



European Securities and  
Markets Authority

# Consultation Paper

**Draft RTS on safeguards for clients and indirect clients (Article 63(2) of the CCPRRR)**



## **Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- 1) respond to the question stated;
- 2) indicate the specific question to which the comment relates;
- 3) contain a clear rationale; and
- 4) describe any alternatives ESMA should consider.

ESMA will consider all comments received by 24 January 2022.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

### **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### **Who should read this paper?**

All interested stakeholders are invited to respond to this consultation. In particular, this paper may be specifically of interest for clearing members, clients, indirect clients, CCPs and authorities involved in CCPs recovery and resolution.

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## Legislative references and abbreviations

### Legislative references

<i>CCPRRR</i>	Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties (OJ L 22, 22.1.2021, p.1)
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### Abbreviations

<i>CCP</i>	Central Counterparty
<i>ESMA</i>	European Securities and Markets Authority
<i>EU</i>	European Union
<i>NCWO</i>	No Creditor Worse Off
<i>OJ</i>	The Official Journal of the European Union
<i>RTS</i>	Regulatory Technical Standards

### Definitions

Unless otherwise specified, the terms used in this consultation paper and in this draft RTS have the same meaning as in CCP RRR.

In addition, for the purposes of this RTS, the following definitions apply:

<i>clearing service provider</i>	any clearing member, client or indirect client providing clearing services in the Union
<i>clearing service user</i>	any client or indirect client using clearing services provided by a clearing service provider
<i>contribution</i>	any contribution made by a clearing service user to the clearing service provider in accordance with a contractual arrangement allowing the clearing service provider to pass on to their clearing service user, directly or indirectly, the negative consequences of the resolution tool used
<i>compensation</i>	compensation (as defined in the first subparagraph of Article 63 of CCPRRR) which may take the form of cash, financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits

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## Executive Summary

### Reasons for publication

Article 63 of Regulation (EU) 2021/23 ('CCPRRR') stipulates safeguards for clients and indirect clients<sup>1</sup>. Where a contractual arrangement allows clearing members to pass on to their clients the negative consequences of the resolution tools those contractual arrangements shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions.

Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

Article 63 also contains the mandate for ESMA to specify in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate.

The purpose of this consultation paper is to present the draft regulatory technical standard providing the conditions for when compensation is required and conditions for where such compensation is considered proportionate. ESMA shall submit those draft regulatory technical standards to the Commission 12 months after the CCPRRR entered into force.

### Contents

Section 2 of the consultation paper contains an introduction to the mandate and Section 3 contains the conditions for contractual symmetry and the transparency requirements to assist the proportionality assessment were applying the safeguard for clients and indirect clients. Section 4 entails the Annexes, the mandate (Annex I), the cost-benefit analysis (Annex II), the summary of questions (Annex III) and the draft RTS (Annex IV).

### Next Steps

ESMA will consider the feedback it received to this consultation in Q1 2022 and expects to publish a final report and submission of the draft technical standards to the European Commission for endorsement spring 2022.

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# 1 Background

1. The objective of the recovery and resolution framework is to ensure that CCPs set out measures to recover from financial distress, to maintain the critical functions of a CCP which is failing or likely to fail while winding up the remaining activities through normal insolvency proceedings, and to preserve financial stability while avoiding a significant adverse effect on the financial system and its ability to serve the real economy and minimising the cost of a CCP failure to taxpayers.
2. The Regulation (EU) 2021/23 ('CCPRRR') on recovery and resolution of central counterparties was published in the Official Journal on 22 January 2021 and it entered into force on 12 February 2021<sup>2</sup>.
3. Article 63 of CCPRRR stipulates that where a contractual arrangement allows clearing members to pass on to their clients the negative consequences of the resolution tools those contractual arrangements shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Those provisions also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients. For the purpose of this consultation paper clearing service providers should be understood as any clearing member, client or indirect client providing clearing services in the Union and clearing service users should be understood as any client or indirect client using clearing services provided by a clearing service provider.
4. ESMA's mandate is to develop a draft RTS in order to specify, in a transparent manner, the conditions under which the passing on of compensation, cash equivalent of such compensation or of any proceeds stemming from a NCWO (i.e. no creditor worse off, further described under Section 2, *Introduction*) claim is required, and the conditions under which it is to be considered proportionate. ESMA shall submit the draft regulatory technical standards to the Commission by 12 February 2022.

