⁶⁷ *Ibid.*

⁶⁸ The Greek crisis may fall into this category.

⁶⁹ Also in this case (R. Ayadi and R.M. Lastra, 11 *Journal of Banking Regulation* (2010), p. 220), scholars had already authoritatively hinted at the main lines of this unified European system of DGS, a 'European DGS that replaces the existing 27 DGSs'. In order to make the statement contemporaneous, number 27 shall be replaced by 28, the more recent number of the countries that are now part of the EU.

EU market would be perfectly integrated. Depositor's protection would be offered to depositors everywhere in the EU by one scheme, irrespective of the EU country where the deposit occurs. The unified and uniform level of protection would avoid the drainage of liquidity from one country to the other, with consequent distortions of the internal market of the bank services.⁷⁰ Recital 19 of the current DGS Directive refers to the 'uncoordinated increases in coverage across the Union' as the reason for transferring money from one country to the other. Conversely, the recent Greek bank depositors' exodus has provided the evidence that the liquidity is moved from one country to the other also because some EU national schemes are perceived as more risky than others. Among these risks is the one left completely unresolved by the DGS Directive: given the isolation of each national deposit scheme and the lack of financial absorption, the failure of the financial system of that country may impinge on the collapse of the local guarantee scheme. With a unified guarantee scheme, any concern of this kind would be dispelled as the depositor would rely on a unified EU guarantee.

Second, the unified depositor's guarantee scheme would impede any distortion in the offer of banking services. In the decision-making process leading the small depositor to open a bank account, the country of incorporation of the bank and the place where the bank operates would end up rendered irrelevant. The only legitimate expectation of a protected depositor would be that his money, up to a certain amount, is safe. Because this guarantee is not given to the depositor in the current legislation, the same principle of free movement of people is not totally fulfilled. Ultimately, this new architecture would promote the cross-border banking business more convincingly than the current system which – with its atomistic separate schemes – fails to do so. In essence, this would be a more precise implementation of the principle of freedom of establishment under Article 53(1) TFEU, on reliance of which the new DGS Directive has been adopted.⁷¹

This project, already envisaged by the Commission in its 2010 proposals but far from being encompassed with the final text of the recent DGS Directive,⁷² would more persuasively implement the concept of the Eurozone banking union,⁷³ of which key elements already are: a Single Supervisory Mechanism;⁷⁴ a Single Resolution Mechanism;⁷⁵ and, last but not least, the European Stability Mechanism.⁷⁶ As a prospective fourth key element, the unified scheme would be more suitable for the Eurozone area, although the

⁷⁰ The exodus of money deposited in Greece and/or the haemorrhage of liquidity from the local banks are events which are going to be iterated in books of economics and history for centuries.

⁷¹ Article 53(1) TFEU corresponds to the previous Article 57(1) of the Treaty of Rome, based on which the previous Directive 1994/19, had been adopted.

⁷² Commission Proposal COM(2010) 368/2.

⁷³ The Single Supervisory Mechanism has been created by virtue of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287/63.

⁷⁴ Already in force as from 4 November 2014.

⁷⁵ The Single Resolution Mechanism shall enter into force on 1 January 2016.

⁷⁶ Chronologically, this is the first pillar, as it has been in force since 8 October 2012.

legislation could be equipped with an opt-in clause, to ensure that other non-Eurozone countries as well as EEA nations can adhere to it.⁷⁷

Undoubtedly, this solution of a unified Eurozone depositors' guarantee scheme may be regarded as *prima facie* radical but also more expensive for the banks contributing to the scheme. The DGS Directive currently imposes a safety net based on risk-adjusted premiums, as opposed to fixed rates. In fact, the risk they would pay with their premium would also take on board the insured risk connected with banks of other Eurozone/EU/EEA countries, and not simply the national ones. A further downside of this prospective model of safety net is that an EU explicit deposit insurance could increase the moral hazard of banks and the risk of default, particularly of credit institutions operating in peripheral areas.

Nevertheless, a possible legal device to minimize these potential issues would be the level of protection: this should be reduced from the current € 100,000 to a more balanced € 50,000. The figure proposed would be, roughly, halfway between the previous minimum harmonization of € 20,000, existing until 2010 and the very generous one introduced, probably in the heat of the moment, in the aftermath of the 2008 financial crisis. This is an amount that should keep at bay any kind of moral hazard risk.

In this respect, the following can be observed. First, € 50,000 would represent half the insured risk currently borne by the EU banks and, therefore, half the premium they are required to pay. Second, from a historical perspective, the legislature, in 2009, did decide to depart from the safety net of € 20,000; however, it did not do so for the correspondent protection afforded to the investor according to the Investor Compensation Directive. Seemingly, it did so for the exceptional circumstances prompted by the 2008 financial crisis. However, it has not yet been demonstrated that the comparative recovery of the banking market after the financial crisis bears a correlation with this decision. Third, € 50,000 is a level of protection more consistent with the concept of 'small depositor'⁷⁸ than the overly generous € 100,000.

