



European Securities and
Markets Authority

Consultation Paper

Draft RTS on the requirements for independent valuers, the methodology for assessing the value of the assets and liabilities of a CCP, the separation of the valuations, the buffer for additional losses to be included in provisional valuations and the methodology for carrying out the valuation for the purpose of the ‘no creditor worse off’ principle (Articles 25(6), 26(4) and 61(5) of 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 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 under the heading '[Data protection](#)'.

Who should read this paper?

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs) as well as from direct or indirect clearing members of CCPs.

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1 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)
<i>EMIR</i>	Regulation (EU) 648/2012 of 4 July 2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1)
<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84)
<i>RTS 153/2013</i>	Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties (OJ L 52, 23.2.2013, p. 41)
<i>RTS 152/2013</i>	Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties (OJ L 52, 23.2.2013, p. 37)
<i>BRRD</i>	Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 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; (OJ L 173, 12.6.2014, p. 190–348)
<i>BRRD RTS 2016/1075</i>	Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the

European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges; (OJ L 184, 8.7.2016 p. 1–71)

BRRD RTS 2018/345 on Valuation Commission Delegated Regulation (EU) 2018/345 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities (OJ L 67, 9.3.2018, p. 8–17OJ)

BRRD RTS 2018/344 NCWO Commission Delegated Regulation (EU) 2018/344 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution (OJ L 67, 9.3.2018, p. 3–7)

Abbreviations

<i>CCP</i>	Central Counterparty
<i>College</i>	A college established pursuant to Article 18 of EMIR
<i>Competent authority</i>	An authority designated under Article 22 of EMIR
<i>CPMI</i>	Committee on Payments and Market Infrastructures
<i>EBA</i>	European Banking Authority
<i>EC</i>	European Commission
<i>ESMA</i>	European Securities and Markets Authority
<i>EU</i>	European Union
<i>FMI</i>	Financial Market Infrastructure
<i>FSB</i>	Financial Stability Board
<i>IOSCO</i>	International Organisation of Securities Commissions



NCWO

No Creditor Worse Off

OJ

The Official Journal of the European Union

OTC

Over-the-counter

RTS

Regulatory Technical Standards

2 Executive Summary

Reasons for publication

Under the Regulation (EU) 2021/23 (CCPRRR), ESMA has been tasked with multiple mandates related to the valuation of assets and liabilities and resolution.

Article 25(6) of the CCPRRR mandates ESMA to develop draft RTS to specify:

- (a) the circumstances under which a person is deemed to be an independent valuer, from both the resolution authority and from the CCP
- (b) the methodology for assessing the value of the assets and liabilities of the CCP for the purpose of valuations in resolution; and
- (c) the separation of the valuations under Articles 24 and 61 (NCWO valuation).

Article 26(4) of the CCPRRR mandates ESMA to develop draft RTS to specify the methodology for calculating the buffer for additional losses to be included in provisional valuations.

Finally, Article 61(5) of the CCPRRR mandates ESMA to develop a draft RTS specifying the methodology for carrying out the valuation for the purpose of assessing compliance with the 'no creditor worse off' (NCWO) principle.

The purpose of this consultation paper is to seek views from all interested stakeholders on the draft regulatory technical standards listed above and presented in the consultation paper. It has been deemed relevant to group such mandates under a single consultation paper and a single set of draft RTS, as they all relate to the conditions for valuation.

Contents

Section 4 of the report contains an introduction to the scope of the mandates. Sections 5 to 8 describe the approach proposed by ESMA with regards to each draft RTS, i.e., the conditions for the independent valuer (section 4), valuation methodology (section 5), the separation of valuations and NCWO valuation (sections 6 and 7) and the buffer for additional losses (section 8).

The proposed draft RTS are set out in Annex 4.

Next Steps

The consultation will be open until 24 January 2022. 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 in spring 2022.

3 Background

1. CCPRRR was published in the OJ on 22 January 2021 and it entered into force on 12 February 2021¹. CCPRRR puts into place a recovery and resolution framework 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 to minimise the cost of a CCP failure to taxpayers.
2. Under Article 25(6) of CCPRRR ESMA is mandated to develop draft RTS to specify (a) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP, (b) the methodology for assessing the value of the assets and liabilities of the CCP; and (c) the separation of the valuations under Articles 24 and 61 of CCPRR.
3. Under Article 26(4) of CCPRRR ESMA is mandated to develop draft RTS to specify the methodology for calculating the buffer for additional losses to be included in the provisional valuations.
4. Under Article 61(5) ESMA is mandated to specify the methodology for carrying out the valuation for the purposes of assessing compliance with the 'NCWO principle.
5. ESMA has taken into account, where appropriate, the corresponding RTS implemented under the BRRD as referred to in CCPRRR, as well as the CPMI-IOSCO guidance on recovery of FMI and the FSB guidance on the resolution of CCPs.
6. It should also be noted that as outlined in ESMA's strategy on sustainable finance², when developing draft technical standards or technical advice under specific mandates received under financial regulations/directives ESMA shall "*ensure the integration of sustainability factors in an effective and proportionate manner*". However, when developing RTS outside the specific remit of sustainable finance, ESMA will consider sustainability factors where appropriate, subject to the specific legal mandate under the relevant legal act.
7. In light of the above, and on the basis of ESMA's assessment, ESMA notes that sustainability aspects are not included in its mandate to develop these proposed draft RTS. ESMA further notes there is no clear link between sustainability factors and the aspects considered under this paper on valuation. Therefore, ESMA considers that the integration of sustainability factors is not appropriate for the proposed draft RTS under this consultation paper.

¹ 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

² https://www.esma.europa.eu/sites/default/files/library/esma22-105-1052_sustainable_finance_strategy.pdf

8. ESMA has cooperated with the EBA in assessing the links of ESMA's mandates under the CCPRR with the empowerments under BRRD on similar aspects for the purpose of resolution under BRRD.

4 Scope of the mandates

4.1 Valuation in resolution

9. The resolution authorities shall ensure that any resolution action is taken on the basis of a valuation ensuring a fair, prudent and realistic assessment of the assets, liabilities, rights and obligations of the CCP.
10. The mandates described under this consultation paper cover multiple elements, including (a) elements relevant to the conduct of valuations; (b) the methodology for calculating the buffer for additional losses to be included in provisional valuations; and (c) the methodology for final valuation under the 'no credit worse off' principle.
11. ESMA has received two mandates in the "Chapter II Valuation" of CCPRR, one mandate under Article 25(6) and another mandate under Article 26(4).
12. Article 25(6) mandates ESMA to develop draft regulatory technical standards to specify three following elements of valuation:
 - (a) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP for the purposes of paragraph 1 of this Article;
 - (b) the methodology for assessing the value of the assets and liabilities of the CCP; and
 - (c) the separation of the valuations under Articles 24 and 61 of this Regulation.
13. ESMA notes that the mandate under Article 25(6) of CCPRR covers the requirements for definitive valuation having regard to the objectives of valuation as referred to in Article 24 and Article 25 of CCPRR.
14. The second mandate for ESMA under the chapter on valuation is specified in Article 26(4) of CCPRR and requires ESMA to develop draft RTS on the methodology for calculating the buffer for additional losses to be included in certain valuations, called provisional valuations.
15. In addition, ESMA is mandated under Article 61(5) of CCPRR to develop draft RTS specifying the methodology for carrying out the valuation for the purposes of assessing compliance with the 'no creditor worse off' principle. The valuation shall include:
 - (d) the treatment that shareholders, clearing members and other creditors would have received 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 pursuant to Article 22(1) 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.

- (e) the actual treatment that shareholders, clearing members and other creditors, have received in the resolution of the CCP.
 - (f) whether there is any difference between the treatment referred to in point (a) of this paragraph and the treatment referred to in point (b) of this paragraph.
16. When developing the draft RTS under Article 61(5) of CCPRRR, ESMA shall also take into account a commercially reasonable estimate of the direct replacement costs, including any additional margin requirements, incurred by the clearing members to reopen within an appropriate period their comparable net positions in the market by considering effective market conditions, including market depth and ability of the market to transact the relevant volume of such net positions within that period, had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules and 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 pursuant to Article 22(1) were met.
 17. ESMA shall, when developing the draft RTS under Articles 25(6) and 26(4) of CCPRRR take into account the RTS developed in accordance with Article 36(14) and (15) of BRRD and adopted pursuant to Article 36(16) thereof.
 18. In addition, when developing the draft RTS under Article 61(5) of CCPRR, ESMA shall take into account the RTS adopted pursuant to Articles 49(5) and 74(4) of BRRD.

Recital 47

For the purpose of protecting the rights of shareholders, of clearing members and of other creditors, clear rules should be laid down concerning the valuation of the assets and liabilities of the CCP and the valuation of the treatment that shareholders, clearing members and other creditors would have received if the resolution authority had not taken resolution action. This should compare the treatment that shareholders, clearing members and other creditors have actually been afforded in resolution and the treatment they would have received if the resolution authority had not taken resolution action in relation to the CCP and if they had instead been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules and the CCP had been wound up in normal insolvency proceedings. The use of the resolution cash call, which should be included in the CCP's operating rules, is reserved for the resolution authority. It cannot be used by the CCP, or an administrator or liquidator in insolvency and it should therefore not be part of the treatment that shareholders, clearing members and other creditors would have received if the resolution authority had not taken resolution action. Any use of the power to reduce the amount of any gains payable to a non-defaulting clearing member by the resolution authority that exceeds contractually agreed limits for such a reduction should also not be part of the treatment that shareholders, clearing members and other creditors would have received if the resolution authority had not taken resolution action.

Where shareholders, clearing members and other creditors have received, in payment of, or compensation for, their claims, less than the amount that they would have received if the resolution authority had not taken resolution action in relation to the CCP and they had instead been subject to possible outstanding obligations pursuant to the CCP's default rules or other contractual arrangements in its operating rules and the CCP had been wound up in normal insolvency proceedings, they should be entitled to the payment of the difference. Clients should only be included in that comparison and should only be entitled to the payment of any difference in treatment when there is a contractual basis for a direct claim from clients against the CCP, making them creditors of the CCP. Only in such cases can the resolution authority control the direct impact of its actions. It should be possible to challenge that comparison separately from the resolution decision. Member States should

be free to decide on the procedure as to how to pay any difference of treatment that has been determined to shareholders, clearing members and other creditors.

Recital 49

To ensure the effective resolution of a CCP, the valuation process should determine as accurately as possible any losses that need to be allocated for the CCP to re-establish a matched book of outstanding positions and to meet ongoing payment obligations. The valuation of assets and liabilities of a failing CCP should be based on fair, prudent and realistic assumptions at the moment when the resolution tools are applied. The value of liabilities should not, however, be affected in the valuation by the financial state of the CCP. It should be possible, for reasons of urgency, for resolution authorities to make a rapid valuation of the assets or the liabilities of a failing CCP. That valuation should be provisional and should apply until an independent valuation is carried out.

Article 25(6) mandate for valuations and independent valuer

6. ESMA, taking into account the regulatory technical standards developed in accordance with Article 36(14) and (15) of Directive 2014/59/EU and adopted pursuant to Article 36(16) thereof, shall develop draft regulatory technical standards to specify:

(a) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP for the purposes of paragraph 1 of this Article;

(b) the methodology for assessing the value of the assets and liabilities of the CCP; and

(c) the separation of the valuations under Articles 24 and 61 of this Regulation.

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 26(4) mandate on Buffer

ESMA, taking into account the regulatory technical standards developed in accordance with Article 36(15) of Directive 2014/59/EU and adopted pursuant to Article 36(16) thereof, shall develop draft regulatory technical standards to specify, for the purposes of paragraph 1 of this Article, the methodology for calculating the buffer for additional losses to be included in provisional valuations.

ESMA shall submit those draft regulatory technical standards to the Commission 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 61(5) mandate on valuations for NCWO

ESMA, taking into account the regulatory technical standards adopted pursuant to Articles 49(5) and 74(4) of Directive 2014/59/EU, shall develop draft regulatory technical standards specifying the methodology for carrying out the valuation referred to in paragraph 1 of this Article including the calculation of the losses following liquidation resulting from the costs referred to in point (c) of the first subparagraph of paragraph 3 of this Article had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules.

ESMA shall submit those draft regulatory 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.

5 Independent Valuer (Article 25(6)(a) CCPRRR)

5.1 Mandate on independent valuer

19. Under CCPRRR the resolution authority shall ensure that the valuations under Article 24 of CCPRRR are carried out by a person independent from any public authority and from the CCP. Article 25(1) of CCPRRR states that the resolution authority shall ensure that the valuations referred to in Article 24 of CCPRRR are carried out: “(a) by a person independent from any public authority and from the CCP; or (b) by the resolution authority, where those valuations cannot be carried out by a person as referred to in point (a).”
20. Under Article 25(6)(a) of CCPRR, ESMA is mandated to specify the circumstances in which a person is **deemed to be independent** from the CCP and the resolution authority.
21. Whilst ESMA notes that BRRD RTS 2016/1075 provides a very useful starting point in drafting the RTS to specify the circumstances where a person is deemed to be independent from the CCP and the resolution authority, CCPs are different to banks, hence some changes to the BRRD RTS would need to be made to accommodate for the different risks identified under CCPs.