# 2 Introduction

5. The resolution process is subject to the no-creditor-worse-off principle<sup>3</sup>, i.e. where the resolution authority uses one or more resolution tools, it shall ensure that shareholders,

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<sup>1</sup> For the purposes of this paper the definitions of 'client' and 'indirect client' would be as defined in the Commission delegated regulation (EU) 2017/2154 of 22 September 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements.

<sup>2</sup> REGULATION (EU) 2021/23 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3ATOC)

<sup>3</sup> Article 60 'No creditor worse off' principle

clearing members and other creditors do not incur greater losses than they would have incurred had the resolution authority not taken resolution action in relation to the CCP at the time the resolution authority considered that the conditions for resolution were met and had the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules.

6. The CCPRRR sets out the safeguards for shareholders, clearing members and other creditors and states that where any shareholder, clearing member or other creditor has incurred greater losses than it would have incurred if the resolution authority had not taken resolution action in relation to the CCP and the CCP had been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations or other arrangements in its operating rules, that shareholder, clearing member or other creditor shall be entitled to the payment of the difference<sup>4</sup>.
7. The CCPRRR equally sets out safeguards for clients and indirect clients that are not “creditors” of the CCP, stating that where there are contractual arrangements allowing clearing members to pass on to their clients the *negative consequences* of the resolution tools, the contractual arrangements shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of CCPRRR or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. It is noted that these requirements on the contractual arrangements also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients<sup>5</sup>.
8. ESMA notes that the mandate under Article 63 of CCPRRR in relation to the safeguard for clients and indirect client concerns the case of compensation under Article 62 and the case of compensation under article 27(6) of CCPRR<sup>6</sup> (i.e. the compensation where the resolution authority has decided to require the CCP to compensate non-defaulting clearing members for their losses stemming from the application of loss allocation tools *provided that the non-defaulting clearing member would have been entitled to the payment of the difference referred to in Article 62*).

#### Recital

(48) Recovery and resolution actions can indirectly affect clients and indirect clients that are not creditors of the CCP, to the extent that costs of recovery and resolution have been passed to those clients and indirect clients under the applicable contractual arrangements. Therefore, the impact of a CCP recovery and resolution scenario on clients and indirect clients should also be addressed through the same contractual arrangements with the clearing members and clients that provide them with clearing services. This can be achieved by ensuring that, if contractual arrangements allow clearing members to pass on to their clients the negative consequences of the resolution tools, those contractual arrangements also include, on an equivalent and proportionate basis, the right

<sup>4</sup> Article 62 Safeguard for shareholders, clearing members and other creditors

<sup>5</sup> Article 63 Safeguard for clients and indirect clients

<sup>6</sup> Article 27 General provisions on resolution tools

of clients to any compensation clearing members receive from the CCP or any cash equivalent of such compensation or any proceeds they receive following a 'no creditor worse off' claim, to the extent that these relate to client positions. Such provisions should also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

#### **Article 62 Safeguard for shareholders, clearing members and other creditors**

Where, in accordance with the valuation carried out under Article 61, any shareholder, clearing member or other creditor has incurred greater losses than it would have incurred had the resolution authority not taken resolution action in relation to the CCP and had the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations or other arrangements in its operating rules, that shareholder, clearing member or other creditor shall be entitled to the payment of the difference.

#### **Article 63 Safeguard for clients and indirect clients**

1. Contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

2. ESMA shall develop draft regulatory technical standards in order to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in the paragraph 1 is required, and the conditions under which it is to be considered proportionate.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### **Article 27(6)**

The resolution authority may require the CCP to compensate non-defaulting clearing members for their losses stemming from the application of loss allocation tools, where those losses are in excess of the losses that the non-defaulting clearing member would have borne under their obligations under the CCP's operating rules, provided that the non-defaulting clearing member would have been entitled to the payment of the difference referred to in Article 62.

The compensation referred to in the first subparagraph may take the form of instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits.

The amount of instruments issued to each affected non-defaulting clearing member shall be proportionate to the excess loss referred to in the first subparagraph. It shall take account of any outstanding contractual obligations of the clearing members toward the CCP and be deducted from any entitlement to the payment of the difference referred to in Article 62.

The amount of instruments shall be based on the valuation conducted in accordance with Article 24(3).



