



European Securities and  
Markets Authority

# Final Report

**Guidelines on the application of the circumstances under which a CCP is deemed to be failing or likely to fail (Article 22(6) of CCPRRR)**



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## **Executive Summary**

### **Reasons for publication**

These Guidelines, developed in accordance with Article 22(6) of 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 ('CCPRRR'), are addressed to competent authorities and aims to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union.

The Guidelines provide competent authorities with guidance on the circumstances under which they should determine a CCP being deemed to be failing or likely to fail.

These Guidelines clarify the different circumstances under which a CCP is deemed to be failing or likely to fail, one of the three cumulative conditions set out in Article 22(1) of CCPRRR for triggering a resolution action. For this purpose, these Guidelines list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR. These Guidelines do not constrain the ultimate discretion of the competent authority and of the resolution authority in making the determination that a CCP is failing or likely to fail.

ESMA published the Consultation Paper with its draft Guidelines under Article 22(6) of CCPRRR on 18 November 2021. The consultation period ended on 24 January 2022. ESMA received 6 responses. ESMA also held a public hearing on the Consultation Paper (along with other consultation papers issued by ESMA under CCPRRR) on 14 January 2022.

This Final Report provides the final Guidelines on the application of the circumstances under which a CCP is deemed to be failing or likely to fail under Article 22(6) CCPRRR.

ESMA also sought advice from the Securities and Markets Stakeholder Group. The Final Report (and the accompanying final Guidelines) assesses and takes into account, where appropriate, the feedback provided by the respondents to the consultation.

### **Contents**

Section I contains the mandate and background to the Guidelines.

Section II provides the Guidelines as well as the responses received and ESMA's feedback.

Section III sets out the Annexes. Annex I sets out a mapping table of legislative references and the legal mandate in Article 22(6) of CCPRRR. Annex II contains the cost and benefit

assessment. Annex III provides the outcome of the SMSG consultation and Annex IV provides the Guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is determined to be failing or likely to fail and the Guidelines on information sharing.

### **Next Steps**

These Guidelines have now been published.

Pursuant to Article 16(3) of ESMA Regulation, competent authorities must inform ESMA of whether they (i) comply, (ii) do not comply but intend to comply, or (iii) do not comply and do not intend to comply with these Guidelines. In case of non-compliance, competent authorities must state their reasons for non-compliance, within two months from the date of publication of the Guidelines on ESMA's website in all EU official languages of their reasons for not complying with the Guidelines.

## Legislative references and abbreviations

For the purposes of this Final Report the term ‘relevant authorities’ will be used in lieu of ‘the competent authority and/or the resolution authority’.

### Legislative references

CCP Recovery and Resolution Regulation (CCPRRR)	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 <sup>1</sup>
EMIR	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <sup>2</sup>
ESMA Regulation	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 <sup>3</sup>
Directive 2014/59/EU	Directive 2014/59/EU of the European Parliament and 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
RTS 153/2013	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 <sup>4</sup>

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<sup>1</sup> OJ L 22, 22.1.2021, p. 1–102

<sup>2</sup> OJ L 201, 27.7.2012, p. 1

<sup>3</sup> OJ L 331, 15.12.2010, p. 84

<sup>4</sup> OJ L 52, 23.2.2013, p. 41



Guidelines EBA FOLTF

Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU

### **Abbreviations**

EU	European Union
ESMA	European Securities and Markets Authority
CCP	Central Counterparty
ESFS	European System of Financial Supervision

## I. Background and mandate

1. The CCP Recovery & Resolution Regulation (CCPRRR) was published in the Official Journal on 22 January 2021 and entered into force on 12 February 2021<sup>5</sup>.
2. The recovery and resolution framework further reinforces the preparedness of CCPs and national authorities with the aim to mitigate financial distress and provide national authorities and ESMA with further insight into CCPs' preparations for stress scenarios. It also provides national authorities with powers to prepare for the potential resolution of a CCP and to deal with the declining health of a CCP in a coordinated manner, thus, to contribute to the smooth functioning of financial markets.
3. These Guidelines are based on Article 22(6) of CCPRRR. The objective of these Guidelines is to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail.
4. These Guidelines clarify the different circumstances under which a CCP is deemed to be failing or likely to fail, one of the three cumulative conditions set out in Article 22(1) of CCPRRR for triggering a resolution action. In particular, they aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered with respect to the circumstances under which a CCP is deemed to be failing or likely to fail. For this purpose, these Guidelines list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR.
5. Given the need to provide guidance on the consultation and information exchange between the competent authority and the resolution authority for the purpose of making a determination if a CCP is failing or likely to fail, the scope of the final Guidelines is expanded beyond the scope set forth by Article 22(6) of CCPRRR. Thus, ESMA has decided to issue Guidelines 8 and 9 pursuant to Article 16(1) of the ESMA Regulation in line with which ESMA may issue guidelines with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law. The additional guidance provided in Guidelines 8 and 9 is limited to the information exchange between authorities established in the same jurisdiction and its provisions are without prejudice to any rules for exchanging information between authorities across jurisdictions.