5.2 The use of the term “independent” under EMIR

22. ESMA has considered the use of “independent” and the requirements under EMIR to be considered “independent” to assess if such considerations could be relevant in the development of the draft RTS on independent valuer under CCPRRR.
23. ESMA initially notes the use of “independent member” (Article 2(28) EMIR) of the board member of the CCP as someone who has no business, family or other relationship that *raises a conflict of interests* regarding the CCP concerned or its controlling shareholders, its management or its clearing members, and who has had *no such relationship during the five years* preceding his membership of the board.
24. ESMA has further considered the RTS 153/2013³ where the independence of certain functions is regulated. Article 47 refers to Model Validation, where any material revisions or adjustments to its models, their methodologies and the liquidity risk

³ Consolidated text: Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties (Text with EEA relevance)
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0153-20160615>

management framework shall be subject to appropriate governance, including seeking advice from the risk committee, and validated by a qualified and independent party prior to application. Independent party is not defined in the RTS but Recital 51 states the following *“In validating a CCP’s models, their methodologies and the liquidity risk management framework it is important to use an appropriate independent party so that any necessary corrective measures can be found and implemented before implementation and to avoid any material conflicts of interest. The independent party should be sufficiently separate from the part of the CCP’s business that develops, implements and will operate the model or policies being reviewed and should not hold a material conflict of interest. Those conditions could be met either by an internal party that has separate reporting lines or an external party.”*

5.3 The definition of the independent valuer under BRRD

25. BRRD includes a very similar mandate for EBA under Article 36(14) of the BRRD where “EBA shall develop draft regulatory technical standards to specify the circumstances in which a person is independent from both the *resolution authority* and the *institution or entity referred to in point (b), (c) or (d) of Article 1(1)* for the purposes of paragraph 1 of this Article, and for the purposes of Article 74”, EC adopted the relevant BRRD RTS 2016/1075 on 23 March 2016.
26. Paragraph 1 of Article 36 of BRRD requires that before a resolution action is taken, the resolution authorities shall ensure that a fair, prudent and realistic valuation of the *assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1)* is carried out by a person independent from any public authority, including the resolution authority, and the institution or entity referred to in point (b), (c) or (d) of Article 1(1)⁴.
27. BRRD RTS 2016/1075 provide general criteria which shall be used to determine whether a person complies with the legal requirement of independence and identify situations which preclude per se a person from acting as independent valuer, i.e. where the person, in the year preceding the date on which that person’s eligibility to act as independent valuer is assessed, has completed a statutory audit of the relevant entity pursuant to Directive 2006/46/EC of the European Parliament and of the Council⁵.
28. As a precondition for being considered independent, Article 38 of BRRD RTS 2016/1075 requires that the persons concerned have the qualifications, experience,

⁴ 1. This Directive lays down rules and procedures relating to the recovery and resolution of the following entities:

(b) financial institutions that are established in the Union when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in point (c) or (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013;

(c) financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the Union;

(d) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies

⁵ Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings (OJ L 224, 16.8.2006, p. 1.)

ability, knowledge and resources to ensure that they can perform the valuation without depending on support from third parties, in particular the relevant public authorities, including the resolution authority, and the relevant entity. In addition, in accordance with Article 38 of BRRD RTS 2016/1075, the independent valuer shall also have no actual or potential material interest in common or in conflict with any relevant public authority or the relevant entity.

29. Article 37 of BRRD RTS 2016/1075 defines 'relevant entity' as "an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU whose assets and liabilities are to be valued pursuant to Article 36 or 74 of Directive 2014/59/EU" and a 'relevant public authority' as "the appointing authority, the resolution authority or the authorities referred to in points (a) to (h) of Article 83(2) of Directive 2014/59/EU, and the first authority referred to in point (i) of Article 83(2) of Directive 2014/59/EU.

5.4 Elements of independence

30. In order to specify the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP, the first aspects considered by ESMA are the **elements of independence**. ESMA notes that Article 38 of the BRRD RTS 2016/1075 specifies three cumulative elements of independence to conclude if a valuer shall be deemed to be independent from the CCP and the resolution authority:
 - (a) First the valuer shall possess qualifications, experience, ability, knowledge and resources required and can carry out the valuation effectively without undue reliance on any relevant public authority or the relevant entity (the "competence element").
 - (b) Secondly the valuer shall be legally separated from the relevant public authorities and the relevant entity (the "**structural separation element**").
 - (c) Thirdly the valuer shall have no material common or conflicting interest with the resolution authority or the relevant entity (the "**conflicting interest element**").
31. ESMA has applied the same elements to determine where a valuer shall be deemed to be independent and to qualify as an independent valuer under CCPRRR. ESMA however has changed the order of the elements to be considered to first assess any material common or conflicting interests as if this is the case there is no need to assess the valuer's competence, under the competence element nor the separation, under the structural separation element.
32. ESMA notes it is the resolution authority that shall ensure the valuations are carried out by a valuer independent from any public authority and from the CCP. ESMA understands that the decision on appointing the independent valuer is to be taken by the resolution authority by applying the requirements set out in the draft RTS, i.e. by assessing the criteria that should be met so the valuer is *deemed independent*.
33. Based on this ESMA has in each of the elements listed the circumstances (including the criteria) where a person should be considered independent and where the criteria

for independence has not been met. All the elements must be complied with, i.e., that the valuer under each of the elements meets the criterion for this element, for the person to be considered independent from both the resolution authority and the CCP.

Question 1: Do you agree with the proposed approach to define three elements of independence that should be met for a valuer to be deemed to be independent from the CCP and the resolution authority?

5.4.1 Definition of relevant entity, relevant authority and independent valuer

34. Before assessing the elements for independence, similarly to BRRD, the scope of entities and authorities from which the valuer needs to be independent would need to be considered.
35. In accordance with Article 25 the valuation shall be performed (a) by a *person independent from any public authority and from the CCP (Independent valuer)*; or (b) by *the resolution authority* (where those valuations cannot be carried out by an independent valuer).

5.4.1.1 Definition – relevant public authority

36. ESMA notes that in Article 25(1) of CCPRRR the independent valuer shall be independent from any *public authority* but then under Article 25(6)(a) the draft RTS should specify the circumstances in which a person is deemed independent from the *resolution authority*.
37. The empowerment under Article 25(6) of CCPRRR explicitly requires ESMA to take into account the RTS developed in accordance with Article 36(14) and (15) of BRRD. Hence, similar wording is to some extent to be found under BRRD where Article 36(1) states that the independent valuer shall be independent from any public authority, including the resolution authority but the draft RTS should specify the circumstances in which a person is independent from the resolution authority. ESMA is therefore of the view that the scope of the empowerment covers circumstances in which an independent valuer is deemed independent from the resolution authority but also from any other public authority involved in the resolution of the CCP, as this could influence or be reasonably perceived to influence the independent valuer's judgement in carrying out the valuation.
38. ESMA has considered the approach taken under BRRD and would apply a similar approach under CCPRRR. Under BRRD the definition entails several authorities, hence under the draft RTS CCPRRR such a proposed definition would include, for example, the resolution authority, the national competent authorities, and any government related entities involved in the CCP subject to resolution.

5.4.1.2 Definition - relevant entity

39. ESMA further notes that where BRRD refers to *institution or entity referred to in Article 1(1)(b)-(d)*, CCPRRR refers to a CCP, hence the entities covered under the regulations are different.
40. ESMA has considered the approach taken under BRRD and has applied a similar approach under the CCPRRR RTS. However, as noted above the main difference is that where BRRD refers to the independence from the relevant entity (and the BRRD RTS specifies such entities to be the ones “whose assets and liabilities are to be valued pursuant to Article 36 or 74” of the BRRD), CCPRRR refers to the independence from the CCP. Hence there is a structural difference where BRRD focuses on the entities holding assets/liabilities to be valued while CCPRRR focuses on the CCP and not the entities whose assets and liabilities are to be valued pursuant to CCPRRR (Articles 24-26 and Article 61 of CCPRRR), i.e., in principle creditors to the CCP, the clearing members.
41. The draft RTS under CCPRRR will therefore define the relevant entity as (i) the CCP and (ii) any entities whose assets, claims and liabilities that will be either valued by the independent valuer under Articles 24-26 and 61 of CCPRRR or whose assets, claims and liabilities will otherwise be materially affected by the valuation done by the independent valuer under Articles 24-26 and Article 61 of CCPRRR.
42. The definition proposed would therefore include the following entities;
 - (a) The CCP itself (including its members and staff) and any group companies;
 - (b) The CCP’s clearing members (as defined in point 12 Article 2 of CCPRRR) clients and indirect clients of the CCP, to the extent they are known to the CCP; and
 - (c) CCPs with an interoperability arrangement (as defined in Article 51 of EMIR) with the CCP under resolution.

5.4.1.3 Definition – Independent valuer

43. Having regard to CCPRRR, ESMA has concluded that both a legal and a natural person may be appointed as a valuer. ESMA however notes that where a natural person is appointed as a valuer, such person shall have similar indemnities insurances as a company providing valuations.
44. ESMA would though suggest that the assessment into suitability and independence of a person applying to become an independent valuer also considers certain aspects of the person:
 - (a) Any material investments or other material financial interests or financial status of the independent valuer.
 - (b) Where the person is a legal person, there should be clear evidence of efficient structural separation or other arrangements that have been put in place (or will be put in place upon appointment) to address any threats to independence such as self-review, self-interest, advocacy, familiarity, trust or intimidation, including

arrangements to differentiate between those staff members who may be involved in the valuation and other staff members.

- (c) Where the person is an accredited auditor there should be clear management to ensure the auditor is duly covered by internal rules to manage any conflict of interests, including where an auditor provide audit services for CCPs subject to interoperability arrangements with the CCP under resolution.
- (d) The persons activity shall be considered, and the person shall declare its activities relevant to the appointments for the period of 3 years preceding the possible appointment as an independent valuer. The independent valuer should not have been employed by any of the relevant entities or by a relevant authority for the past 3 years.
- (e) The person shall not seek nor accept financial or other advantages from any relevant public authority, or the relevant entity expect for where the payment to the independent valuer of such remuneration and expenses are reasonable in connection with the conduct of the valuation.

Question 2: Do you agree with the proposed definitions for the relevant entity, relevant authority and independent valuer?

5.5 The conflicting interest element - Material common or conflicting interest

- 45. Article 41 of BRRD RTS 2016/1075 provides the conditions to ensure that the independent valuer has no material common or conflicting interest with any relevant public authority or the relevant entity. The concept of material interest is further specified under the BRRD RTS concluding that an actual or potential interest shall be deemed material whenever it could influence, or be reasonably perceived to influence, the independent valuer's judgement in carrying out the valuation.
- 46. ESMA concludes that the draft RTS under CCPRRR would need to establish the criteria that would result in a conclusion that the person would objectively be deemed to be independent from the relevant entity and the relevant public authority. The following criteria would then need to be met for such person to be deemed independent from the relevant entities and relevant authority.

Criterion 1: A valuer shall not have an actual or potential material interest in common or in conflict with any relevant public authority or any relevant entity.

- 47. Hence where a person has been identified to have an actual or potential material interest in common or in conflicting view of the CCP or the relevant resolution authority it cannot be considered an independent valuer. The different aspects of the criterion and how these shall be met by a valuer are further explained below.

a) Criterion 1 Part 1: A valuer shall not have an actual or potential [interest]...

- 48. ESMA notes that the interpretation of *potential* may raise uncertainties, hence would need to be further explained. A potential [interest] would be understood as an interest

that has not yet materialised, but would materialise with the passing of time, hence it is not yet an actual interest but a potential interest. A potential [interest] would also be where an interest is possible but not yet actual, hence, to be classified as a potential interest is a fairly low threshold.

49. ESMA further notes that the following aspects listed below *would be classified as an actual or potential interest* and would need to be considered non-material, i.e. negligible, for the person to qualify under the Principle 1 and be deemed independent.
 - (a) The provision by the applicant valuer of services, including the past provision of services, to a relevant entity or a relevant public authority and where in particular an identified link between those services and the elements relevant for the valuation have been established; and
 - (b) Any personal and financial relationships between the applicant independent valuer and the relevant entity or relevant public authority.

b) Criterion 1 Part 2: ...material interest in common or in conflict with...

50. ESMA notes that under the BRRD RTS “an actual or potential interest shall be deemed material whenever, in the assessment of the appointing authority or such other authority as may be empowered to perform this task in the Member State concerned, it *could influence, or be reasonably perceived to influence*, the independent valuer's judgement in carrying out the valuation.”
51. ESMA concludes that the concept of material reflects the interest, hence refers to if the interest would have a material, substantial or non-negligibly effect on the person. ESMA further concludes that a low threshold would ensure that a person being deemed independent is indeed safely assessed as not having interests in conflict with any of the relevant entities nor relevant public authorities. It would still be the resolution authority to decide on the independence of the valuer and that would apply the criteria on a case-by-case basis, hence ESMA suggests to go for a low threshold in the draft RTS and it would be for the valuer or applicant to justify why an interest would not be material. The draft RTS would therefore assume that where the interest is negligible, then it would not be considered as material, however if the interest is non-negligible, then it would be considered as material. Hence, to be independent a person should not have a non— negligible interest in common or in conflict with the relevant entity or relevant public authority.
52. ESMA has concluded that certain interests are to be considered, by definition, material interests in common or in conflict with the relevant entities or relevant public authorities. Hence, ESMA has identified some situations where the person (applicant independent valuer) would not be considered independent and would be considered to have a material interest common or in conflict with the relevant entity or relevant public authority.
 - (a) Where a valuer (applicant for the role of independent valuer) is linked by employment, outsourcing arrangements, consulting activity or any other type of engagement with a relevant entity or relevant public authority.

- (b) Where there is a material link between the valuer to a relevant entity or relevant authority. Such a material link could be such valuer/entity own (including the legal or natural persons who control or have a qualifying holding in the relevant entity) or is the same group as the relevant entity or relevant authority. It could also be where an employee or similar person of that valuer has been appointed to participate in a relevant entity or relevant authority's governance as part of their board or in other similar management position (including the senior management and the members of the management body of the relevant entity) or being consulted by such relevant entity or relevant authority. Another example would be where the valuer has been/or is currently appointed by the relevant public authority to provide services.
 - (c) Where the applicant for the role of independent valuer, in the one year preceding the date on which that person's eligibility to act as independent valuer is assessed, has completed a statutory audit of the relevant entity pursuant to Directive 2006/46/EC of the European Parliament and of the Council⁶.
 - (d) Where the applicant for the role of independent valuer has an interest in common or in conflict with the relevant entity or relevant authority and this interest would likely influence, or be reasonably perceived to influence, its judgement in carrying out the valuation. This would for example cover where the applicant for the role of independent valuer has business activities, family or other relationships that raise a conflict of interest regarding the CCP concerned or its controlling shareholders, its management or its clearing members.
53. ESMA has also considered if there are potential valuers that have links to the relevant entity or relevant public authority but where such a link would not be seen as material, i.e. where such valuers are to be assumed to be independent even if they have links to the CCP. One of those type of persons could be the persons working for audit firms and where the same audit firm manages other CCPs, possible with an interest in the CCP subject to resolution. However, ESMA would propose that such applicants should be considered to possibly have a material interest in the relevant entity or relevant public authority automatically and hence to be assessed in accordance with the draft RTS. ESMA has not identified any group of entities with a link to the relevant CCP, where such a link should be considered non-material or negligible.
- c) Criterion 1 Part 3: ...any relevant public authority or any relevant entity.**
54. Both relevant public authority any relevant entity are concepts that are explained above. ESMA however notes that an interest in common or in conflict with a public authority or a relevant entity could also be identified with respect to the main stakeholders of such a relevant entity. ESMA has identified the following stakeholders of an entity as relevant for the assessment of a person's independence:

⁶ Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings (OJ L 224, 16.8.2006, p. 1.)