### **3 Safeguard for clients and indirect clients (Article 63 of CCPRRR)**

#### **3.1 Scope of the mandate**

9. The mandate requires ESMA to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.
10. Where contractual arrangements allow clearing members to pass on to their clients the negative consequences of the resolution tools, this is referred to in this consultation paper as “contribution pass-on”. Article 63 states that where there is a contractual agreement for contribution pass-on, the contractual agreement shall also contain, on an equivalent and proportionate basis, the right of clients (or indirect clients) to any recompense or compensation clearing members receive. Compensation in this consultation paper refers to compensations established through an Article 62 claim and any compensation under Article 27(6) where the resolution authority may require the CCP to compensate non-defaulting clearing members.
11. The same principle applies where a client or indirect client have provided clearing services and engaged in contribution pass-on with its clients or indirect clients. The obligation for clearing service providers to pass on compensation to their clearing service users is in line with the contractual symmetry principle.
12. ESMA notes that the scope of the initial right of the clearing service provider to pass-on any negative consequence in the use of the resolution tools, to its clients (or indirect clients) is based on a contractual agreement. This agreed possibility for a clearing service provider to pass on negative consequences to its clearing service user, is outside the remits of the mandate, hence whilst this step is outside the mandate, ESMA would encourage those aspects to be reflected upon by the clearing service providers to ensure any requests for contribution through contribution pass-on is properly managed by the clearing service provider. This is due to the fact that this first step is still indirectly important for the mandate, as it establishes the basis for any distribution of any compensation. Hence to be able to establish the conditions under which a compensation is to be considered proportionate this draft RTS includes the aspect on how to inform the clients and indirect clients of the basis of the calculations made to ensure any distribution is proportionate to the contribution made and to be able to provide this information the clearing service provider should have any request for contribution (pass-on) clearly documented.

#### **3.2 Conditions for contractual symmetry**

13. ESMA suggests that the RTS regulates the minimum requirements to be applied by the clearing service providers in agreeing on reasonable commercial terms the compensation

rights of the clients or indirect clients, subject to such a compensation having been confirmed under Article 62.

### 3.2.1 Principle 1: Fair and reasonably

14. Reasonable commercial terms shall ensure unbiased and rational contractual arrangements on how compensation should be distributed proportionately, equally and fairly.
15. The contribution (i.e. the contribution pass-on) sets out the basis for the scope of any compensation payable by the clearing service provider to a clearing service user. However, it should be noted that the right for compensation does not equal the contribution made, as compensation is based on the confirmed overall NCWO claim, i.e. the payment of the difference, and any proceeds received are included to the extent that such contribution received is related to client positions.

#### Principle 1: Fair and reasonably

A clearing service provider shall ensure that any passing through of a compensation to clearing service users are made on a fair, reasonable, non-discriminatory and transparent basis.

**Question 1: Do you agree with the proposed conditions for fair and reasonably distribution of compensation? If not, please explain?**

### 3.2.2 Principle 2: Pro-rata, fair and proportionate allocation of compensations

16. As noted above, a compensation under Article 63 or 27(6) is subject to Article 62. This means that any compensation may not be reflecting the full contribution (i.e. the contribution pass-on) made under the resolution tools by clearing service users.
17. ESMA notes the reference to the right of clients to any compensation clearing members receive from the CCP or any cash equivalent of such compensation or any proceeds they receive following a 'no creditor worse off' claim, *to the extent that these relate to client positions*. This would be understood as a reference to the contribution as a sequence, where the contribution request is proportionate to client positions, but where compensation will also be depending on the decision on compensation under Article 62.
18. In addressing the proportionality, there is a reference in Article 27(6) to take into account "any outstanding contractual obligations of the clearing members toward the CCP *and be deducted* from any entitlement to the payment of the difference referred to in Article 62" hence the payment as calculated under Article 62 will reflect the overall position by the clearing member, however, the compensation received shall still be distributed to the contributors based on the contribution made on a proportionate basis.

**Principle 2: Pro-rata, fair and proportionate allocation of compensations**

Where a compensation derives from a claim under Article 62, clearing service providers shall compensate their clearing service users where such clearing service users have contributed under the loss allocation tools.

Where the resolution authority has required a CCP under Article 27(6) to compensate its clearing members, clearing service providers shall compensate their clearing service users where such clearing service users have contributed under the loss allocation tools.

Any allocation of compensation towards a contribution made by a clearing service user shall be made pro rata towards the contribution made and distributed proportionately and fairly.

**Question 2: Do you agree with the proposed conditions for compensation on a pro-rata, fair and proportionate basis? If not, please explain?**

**3.2.3 Principle 3: Set-off**

19. Where a clearing service provider is obliged under the contractual agreement to distribute compensation to a clearing service user the clearing service provider may apply set-off but only where such obligation is, at the time of set-off, due and payable by such party. However where such deduction is applied, at the level of the clearing service provider, the calculation of reimbursements to the clearing service user shall be based on the original amount, i.e. before any deduction or reduction was made by the clearing service provider.