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<sup>5</sup> REGULATION (EU) 2021/23 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132  
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3ATOC)

6. These Guidelines do not constrain the ultimate discretion of the competent authority and of the resolution authority in making the determination that a CCP is failing or likely to fail. The identification that an objective element enlisted in one of the Guidelines has materialised in respect of a particular CCP should not lead the competent authority nor the resolution authority, as the case may be, to the automatic determination that the CCP is failing or likely to fail or result in an automatic application of resolution tools. Similarly, the objective elements listed in these Guidelines are not exhaustive and should remain open since not all crisis circumstances can be reasonably foreseen.
7. When developing these Guidelines, ESMA, in line with Article 22(6) of CCPRRR, also took into account the Guidelines EBA FOLTF.
8. ESMA published the Consultation Paper with its draft Guidelines under Article 22(6) of CCPRRR on 18 November 2021. The consultation period ended on 24 January 2022. ESMA received 6 responses. ESMA also held a public hearing on the Consultation Paper (along with other consultation papers issued by ESMA under CCPRRR) on 14 January 2022.
9. This Final Report provides the final Guidelines on the application of the circumstances under which a CCP is deemed to be failing or likely to fail under Article 22(6) CCPRRR.

### **I.1 Summary of general consultation responses**

10. There is an overall support expressed by respondents regarding the proposed draft guidelines in the Consultation Paper, however some technical aspects are noted in the responses and they are specified in relation to each of the Guidelines.
11. One respondent notes that the Guidelines could be improved in objectivity and could better take into account the costs and impact to the marketplace if a CCP is put in resolution prematurely.
12. Some respondents note that the timing for determining whether a CCP is failing or likely to fail should be towards the end of the recovery process and that it should be clear that its available resources are exhausted to a large extent or that they are insufficient to restore its viability. In the respondents' view, the CCPs should not be prevented from executing their recovery plans or be interrupted in their actions undertaken in line with these approved plans within the recovery phase. In the respondent's view, it is important to allow CCPs to perform their default management processes and apply their recovery tools to the highest possible degree. Hence, the decision regarding when to invoke resolution should only be taken if it is clearly necessary to provide for continuity of clearing services and market stability.

## **I.2 ESMA's feedback**

13. On the overarching comments received, ESMA has adjusted where considered relevant to increase objectivity.
14. ESMA is mandated under CCPRRR to issue Guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail. Therefore, an assessment as to the effect of resolution actions falls outside the scope of the mandate.
15. ESMA notes the comments on timing for determining whether a CCP is failing or likely to fail has been considered under Guidelines 3 and 4 below.

## **II. Guidelines as per Consultation Paper, responses and feedback**

### **II.1 General considerations for the determination under Article 22(3) (a) to (e) of CCPRRR.**

16. When the resolution authority makes the determination whether a CCP is failing or likely to fail, it should consider the Guidelines 1 to 7 and in particular the objective elements listed in Guidelines 3 to 7 of these Guidelines in relation to the CCP's recovery tools, financial resources, liquidity, operational capacity and other aspects with respect to the requirements for continuing authorisation based on the information that the resolution authority has at its disposal.

#### **II.1.1 Guideline 1 Objective elements for determination that a CCP is failing or likely to fail**

17. Guideline 1 proposed general considerations in the form of objective elements for determining whether a CCP is failing or likely to fail and that should be applied in the process of determining a CCP failing or likely to fail under Guidelines 3-7.

#### **Guideline 1 as proposed in the Consultation Paper**

For the purpose of making a determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3)(a)-(e) the relevant authorities should assess the available objective elements relating to each of the following areas as further specified in these Guidelines:

- a. the availability and adequacy of the CCP's recovery tools;
- b. the pre-funded and committed financial resources still available to the CCP;

- c. the liquid resources and liquidity arrangements still available to the CCP;
- d. the operational capacity of the CCP; and
- e. other requirements for continuing authorisation.