- (a) the senior management and the members of the management body of the relevant entity;
 - (b) the legal or natural persons who control or have a qualifying holding in the relevant entity or have links to such legal or natural persons; and
 - (c) the material creditors or debtors.
55. ESMA therefore concludes that for a valuer to be considered independent, such valuer shall not have an interest in conflict or in common with the relevant authorities and relevant entities, and the reference to those relevant parties includes the stakeholders set out in point 1-3 above.

Ongoing compliance with the material common or conflicting interest element

56. ESMA suggests (similarly to the drafting of the BRRD RTS 2016/1075) that any person considered for the position of independent valuer, or appointed as an independent valuer shall (at all times):
- (a) maintain, in accordance with any applicable codes of ethics and professional standards, policies and procedures to identify any actual or potential interest which may be considered to constitute a material interest;
 - (b) without delay notify the resolution authority of any actual or potential interest which the independent valuer considers may (in the authority's view) be considered to amount to a material interest.
 - (c) take appropriate steps to ensure that none of the staff or other persons involved in carrying out the valuation have any material interest.

Question 3: Do you agree with the proposed conditions to assess whether a person considered for the position of independent valuer or appointed as independent valuer does not have an actual or potential material interest in common or in conflict with any relevant public authority or the CCP?

5.6 The competence element - qualifications, experience, ability, knowledge and resources

57. Article 39 of the BRRD RTS 2016/1075 provides the conditions applying in relation to the qualifications, experience, ability, knowledge, and resources an independent valuer shall have. ESMA has considered those conditions and has applied similar requirements.
58. However, ESMA has considered how to accommodate the wording slightly to better reflect the aspects of CCPs i.e., to better reflect the characteristics specific to CCPs, such as the skills and knowledge of clearing, post-trading, prudential supervision and financial matters, as well as of experience relevant to CCP supervision and regulation. The argument to include such requirement would be to ensure the valuer has the experience as required to perform the valuation and has a good understanding of the mechanics and functions of the CCP. The argument against would be that the

requirement may be too specific and limit the list of possible valuers and that the valuer may not need to be an expert on CCPs in undertaking the valuations competently.

59. ESMA sees merit in those arguments but is cautious that a too general description of competences would result in selecting valuers specialised in valuation of entities other than CCPs, which could create concerns as the valuation of a bank under resolution is very different from the resolution of a CCP, for many reasons. ESMA, however, also acknowledges the fact that the list should not be too limited as this could create a problem in a time sensitive situation where valuations should be done effectively and urgently.
60. ESMA has concluded that it would be desirable for the valuer to be well versed in CCPs, but that this requirement should not be a hurdle for the resolution authority to appoint a valuer. Hence, ESMA would suggest that some requirements specific to CCPs are kept but that the resolution authorities establish a list of potential valuers once the CCPRRR draft RTS enters into force, and revise this list on a regular basis, therefore ensuring that a sufficient level of competence and knowledge of the specificities of CCPs are ensured whilst ensuring swift process.
61. ESMA notes that BRRD RTS 2016/1075 contains the following requirement “The independent valuer shall possess the necessary qualifications, experience, ability and knowledge in all matters considered relevant by the appointing authority”. ESMA would apply a similar approach but with the difference that the draft RTS under CPPRRR would have to present circumstances where a person would be deemed to meet the requirements under the competence requirements.
62. The independent valuer shall finally hold, or have access to, such human and technical resources necessary (as assessed by the resolution authority) to carry out the valuation bearing in mind the nature, size and complexity of the valuation to be performed.

Criterion 2: A valuer shall possess the necessary qualifications, experience, ability and knowledge and have the resources required to be able to carry out the valuation effectively to independently assess the valuation without undue reliance on any relevant public authority or the relevant entity.

63. Hence where a person has been identified not to possess the necessary qualifications, experience, ability and knowledge in all matters as listed in the draft RTS, such a person cannot be considered an independent valuer. The different aspects of the criterion and how these shall be met by a valuer, are further explained below.

a) Criterion 2 Part 1: A valuer shall possess the necessary qualifications...

64. ESMA notes that a person to be appointed as an independent valuer, shall have the necessary qualifications. As a minimum that a person should have to be able to be appointed as an independent valuer, ESMA assessed that the person should be qualifying as a statutory auditor or audit firm within the meaning of Directive 2006/43/EC of the European Parliament and of the Council (1).

b) Criterion 2 Part 2: ...experience, ability and knowledge...

65. ESMA further notes that the person shall possess the necessary experience, ability and knowledge to be able to undertake the valuation independently in accordance with the objectives of CCPRRR. ESMA has identified the following experience, ability and knowledge the person should have as a minimum to be appointed as an independent valuer and to meet the requirement under this Criterion 2. ESMA notes that as the CCPs are systemically important any independent valuer would need to have a thorough experience, ability and knowledge to undertake the valuation independently.
66. The person shall have experience, ability and knowledge:
- (a) of the valuations generally made of financial instruments, of valuation in post-trading, and in particular of the instruments cleared by the CCP;
 - (b) of CCPRRR and EMIR;
 - (c) to apply and understand the recovery plans and rulebooks of the CCP; and
 - (d) to apply and understand the resolution plan of the CCP and applicable resolution tools under CCPRRR.

c) Criterion 2 Part 3: ... and have the resources required to be able to carry out the valuation effectively and to independently assess the valuation without undue reliance on any relevant public authority or the relevant entity.

67. In order to be considered independent, a person shall also be able to apply its competence and experience and shall therefore not seek or take any instructions or guidance from any relevant public authority or the relevant entity in the execution of its tasks. , However in the context of the appointment, this shall not prevent the valuer from receiving instructions from the resolution authority in relation to the tasks to undertake but not on how they should be undertaken, nor on what conclusions could be reached, neither on the decisions that could be taken as a result of the instruction. Hence, a valuer seeking or taking instructions or guidance from any relevant public authority or the relevant entity shall not be considered as meeting the requirements under Criterion 2.
68. ESMA notes that in line with the BRRD RTS, a person shall still be deemed independent where the provision of instructions, guidance, premises, technical equipment or other forms of support occurs but where, this is not considered as affecting the valuation to be made by the valuer. Such provision could be, for example, access to data system, access to the CCPs premises, information provided by the CCPs staff or other information that can be objectively verified by the independent valuer in the process of the valuation and where this assistance would contribute to achieving the goals of the valuation.

Question 4: Do you agree with the proposed conditions to assess whether a person considered for the position of independent valuer or appointed as independent valuer has the necessary qualifications, experience, ability, knowledge and resources?

5.7 Structural separation element - Structural Separation and conflicting interests

69. Article 40 of the BRRD RTS provides the conditions applying in relation to the separation of the valuer from the relevant public authorities and the relevant entity.
70. ESMA has considered the requirements on legal structural separation for valuers under CCPRRR and is of the view that similar requirements shall apply for independent valuers under the draft RTS CCPRRR.
71. However, ESMA would make some adjustments ensuring the requirements are relevant in the context of CCPs. ESMA notes the reference to “*valuer is legally separated*” under Article 38(2) of BRRD RTS 2016/1075 but that Article 40 of the same RTS refers to *structural separation*. ESMA agrees that the person shall not only be legally separated from the relevant entities or relevant public authorities, but also structurally, operationally or otherwise effectively separated from such entities as further elaborated on under the BRRD RTS. Such independence could be where the valuer should be independent from the CCP’s business and from any other recognised or authorised CCP’s business relevant to the CCP at hand. (“structural separation”.)

Criterion 3: A valuer shall be a person separate from any relevant public authority, including the resolution authority, and the relevant entity.

a) Criterion 3- Part 1 A valuer shall be a person separate from....

72. ESMA notes that the person shall be separate, i.e. legally, structurally, operationally, effectively separate from any relevant public authority or the relevant entity. To meet this requirement the person shall at a minimum:
 - (a) in relation to natural persons, not be an employee or contractor of any relevant public authority or the relevant entity;
 - (b) in relation to legal persons, not belong to the same group of companies as any relevant public authority or any relevant entity.

Question 5: Do you agree with the proposed approach to determine and assess the three elements of independence to conclude if a valuer shall be deemed to be independent from the CCP and the resolution authority?

6 The methodology for assessing the value of the assets and liabilities of the CCP (Article 25(6)(b) CCPRRR)

6.1 Mandate

73. The objectives of valuation are specified under Article 24 of CCPRRR. Resolution authorities shall ensure that any resolution action is taken based on a valuation

ensuring a fair, prudent and realistic assessment of the assets, liabilities, rights and obligations of the CCP.

74. ESMA shall under its mandate set out in Article 25(6)(b) of CCPRRR specify the methodology for assessing the value of the assets and liabilities of the CCP.
75. A resolution authority shall before it places a CCP under resolution, ensure that a first valuation is carried out to determine whether the conditions for resolution under Article 22(1) are met and after the resolution authority has decided to place a CCP under resolution, it shall ensure that a second valuation is carried out to certify certain aspects in the resolution process⁷.
76. The valuation methodology would need to cater for those different aspects of valuations.
77. BRRD includes a very similar mandate to EBA⁸ and EC adopted the BRRD RTS 2018/345 on Valuation on 14 November 2017. In developing the draft RTS under its mandate, ESMA shall take into account the RTS developed in accordance with Article 36 (15) of BRRD.

6.2 General principles of the draft CCPRRR RTS on valuation

78. The first aspect considered in BRRD RTS 2018/345 on Valuation covers definitions and generalities on valuation (such as the main aspects when valuing), the valuation dates to be used, the sources to be used (both internal such as accounting documents and external such as market data) and the deliverables (the valuation report content, including results and methodology).
79. ESMA considers those general valuation aspects as being valid in the context of a CCP's resolution since they answer key questions to define valuation (such as what-when-how and in what form). ESMA therefore proposes to keep a similar framework and content for the draft RRR RTS on valuation. ESMA has accommodated the wording and updated some references (to the applicable CCP regulations), made explicit the

⁷ In accordance with Article 24 (3) of CCPRRR this includes;

(a) inform the decision on the appropriate resolution action to be taken;

(b) ensure that any losses on the assets and rights of the CCP are fully recognised at the moment the resolution tools are applied;

(c) inform the decision on the extent of the cancellation or dilution of instruments of ownership and the decision on the value and number of instruments of ownership issued or transferred as a result of the exercise of resolution powers;

(d) inform the decision on the extent of the write-down or conversion of any unsecured liabilities, including debt instruments and here the valuation shall take into account any losses that would be absorbed by the enforcement of any outstanding obligations of the clearing members or other third parties owed to the CCP and the level of conversion to be applied to debt instruments;

(e) where the loss and position allocation tools are applied, inform the decision on the extent of losses to be applied against affected creditors' claims, outstanding obligations or positions in relation to the CCP and on the extent and necessity of a resolution cash call;

(f) where the bridge CCP tool is applied, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the bridge CCP and the decision on the value of any consideration that may be paid to the CCP under resolution or, where relevant, to the holders of the instruments of ownership;

(g) where the sale of business tool is applied, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the third party purchaser and to inform the resolution authority's understanding of what constitutes commercial terms for the purposes of Article 40.

⁸ Article 36(15) of BRRD

importance of CCP rulebook in valuation and included interoperability arrangements. These aspects are covered under Articles 8 to 13 of the draft CCPRRR RTS.

6.3 Principles for the valuations in accordance with Article 24(2) and 24(3)

80. ESMA has considered the two valuations to be covered by the methodology to be specified under Article 25(6) (b) of CCPRR. The first aims to determine whether the conditions for resolution under Article 22(1) of CCPRRR are met before a resolution authority places a CCP under resolution and the second is to ensure that after the resolution authority has decided to place a CCP under resolution, the resolution authority shall ensure that a second valuation is carried out to undertake the resolution measures and tools. ESMA has concentrated on if there would be differences needed to the valuation based on the slightly different aims of the valuations, one to place a CCP in resolution and one to decide on resolution tools and other resolution measures.
81. In considering the BRRD RTS 2018/345 on Valuation, ESMA noted as a general comment that the principles for valuations developed in relation to the resolutions of entities covered by the BRRD are also relevant for CCPs.
82. Regarding the first valuation under Article 24(2), ESMA proposes to generally maintain BRRD RTS 2018/345 format and text referring to general accounting principles before focusing on accounting areas requiring attention, including the importance of cleared contracts in the context of a CCP (instead of loans for financial institutions).
83. Also, internal/external factors affecting the valuation and leading to resolution have been reviewed in the context of the resolution of CCPs, as ESMA also proposes to specify the two scenarios leading to resolution, namely default and non-default events. References and links to CCP regulation have finally been included. These aspects are covered under Articles 15 to 17 of the draft CCPRRR RTS.
84. Regarding the second valuation under Article 24(3) ESMA also suggests following the text of BRRD RTS 2018/345. This section could be understood as a second layer following the first valuation and focusing first on the conditions and principles to meet the objectives of the second valuation, before listing valuation methodologies depending on contemplated resolution tools and covering valuation specificities for all resolution cases. These aspects are covered under Articles 18 to 20 of the draft RRR RTS.
85. Article 18 sets up general principles, such as the importance of communication between the resolution authority and the independent valuer in finding the appropriate resolution tools or the treatment of debt or capital instruments.
86. ESMA recommends covering the key role of the measurement basis / type of value for cash flows: indeed, accounting rules to be applied for cash flows, assets and liabilities may vary depending on the intended resolution tool. For instance, the value of an asset would not be the same if it were retained or sold out on the market. For this reason, different values such as hold value, fair value, franchise value and disposal value are introduced and linked to specific situations.

87. Following the introduction of the foundations for measurement, ESMA proposes to include details on how the different resolution tools expect to impact the cash flows and the value of assets and liabilities. This is done through a principle where the valuer shall use its expert judgement to determine all factors impacting the valuation depending on the contemplated resolution tools and at the same time have latitude to identify relevant alternative measurement bases.