**Principle 3: Set-off**

A clearing service provider may set-off a compensation payment towards any obligation owed by the client (or indirect client) to the original amount but only where such obligation is, at the time of set-off, due and payable by such party.

However where such deduction is applied at the level of the clearing service provider towards a clearing service user also acting as a clearing service provider, the calculation of reimbursements to its clearing service users shall be based on the original amount, i.e. before any deduction or reduction was made.

**Example 1:** The Resolution Authority directs the CCP to reimburse EUR 300 million to one of its CM (CM1). CM1 has 3 clients (C1, C2, C3) to which it should consequently reimburse different amounts. CM1 has a claim against C1 that is due and payable, hence CM1 shall deduct the corresponding amount before transferring the remainder of the reimbursement to C1. However, C1 has not contributed itself, but 2 of its clients (i.e. indirect clients) have. This means that C1 should use the original amount, i.e. the original amount of compensation due by CM1 to C1 before the qualifying debt off-set was applied, when calculating the compensation C1 shall provide to its indirect clients.

**Question 3: Do you agree with the proposed conditions for set-off? If not, please explain?**

### 3.2.4 Principle 4: Segregation

#### Principle 4: Segregation

Any compensation received by a clearing service provider on behalf of a clearing service user shall, when received, be held separately on a segregated account by the clearing service provider.

**Question 4: Do you agree with the proposed conditions for segregation? If not, please explain?**

### 3.2.5 Principle 5: Pari-passu

#### Principle 5: Pari-passu

A clearing service provider shall allocate all compensation received pari-passu between its own house accounts and client accounts.

**Question 5: Do you agree with the proposed conditions for pari-passu? If not, please explain?**

### 3.2.6 Principle 6: Compensation instruments

20. Proportionality is also relevant in relation to types of compensation instruments, such as financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits. The principle is that the composition of the contribution should be the same (equal) between the recipients and proportionate to the contribution.
21. The right of clearing service users is to receive *any recompense or compensation* received under Article 27(6) or *any cash equivalent of such recompense or compensation* or any proceeds received following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Article 27(6) states that the compensation referred to in the first subparagraph may take the form of instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits and that the amount of instruments issued to each affected non-defaulting clearing member shall be proportionate to the excess loss identified. Article 62 refers to *payment of the difference*. Reading the Article 62, 63 and Article 27(6) jointly, ESMA would understand that the form of compensation includes cash compensation as well as other forms of financial instruments as listed above.
22. However as the list of instruments that may be used to compensate clearing members, clients and indirect clients is very wide, this may have two effects: (i) different instruments bear different risks, where cash risk is generally low and a claim in the CCP's future profit generally bears a high risk, and (ii) there may be cases where for some of the clearing

service users, a type of instrument may cause problem, such as registration of such instruments in different systems.

23. In relation to the different risks in relation to the different form of compensation, the clearing service provider shall divide the different types of instruments equally between the clearing service users.
24. In relation to the second situation, the clearing service provider may provide a substitution to the clearing service user, by which it would pass on the compensation in a different form. Such transformation shall be done on the basis of a reasonable valuation and not be imposed on the clearing service user.

**Principle 6: Compensation instruments**

The clearing service provider shall divide the different types of instruments equally between the clearing service users.

The clearing service provider may offer a substitution to the clearing service user, by which it would pass on the compensation in a different form. Such transformation shall be done on the basis of a reasonable valuation and not be imposed on the clearing service user.

Example 2: Where the clearing member and two of its clients shall share on a contribution made by the CCP of EUR 10 million, and where the contribution consists of EUR 1 million as a cash payment, EUR 3 million as debt instruments, EUR 3 million as instruments recognising a claim in the CCPs future and finally EUR 3 million in financial instruments, the clearing member cannot allocate the cash and the financial instruments (assuming those bear the lowest risk) to itself and then distribute the remaining instruments to the clients, but have to split each type of instrument or cash between the parties, equally. Assuming they have all contributed with 10 million each, each of the clearing member, the client 1 and the client 2 will each receive (i) EUR 333, 000 as a cash payment, (ii) EUR 1 million in debt instruments, (iii) EUR 1 million in instruments recognising a claim in the CCPs future and (iv) finally EUR 1 million in financial instruments.