18. In accordance with Article 22(1) (a) of CCPRRR, the determination that a CCP is failing or is likely to fail can be done by any of the following:

- a. the competent authority, after consulting the resolution authority; or
- b. the resolution authority after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion.

### **II.1.2 Guideline 2 Comprehensive analysis**

19. Also, Guideline 2 proposed general consideration that should be applied in the process of determining a CCP failing or likely to fail under Guidelines 3-7.

#### **Guideline 2 as proposed in the Consultation Paper**

The relevant authorities should, decide whether the CCP is failing or likely to fail on the basis of a comprehensive assessment of both qualitative and quantitative objective elements, taking into account all circumstances and information available at such time and to the extent relevant for the CCP.

20. The objective elements listed in these Guidelines should be carefully analysed on a comprehensive basis. The determination that a CCP is failing or likely to fail should remain an expert judgement and should not be automatically derived from any of the objective elements alone. Furthermore, the set of objective elements listed in these Guidelines does not prevent the relevant authorities from taking into account other considerations signalling that a CCP is failing or likely to fail.

21. The prevailing circumstances requiring the relevant authorities to undertake the assessment needed to decide on the resolution of the CCP should be taken into consideration. Typical circumstances which may result in the failure of the CCP include:

a) the inability of the CCP to manage the default of one or more clearing members (i.e. default events);

b) the inability of the CCP to address a non-default event resulting in unmanageable losses for the CCP. A large range of events could lead to non-default losses (i.e. non-default events), such as those related to:

(i) the failure of, or loss of access to, one or more non-clearing counterparties, such as liquidity providers, settlement banks or platforms, custodians, investment agents, concentration banks or service providers;

(ii) custodial risk;

(iii) settlement risk;

(iv) investment risk;

(v) operational risk events (e.g. IT failures, fraud, cyber-attacks, mistakes in margin calls, erroneous booking of an investment trade);

(vi) legal risk.

22. These events could occur in isolation or jointly and the recovery tools and resources available to the CCP to manage these events could differ. Consequentially, when determining whether the CCP is failing or is likely to fail, the relevant authorities should apply the objective elements in these Guidelines to the extent justified depending on the prevailing circumstances of the CCP.

### **II.1.3 Summary of consultation responses**

#### **II.1.3.1 Available objective elements**

23. Several respondents generally agree with the general considerations proposed in Guidelines 1 and 2 determining if a CCP is failing or likely to fail as long as such assessment is made in a timely manner and before a CCP can deteriorate further. One respondent notes that such determination of resolution is only made after a comprehensive assessment of both qualitative and quantitative objective elements based on information available at such time.
24. One respondent notes that Guideline 1 refers to “available objective elements”, and that the emphasis on objective measures is crucial and that in order to be clear and predictable, the test must be based on hard evidence as to the CCP’s financial ability to continue to provide clearing services in a sound manner.
25. A respondent also notes that some objective elements are easier to identify in a timely manner than others and believe it would be valuable for the relevant authority to monitor data that may serve as early warning signals such as participants closing out positions, or transaction volumes dropping below a certain threshold in order to be able to apply the consideration described in Guidelines 1 and 2.

### II.1.3.2 Expert judgement

26. A few respondents welcome that the Guidelines recognise that the determination of whether a CCP is failing or likely to fail should remain an expert judgement and should not be automatically derived from any of the objective elements alone and that this expert judgment, as opposed to an automatic determination, is important for dealing with what would likely be a very extreme situation such as the resolution of a CCP.