6.4 Sources of information for valuations

88. ESMA notes that a lack of complete, correct and sufficiently granular information would make it more challenging for the independent valuator to prepare the valuations, but also for parties that would potentially like to acquire the entity, as uncertainty is likely to lower the final sales price.
89. ESMA has identified the following information listed in Article 10 of draft CCPRRR RTS and in line with BRRD RTS 2018/345 on Valuation, that should be obtained by the resolution authority in order to undertake the valuation:
- (a) the updated financial statements and regulatory reporting prepared by the CCP as close as possible to the valuation date;
 - (b) an explanation of the rules, key methodologies, assumptions and judgements used by the CCP in order to prepare the financial statements and regulatory reporting;
 - (c) data contained in the records of the CCP;
 - (d) relevant market data;
 - (e) conclusions drawn by the valuer from discussion with management and auditors;
 - (f) where available, supervisory assessments of the CCP's financial condition, including information acquired pursuant to point (h) of Article 18(1) of Regulation (EU) No 2021/23;
 - (g) industry-wide assessments of asset quality, where relevant to the CCP's assets, as well as stress test results;
 - (h) valuations of peers, adequately adjusted to capture the CCP's specific circumstances;
 - (i) historical information, adequately adjusted to eliminate factors that are no longer relevant, and to incorporate other factors that did not affect the historical information; or
 - (j) trend analyses, adequately adjusted to reflect the CCP's specific circumstances.
90. With regard to CCP specific activities, ESMA proposes to elaborate further on the level of granularity that may be requested for illustrative purposes:
- (a) the information on both the assets and liabilities has to be granular and compete;
 - (b) the information shall include detailed information on line-by-line or portfolio-by-portfolio positions, transactions and collateral; and

- (c) the information shall include default fund amounts and skin in the game at the most granular level.

Question 6: Do you agree with the respective proposed approaches for the valuation under Article 24(2) and Article 24(3) of Regulation (EU) 2021/23?

7 The mandate on the separation of the valuations under Articles 24 and 61(Article 25(6)(c)) and the mandate on No Creditor Worse Off principle (NCWO) (Article 61(5) CCPRRR)

7.1 Mandates

91. In resolution, the resolution authorities shall ensure that the NCWO principle⁹ is respected, i.e. that “shareholders, 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 [...]”.
92. Consequently Article 61 of CCPRRR introduces a 3rd valuation (in addition to the 2 valuations in Article 24) for the application of the NCWO principle in order to assess the positive or negative impact of the use of resolution tools on stakeholders compared to a scenario where no resolution tools would have been used. The mandate for ESMA hereunder requires ESMA to specify the separation of the valuations under Articles 24 and 61 (Article 25(6)(c) of CCPRRR).
93. Under Article 61 of CCPRRR ESMA shall also develop draft RTS specifying the methodology for carrying out the valuation to assess the compliance with the NCWO principle. This mandate includes the aspect of replacement cost by including the costs identified under Article 61(3)(c) requiring the methodology to take into account a commercially reasonable estimate of the direct replacement costs, including any additional margin requirements, incurred by the clearing members to reopen within an appropriate period their comparable net positions in the market by considering effective market conditions, including market depth and ability of the market to transact the relevant volume of such net positions within that period.
94. To assess the scope of this mandate ESMA notes that the mandate is to specify the methodology for carrying out the valuation referred to in paragraph 1, however paragraph 2 contains two valuations as set out in (a) and (b). ESMA is of the view that both valuations under Article 61(2)(a) and Article 61(2)(b) (linking to Article 24) should be covered by the methodology as (a) refers to the treatment that shareholders, clearing members and other creditors would have received had the resolution authority not taken resolution action and had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules (the counterfactual) and (b) refers to the actual

⁹ Article 60 of CCPRRR

treatment that shareholders, clearing members and other creditors, have received in the resolution of the CCP.

95. ESMA concludes the mandate covers the establishment of direct replacement costs.
96. ESMA finally notes the reference to “following the full application of the applicable contractual obligations and other arrangements in its operating rules” is made both under Article 61(2)(a) and under Article 61(5) of CCPRRR. ESMA identified two cases where the outcome would diverge between resolution and counterfactual valuation: if the resolution authority decides to diverge from the rules defined by the CCP with regard to recovery or if the CCP rules include specific treatments for service closure or insolvency proceedings that are not considered under resolution.
97. This section covers the two mandates jointly, the separation of the valuations under Articles 24 and 61 of CCPRRR and the mandate under Article 61 in relation to the NCWO principle. The reason for this is that one first needs to define NCWO valuation before highlighting the difference of treatment with valuation under resolution.
98. The mandate for ESMA is therefore to specify the separation of these valuations under Articles 24 and 61. In developing this mandate it shall take the RTS adopted pursuant to Article 36(15) and 74(4) of Directive 2014/59/EU into account.

7.2 Similar mandates under BRRD

99. BRRD includes a very similar mandate to EBA, and EC adopted the Commission Delegated Regulation (EU) 2018/344, of 14 November 2017 covering “the criteria relating to the methodologies for valuation of difference in treatment in resolution” (BRRD RTS NCWO¹⁰). ESMA has capitalised on this in this draft RTS and proposed to keep the same approach differentiating treatments for valuation on resolution and valuation for the application of NCWO, i.e. the counterfactual.

7.3 Valuation under resolution versus NCWO valuation

100. ESMA proposes to follow a logical approach similar to BRRD and the BRRD RTS 2018/344 on NCWO that is detailed in this section, starting with general provisions on which date and how resolution and NCWO valuations should be carried out, then inventorying all accounts at the CCP taking into consideration priority and segregation rules for creditors before implementing both valuations and comparing them. Specificities for both valuations need to be covered, including direct replacement costs. Finally, suggestions are made on how to conduct a valuation report.
101. As previously explained, generalities on valuation highlighting the potential differences for calculation dates and bases are proposed consistently with the BRRD RTS 2018/344 on NCWO under insolvency proceedings. ESMA then proposes to define that

¹⁰ COMMISSION DELEGATED REGULATION (EU) 2018/344 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R0344>

the valuer shall start with a detailed inventory of assets and claims. These aspects are covered under Articles 21 and 22 of the draft CPPRRR RTS.

102. ESMA has then considered the approach taken by EBA in the BRRD RTS NCWO and supports EBA's logical process containing the following valuation steps:
- first, to value the treatment that shareholders and creditors would have received under normal insolvency laws;
 - second, to value the treatment received following the application of resolution tools; and
 - thirdly, to finally identify creditors for whom the outcome of the value under normal insolvency laws exceeds the actual and potentially discounted outcome of the value under resolution.

These aspects are covered under Article 23 of the draft CPPRRR RTS.

103. With regard to specificities linked to the treatment of shareholders and creditors under normal insolvency proceedings, ESMA suggests listing different sources to evaluate the impact on discounted cashflows or asset prices including:
- the impact of applicable insolvency law and practice, given applicable CCP rules;
 - any reasonably foreseeable costs that would have been incurred by an administrator or insolvency practitioner; and
 - any information from relevant historical cases.
104. After having considered these sources the potential impacts for discounted cashflows or asset prices are presented in a detailed format. Finally, the impacted outcome is allocated per seniority to stakeholders, also considering segregation rules. These aspects are covered under Article 24 of the draft RRR RTS.
105. ESMA, in line with the empowerment under Article 61(5) of CCPRRR, has considered the part of the mandate to take into account a commercially reasonable estimate of the direct replacement costs, including any additional margin requirements, incurred by the clearing members to reopen within an appropriate period their comparable net positions in the market by considering effective market conditions, including market depth and ability of the market to transact the relevant volume of such net positions within that period.
106. ESMA proposes to include a comprehensive list of replacement costs that may be considered as direct replacement costs by the independent valuer and incurred by the clearing members under normal insolvency proceedings.
107. ESMA considers that the most significant and direct costs incurred by clearing members are the losses stemming from market moves between the time net positions were closed by the CCP and the time they were reopened, as well as liquidity and concentration costs associated to the reopening of these net positions. ESMA notes that some proxies, such as initial margins, have been proposed to estimate these costs. However, ESMA believes that these proxies may be misleading since they would

picture costs linked to an extreme scenario. Such strong assumption would interfere with the independent work of the independent valuer. These aspects are covered under Article 25 of the draft CCPRRR RTS.

108. ESMA is also of the view that some costs may be challenging to estimate in a hypothetical scenario, especially connection costs or capital and funding costs. The valuer may need to follow a simplistic approach in some cases or even refer to how clearing members reopened terminated positions under resolution to better assess these costs under the NCWO valuation.
109. On the determination of the actual treatment of shareholders and creditors in resolution, ESMA proposes to cover both - general cases, where shareholders and creditors have claims following the application of any resolution actions and specific cases, where some shareholders and creditors have received equity or debt compensation that should be taken into account to reduce claims.
110. ESMA also suggests that direct replacement costs incurred by clearing members and due to the implementation of resolution tools should be considered in order to get comparable amounts when assessing NCWO principle. These aspects are covered under Article 26 of the draft RRR RTS.
111. ESMA finally notes that the valuation report may benefit from a logical structure starting with a summary of the valuation, an explanation of the methodology leading to this valuation and any differences identified compared to other valuations. These aspects are covered under Article 28 of the draft CPPRRR RTS.

Question 7: Do you agree with the described process for performing the ‘No Creditor Worse Off’ Valuation in accordance with Article 61 of Regulation (EU) 2021/23?

Question 8: Do you agree with the proposed list of direct replacement costs to be included in the NCWO valuation?

8 The additional amount in provisional valuation (Article 26(4) of CCPRRR)

8.1 Mandate

112. Valuations referred to in Article 24 of CCPRRR shall be considered definitive where they meet the requirements laid down in Article 25(2) of CCPRRR, however where this is not the case the valuation is considered a provisional valuation. Provisional valuations shall include a buffer for additional losses and an appropriate justification for that buffer. ESMA is mandated to develop a methodology for calculating the buffer for additional losses to be included in provisional valuations.
113. ESMA is required under Article 26(4) of CCPRRR to develop the draft RTS taking into account the RTS developed in accordance with Article 36(15) of BRRD and adopted pursuant to Article 36(16) thereof. Thus, BRRD includes in Article 36 a very similar

mandate to EBA, and EC adopted the BRRD RTS 2018/345 on Valuation covering in Article 13 “the Methodology for calculating and including a buffer for additional losses”. The BRRD RTS Valuation text remains very general on the methodology to calculate a buffer for additional losses.

8.2 Buffer definition

114. ESMA followed the same approach as EBA. It should be noted though that this buffer should not bias the choices to be made by the resolution authority, including whether the conditions for resolution are met under Article 22 of CCPRRR and taking an informed decision on the appropriate resolution actions to be taken.
115. ESMA also considered whether a more prescriptive approach would have been beneficial such as providing a methodology to assess the buffer or define a floor. However, ESMA came to the conclusion that such proposal may have biased the work of the valuer and the decision to enter resolution or use a specific tool. These aspects are covered under Article 21 of the draft CPPRRR RTS.

Question 9: Do you agree with the proposed approach for the calculation of the buffer for additional losses to be included in provisional valuations?

9 Annexes

9.1 Annex 1 - Mandates

Article 25(6) of CCPRRR

“ESMA, taking into account the regulatory technical standards developed in accordance with Article 36(14) and (15) of Directive 2014/59/EU and adopted pursuant to Article 36(16) thereof, shall develop draft regulatory technical standards to specify:

- (a) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP for the purposes of paragraph 1 of this Article;*
- (b) the methodology for assessing the value of the assets and liabilities of the CCP; and*
- (c) the separation of the valuations under Articles 24 and 61 of this Regulation.*

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 26(4) of CCPRRR

“ESMA, taking into account the regulatory technical standards developed in accordance with Article 36(15) of Directive 2014/59/EU and adopted pursuant to Article 36(16) thereof, shall develop draft regulatory technical standards to specify, for the purposes of paragraph 1 of this Article, the methodology for calculating the buffer for additional losses to be included in provisional valuations.

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 61(5) of CCPRRR

“ESMA, taking into account the regulatory technical standards adopted pursuant to Articles 49(5) and 74(4) of Directive 2014/59/EU, shall develop draft regulatory technical standards specifying the methodology for carrying out the valuation referred to in paragraph 1 of this Article including the calculation of the losses following liquidation resulting from the costs referred to in point (c) of the first subparagraph of paragraph 3 of this Article had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules.

ESMA shall submit those draft regulatory 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.”

9.2 Annex 2 – Draft cost-benefit analysis

9.2.1 Cost-benefit analysis – Circumstances for the independent valuer to be deemed independent from both the CCP and any relevant authority

Introduction

Pursuant to the first subparagraph of paragraph 6 of Article 25 of the CCPRRR, the Commission is empowered to adopt a delegated act to supplement the CCPRRR to specify the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP, for the purpose of paragraph 1 of Article 25 of the CCPRRR.

ESMA shall develop draft regulatory technical standards further specifying these circumstances and shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

Background

In accordance with Article 25(1)(a) of CCPRR, the valuations of a CCP's assets and liabilities referred to in Article 24 shall be performed by a person independent from any public authority and from the CCP.

Such independence is needed to ensure the fairness, prudence and accuracy of the valuations. Indeed, any conflict of interest between the valuer and the resolution authority or the CCP would undermine the credibility and the quality of the valuation. It would also increase the risk of challenges and litigation, as the parties affected by the outcome of the valuation would be likely to challenge any resolution action if the valuation does not seem fair.

Policy options

The empowerment to ESMA is to specify the circumstances in which a person could be deemed to be independent from both the resolution authority and from the CCP.

ESMA has considered two policy options, i.e.:

- Specify a list of specific situations where the valuer could not be considered as independent.
- Define general criteria that would need to be assessed by the resolution authority to conclude that the valuer is independent.

Cost-benefit analysis

Specific objective	Ensure that the person or entity performing the valuation of the assets and liabilities of the CCP in resolution is independent from the resolution authority and from the CCP.
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	In addition, the RTS should help preventing undue influence from the resolution authority or the CCP, or any relevant entity with an interest in the final value and content of the valuation. It shall help ensuring transparency over the valuation, enhance market confidence in the quality of the valuation, and reduce litigation risks.
Policy option 1	Define a prescriptive list of conflicts of interest that would prevent a person / entity to be considered as independent from the resolution authority or the CCP
How would this option achieve the objective?	The prescriptive list of conflicts of interest situations would be used as a basis to select or discard potential independent valuers.
Benefits	A prescriptive list of conflicts of interest situations would decrease the risk for misinterpretation and limit potential conflicts between parties. It would reduce uncertainty for the market and the authorities.
Regulator's costs	No additional costs expected.
Compliance costs	Under this policy option, it may be difficult to identify all potential cases of conflicts of interest. There may be risks of gaps in the regulation. Also, a prescriptive list is not flexible as new cases may arise in the future which will require policy makers to amend the regulatory framework.
Policy option 2	Define general elements and criteria to be met for a person to be deemed independent
How would this option achieve the objective?	The resolution authority would assess the independence of a potential independent valuer by applying the general elements and criteria defined in the RTS.
Benefits	Relying on general elements and criteria would be a more flexible approach and would reduce the risk of error and/ or of facing situations not covered in the detailed list of conflicts of interest.
Regulator's costs	Regulator's costs increase moderately compared to option 1, as the appointing resolution authority will need to perform an assessment of the applicant's independent based on the proposed criteria.