**Question 6: Do you agree with the proposed conditions for equal distribution between different compensation tools and instruments? If not, please explain?**

### 3.3 Transparency requirements to assist the proportionality assessment

#### 3.3.1 Disclosure

25. Article 63 states that contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive, hence the possibility for any contribution pass-on and following compensations are subject to contractual agreement, and it is within the remits of the parties to agree on.
26. The reference in the mandate “to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements,” shall be considered in light of the limitations set out above. ESMA concludes that the mandate suggests a transparency beyond the contractual parties to the agreement as it requests ESMA to specify the conditions for compensation in a transparent manner, hence possibly to the market, the CCP and the relevant authorities, but within the remits of any confidentiality of a contractual arrangement and noting that the mandate does not refer to a public disclosure.
27. A compensation claim can only arise once a NCWO claim has been awarded under Article 62 of the CCPRRR and will follow the procedure under the CCPRRR and be subject to public disclosure in accordance with the principles laid out in the CCPRRR. ESMA would not establish any additional requirement for public disclosure on compensation.
28. Also, as the relationship between clearing service providers and clients or indirect clients are subject to requirements under other regulations, there may be a requirement under those regulations to publicly disclose some main features of the obligation to contribute to CCPs under the resolution loss allocation tools.

#### 3.3.2 Principle 7: Transparency - notice requirements

29. ESMA would suggest that to ensure compensations are proportionate, the clearing service providers should be subject to some transparency requirements towards the clearing service users and towards the resolution authority in relation to the distribution of compensations.
30. ESMA envisages that where any contribution is required to be made by clearing service users, in accordance with the agreed terms, and where such contribution is to be provided to the CCP (directly or indirectly) by clearing service providers, there are clear benefits of a documentation trail.
31. The notice to a clearing service user in relation to compensation allocations should therefore contain:
  - a) A copy of the decision of the resolution authority to require the CCP to provide compensation to the clearing members;

- b) A copy of the decision by the resolution authority that the clearing service provider is entitled to the payment of the difference referred to in Article 62;
  - c) Information on the compensation received by the clearing service provider before any set-off or other deductions were made (if any);
  - d) A simulation evidencing how such compensation amount will be proportionally distributed between the clearing service users having made contributions;
  - e) Information on the form under which the compensation amount has been provided to the clearing service provider, separating between cash or any other form of financial instruments, or through instruments of ownership, debt instruments or instruments recognising a claim on the future profits of the CCP;
  - f) Information on the composition of the compensation amount for the clearing service users and details on the overall distribution of the compensation amount between clearing service users and house accounts and the combination of different types of cash or instruments provided based on the initial compensation received by the clearing service provider; and
  - g) Any calculation of interest or any other relevant term effecting the compensation.
32. The resolution authority should be provided, by the clearing service provider, a weekly summary of all written notices provided to its clearing service users identifying and providing details on compensation provided or to be provided to such clearing service users based on the contributions made by such clearing service users in accordance with the agreed terms between the parties.
33. This transparency is intended to assist the resolution authority to ensure the conditions under the RTS are met and to inform the resolution authority of the end-allocation of compensations.

**Principle 7: Transparency - notice requirements**

Contribution allocation should be subject to a clear documentation trail and the clearing service provider shall provide notices specifying contribution, allocation and the composition of the compensation received to clearing service users. Such notices shall also be shared with the resolution authority.

**Question 7: Do you agree with the proposed notice requirements? If not, please explain?**

## 4 Annexes

### 4.1 Annex I Mandate

#### Article 63

##### Safeguard for clients and indirect clients

1. Contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

2. ESMA shall develop draft regulatory technical standards in order to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in the paragraph 1 is required, and the conditions under which it is to be considered proportionate.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.



## 4.2 Annex II Cost-benefit analysis

### 1. Introduction

Pursuant to the third subparagraph of paragraph 2 of Article 63 of CCPRRR the Commission is empowered to adopt a delegated act to supplement the CCPRRR to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.

### 2. ESMA shall develop draft regulatory technical standards

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022. The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

In carrying out a cost benefit analysis on the draft regulatory technical standards it should be noted that:

- The main policy decisions have already been taken under the primary legislation (CCPRRR) and the impact of such policy decisions have already been analysed to some extent by the Impact Assessment by the European Commission<sup>7</sup>;
- ESMA does not have the power to deviate from its specific mandate provided by the Commission;
- ESMA policy options should be of a pure technical nature and not contain strategic decisions or policy choices and their content is delimited by the legislative acts on which they are based.

### 2. Background

Safeguard for clients and indirect clients entails the obligation for contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools to also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

### 3. Policy Options

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<sup>7</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN>

The empowerment to ESMA is to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.

ESMA has considered how to specify the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.

#### 4. Cost-benefit analysis

Below is detailed the different corresponding policy options on how to further specify the factors through different elements.