A further suggestion contained in this paper is that the EU legislature comes up with a clear definition of 'small depositor'. The 'small depositor' and not any depositor, is worthy of protection in the philosophy of the DGS Directive. The 'small depositor', a category that currently does not have EU standing, shall be the one having money deposited with a bank up to a certain amount, fixed in advance and reasonably close to € 50,000 or a different amount to be fixed from time to time. In essence, the depositor of an amount

⁷⁷ See for the most recent the debate revolving around the Eurozone banking union, E. Ligere, 'Quo Vadis, Europe', 30 *Journal of International Banking Law and Regulation* (2015), p. 121–126; and, furthermore, D. Busch and G. Ferrarini (eds), *European Banking Union*.

⁷⁸ Among scholars, it is highlighted that the protection, both in the banking sector and in the investment one, is provided for 'small depositors and investors' (emphasis added). G. Walker and R. Purves, *Financial Services Law* (3rd edition, Oxford University Press, 2014), p. 124–125. For an exhaustive analysis of the philosophy, *ratio essendi* and legislation relating to the investors' protection, see H. Wegman, *Investor Protection. Towards Additional EU Regulation of Investment Funds* (Wolters Kluwer, 2015).

up to € 50,000 is the small depositor that needs to be protected in the underpinning philosophy of the EU legislation. An individual or entity with a higher availability of money would be wealthy enough to consider the possibility and opportunity to seek advice and to find both the bank and the country where it is better to deposit his sum of money.

§8. CONCLUSION

It was anticipated that the recently enacted Directive 2014/49 would introduce a pan-European mechanism of protection to safeguard the interests of depositors. The EU legislator has made a superficial, and indeed thinly veiled, effort at achieving this merely by means of a mathematical adjustment: the alignment of the previous limits of coverage and their convergence to a unified and uniform level of € 100,000.

With that in mind, the aim of this paper has hopefully been fulfilled in demonstrating that, beyond the façade, the latest piece of legislation sits very uneasily alongside its apparent philosophy: 'the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institution (...)'.⁷⁹ The mechanism of limited cross-border financing among national schemes, put in place by Directive 2014/49, casts considerable doubt on the principle of protection of the depositors: moreover, the mutual and cross-border borrowing among schemes ought to have been an obligation levied on each country, rather than an option.⁸⁰

Empirically, the recent mass bank run in Greece, occurring as it did at a time when the new piece of legislation was already in force, has confirmed the conviction held by the author that the new piece of legislation is imbued with weakness and, paradoxically, that it is obsolete.

In light of the Greece case study and given the dissatisfactory answers provided by EU statute, the paper suggests that, prospectively, a unified European scheme of depositors' protection should be implemented. This Eurozone scheme, fitted with an opt-in clause for the other EU and EEA countries, would be the corollary of a system of supervision of credit institutions and would guarantee that, up to € 100,000 or, as suggested in this paper,⁸¹ a more balanced € 50,000, an absolute right of protection of the depositor is conferred, irrespective of where in the Eurozone his money is deposited.

On these grounds, the potential for a more stimulating idea could be put forward, one which is partly connected with the *Landsbanki* case. It is true that, in the way the DGS rules are codified,⁸² the EU guarantee scheme is merely an 'industry funded' one;

⁷⁹ Recital 3 of Directive 2014/49.

⁸⁰ See above Section 5.

⁸¹ See previous Section 7.

⁸² Within Directive 2014/49, this is Article 3(10).

the depositors' safety net cannot rely on a guarantee given by the Member State or any regional authority. Yet, economists have been elucidating for some time that, as far as the funding variables are concerned, the source of funding of a depositors' protection scheme can unequivocally be public too.⁸³ On such an argument, it is not beyond the realm of possibility that the ECB may become, with all the necessary adjustments to the EU 'constitutional' architecture, the lender of last resort of all the Euro-zone deposits of an amount up to € 50,000. Perhaps, this public € 50,000 ECB-guaranteed deposit could be the real 'bazooka' evoked in the most difficult moments of the Euro-zone crisis?⁸⁴

Ultimately, five years ago it was authoritatively suggested by scholars⁸⁵ that the global financial crisis had 'woken up the European authorities prompting them to review the existing frameworks to manage the crisis both domestic and on a cross-border basis'. The instinctive question then, in analysing the new DGS Directive, is whether the European authorities have decided once again to fall into the waiting arms of Morpheus the God of Dreams. Should this be the case, is Morpheus in a position to realize the dream of an EU 'small depositor' enjoying a pleasant sleep and relying on the repayment of his 'small' bank account?

⁸³ A. Demirgüç-Kunt and T. Sobaci, 14 *The World Bank Economic Review* (2001), p. 483.

⁸⁴ P. Inman, 'ECB "Takes Out the Bazooka" with Bigger than Expected QE Stimulus Package', *The Guardian* (2015), www.theguardian.com/business/2015/jan/22/ecb-big-bazooka-bigger-than-expected-qe-stimulus.

⁸⁵ R. Ayadi and R.M. Lastra, 10 *Journal of Banking Regulation* (2010), p. 210. For a balanced analysis of the dichotomy between financial markets and financial regulation during and financial crisis, see N. Moloney, E. Ferran and J. Payne, *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015).