### II.1.3.3 Timing

27. A few respondents highlight that regarding the timing of such determination, the CCP in question should already be towards the end of the recovery process and it should be clear that its available resources are exhausted to a large extent or that they are insufficient to restore its viability.
28. Such respondents further note that a CCPs should not be prevented from executing their recovery plans or be interrupted in their actions undertaken in line with these approved plans within the recovery phase as it is important to allow CCPs to perform their default management processes and apply their recovery tools to the highest possible degree.
29. One respondent is highly concerned by the prospect of a resolution authority intervening before the CCP has had the opportunity to fully exhaust the arrangements and tools provided for under its recovery plan and rulebook that have been carefully calibrated to address stress events and appropriately incentivize the active participation of market participants in the default management and recovery process and argues that there should be safeguards for CCPs protecting them from too early or unnecessary intervention by the resolution authorities which could very well lead to their inappropriate takeover or other harmful treatment to the detriment of the CCPs and their participants. It is important that no single criterion from the Guidelines should automatically trigger resolution. The CCPs' rulebooks provide not only the proper balance of incentives for all participants, but also as much certainty as is possible during periods of stress.
30. It is noted, along the same line, that it is essential to avoid premature intervention that would itself be damaging to financial stability, to ensure explicitly in the Guidelines that all such tools and plans should be fully respected and allowed to function, rather than cut short before they have had a chance to succeed. Such respondent also note that the authorities should take care to assess what private-sector alternatives are available, once it does become relevant to consider resolution.
31. Finally, one respondent notes that a CCP should only be put in resolution once the CCP's recovery process is exhausted or it is clear that it will be insufficient to restore the CCP's viability and that this is reflected in the FSB's guidelines on resolution<sup>6</sup> which prescribe

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<sup>6</sup> [https://www.fsb.org/wp-content/uploads/r\\_141015.pdf](https://www.fsb.org/wp-content/uploads/r_141015.pdf)

that resolution is triggered when “*recovery plan and any rules and procedures for loss allocation have failed to return the FMI to viability or have not been implemented in a timely manner*”, or when recovery measures are “*not reasonably likely to return the FMI to viability or would otherwise be likely to compromise financial stability*” and they suggest that this reference to the FSB guidelines should be included in the final Guidelines.

#### **II.1.4 ESMA’s feedback**

32. ESMA notes the support of available objective elements and adds that that any decision should be based on hard evidence to the extent possible. The respondents welcome the approach that the decision is an expert judgement and not an automatically generated one if a trigger is met. ESMA notes that due to the decision being an expert judgement, it should be based on objective elements but cannot be entirely evidence driven as the decision in the end is an expert judgement taken by the resolution authority.
33. ESMA notes the comments on exhaustion of the recovery plan before resolution actions are activated. ESMA would, however, like to note that CCPRRR does not exclude the possibility for the relevant authority to take some resolution action prior to the end of the recovery phase. For instance, Article 22(5) of CCPRRR states that the resolution authority may also take a resolution action where it considers that the CCP has applied or intends to apply recovery measures which could prevent the CCP’s failure but cause significant adverse effects to the financial system of the Union or of one of more of its Member States. Similarly Article 23(1) of CCPRRR provides that the resolution authority shall take all appropriate measures to apply the resolution tools referred to in Article 27 of CCPRRR and exercise the resolution powers referred to in Article 48 of CCPRRR noting that all contractual obligations and other arrangements in the CCP’s recovery plan are enforced, to the extent that they have not been exhausted before entry into resolution, unless the resolution authority determines that in order to achieve the resolution objectives in a timely manner it would be more appropriate to refrain from enforcing certain contractual obligations under the CCP’s recovery plan or otherwise deviate from it or to apply resolution tools or exercise the resolution powers as referred to in Article 23(1)(a)(i) and (ii) of CCPRRR.
34. In accordance with Article 22(6) of CCPRRR ESMA shall issue guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union. A limitation to only apply the Guidelines to determine whether a CCP is deemed to be failing or likely to fail after all contractually agreed obligations and other arrangements in the CCP’s recovery plan have been enforced would not be compliant with CCPRRR. Consequently, ESMA will not change the time when the Guidelines apply and will not qualify the application of the Guidelines to a point in time only after the recovery measures are exhausted.

35. ESMA does not see a need for substantive changes to Guidelines 1 and 2. However, on the basis of the input received and to ensure further clarity, ESMA made some drafting improvements and included further explanation in the text of the Guidelines.
36. The revised Guidelines 1 and 2 are set out in the Guidelines.

## **II.2 Determinations under Article 22(3)(a) to (e) of CCPRRR**

### **II.2.1 Determination under Article 22(3)(c) of CCPRRR; Guideline 3 on availability and adequacy of the CCP's recovery tools**

37. In line with Article 22(3)(c) of CCPRRR, a CCP should be considered as failing or likely to fail if the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures as determined by the competent authority or the resolution authority under Article 22(1)(a) of CCPRRR.