Compliance costs	The definition of general elements and criteria will leave room for discretion and interpretation hence increasing the burden on both the applicant and the resolution authority, also increasing the risk of challenge of the valuer's choice.
Which policy option is the preferred one?	Policy option 2.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	The policy response chosen is the responsibility of ESMA.

Question 10: With regards to the proposed policy options for the circumstances for the independent valuer to be deemed independent, do you agree with Option 2? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach ?

Question 11: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.

9.2.2 Cost-benefit analysis – Valuation of assets and liabilities of a CCP

Introduction

In accordance with the second subparagraph of paragraph 6 of Article 25 of the CCPRRR, ESMA is mandated to develop draft regulatory technical standards to specify the methodology for assessing the value of the assets and liabilities of the CCP for the purpose of the first and second valuation in resolution.

In addition, in accordance with Article 26(4) of the CCPRRR, ESMA shall develop a draft RTS to specify the methodology for calculating the buffer for additional losses to be included in provisional valuations.

Those draft RTS shall be submitted to the Commission by 12 February 2022.

Background

CCPRRR provides the resolution authority with a set of resolution tools and powers to handle situations involving CCP failures.

However, in accordance with Article 24(1) of the CCPRRR, before applying these tools the resolution authority should be informed on whether the conditions for resolution are met, and such decision should be based on a first valuation.

Then, once the resolution authority has concluded that the CCP meets the conditions for resolution, a second valuation shall be carried out, in order to ensure that any resolution action is taken based on a fair, prudent and realistic assessment of the assets, liabilities, rights and obligations of the CCP.

In addition, where a valuation is provisional, it should include a buffer for additional losses.

Policy options

As noted in the consultation paper, ESMA proposes to leverage on the similar BRRD RTS to specify the methodology for the valuation of a CCP's assets and liabilities. Hence, several areas have been considered under which two alternative policy options could be considered.

- Overarching principle for valuation
 - o Option 1: the RTS aim for consistency with existing accounting and prudential rules
 - o Option 2: the RTS aim for an economic valuation approach, rather than focusing on accounting and prudential values
- Date of valuation
 - o Option 1: valuation relies on the last available financial statement
 - o Option 2: valuation is performed at the expected date of resolution
- Information to be used
 - o Option 1: the valuation relies only on financial statements and (where available) supervisory information
 - o Option 2: the valuation relies on all available pertinent information
- Measurement basis:
 - o Option 1: standardized measurement basis (same valuation method for all type of assets and liabilities)
 - o Option 2: measurement method tailored depending on the type of assets
- Buffer for additional losses:
 - o Option 1: a complete valuation of the CCP's assets for the purpose of calculating a buffer for additional losses to address the uncertainty of provisional valuation

- Option 2: the valuer would be allowed to extrapolate losses from part of the entity's assets for the purpose of calculating a buffer for additional losses

Cost-benefit analysis

Overarching principles

Specific objective	Overarching principles for the valuation of assets and liabilities
Policy option 1	Favour consistency with existing accounting and prudential rules
Benefits	Valuation methodologies based on existing accounting rules are well understood by CCPs as well as supervisors, auditors and market participants. Low cost of design and implementation as the RTS will rely on existing accounting frameworks.
Regulator's costs	
Compliance costs	Under this policy option, there may be a risk of incompatibility with the purpose of the second valuation, which aims to inform the resolution authority so that it chooses the best resolution tools.
Policy option 2	Favour an economic valuation approach, rather than focusing on accounting and prudential rules
Benefits	This policy option would allow
Regulator's costs	
Compliance costs	
Which policy option is the preferred one?	Mixed approach: as for the valuation of entities under BRRD, ESMA would suggest relying on accounting and regulatory rules for the first valuation, and to aim for an economic value approach for the second valuation.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to	The policy response chosen is the responsibility of ESMA.

be informed or consulted?	
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Valuation date

Specific objective	Specify the valuation date
Policy option 1	Choose the date of the last available public financial statement
Benefits	Ensures higher transparency and objectivity as the valuation will be based on historical data
Regulator's costs	Risk of missing pertinent information as public data may be outdated.
Compliance costs	Costs reduced as the valuation date is directly given in the RTS and does not rely on a specific model to be identified.
Policy option 2	Choose the date when resolution is expected
Benefits	This approach is the most effective to ensure that the valuation is prudent and realistic as it takes into account the most accurate value of the CCP about to be resolved.
Regulator's costs	n/a
Compliance costs	Adds complexity as the determination of the valuation date will be based on estimates and will not be predictable.
Which policy option is the preferred one?	ESMA suggests relying on option 2, i.e. the expected resolution date.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	The policy response chosen is the responsibility of ESMA.

Information to be used

Specific objective	Information to be used for the purpose of the valuation
Policy option 1	Rely only on financial statements and supervisory information
Benefits	This option would be relatively easy to implement, and the information should be already available to the resolution authority.
Regulator's costs	No additional cost expected.
Compliance costs	There is a risk under this policy option that the resolution authority will miss some pertinent information, as the financial situation of the CCP may have changed since the latest report.
Policy option 2	Rely on all available public information
Benefits	This policy option will ensure that the valuation reflects all available information as of the valuation date and will be therefore more accurate.
Regulator's costs	Regulator's cost may be higher under this option as the resolution authority will need to gather extra information (compared to option 1 where the valuation is based on already available supervisory information and public financial statements)
Compliance costs	
Which policy option is the preferred one?	ESMA suggests relying on option 2, i.e. to rely on a holistic approach that considers any information pertinent to the valuation.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	The policy response chosen is the responsibility of ESMA.

Question 12: With regards to the proposed policy options for the information to be used in valuation, do you agree with Option 2? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach?

Question 13: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Measurement basis

Specific objective	Select the measurement basis for valuation
Policy option 1	Standardised measurement basis (same valuation method for all types of assets and liabilities)
Benefits	This policy option would be easier to implement as all assets and liabilities will be measured under the same methodology.
Regulator's costs	Lower, as a common methodology is used.
Compliance costs	There is a risk that the valuation may be mis-estimating the value of assets and liabilities, as the methodology may not reflect the specific
Policy option 2	Tailored based measurement method, depending on the type of assets
Benefits	Such policy option would allow to take into account all assets and liabilities specificities and particular risk profiles when valuating them.
Regulator's costs	More complex approach as it requires to develop specific measurement methods for each assets and liabilities.
Compliance costs	n/a
Which policy option is the preferred one?	ESMA suggests to rely on a mixed approach, i.e. to apply the same valuation methodologies for every type of assets and liabilities, but to take into account the specificities of these assets in determining cash flows.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	The policy response chosen is the responsibility of ESMA.

Question 14: With regards to the policy options for the measurement basis, do you agree with proposed mixed approach? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach?

Question 15: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Buffer for additional losses

Specific objective	Buffer for additional losses in provisional valuations
Policy option 1	Calculate the buffer based on all entity's assets
Benefits	This policy option may reduce the uncertainty compared to the final valuation, as it requires a very granular valuation of the CCP's assets
Regulator's costs	N'a
Compliance costs	Increased computation costs, as this valuation will require more time, potentially delaying the resolution process.
Policy option 2	Calculate the buffer based on only part of the CCP's assets or on an average of losses estimated for assets of peer competitors
Benefits	This policy option will shorten the valuation process and allow for a quicker decision-making.
Regulator's costs	n/a
Compliance costs	This policy option may increase the risk that additional uncovered losses may be incurred, that would not have been envisaged in the provisional valuation.
Which policy option is the preferred one?	Policy option 2
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to	The policy response chosen is the responsibility of ESMA.

be informed or consulted?	
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Question 16: With regards to the proposed policy options for the buffer for additional losses in provisional valuations, do you agree with Option 2? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach?

Question 17: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.

9.3 Annex 3 - Summary of questions

Question 1: *Do you agree with the proposed approach to define three elements of independence that should be met for a valuer to be deemed to be independent from the CCP and the resolution authority?*

Question 2: *Do you agree with the proposed definitions for the relevant entity, relevant authority and independent valuer?*

Question 3: *Do you agree with the proposed conditions to assess whether a person considered for the position of independent valuer or appointed as independent valuer does not have an actual or potential material interest in common or in conflict with any relevant public authority or the CCP?*

Question 4: *Do you agree with the proposed conditions to assess whether a person considered for the position of independent valuer or appointed as independent valuer has the necessary qualifications, experience, ability, knowledge and resources?*

Question 5: *Do you agree with the proposed approach to determine and assess the three elements of independence to conclude if a valuer shall be deemed to be independent from the CCP and the resolution authority?*

Question 6: *Do you agree with the respective proposed approaches for the valuation under Article 24(2) and Article 24(3) of Regulation (EU) 2021/23?*

Question 7: *Do you agree with the described process for performing the ‘No Creditor Worse Off’ Valuation in accordance with Article 61 of Regulation (EU) 2021/23?*

Question 8: *Do you agree with the proposed list of direct replacement costs to be included in the NCWO valuation?*

Question 9: *Do you agree with the proposed approach for the calculation of the buffer for additional losses to be included in provisional valuations?*

Question 10: *With regards to the proposed policy options for the circumstances for the independent valuer to be deemed independent, do you agree with Option 2? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach ?*

Question 11: *If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.*

Question 12: *With regards to the proposed policy options for the information to be used in valuation, do you agree with Option 2? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach?*

Question 13: *If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.*

Question 14: *With regards to the policy options for the measurement basis, do you agree with proposed mixed approach? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach?*

Question 15: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Question 16: With regards to the proposed policy options for the buffer for additional losses in provisional valuations, do you agree with Option 2? If not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach?

Question 17: If you advocate for a different approach, how would it impact the cost and benefit assessment? Please provide details.

9.4 Annex 4 - Draft RTS on the requirements for independent valuers, the methodology for assessing the value of the assets and liabilities of a CCP, the separation of the valuations, the buffer for additional losses to be included in provisional valuations and the methodology for carrying out the valuation for the purpose of the ‘no creditor worse off’ principle

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

supplementing Regulation (EU) No 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the requirements for independent valuers, the methodology for assessing the value of assets and liabilities of a CCP, the separation of the valuations, the methodology for calculating the buffer for additional losses to be included in provisional valuations, and the methodology for carrying out the no creditor worse off valuation

of []

(text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to 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 counterparties¹¹, and in particular Articles 25(6), 26(4) and 61(5) thereof,

Whereas:

- (1) The provisions in this Regulation are closely linked to each other, since they all deal with the CCP resolution framework set out by Regulation (EU) 2021/23, and in particular with the circumstances and methodology for the valuation of assets and liabilities in resolution. To ensure coherence between those provisions, which should enter into force simultaneously and to facilitate the resolution process, there is a need for institutions, authorities and market participants, including investors that are non-Union residents, to have a comprehensive view and compact access to their obligations and rights. It is therefore desirable to include the

¹¹ OJ L 22, 22.1.2021, p. 1

relevant regulatory technical standards required by Regulation (EU) 2021/23 in a single Regulation.

- (2) Further to the definitions of Regulation (EU) 2021/23, some specific definitions of technical terms are necessary for the purpose of this Regulation.
- (3) When carrying out their valuation tasks for the purposes of Article 24 and Article 61 of Regulation (EU) 2021/23, it is necessary to ensure that independent valuers are not being influenced, and are not perceived to be influenced, by public authorities, including the resolution authority, or by the CCP.
- (4) Accordingly, uniform rules should apply to determine the circumstances in which a person shall be considered independent from the relevant public authorities, including the resolution authority, and from the CCP. Those rules should contain requirements as to the expertise and resources of the person concerned and their relation to the relevant public authorities, including the resolution authority, and the CCP.
- (5) Independence can be reinforced by conditions ensuring the adequacy of the expertise and resources of the independent valuer. More specifically it should be ensured that the independent valuer possesses the necessary qualifications, knowledge and expertise in all relevant subjects, including valuations of the financial instruments cleared by the CCP, the applicable CCP requirements under Regulation (EU) 648/2012, existing CCPs recovery plans and rulebooks, and applicable resolution tools under Regulation (EU) 2021/23.
- (6) It should also be ensured that the independent valuer holds, or has access to, sufficient human and technical resources to carry out the valuation.
- (7) Furthermore, it should be ensured that the independent valuer is also capable of carrying out the valuation effectively without undue reliance on any relevant public authority, including the resolution authority and the CCP. However, the provision of instructions or guidance necessary to support the conduct of the valuation, for example in relation to the methodology provided pursuant to the Union legislation in the field of valuation for purposes relating to resolution, should not be seen as constituting undue reliance where such instructions are, or guidance is, considered necessary to support the conduct of the valuation. In addition, the provision of assistance, such as the provision by the CCP concerned of systems, financial statements, regulatory reports, market data, other records or other assistance to the independent valuer should not be prevented where, in the assessment of resolution authority, this is considered necessary to support the conduct of the valuation. In accordance with any procedures which may be put in place, the provision of instructions, guidance and other forms of support should be agreed on a case-by-case or pooled basis.
- (8) The payment of reasonable remuneration and the reimbursement of reasonable expenses in connection with the valuation should not be prevented.
- (9) Independence can be endangered if valuation is performed by a person who is employed by or affiliated to any relevant public authority, including the resolution authority, and the CCP even in cases where full structural separation to address threats such as self-review, self-interest, advocacy, familiarity, trust or intimidation has been established. Therefore, there is a need to ensure that appropriate legal separation is secured such that the independent valuer

is not an employee or contractor of, nor in a group with, any relevant public authority, including the resolution authority, or the CCP concerned.