<p><b>Specific objective</b></p>	<p>Safeguard for clients and indirect clients entails the obligation for contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools to also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance and that this obligation also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.</p> <p>The empowerment to ESMA is to specify, in a transparent manner, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.</p> <p>ESMA notes that the mandate under CCPRRR is limited to the compensation phase of the process and does not cover the “contribution pass-on” phase.</p>
<p><b>Policy option 1</b></p>	<p>To specify the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate providing <i>7 principles</i> to ensure the compensation is provided in fairness, in a proportionate manner and with transparency and traceability and where those principles have established themselves into requirements for how compensation shall be allocated and distributed among those clients and indirect clients, the clearing service users, that has contributed to the CCP directly or indirectly, through contribution pass-on.</p>
<p>How would this option achieve the objective?</p>	<p>This option would in ESMA’s view be satisfactory for several reasons, one is that all main principles of fairness, proportionality, transparency and traceability is ensured as they have established</p>

	<p>themselves into requirements under the RTS and that contractual agreements shall be compliant with those requirements hence adhere to the overarching principles.</p>
<b>Policy option 2</b>	<p>To specify the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate by providing <i>more than the 7 principles</i> to ensure the compensation is provided in fairness, in a proportionate manner and with transparency and traceability and where those principles have established themselves into requirements for how compensation shall be allocated and distributed among those clients and indirect clients, the clearing service users, that has contributed to the CCP directly or indirectly, through contribution pass-on.</p>
How would this option achieve the objective?	<p>This option would in ESMA's view be satisfactory to some extent, as it would provide some additional requirements as to the requirements to be included in the contractual agreements to ensure the overarching aim of establishing contractual arrangements that ensure fair and proportionate compensation and in addition ensures transparency and traceability.</p> <p>However, this could be seen as less proportionate as the requirements to be included in the contractual agreements are extended, to further protect the clients and indirect clients that have contributed through "contribution pass-on".</p>
Which policy option is the preferred one?	<p>Policy option 1, as this option would provide the minimum requirements for the contractual agreement to include to ensure the overarching aim of fairness, proportionality, transparency and traceability without limiting the freedom to contract more than is justified by the overall goal to ensure clients and indirect clients that have contributed are compensated in a fair and proportionate manner.</p> <p>In relation to option 2, ESMA is of the view that to include additional requirements may not be justified on balance if further reducing the freedom to contract.</p>
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to	<p>ESMA is empowered to provide a draft regulatory technical standard to the Commission which has the responsibility to define how to ensure the policy option chosen for its Delegated Act achieves its aim under the CCPRRR.</p>

be informed or consulted?	
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Impacts of the proposed policies:	
<b>Policy option 1</b>	
Benefits	It will provide seven requirements that all contracts will have to include where a clearing service provider provides clearing services to a client or indirect client.
Regulator's costs	For the regulator no compliance costs beside the normal supervision to ensure the requirements are complied with.
Compliance costs	The costs for CCP will be overall notable, however, given that the requirement to ensure compensation to be distributed to clients and indirect clients are set out in Article 63 of CCPRRR the costs derive from the implementation of CCPRRR. The cost of Option 1 is considered balanced as the requirements have established themselves in a limited set of requirements for the CCP to ensure are included in contractual agreement with clients and indirect clients.
<b>Policy option 2</b>	
Benefits	It will provide more than 7 requirements that all contracts will have to include where a clearing service provider provides clearing services to a client or indirect client.
Regulator's costs	For the regulator no compliance costs beside the normal supervision to ensure the requirements are complied with.
Compliance costs	<p>The costs for CCP will be overall notable, however, given that the requirement to ensure compensation to be distributed to clients and indirect clients are set out in Article 63 of CCPRRR the costs derive from the implementation of CCPRRR.</p> <p>The cost of Option 2 could be considered too high considering quite a few contractual requirements would have to be included in the contractual agreements with the clients and the indirect clients and where the freedom to contract is equally reduced by those mandatory requirements.</p>

**Question 8: Do you agree with the Option 1, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 1)?**

**Question 9: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.**

### **4.3 Annex III Summary of questions**

**Question 1: Do you agree with the proposed conditions for fair and reasonable distribution of compensation? If not, please explain?**

**Question 2: Do you agree with the proposed conditions for compensation on a pro-rata, fair and proportionate basis? If not, please explain?**

**Question 3: Do you agree with the proposed conditions for set-off? If not, please explain?**

**Question 4: Do you agree with the proposed conditions for segregation? If not, please explain?**

**Question 5: Do you agree with the proposed conditions for pari-passu? If not, please explain?**

**Question 6: Do you agree with the proposed conditions for equal distribution between different compensation tools and instruments? If not, please explain?**