#### **Guideline 3 as proposed in the Consultation Paper**

When assessing the ability of the CCP to restore its viability through the implementation of its recovery measures, the relevant authorities should base their determination on objective elements including:

- a. the recovery tools and measures that have been exercised by the CCP and their success in bringing the CCP closer to a matched book, restoring its financial position, addressing or allocating losses or covering liquidity shortfalls;
- b. the recovery tools and measures that are still available to the CCP and the ability of the CCP to exercise them, including the CCP's legal powers and operational capacity to do so;
- c. the ability of stakeholders who are called to bear losses, to incur costs or contribute to cover liquidity shortfalls when the recovery plan is implemented and continue participating in the CCP's recovery according to their contractual obligations, and the potential financial stability risks related to the potential inability of these stakeholders to bear the losses and costs, to the extent the information is available.

#### **II.2.1.1 Summary of consultation responses**

38. There is an overall agreement on the principles highlighted in Guideline 3, however a few aspects are noted by the respondents as detailed below.

## I. Recovery Plans

39. Whilst supporting Guideline 3, one respondent notes that it is essential not to 'second-guess' recovery plans, which exist for good reason and are performed to well established regulatory standards around the world. Interfering with these plans will only add to financial instability, rather than reduce it.
40. One respondent does not agree and would like to push back on the consideration of the adequacy of the CCP's recovery tools in determining if a CCP is failing or likely to fail. Such respondent argues that CCPs carefully design their recovery plans *ex ante* and the plans are subject to scrutiny and approval of the competent authority, supervisory college and resolution authority which should guarantee their adequacy. Therefore, CCPs should not be prevented later from executing these plans or being interrupted in their actions undertaken in line with these approved plans within the recovery phase. It is important to allow CCPs to perform their default management processes and apply their recovery tools to the highest possible degree.
41. Another respondent notes that specific consideration should be given to the recovery tools still available to the CCP, and the *implications on overall market stability should they be exercised* in making an assessment on whether a CCP is able to restore its viability. The respondent further notes that in periods of extreme market stress, the use of a given recovery tool may restore the viability of a CCP, but at the cost of market stability, which may achieve more harm than good, and may put the viability of other market participants, including other CCPs, at risk.

## II. Ability to bear losses

42. The respondent also notes that the principle of assessing the ability of stakeholders who are called to bear losses to actually incur these losses may form part of the impact assessment of a recovery tool on market stability, but it is important to formulate *how this will be done in a period of market stress*, and within the limited available time given the information available to the relevant authorities will likely be stale. The respondent further highlights the need for early warning indicators in order to be able to obtain the relevant and current information from stakeholders such as capital ratios and liquidity status, in order to be able to make an accurate assessment.
43. Another respondent notes that in addition to the ability of stakeholders to cover potential liquidity shortfalls in the recovery other liquidity providers such as credit facilities provided by the Central Bank should also be considered.

## III. Information

44. Some respondents note the qualification 'to the extent the information is available' under point c) of Guideline 3 and point out that the information to be required from a CCP for

the assessment of this element should only include information readily available at the CCP.

#### II.2.1.2 ESMA's feedback

45. ESMA notes the comments on the ability of the CCP to restore its viability through the implementation of its recovery measures and refers to the assessment under Guidelines 1 and 2 on the interplay between the use of recovery plans and resolution measures.
46. ESMA notes the reflection on how to assess the ability to contribute in a situation of market stress, within a time limit and based on the information available at this point in time and has provided further guidance on this as part of the explanatory text of Guideline 3.
47. ESMA also notes the request to consider credit facilities provided by the Central Bank and has added this aspect to Guideline 3.
48. The revised Guideline 3 is set out in the Guidelines.

### **II.2.2 Determination under Article 22(3)(a) and (d) of CCPRRR; proposed Guideline 4 and Guideline 5 on financial resources**

49. In accordance with Article 22(3)(a) and (d) of CCPRRR, a CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances apply:
  - (a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of EMIR; or
  - (d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due.
50. Both Guidelines 4 and 5 provide guidance on the application of Article 22(3)(a) and (d) of CCPRRR, they however refer to different types of required financial resources of the CCP; Guideline 4 lists objective elements to be assessed with respect to the stock of available financial resources at the CCP, and Guideline 5 focuses on the forecasted flows of liquid resources that will impact the liquidity risk profile of the CCP and the level of liquid resources available to the CCP.