- (10) It is also necessary to ensure that the independent valuer does not have any material interest in common or in conflict with any relevant public authority, including the resolution authority, and the CCP, including its senior management, controlling shareholders, group entities and significant creditors, as could be the case when the independent valuer is a significant creditor of the CCP concerned. Similarly, personal relationships could represent a material interest.
- (11) Accordingly, the resolution authority should assess whether any material common or conflicting interests are present. For the purposes of this assessment the independent valuer should notify the appointing authority, or such other authority as may be empowered to conduct this task in the Member State concerned, of any actual or potential interest which the person considers may, in the assessment of that authority, be considered to amount to a material interest and provide any information as may be reasonably requested by the authority to inform this assessment. In the case of legal persons, independence should be assessed by reference to the company or partnership as a whole but taking account of any structural separation and other arrangements that may be put in place to differentiate between those staff members who may be involved in the valuation and other staff members, to address threats such as self-review, self-interest, advocacy, familiarity, trust or intimidation. If the significance of those threats compared to the safeguards applied is such that the person's independence is compromised, the company or partnership should not be the independent valuer.
- (12) A statutory auditor who has completed an audit of the CCP in the year preceding the independent valuer's assessment for eligibility to act as valuer should not be regarded as independent under any circumstances. As regards other audit or valuation services provided to the CCP concerned in the years immediately preceding the date on which independence is to be assessed, these should also be assumed to present a material interest in common or in conflict unless it is demonstrated to the satisfaction of the appointing authority, or such other authority as may be empowered to conduct this task in the Member State concerned, that this is not the case having regard to all relevant circumstances, including any structural separation or other arrangements in place.
- (13) Following appointment it is essential that the independent valuer maintains policies and procedures in accordance with the applicable codes of ethics and professional standards to identify any actual or potential interest which the valuer considers may amount to a material interest in common or in conflict. The resolution authority should be notified immediately of any actual or potential interests identified and should consider whether these amount to a material interest in which case the independent valuer's appointment should be terminated and a new valuer appointed.
- (14) The CCP resolution process distinguishes between two valuations, in accordance with Article 24 of Regulation (EU) 2021/23. An initial valuation assessing whether the conditions for resolution have been met, and a second valuation which forms the basis for the resolution authority decision to apply one or more resolution tools. For the purpose of the initial valuation, it is appropriate to ensure that when determining whether the conditions for

resolution are met, a fair and realistic valuation of the CCP's assets and liabilities is conducted. For the second valuation the purpose of which is to inform resolution actions, it is important to ensure that the valuation of the assets and liabilities of the CCP is based on fair, prudent and realistic assumptions.

- (15) Valuations for the purpose of informing the determination by the competent authority or the resolution authority whether the conditions for resolution are met should be consistent with the applicable accounting and prudential framework. The valuer, however, should be able to depart from assumptions made by the CCP's management under which the financial statements are prepared to the extent such departure is consistent with the applicable accounting and prudential regulatory framework.
- (16) It is appropriate to have rules that ensure that the valuation for the purposes of informing the choice of resolution actions are fair, prudent and realistic, to ensure that all losses are fully recognised at the moment the resolution tools are applied. The choice of the most appropriate measurement basis (hold value or disposal value) should be made for the particular resolution actions being considered by the resolution authority.
- (17) Valuations for the purpose of informing the choice and design of resolution actions shall assess the economic value and not the accounting value. Those valuations should consider the present value of cash flows that the CCP can reasonably expect, even where this requires departing from accounting or prudential valuation framework. Such valuation should also consider that cash flows may arise from continuing to hold the assets, yet should take into account the potential effects of the resolution on future cash flows.
- (18) Alternatively, where the CCP lacks the ability to hold the assets or their disposal is considered necessary or appropriate to achieve the resolution objectives, the valuation should reflect that those cash flows may arise from the disposal of assets, liabilities or business lines, assessed over a defined disposal period.
- (19) The disposal value should generally be understood as equivalent to the observable market price that could be obtained on the market for a particular asset or group of assets and may reflect a discount that is appropriate in view of the amount of assets being transferred. However, the valuer should be able where appropriate having regard to the actions to be taken under the resolution scheme, to determine the disposal value by applying a reduction to such observable market price for a potential accelerated sale discount. Where the assets do not have a liquid market, the disposal value should be determined by reference to the observable prices on markets where similar assets are traded or to model calculations using observable market parameters with discounts for illiquidity reflected as appropriate. Where the sale of business or the use of the bridge CCP tool are contemplated, reasonable expectations for franchise value may be taken into account when determining the disposal value.
- (20) A provisional valuation pursuant to Article 26(4) of Regulation (EU) 2021/23 forming the basis of the decision on the taking of the appropriate resolution action should include a buffer aimed at approximating the amount of additional losses. That buffer should be based on a fair, prudent, and realistic assessment of those additional losses. The decisions and assumptions supporting the calculation of the buffer should be adequately explained and justified in the valuation report.

- (21) In accordance with Article 61 of Regulation (EU) No 2021/23, a specific methodology should be developed for carrying out the valuation aimed at determining whether there is any difference in the treatment that shareholders, clearing members and other creditors would have received 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, and the actual treatment that shareholders, clearing members and other creditors, have received in the resolution of the CCP.
- (22) Any difference in treatment resulting in greater losses incurred to any shareholder, clearing member or other creditor should entitle those shareholders, clearing members and other creditors to the payment of the difference, in accordance with Article 62 of Regulation (EU) 2021/23.
- (23) The valuation under Article 61 of Regulation (EU) No 2021/23 is to be carried out by an independent valuer meeting the conditions set out in Article 25 of Regulation (EU) No 2021/23, as soon as possible after the resolution action or actions have been effected, even though its completion could take some time. That valuation should be based on available information relevant to the date when the decision to resolve a CCP is adopted, in order to adequately reflect specific circumstances, such as distressed market conditions, existing at that resolution decision date. Information obtained after the resolution decision date should only be used where it could reasonably have been known at that date.
- (24) In order to ensure that a comprehensive and credible valuation is carried out, the valuer should have access to any appropriate legal documentation, including to a list of all claims and contingent claims against the entity, classified according to their priority under normal insolvency proceedings. The valuer should be allowed to enter into arrangements to obtain specialist advice or expertise as required by the circumstances.
- (25) For purposes of determining the treatment that shareholders, clearing members and other creditors would have received 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 pursuant to Article 22(1) and had the CCP been put under normal insolvency proceedings, the valuer should assess the losses that would have been realistically incurred by clearing members and other creditors, had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules. It shall disregard any provision of extraordinary public financial support to the CCP, or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest terms.
- (26) The independent valuer shall also take into account a commercially reasonable estimate of the direct replacement costs, including any additional margin requirements incurred by the clearing members to reopen within an appropriate period their comparable net positions in the market. For this purpose, the independent valuer shall consider the clearing members' hypothetical credit exposures at the time of replacing the net positions, to which it shall add any liquidity and concentration cost, unavoidable operating costs and material funding costs stemming from the additional collateral requirements.

- (27) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (28) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹², 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 in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

CHAPTER I
COMMON PROVISIONS

Article 1

Subject matter

This Regulation further specifies:

- (1) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP for the purposes of paragraph 1 of Article 25 of Regulation (EU) No 2021/23 and of Article 61 of that Regulation;
- (2) the methodology for assessing the value of the assets and liabilities of the CCP in accordance with Article 25(6)(b) of Regulation (EU) No 2021/23;
- (3) the separation of the valuations under Articles 24 and 61 of Regulation (EU) No 2021/23 in accordance with Article 25(6)(c) of Regulation (EU) No 2021/23.
- (4) the methodology for calculating the buffer for additional losses to be included in provisional valuations for the purposes of paragraph 1 of Article 26 of Regulation (EU) No 2021/23 in accordance with Article 26(4) of that Regulation.
- (5) the methodology for carrying out the valuation referred to in paragraph 1 of Article 61 of Regulation (EU) No 2021/23 including the calculation of the losses following liquidation resulting from the costs referred to in point (c) of the first subparagraph of paragraph 3 of Article 61 of that Regulation had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules, in accordance with Article 61(5) thereof.

CHAPTER II
INDEPENDENT VALUER

¹² OJ L 331, 15.12.2010, p. 84

Article 2

Definitions

For the purposes of this Chapter, the following definitions apply:

- (1) ‘relevant entity’ means
 - (a) the CCP subject to valuation (including its members and staff) and any group companies;
 - (b) The CCPs clearing members (defined in point 12 Article 2 of Regulation (EU) No 2021/23), clients (as defined in point 18 of Article 2 of Regulation (EU) No 2021/23) and indirect clients (as defined in point 20 of Article 2 of Regulation (EU) No 2021/23) of the CCP;
 - (c) CCPs with an interoperability arrangement (defined in Article 51 of Regulation (EU) NO 648/2012) with the CCP under resolution.
- (2) ‘relevant public authority’ means:
 - (a) The resolution authority established in accordance with Article 3(1) of Regulation (EU) No 2021/23;
 - (b) The competent authority for the CCP under resolution established in accordance with Article 22(1) Regulation (EU) No 648/2012¹³;
 - (c) The members and observers of the resolution college established in accordance with Article 4 of Regulation (EU) No 2021/23, and the members listed in Article 4(2) of Regulation (EU) No 2021/23;
 - (d) The members of the EMIR college established in accordance with Article 18 of Regulation (EU) No 648/2012;
 - (e) The competent authority for any entity within the same group as the CCP under resolution;
 - (f) The deposit guarantee scheme to which the CCP, where such CCP is also licenced as a credit institution in accordance with Article 4(1) (1) of Regulation (EU) 575/2013¹⁴, under resolution is affiliated;
 - (g) The body in charge of the resolution financing arrangements where the CCP is also licenced as a credit institution in accordance with Regulation (EU) 575/2013
 - (h) Where applicable, the group-level resolution authority and any entity within the same group as the CCP;
 - (i) The competent ministry;
 - (j) Any other public authority involved in the resolution process of a CCP.

¹³ OJ L 201, 27.7.2012, p. 1–59

¹⁴ OJ L 176, 27.6.2013, p. 1–337

- (3) A valuer means a legal or natural person appointed as an independent valuer for the purposes of paragraph 1 of Article 25 of Regulation (EU) No 2021/23 and of Article 61 of that Regulation.

Article 3

Elements of independence

1. The valuer shall be deemed to be independent from any relevant public authority and the relevant entity where all the following conditions are met at the time of the appointment and during the valuation of the CCP in accordance with Regulation (EU) No 2021/23:
 - (a) the valuer has no material common or conflicting interest within the meaning of Article 4.
 - (b) the valuer possesses the necessary qualifications, experience, ability, knowledge and the resources required to be able to carry out the valuation effectively in accordance with Article 6; and
 - (c) the valuer is legally separated from the relevant public authorities and the relevant entity in accordance with Article 7.

2. A valuer shall provide information and confirm compliance with the criteria listed in point (a) to (e).
 - (a) Any material investments or other material financial interests or financial status of the valuer shall be declared and confirmed not conflicting with the appointment as an independent valuer;
 - (b) Where the person is a legal person, there shall be clear evidence of efficient structural separation or other arrangements that have been put in place (or will be put in place upon appointment) to address any threats to independence such as self-review, self-interest, advocacy, familiarity, trust or intimidation, including arrangements to differentiate between those staff members who may be involved in the valuation and other staff members;
 - (c) Where the person is an accredited auditor there shall be clear management to ensure the auditor is duly covered by internal rules to manage any conflict of interests, including where an auditor provide audit services for CCPs subject to interoperability arrangements with the CCP under resolution;
 - (d) The person's activity shall be considered, and the person shall declare its activities relevant to the appointments for the period of 3 years preceding the possible appointment as an independent valuer. The independent valuer shall not have been employed by any of the relevant entities or by a relevant authority for the past 2 years;
 - (e) The person shall not seek nor accept financial or other advantages from any relevant public authority or the relevant entity without prejudice to the payment to the independent valuer of remuneration and expenses that are reasonable in connection with the conduct of the valuation.

3. The Resolution Authority shall establish a list of potential valuers that meeting the criteria under this Article and review it on a regular basis.

Article 4

Material common or conflicting interests

1. The independent valuer shall not have an actual or potential material interest in common or in conflict with any relevant public authority or the relevant entity.
2. Any interest in common or in conflict with the relevant entity or relevant public authority shall be a negligible interest to meet the requirement under paragraph 1 of this Article.
3. The following aspects listed in (a) to (b) shall be classified as an actual or potential interest and would need to be negligible for the criterion under paragraph 1 of this Article to be met.
 - (a) The provision by the applicant independent valuer of services, including the past provision of services, to a relevant entity or a relevant public authority and where in particular an identified link between those services and the elements relevant for the valuation have been established; and
 - (b) Any personal and financial relationships between the applicant independent valuer and the relevant entity or relevant public authority.
4. The following interests shall be deemed material interests in common or in conflict with the relevant entities or relevant public authorities:
 - (a) Where a valuer is linked by employment, outsourcing arrangements, consulting activity or any other type of engagement with a relevant entity or relevant public authority;
 - (b) Where the valuer has a material link to a relevant entity or relevant authority, such as ownership, group structure, employment, business activities, family or other relationships, management, consulting arrangement, shareholders and the provision of services in relation to supervision;
 - (c) Where the valuer, in the year preceding the date on which that person's eligibility to act as independent valuer is assessed, has completed a statutory audit of the relevant entity pursuant to Directive 2006/46/EC¹⁵ of the European Parliament and of the Council;
 - (d) Where the valuer has an interest in common or in conflict with the relevant entity or relevant authority which could influence, or be reasonably perceived to influence, its judgement in carrying out the valuation.
5. For the purposes of paragraph 1 interest in common or in conflict with at least the following parties shall be relevant:
 - (a) the senior management and the members of the management body of the relevant entity;

¹⁵ Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings (OJ L 224, 16.8.2006, p. 1.)

- (b) the legal or natural persons who control or have a qualifying holding in the relevant entity; and
 - (c) the creditors identified by the resolution authority, to be significant on the basis of the information available to the resolution authority.
6. A valuer appointed as an independent valuer shall:
- (a) maintain, in accordance with any applicable codes of ethics and professional standards, policies and procedures to identify any actual or potential interest which may be considered to constitute a material interest;
 - (b) without delay notify the appointing authority or such other authority as may be empowered to perform the task referred to in paragraph 2 in the Member State concerned of any actual or potential interest which the independent valuer considers may, in the assessment of the authority, be considered to amount to a material interest; and
 - (c) take appropriate steps to ensure that none of the staff or other persons involved in carrying out the valuation have any material interest.