**Question 7: Do you agree with the proposed notice requirements? If not, please explain?**

**Question 8: Do you agree with the Option 1, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 1)?**

**Question 9: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.**

## 4.4 Annex IV - Draft RTS

### COMMISSION DELEGATED REGULATION (EU) No .../..

**supplementing Regulation (EU) No 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties, and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 by specifying the conditions under which a compensation can be passed to clients and indirect clients and the conditions under which ha compensation is to be considered proportionate**

of [ ]

**(text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to the Regulation (EU) No 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties, and in particular of Article 63(2), thereof,

Whereas:

(1) The RTS is built on three main principles, fairness, proportionality and traceability and those main principles have established themselves into requirements for how compensation shall be allocated and distributed among those clients and indirect clients, the clearing service users, that has contributed to the CCP directly or indirectly, through contribution pass-on.

(2) To ensure the contribution is fair, a clearing service provider shall ensure that any passing through of a compensation to clearing service users are made on a fair, reasonable, non-discriminatory and transparent basis.

(3) To ensure proportionality and fairness, all allocation of compensation towards a contribution made by a clearing service user shall be made pro rata towards the contribution made and distributed fairly. Another requirement is that where a clearing service provider apply set-off towards the recipient of a contribution, and where such recipient is also a clearing service provider, the calculation of contribution

to its clearing service users shall be based on the original amount, i.e. before any deduction or reduction was made.

(4) To further ensure fairness and to protect the clearing service users, a clearing service provider shall, when receiving compensation on behalf of a clearing service, user hold such contribution separately on a segregated account and a clearing service provider shall allocate all compensation received *pari-passu* between its own house accounts and client accounts.

(5) To ensure fairness and equal distribution of compensation, the clearing service provider shall divide the different types of instruments included in a contribution equally between the clearing service users and house accounts and the clearing service provider may only provide a substitution to the clearing service user in accordance with a pre-set procedure to protect the clearing service user. Such transformation shall be done on the basis of a reasonable valuation and not be imposed on the clearing service user.

(6) To ensure transparency and traceability the clearing service provider is required to comply with certain information requirements towards its clearing service users and towards the resolution authority.

(7) Further to the definitions of Regulation (EU) No 2021/23, some specific definitions to technical terms used are necessary.

(8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(9) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council, ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

*Article 1*

*Definitions*

For the purposes of this Regulation the following definitions apply:

‘Clearing service provider’ means any clearing member, client or indirect client providing clearing services in the Union.

‘Clearing service user’ means any client or indirect client using clearing services provided by a clearing service provider.



“Contribution” means any contribution made by a clearing service user to the clearing service provider in accordance with a contractual arrangement allowing the clearing service provider to pass on to their clearing service user, directly or indirectly, the negative consequences of the resolution tool used.

“Compensation” means the compensation referred to in the first subparagraph of Article 63 of Regulation (EU) No 2021/23 and may take the form of cash, financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP’s future profits.

## *Article 2*

### *Fair and reasonable*

A clearing service provider shall ensure that in passing on of compensation from the CCP under Article 27(6) or from the safeguard referred to in Article 62 of Regulation (EU) No 2021/23 to its clearing service users, the distribution of compensation is made in a fair, reasonable, non-discriminatory and transparent manner.

## *Article 3*

### *Distribution of compensation amount*

1. Where a compensation derives from a claim under Article 62 of Regulation (EU) No 2021/23 the clearing service provider shall compensate each clearing service user where such clearing service user has made a contribution.

2. Where, in accordance with Article 27(6) of Regulation (EU) No 2021/23 , the resolution authority has required a CCP to compensate its clearing members, the clearing service provider shall compensate each clearing service user where such clearing service user has made a contribution.

3. A clearing service user shall be entitled to compensation, in relation to a contribution made by such a clearing service user, where a clearing service provider receives compensation from the CCP of which it is a member; or receives compensation referred to in Article 62 of Regulation (EU) No 2021/23, including under all of the following cases:

- a) where the clearing member, having requested contribution from a client receives a compensation;
- b) where the client to the clearing member having requested contribution from its client (an indirect client) receives compensation from the clearing member providing clearing services to it; and
- c) where the indirect client having requested contribution from its client (also an indirect client) receives compensation from the clearing service provider providing clearing services to it.