#### II.2.2.1 Guideline 4 The pre-funded and committed financial resources available to the CCP

<b>Guideline 4 as proposed in the Consultation Paper</b>
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In conjunction with the assessment of the CCP's recovery tools, when determining whether the CCP is likely to be unable to pay its debts or other liabilities as they fall due, the relevant authorities should assess the pre-funded and committed financial resources available to the CCP and base this assessment on objective elements, including:

- a) the amount of both pre-funded and separately committed financial resources available to the CCP to undertake recovery in each case to the extent they meet the financial resources requirements imposed on the CCP in accordance with Article 43 of EMIR and Article 35 of the RTS 153/2013;
- b) an assessment of market conditions that may impede the CCP converting between collateral asset classes as swiftly as necessary to meet its related obligations or realising the value of the collateral it holds under the prevailing market conditions;
- c) in relation to committed financial resources, the ability of the committed parties (such as clearing members, the parent company, shareholders or liquidity providers) to actually transfer the committed amounts to the CCP within the timeframe required under the prevailing conditions;
- d) in relation to its pre-funded financial resources (CCP's own contributions and/or contributions of its clearing members), the ability of the CCP to replenish them within a reasonable time frame to a level that can deliver continuity of critical functions and meet regulatory compliance;
- e) where the prevailing circumstances of the CCP involve a default event, indicators that the CCP could only return to a matched book by actions that would require resources in excess of its available pre-funded and committed financial resources;
- f) where the prevailing circumstances of the CCP involve a default event and/or a non-default event, the sufficiency of the pre-funded and committed resources to meet the realised and expected losses and, if necessary, recapitalise the CCP; and
- g) where the prevailing circumstances of the CCP involve a non-default event, the sufficiency of its capital and the willingness and ability of the committed parties to absorb the realised and expected losses or recapitalise the CCP following the loss event.

51. The objective elements to assess with respect to the pre-funded and committed financial resources will depend on the content of the recovery plan, which may vary from one CCP to another. Some recovery plans may, for instance, contain parental guarantees or commitments to inject capital at the start or during the recovery process.
52. Where the prevailing circumstances of the CCP involve a non-default event, most CCPs would in addition to the resources envisaged under CCPRRR, rely on capital injections

from parent companies, shareholders or insurance policies to address uncovered non-default losses. Some CCPs have developed arrangements to allocate certain business risk losses – such as losses associated with the investment and custody of participant assets – to their clearing participants beyond some predefined thresholds.

#### II.2.2.2 Guideline 5 Liquid resources and liquidity arrangements available to the CCP

##### **Guideline 5 as proposed in the Consultation Paper**

The relevant authorities should determine, according to the CCP's operating rules and considering the relevant market conditions, whether the CCP is likely to meet its settlement obligations in all relevant currencies as they fall due and/or is able to recourse to its usual liquidity tools.

This assessment should be based on objective elements, including amongst others, significant adverse developments affecting the available liquidity risk profile and the liquid resources of the CCP, and its compliance with the minimum requirements for liquidity as stipulated in Article 44 of EMIR, as further specified by Article 32 of RTS 153/2013.

The assessment should consider, where relevant:

- (a) forecasted contractual inflows arising from payments due to the CCP, both in relation to cleared positions and other business activities;
- (b) forecasted outflows arising from payments due from the CCP, including withdrawals of collateral and settlement obligations;
- (c) liquid resources available to the CCP and its ability to convert between asset classes and currencies as necessary to meet its obligations;
- (d) liquidity lines or other arrangements available to the CCP and the certainty of these arrangements in the prevailing market and economic conditions.

53. The liquidity tools to be considered could for instance include foreign exchange arrangements and full market access (i.e. the ability to buy and/or sell securities immediately or to make use of repos and reverse repos).

#### II.2.2.3 Summary of consultation responses

54. There is an overall support for the proposed Guidelines considering the financial resources of the CCP's in determining if a CCP is failing or likely to fail. However, a few aspects are noted by the respondents, as detailed below.

55. One respondent reiterates the points on timeliness of the determination and any potential impact on market stability of any approaches that rely on other stakeholders and parties absorbing losses to restore the viability of a CCP.