Article 5

Qualifications, experience, ability, knowledge and resources

1. An independent valuer shall possess the necessary qualifications, experience, ability and knowledge and have the resources required to be able to carry out the valuation effectively and to independently assess the valuation without undue reliance on any relevant public authority or the relevant entity.
2. To be considered to meet the requirement for independence under paragraph 1 of this Article, an applicant independent valuer shall be qualifying as a statutory auditor or audit firm within the meaning of Directive 2006/43/EC of the European Parliament and of the Council¹⁶.
3. For the purposes of paragraph 1 of this Article, the applicant independent valuer shall at least provide evidence or confirm in writing the following necessary experience, ability and knowledge:
 - (a) of the valuations made of financial instruments, of valuation in post-trading, and in particular of the instruments cleared by the CCP;
 - (b) of the Regulation (EU) No 2021/23 and Regulation (EU) No 648/2012;
 - (c) to apply and understand the recovery plans and rulebooks of the CCP;
 - (d) to apply and understand the resolution plan of the CCP and applicable resolution tools under the Regulation (EU) No 2021/23.
4. An applicant independent valuer shall be able to apply its competence and experience in an independent manner and shall not need to seek nor take any instructions or guidance from any relevant public authority or the relevant entity.

¹⁶ [xxx]

5. Paragraph 4 shall not prevent the provision of instructions, guidance, premises, technical equipment or other forms of support where, this is considered negligible and not effecting the valuation to be made.

Article 6

Structural separation

1. An independent valuer shall be a person legally, structurally, operationally and effectively separate, from any relevant public authority or the relevant entity.
2. For the purposes of paragraph 1, the following requirements shall apply:
 - (a) in relation to natural persons, the independent valuer shall not be an employee or contractor of any relevant public authority or the relevant entity; and
 - (b) in relation to legal persons, the independent valuer shall not belong to the same group of companies as any relevant public authority or any relevant entity.

CHAPTER III

METHODOLOGY FOR ASSESSING THE VALUE OF THE ASSETS AND LIABILITIES OF THE CCP BEFORE AND AFTER RESOLUTION

SECTION I

GENERAL PROVISIONS

Article 7

Definitions

For the purpose of this Chapter, the following definitions shall apply:

- a) ‘valuation’ means the assessment of a CCP’s assets and liabilities conducted by a valuer pursuant to Article 24 of Regulation (EU) No 2021/23, or the provisional valuation conducted by the resolution authority or the valuer, as the case may be, pursuant to paragraph (1) of Article 26 of that Regulation
- b) ‘valuer’ means either the independent valuer within the meaning of Article 4 or the resolution authority when conducting a provisional valuation pursuant to paragraph (1) of Article 26 of Regulation (EU) No 2021/23.
- c) ‘fair value’ means the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the valuation date, as defined in the relevant accounting framework.
- d) ‘hold value’ means the present value, discounted at an appropriate rate, of cash flows that the CCP can reasonably expect under fair, prudent and realistic assumptions from retaining particular assets and liabilities, considering factors affecting customer or counterparty behaviour or other valuation parameters in the context of resolution.
- e) ‘disposal value’ means the measurement basis referred to in Article 20(5).

- f) ‘franchise value’ means the net present value of cash flows that can reasonably be expected to result from the maintenance and renewal of assets and liabilities or businesses and includes the impact of any business opportunities, as relevant, including those stemming from the different resolution actions that are assessed by the valuer. Franchise value may be higher or lower than the value arising from the contractual terms and conditions of assets and liabilities existing at the valuation date.
- g) ‘equity value’ means an estimated market price, for transferred or issued shares, that results from the application of generally accepted valuation methodologies. Depending on the nature of the assets or business, equity value may comprise franchise value.
- h) ‘measurement basis’ means the approach for determining the monetary amounts at which assets or liabilities are presented by the valuer.
- i) ‘resolution date’ means the date on which the decision to resolve a CCP is adopted, pursuant to Article 71 of Regulation (EU) No 2021/23.

Article 8

General criteria

1. When performing the valuation, the valuer shall consider circumstances affecting the expected cash flows of, and discount rates applicable to a CCP's assets and liabilities stemming from the failure of the CCP's clearing members or non-default events and shall aim to fairly represent the CCP's financial position in the context of the opportunities and risks it deals with.
2. The valuer shall disclose and justify the key assumptions used in the valuation. Any significant deviation in the valuation from the assumptions or rules used by the CCP's management in the preparation of financial statements and in the calculation of the CCP's regulatory capital and capital requirements shall be supported by the best available information.
3. The valuer shall provide the best point estimate of the value of a given asset, liability, or combinations thereof. Where appropriate, the results of the valuation shall also be provided in the form of value ranges.
4. Criteria laid down in this Regulation for the measurement of individual assets and liabilities of a CCP, shall also apply to the measurement of portfolios or groups of assets or combined assets and liabilities, businesses, or the CCP considered as a whole, as the circumstances require.
5. The valuation shall subdivide creditors in classes according to their priority ranking and applicable insolvency law, and shall include the following estimates:
 - (a) the value of claims of each class according to the applicable insolvency law and, where relevant and feasible, according to the contractual rights conferred on claimants;
 - (b) the proceeds each class would receive if the CCP were wound-up under normal insolvency proceedings.

When calculating the estimates pursuant to points (a) and (b) of the first subparagraph, the valuer may apply the criteria set out in Article 24.

6. Where appropriate and feasible, taking into account timing and credibility of the valuation, the resolution authority may request several valuations. In that case, the resolution authority shall

establish the criteria to determine how these valuations shall be used for the objectives set out in Article 24 of Regulation (EU) No 2021/23.

Article 9

Valuation date

The valuation date shall be one of the following dates:

- (a) the reference date as determined by the valuer on the basis of the date as close as possible before the expected date of a decision by the resolution authority to put the CCP in resolution or to exercise the power to write-down or to convert capital instruments;
- (b) where a definitive valuation required by Article 26(2) of Regulation (EU) No 2021/23 is conducted, the resolution date; or
- (c) in relation to liabilities arising from contracts defined by Article 29(1) of Regulation (EU) No 2021/23, the date on which these contracts are terminated.

Article 10

Sources of information

The valuation shall be based on any information pertinent to the valuation date which is deemed relevant by the valuer. In addition to the CCP's financial statements, valuation reports, related audit reports and regulatory reporting as of a period ending as close as possible to the valuation date, that relevant information may include the following:

- (a) the updated financial statements and regulatory reporting prepared by the CCP as close as possible to the valuation date;
- (b) an explanation of the rules, key methodologies, assumptions and judgements used by the CCP in order to prepare the financial statements and regulatory reporting;
- (c) data contained in the records of the CCP;
- (d) relevant market data;
- (e) conclusions drawn by the valuer from discussion with management and auditors;
- (f) where available, supervisory assessments of the CCP's financial condition, including information acquired pursuant to point (h) of Article 18(1) of Regulation (EU) No 2021/23;
- (g) industry-wide assessments of asset quality, where relevant to the CCP's assets, as well as stress test results;
- (h) valuations of peers, adequately adjusted to capture the CCP's specific circumstances;
- (i) historical information, adequately adjusted to eliminate factors that are no longer relevant, and to incorporate other factors that did not affect the historical information; or
- (j) trend analyses, adequately adjusted to reflect the CCP's specific circumstances.

Article 11

Impact of group arrangements

1. Where the CCP forms part of a group, the valuer shall take into account the impact that existing contractual intra-group support arrangements can have on the value of the assets and liabilities where, on the basis of the circumstances, it is probable that those arrangements will be put into effect.
2. The valuer shall only take into account the impact of other formal or informal arrangements within the group where, on the basis of the circumstances, it is probable that those arrangements shall remain in place in the context of a group's stressed financial condition or in resolution.
3. The valuer shall determine whether the resources of a CCP within the group are available to meet losses of other group entities.

Article 12

Impact of interoperability arrangements

Where the CCP entered into interoperability arrangements in accordance with Article 54 of Regulation (EU) No 648/2012, the valuer shall take into account the potential impact that existing contractual interoperability arrangements can have on the value of the assets and liabilities.

Article 13

Valuation report

The valuer shall prepare a valuation report to the resolution authority which shall include at least the following elements:

- (a) except as provided in Article 26(1) of Regulation (EU) No 2021/23, the information referred to in points (a) to (c) of Article 25(4) of that Regulation;
- (b) except as provided in Article 26(1) of Regulation (EU) No 2021/23, the information referred to in Article 25(5) of that Regulation;
- (c) the valuation of the liabilities arising from contracts as defined under Article 29 of Regulation (EU) No 2021/23 and carried out in accordance with that same Regulation;
- (d) a summary of the valuation including an explanation of best point estimate, value ranges and sources of valuation uncertainty;
- (e) an explanation of the key methodologies and assumptions used by the valuer when performing the valuation, how sensitive the valuation is to the choices of methodologies and assumptions and, where feasible, an explanation of how those methodologies and assumptions differ from those used for other relevant valuations including any preliminary resolution valuations;

- (f) any additional information which in the valuer's opinion would assist the resolution authority or competent authority for purposes of Article 24(1) to (3) and Article 26(1) to (3) of Regulation (EU) No 2021/23.

SECTION II

CRITERIA FOR THE VALUATION FOR THE PURPOSE OF ARTICLE 24(2)

Article 14

General principles

1. The valuations for the purpose referred to Article 24(2) of Regulation (EU) No 2021/23 shall be based on fair and realistic assumptions and shall seek to ensure that losses under the appropriate scenario are fully recognised. Where such valuation is available, it shall inform the determination of the competent authority or of the resolution authority as appropriate, that a CCP is 'failing or likely to fail' as referred to in Article 22(1)(a) of Regulation (EU) No 2021/23. Based on existing supervisory guidance or other generally recognised sources setting out criteria conducive to the fair and realistic measurement of different types of assets and liabilities, the valuer may challenge the rules, assumptions, data, methodologies and judgements on which the CCP based its valuations for financial reporting obligations or for the calculation of regulatory capital and capital requirements and disregard them for the purposes of the valuation.
2. The valuer shall determine the most appropriate valuation methodologies which may rely on the CCP's internal models and rules where the valuer deems it appropriate taking into account the nature of the CCP's risk management framework and the quality of data and information available.
3. The valuations shall be consistent with the applicable accounting and prudential regulatory framework.

Article 15

Areas requiring particular attention in the valuation

The valuer shall particularly focus on areas subject to significant valuation uncertainty which have a significant impact on the overall valuation. For those areas the valuer shall provide the results of the valuation in the form of best point estimates and, where appropriate, value ranges, as laid down in Article 9(3). Those areas shall include:

- (a) contracts as defined under Article 29(1) of Regulation (EU) No 2021/23;
- (b) Loans, the expected cash flows of which depend on a counterparty's ability, willingness or incentive to perform on its obligation;
- (c) repossessed assets, the cash flows of which are affected by both the asset's fair value at the time the CCP forecloses on the related security or lien, and the expected evolution of such value after foreclosure;
- (d) any other instruments measured at fair value where the determination of that fair value in accordance with accounting or prudential requirements on their marking to market or marking to model is no longer applicable or valid taking into account the circumstances;

- (e) goodwill and intangibles, where the impairment test may depend on subjective judgement, including as regards the reasonably attainable cash flow stream, discount rates, and the perimeter of cash generating units;
- (f) legal disputes and regulatory actions, the expected cash flows of which may be subject to varying degrees of uncertainty relating to their amount and/or timing;
- (g) items including pension assets and liabilities and deferred tax items.

Article 16

Factors affecting the valuation

1. The valuer shall take into account general factors that may affect the key assumptions on which the values of assets and liabilities in the areas referred to in Article 15 are based, including the following factors:
 - (a) the economic and industry circumstances affecting the CCP, including default events, or non-default events and relevant market developments;
 - (b) the CCP's business model and changes in its strategy;
 - (c) the CCP's asset selection criteria;
 - (d) circumstances and practices that are likely to lead to payment shocks;
 - (e) circumstances affecting capital requirements;
 - (f) the impact of the CCP's financial structure on the capacity of the CCP to retain assets and contracts for the expected holding period and the CCP's ability to generate predictable cash flows;
 - (g) the CCP's operating rules and loss allocation
 - (h) general or CCP-specific liquidity or funding concerns.
2. The valuer shall clearly separate any material unrealised gains identified in the valuation process, to the extent that those gains have not been recognised in the valuation and shall provide adequate information in the valuation report of the exceptional circumstances that have led to those gains.

SECTION III

CRITERIA FOR THE VALUATION FOR THE PURPOSE OF ARTICLE 24(3) AND OF ARTICLE 26(1), SECOND SUBPARAGRAPH

Article 17

General principles

1. The valuer shall assess the impact on the valuation of each resolution action that the resolution authority may adopt to inform the decisions referred to in Article 24(3) of Regulation (EU) No 2021/23. Without prejudice to the valuer's independence, the resolution authority may consult with the valuer in order to identify the range of resolution actions being considered by that authority, including actions contained in the resolution plan or, if different, any proposed resolution scheme.

2. To ensure a fair, prudent and realistic valuation, the valuer shall, where appropriate and in consultation with the resolution authority, present separate valuations that reflect the impact of a sufficiently diverse range of resolution actions.
3. The valuer shall ensure that when the resolution tools are applied or when the power to write-down or convert relevant capital or debt instruments is exercised, any losses on the assets of the CCP are fully recognised under scenarios that are relevant to the ranges of resolution actions being considered.
4. Where the values of the valuation diverge significantly from the values presented by the CCP in the financial statements, the valuer shall use the assumptions of that valuation, to inform the adjustments to the assumptions and to the accounting policies necessary for the preparation of the updated balance sheet required under Article 25(4) of Regulation (EU) No 2021/23, in a way consistent with the applicable accounting framework. As regards losses identified by the valuer which cannot be recognised in the updated balance sheet, the valuer shall specify the amount, describe the reasons underlying the determination of the losses and the likelihood and time horizon of their occurrence.
5. Where instruments of ownership and debt instruments or other unsecured liabilities are converted to equity, a valuation shall provide an estimate of the post-conversion equity value of new shares transferred or issued as consideration to holders of converted capital instruments or other creditors. That estimate shall form the basis for the determination of the conversion rate or rates pursuant to Article 33 of Regulation (EU) No 2021/23.