4. Any compensation shall be distributed by the clearing service provider to its clearing service users pro rata in relation to the contribution made.
5. The clearing service provider shall calculate the compensation amount owed to each clearing service user entitled to compensation and inform each of them in accordance with Article 5 of the amount to be made available to such recipient and of the methodology used to calculate the compensation amount.
6. The clearing service provider shall not compensate its own contribution before compensating the contributions made by a clearing service user. Compensations shall be distributed pari-passu between a clearing service providers own house accounts and client users accounts.
7. A clearing service provider may apply deductions or set-off towards the compensation amount where the other obligation is due and payable by the recipient of such compensation amount. However where the recipient is also a clearing service provider, the calculation of the distribution of the compensation amounts towards its clearing service users shall be calculated based on the compensation amounts before any such deductions or set-offs were made.
8. A clearing service provider shall hold any compensation amount received pursuant to Article 62 of the Regulation (EU) No 2021/23 or Article 26(7) on a separate and segregated account to ensure such assets are not comingled with any other assets of the clearing service provider until all compensations due are fully distributed.

#### *Article 4*

##### *Type of compensation*

1. Where the compensation consists of different instruments, such as cash, instruments of ownership, debt instruments or any other instruments recognising a claim on the future profits of the CCP in resolution, the clearing service provider shall separate the compensation by type of instrument, and thereafter allocate each type of instrument equally between the clearing service users and any house account, entitled to compensation, except where:
  - (a) the clearing service user entitled to a compensation makes a request to receive such compensation in an alternative instrument or mix of instruments; or
  - (b) the clearing service provider is unable to deliver the compensation amount to the clearing service user in the form of the mix of instruments that would result from the application of this paragraph, due to settlement restrictions or due to another impediment to the transfer of some instruments that cannot be corrected by the clearing service user within 3 business days of being notified of the impediment.
2. In the situations listed in points (a) and (b) of the paragraph 1, the clearing service provide shall, to the extent possible, accommodate a request made under (a) or an inability identified under (b), and the compensation amount may be delivered in an alternative instrument or mix of instruments as agreed to by the receiving clearing service user.

3. Where the clearing service provider is unable to change the type of instruments to accommodate the request made under (a) or to cure an impediment under (b), it will distribute the instruments as originally communicated to the clearing service user or distribute the instruments to an alternative addressee as directed by the clearing service user. The clearing service provider shall inform the clearing service user in writing of the reason for being unable to accommodate the clearing service user.
4. The alternative compensation instrument shall be valued using a fair and reasonable market price.

## *Article 5*

### *Compensation notification*

1. The clearing service provider shall inform in writing the clearing service users that have made a contribution, of any compensation determined in accordance with Article 62 of the Regulation (EU) No 2021/23 to the extent that such proceeds are related to client positions or where determined by the resolution authority under Article 26(7) of the Regulation (EU) No 2021/23.
2. The notification referred to under paragraph 1 shall contain, at least, the following information stated in a clear and precise manner:
  - a) A copy of the decision of the resolution authority requiring the CCP to provide compensation to the clearing members that have incurred excess losses as defined under Article 26(7) also clarifying how this amount is deducted from any entitlement to the payment of the difference referred to in Article 62 of Regulation (EU) No 2021/23;
  - b) A copy of the decision by the resolution authority that the clearing member is entitled to the payment of the difference referred to in Article 62 of Regulation (EU) No 2021/23;
  - c) Information on the compensation received by the clearing service provider before any set-off or other deductions were made (if any) in accordance with Article 3(7) above;
  - d) A simulation evidencing how the compensation will be proportionally distributed between the clearing service users having made contributions;
  - e) Information on the form under which the compensation amount has been provided to the clearing service provider, separating between cash or any other form of financial instruments, including through instruments of ownership, debt instruments or instruments recognising a claim on the future profits of the CCP as detailed under Article 4(1);
  - f) Information on the composition of the compensation amount for each clearing service user and details on the overall distribution of the compensation amount between clearing service users and house accounts and the combination of different types of cash or instruments provided based on the initial compensation received by the clearing service provider, as detailed under Article 4(1); and

g) any calculation of interest or any other relevant term effecting the compensation.

3. A clearing service provider shall inform the resolution authority in writing of the full compensation amount it has received from the CCP and any other amount received under Article 62 of Regulation (EU) No 2021/23 and of how it has distributed or will be distributing this amount among its clearing service users and the own house accounts based on the contributions registered and in accordance with the requirements set out in Articles 3 and 4.

4. The clearing service provider shall, during the resolution phase, provide the resolution authority with a weekly summary of all written notices as per paragraph 1 and 2 above, provided by the clearing service provider to its clearing service users.

## Article 6

### *Entry into force and application*

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, XXX