I. Non-default event may lead to clearing members leaving the CCP

56. One respondent notes that a non-default event may erode the trust in a CCP, which may impact the long-term viability of the CCP if market participants choose to move positions and financial resources to competing services if any exist. It is important that this information is considered by using approaches identified in paragraph 36 of the Consultation Paper, such as observing quantitative data like clearing volumes, trends in margins held at the CCP and the availability of an alternative service at a different CCP, alongside qualitative information arising from discussions with clearing members and clients. Such respondent proposed in relation to paragraphs 35 and 26 of the Consultation Paper, to add a caveat that clearing members leaving the CCP will not necessarily mean a resolution is necessary as long as the process is managed orderly and the CCP fulfils authorisation requirements and is likely to do so in the future.

II. Converting between collateral assets

57. One respondent notes the assessment of market conditions that may impede the CCP converting between collateral assets classes as swiftly as necessary to meet its related obligations or realising the value of the collateral it holds under such conditions and believes that such an assessment during extreme market volatility would be hard to conduct.

58. In addition, it is noted that a CCP will always place its holdings on high graded and highly liquid collateral asset classes however market conditions at such time would usually dictate the value and rate at which assets can be liquidated.

59. Hence, such respondents do not believe that this should be part of the assessment to determine a CCP in resolution since there are many external factors that could influence the result of that market assessment which could wrongly place a CCP in resolution. Therefore, they believe that ESMA's assessment should be limited to the market conditions but not to the CCP's ability to convert between asset classes.

II.2.2.4 ESMA's feedback

60. ESMA notes the request to qualify non-default losses with objective quantitative data, as a non-default event, could lead to a loss of confidence, and whilst point (g) of proposed Guideline 4 refers to "where the prevailing circumstances of the CCP involve a non-default event, the sufficiency of its capital and the willingness and ability of the committed parties to absorb the realised and expected losses or recapitalise the CCP following the

loss event”. ESMA would like to note that this relates to available financial resources and this assessment should be an objective assessment based on objective elements.

61. ESMA notes the reservation in relation to the ability to convert collateral assets and that this may be a result of many external factors. In this respect it should be noted that such external factors may affect the viability of a CCP and its access to financial resources and is a valid marker. ESMA has however amended the element to focus on the inability for a CCP to convert as this could result in the CCP being unable to pay its debts or other liabilities as they fall due.
62. The revised Guidelines 4 and 5 are set out in the Guidelines.

### **II.2.3 Determination under Article 22(3)(b) of CCPRRR; proposed Guideline 6 on operational capacity of a CCP**

63. In accordance with Article 22(3)(b) of CCPRRR, a CCP should be considered as failing or likely to fail if the CCP is unable, or is likely to be unable, to provide a critical function.

#### **Guideline 6 as proposed in the Consultation Paper**

The relevant authorities should assess the circumstances and events which could negatively impact the CCP’s operational capacity to continue providing critical functions, even without infringing financial resources and liquidity arrangements, and base this assessment on objective elements, including amongst others:

- a) the CCP’s inability to fulfil its obligations towards its participants, including to call, receive or transfer back collateral, and/or to undertake recovery measures, due to persistent operational constraints;
- b) the loss of confidence of its clearing participants and other stakeholders in the CCP’s ability to manage risks, operationally and/or financially; or
- c) the CCP’s inability to recover from an operational event (such as a cyber-attack) or to address severe operational constraints in a timely manner.

64. In the context of fulfilling its obligations towards its participants, including calling, receiving or transferring back collateral, the CCP’s operational constraints may arise from the failure of systems, the failure or loss of access to settlement banks, a cyber-attack or an event that means the CCP lacks available or sufficiently experienced operational staff and an event which could negatively impact the CCP’s operational capacity to continue providing critical functions may also create a risk for financial stability.
65. To be considered as failing or likely to fail, a CCP’s loss of business to competitors should:

- a) be massive and uncontrolled by the CCP; or
  - b) represent a risk to the viability of the CCP, with a possible sudden insolvency of the CCP if it is unable to fulfil its obligations.
66. The CCP's loss (directly or indirectly) of clearing participants and other stakeholders' confidence, leading to a situation where the CCP is no longer able to carry out its business activities, may be evidenced by:
- a) a decrease in transactions submitted for clearing;
  - b) the intention of liquidity providers to decrease the amount of the CCP's liquid resources;  
or
  - c) the intention of clearing members to terminate their contracts with the CCP.
67. A CCP may be unable to address severe operational constraints in a timely manner, where for instance business continuity plans prove not to be adequate to restore the CCP's operations.