Article 18

Selection of the measurement basis

1. In selecting the most appropriate measurement basis or bases, the valuer shall take into account the range of resolution actions to be examined according to Article 17(1).
2. The valuer shall determine the cash flows that the CCP can expect on the basis of fair, prudent and realistic assumptions from existing assets and liabilities following adoption of the examined resolution action or actions, discounted at an appropriate rate as determined in accordance with paragraph 6.
3. Cash flows shall be determined at the appropriate level of aggregation, ranging from individual assets and liabilities to portfolios or businesses.
4. Where the resolution actions referred to in Article 17(1) require that assets and liabilities are to be retained by a CCP that continues to be a going concern entity, the valuer shall use the hold value as the appropriate measurement basis. The hold value may, if considered fair, prudent and realistic, anticipate a normalisation of market conditions.

The hold value shall not be used as the measurement basis where assets are transferred to a bridge CCP pursuant to Article 42 of Regulation (EU) No 2021/23, or where a sale of business tool pursuant to Article 40 of that Regulation is used.

5. Where the resolution actions referred to in Article 17(1) envisage the sale of assets the expected cash flows shall correspond to the disposal values envisaged for the expected disposal horizon.

6. The discount rates shall be determined having regard to the timing of cash flows, risk profile, financing costs and market conditions as appropriate to the asset or liability being measured, the disposal strategy considered and the CCP's post-resolution financial position.

Article 19

Specific factors relating to the estimation and discounting of expected cash flows

1. For the purpose of estimating cash flows, the valuer shall apply their expert judgement in determining key characteristics of the assets or liabilities being measured. The valuer shall also apply their expert judgement in determining how the continuation, potential renewal or refinancing, run-off or disposal of those assets or liabilities, as envisaged in the examined resolution action, affect those cash flows.
2. Where the resolution action envisages a CCP holding an asset, maintaining a liability, or continuing a business, the valuer may take into account factors potentially affecting future cash flows, including the following:
 - (a) changes in assumptions or expectations, as compared to those prevailing as of the valuation date, consistent with long-term historical trends and a reasonable horizon consistent with the contemplated holding period of assets or for the recovery of the CCP;
or
 - (b) additional or alternative valuation bases or methodologies that are considered appropriate by the valuer and consistent with this Regulation, including in the context of assessing the post-conversion equity value of shares.
3. As regards groups of assets and liabilities or businesses envisaged to be run off, the valuer shall take into account workout costs and benefits.
4. Where a CCP's situation prevents it from holding an asset or continuing a business, or where the sale is otherwise considered necessary by the resolution authority to achieve the resolution objectives, the expected cash flows shall be referenced to disposal values expected within a given disposal period.
5. The disposal value shall be determined by the valuer on the basis of the cash flows, net of disposal costs and net of the expected value of any guarantees given, that the CCP can reasonably expect in the currently prevailing market conditions through an orderly sale or transfer of assets or liabilities. Where appropriate, having regard to the actions to be taken under the resolution scheme, the valuer may determine the disposal value by applying a reduction for a potential accelerated sale discount to the observable market price of that sale or transfer. To determine the disposal value of assets which do not have a liquid market, the valuer shall consider observable prices on markets where similar assets are traded or model calculations using observable market parameters, with discounts for illiquidity reflected as appropriate.
6. The valuer shall have regard to factors that might affect disposal values and disposal periods, including the following:
 - (a) the disposal values and disposal periods observed in similar transactions, adequately adjusted to take into account differences in the business model and in the financial structure of the parties to those transactions;

- (b) advantages or disadvantages of a particular transaction that are specific to the parties involved or to a subset of market participants;
 - (c) particular attributes of an asset or business that may only be relevant to a potential purchaser, or to a subset of market participants;
 - (d) the likely impact of expected sales on the CCP's franchise value.
7. When assessing the value of businesses for purposes of the use of the sale of business or of the bridge CCP tool, the valuer may take into account reasonable expectations for franchise value. Such expectation for franchise value shall include that resulting from a renewal of assets, from a refinancing of an open portfolio, or from a continuation or resumption of business in the context of the resolution actions.
 8. A valuer assessing that no realistic prospect for the disposal of an asset or business can reasonably be expected, shall not be required to determine the disposal value, but shall estimate the related cash flows on the basis of the relevant prospects for continuation or run-off. This provision shall not apply to the sale of business tool.
 9. For parts of a group of assets or of a business that are likely to be liquidated under ordinary insolvency procedures, the valuer may consider the disposal values and disposal periods observed in auctions involving assets of a similar nature and condition. The determination of expected cash flows shall take into account illiquidity, the absence of reliable inputs for the determination of disposal values, and the resulting need to rely on valuation methodologies based on unobservable inputs.

Article 20

Methodology for calculating and including a buffer for additional losses

1. To address the uncertainty of provisional valuations conducted in accordance with points (a) to (g) of Article 24(3) of Regulation (EU) No 2021/23, the valuer shall include in the valuation a buffer to reflect facts and circumstances supporting the existence of additional losses of uncertain amount or timing. In order to avoid double counting of uncertainty, the assumptions supporting the calculation of the buffer shall be adequately explained and justified by the valuer.
2. In order to determine the size of the buffer, the valuer shall identify factors that may affect expected cash flows as a result of resolution actions likely to be adopted.
3. For the purposes of paragraph 2, the valuer may extrapolate losses estimated for a part of the CCP's assets to the remainder of the CCP's balance sheet. Where available, average losses estimated for assets of peer competitors may also be extrapolated, subject to the necessary adjustments for differences in the business model and financial structure.
4. The buffer should not bias the choices to be made by the resolution authority, including whether the conditions for resolution are met under Article 22 of Regulation (EU) 2021/23 and taking an informed decision on the appropriate resolution actions to be taken.

CHAPTER IV

SEPARATION OF THE VALUATION UNDER RESOLUTION AND VALUATION FOR THE APPLICATION OF THE NO-CREDITOR-WORSE-OFF PRINCIPLE. METHODOLOGY FOR CARRYING OUT THE VALUATION FOR THE APPLICATION OF THE NO-CREDITOR-WORSE-OFF PRINCIPLE

Article 21

General provisions

1. For the purposes of determining the treatment of shareholders and creditors under normal insolvency proceedings, the valuation shall only be based on information about facts and circumstances which existed and could reasonably have been known at the resolution decision date which, had they been known by the valuer, would have affected the measurement of the assets and liabilities of the CCP at that date.

For the purposes of this Regulation, ‘resolution decision date’ means the date on which the decision to resolve a CCP, is adopted pursuant to Article 71 of Regulation (EU) No 2021/23.

2. For purposes of determining the actual treatment of shareholders and creditors in resolution, the valuer shall rely on available information concerning facts and circumstances existing as of the actual treatment date or dates at which shareholders and creditors receive compensation (‘actual treatment date or dates’).
3. The reference date of the valuation shall be the resolution decision date, which may differ from the actual treatment date. Insofar as the valuer deems the impact of any discounting of the proceeds to be negligible, the undiscounted proceeds at the date the resolution action has been implemented may be directly compared with the discounted amount of hypothetical proceeds that shareholders and creditors would have received had the CCP entered normal insolvency proceedings at the resolution decision date.

Article 22

Inventory of assets and claims

1. The valuer shall establish an inventory of all identifiable and contingent assets owned by the CCP. Such inventory shall include assets for which the existence of associated cash flows is demonstrated or can reasonably be expected.
2. A list of all claims and contingent claims against the CCP, shall be made available to the valuer. That list shall classify all claims and contingent claims according to their priority levels and CCP segregation rules in normal insolvency proceedings. The valuer shall be allowed to enter into arrangements for specialist advice or expertise as regards the consistency of the ranking of claims with the applicable insolvency law.
3. Encumbered assets and claims secured by those assets shall be identified separately by the valuer.

Article 23

Steps of the valuation

For the purposes of determining whether a difference in treatment as referred to in Article 61(2) of Regulation (EU) No 2021/23 exists the valuer shall assess:

- (a) the treatment that shareholders and creditors in respect of which resolution actions have been effected would have received had the CCP, entered normal insolvency proceedings at the resolution decision date, disregarding any provision of extraordinary public financial support;
- (b) the value of the restructured claims following the application of resolution powers and tools, or of other proceeds received by shareholders and creditors as at the actual treatment date or dates, discounted back to the resolution decision date if deemed necessary to enable a fair comparison with the treatment referred to in point (a);
- (c) whether the outcome of the treatment in point (a) exceeds the outcome of the value referred to in point (b) for each creditor in accordance with the priority levels in normal insolvency proceedings as identified according to Article 22.

Article 24

Determination of the treatment of shareholders and creditors under normal insolvency proceedings

1. The methodology for conducting the valuation pursuant to point (a) of Article 23 shall be limited to determining the discounted amount of expected cash flows under normal insolvency proceedings.
2. Expected cash flows shall be discounted at the rate or rates reflecting, as appropriate, the timing associated with expected cash flows, prevailing circumstances, as of the resolution decision date, risk-free interest rates, risk premia for similar financial instruments issued by similar entities, market conditions or discount rates applied by potential acquirers and other relevant characteristics of the element or elements being valued ('relevant discount rate'). The relevant discount rate shall not apply where particular rates, if relevant for the purposes of the valuation, are specified in applicable insolvency law or practice.
3. The valuer shall take the following into account in the determination of the discounted amount of expected cash flows under normal insolvency proceedings:
 - (a) applicable CCP operating rules, contractual arrangements, insolvency law and practice in the relevant jurisdiction, which may influence factors such as the expected disposal period or recovery rates;
 - (b) reasonably foreseeable administration, transaction, maintenance, disposal and other costs which would have been incurred by an administrator or insolvency practitioner, as well as financing costs;
 - (c) the information on recent past insolvency cases of similar entities, where available and relevant;
 - (d) An estimate of the direct replacement costs incurred by clearing members, calculated in accordance with Article 25.

4. For contracts defined under Article 29(1) of Regulation (EU) No 2021/23 that are terminated under normal insolvency proceedings, the valuer shall determine their amounts consistently with the methodology set out in that Regulation, to the extent consistent with insolvency law and practice.
5. For other assets traded in an active market, the valuer shall use the observed price, except where specific circumstances hamper the marketability of the assets of the CCP, such as concentration, saturation and depth of the market.
6. For other assets not traded in an active market, the valuer shall consider a number of factors when determining the amount and timing of expected cash flows, including:
 - (a) prices observed in active markets where similar assets are traded;
 - (b) prices observed in normal insolvency proceedings or otherwise distressed transactions involving assets of a similar nature and condition;
 - (c) prices observed in transactions involving the sale of business or the transfer to a bridge CCP in a resolution context relating to similar entities;
 - (d) the likelihood of an asset generating net cash inflows under normal insolvency proceedings;
 - (e) expected market conditions within a given disposal period, including market depth and the ability of the market to exchange the relevant volume of assets within that period; and
 - (f) the length of a given disposal period shall reflect the implications of the applicable insolvency law, including the expected length of the liquidation process, or the characteristics of the relevant assets.
7. The valuer shall consider whether the financial condition of the CCP would have affected the expected cash flows, including through restrictions on the administrator's ability to negotiate terms with potential purchasers.
8. Where possible, and subject to any applicable provision of the relevant insolvency regime, the cash flows shall reflect the contractual, statutory, or other legal rights of creditors or normal insolvency practices.
9. The hypothetical proceeds resulting from the valuation shall be allocated to shareholders and creditors in accordance with their priority level and segregation rules under the applicable insolvency law, as provided for in Article 22.

Article 25

Direct replacement costs incurred by the clearing members under normal insolvency proceedings

1. In addition to the losses calculated under article 24 and for the purposes of determining whether a difference in treatment as referred to in Article 61(2) of Regulation (EU) No 2021/23 exists, the valuer shall also take into account a commercially reasonable estimate of the direct replacement costs incurred by clearing members to reopen their terminated net positions as referred to in point (c) of the first subparagraph of paragraph 3 of Article 61 of Regulation (EU) No 2021/23.
2. To that extent the valuer may consider the following additional costs for clearing members:

- (a) the hypothetical credit exposures of the clearing members to the CCP at the time of replacing the net positions, had these positions remained open at the CCP until that date;
 - (b) any liquidity and concentration costs incurred by clearing members when reopening these net positions;
 - (c) any material unavoidable operating costs incurred by clearing members associated to new connections or transactions between clearing members and any counterparty or CCP, including membership, trading, clearing, payment, settlement and custody fees;
 - (d) any additional material funding cost stemming from the difference in margin requirements and default fund contributions at the CCP and associated with the reopening of net positions with any counterparty or CCP.
3. Losses stemming from the CCP being wound up under normal insolvency proceedings and determined in Article 24 shall not be double counted and shall be excluded from direct replacement costs.

Article 26

Determination of the actual treatment of shareholders and creditors in resolution

1. The valuer shall identify all claims outstanding after the write-down or conversion of capital instruments and the application of any resolution actions and shall assign those claims to the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date. Except where the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date receive cash compensation as a result of the resolution, the valuer shall determine their actual treatment in accordance with paragraphs 2 to 4.
2. Where the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date receive equity compensation as a result of the resolution, the valuer shall determine their actual treatment by providing an estimate of the overall value of shares transferred or issued as consideration to the holders of converted capital instruments ~~or to the bailed-in creditors~~. That estimate may be based on the assessed market price resulting from generally accepted valuation methodologies.
3. Where the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date receive debt compensation as a result of resolution, the valuer shall determine the actual treatment by taking into account factors such as the changes in contractual cash flows that result from the write-down or conversion, or the application of other resolution actions, as well as the relevant discount rate.
4. For any outstanding claim, the valuer may take into account, where available and together with the factors described in paragraphs 2 and 3, prices observed in active markets for the same or similar instruments issued by the CCP under resolution or other similar entities.
5. The valuer shall also consider actual direct replacement costs incurred by clearing members and listed in Article 25(2) when comparing the actual treatment of shareholders and creditors in resolution with the valuation for the application of the no-creditor-worse-off principle.

Article 27

Valuation report

The valuer shall prepare a valuation report to the resolution authority which shall include at least the following elements:

- (a) a summary of the valuation including a presentation of valuation ranges and sources of valuation uncertainty;
- (b) an explanation of the key methodologies and assumptions adopted, and how sensitive the valuation is to these choices;
- (c) an explanation, where feasible, why the valuation differs from other relevant valuations, including the resolution valuations conducted in accordance with Regulation (EU) No 2021/23 and associated guideline or other regulatory or accounting valuations.

Article 29

Entry into force

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, XXXXX.

For the Commission

The President