#### II.2.3.1 Summary of consultation responses

68. The respondents agree with the proposed Guideline 6 in principle and in particular more respondents support points a) and c) of Guideline 6 but raise issues in relation to point b).

#### III. Loss of confidence

69. Several respondents challenge ESMA's proposal to assess "the loss of confidence of its clearing participants and other stakeholders in the CCP's ability to manage risks, operationally and/or financially" and they believe that such assessment goes beyond ESMA's mandate under CCPRRR and is not an indication that a CCP is failing or is likely to fail.
70. One respondent clarifies this by noting that Points 22 and 23 of Section C of the Annex included in CCPRRR ("*Matters that the resolution authority is to consider when assessing the resolvability of a CCP*") specify that, when assessing the resolvability of a CCP, the resolution authority should assess to what extent the impact of a CCP resolution on the financial system, the economy and on financial market's confidence can be evaluated. Therefore, to the respondent's understanding the potential financial market's loss of confidence should be considered as a *consequence* of the resolution that is to be analysed ex-ante, rather than a *trigger* for resolution.
71. In addition, the respondent also points out that Article 22(3) of CCPRRR specifies that a CCP is deemed to be failing or likely to fail if (a) it infringes, or is likely to infringe, its

authorisation requirements in a way that would justify the withdrawal of its authorisation; (b) it is unable, or is likely to be unable, to provide a critical function; (c) it is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures; (d) it is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due; (e) it requires extraordinary public financial support. Such respondent notes that a loss of stakeholders' confidence does not seem to be foreseen among the above listed circumstances. This loss of confidence would by definition be unilateral and have commercial or other interests behind, disguised in a different manner.

72. The three indicators included in paragraph 36 of the Consultation Paper, i.e. a decrease in transactions submitted for clearing, the intention of liquidity providers to decrease the amount of the CCP's liquid resources, as well as the intention of clearing members to terminate their contract with the CCP may not be directly related to the CCP's business activities or its inability to perform at the required level. It may rather be linked to clearing members' choice of clearing or other commercial decisions. Furthermore, these indicators may be very challenging to measure and not accurately reflect the level of confidence in the CCP's capacity to manage risks.
73. A respondent notes that it is the members' choices on where to clear and that this is strictly a commercial decision. Their decision to move existing contracts to a different CCP is "controlled" through their contractual obligations under a CCP's rulebook, therefore there cannot be circumstances whereby "loss of business to a competitor CCP could be uncontrollable" as noted in paragraph 35 of the Consultation Paper.
74. Another respondent notes similarly that paragraph 35 of the Consultation Paper, which states that a CCP's loss of business to the competitors may be a reason to consider the CCP as failing or likely to fail, may have a negative impact on competitiveness as there could be many reasons behind a clearing member's decision to move its business to another CCP. Furthermore, the paragraph refers to the loss of business that should be "*massive and uncontrolled*". Such respondent notes that any clearing member always has the obligation to settle any open positions, and as a consequence even if such member intends to move its business, it can only do so with future trades that offset the original ones. Therefore, it is not clear how this process could result as being "*uncontrolled*". In addition, it is not fully clear if this paragraph refers to just moving business to another CCP or actually terminating the business relation with the CCP. In case of the latter, CCPs usually have notice periods in place with the objective of preventing an uncontrolled loss of business.
75. Furthermore, if there is a decrease in transactions submitted for clearing within a particular service or the majority of clearing members decide to terminate contracts within that service, the CCP can activate its orderly wind-down plan, as it should be clear that a CCP without any business would not have any critical functions anymore.
76. Similarly, the intention of market participants to alter their existing arrangements with CCPs are notoriously performative, and to a large extent dependent on the attitude of the

authorities and the marketplace overall towards any institution (CCP or otherwise) that may be in difficulty at a given point in time. Moreover, those intentions may well reflect expectations as to the performance of other market participants, rather than the CCP *per se*.

77. One respondent notes that the loss of confidence in the CCP is supposed to be evidenced by a decrease in transactions submitted for clearing, the intention of liquidity providers to decrease the amount of the CCP's liquid resources or the intention of clearing members to terminate their contracts with the CCP. Such respondent identified few issues with this element of a *decrease in transactions submitted for clearing*, where first of all, a loss of confidence is not an objective measure that can be quantified easily, and it would be very difficult to set a reasonable threshold of such a decrease to apply this indicator in a consistent manner and secondly, a decrease in transactions submitted for clearing can result from members' risk assessments in what is likely to be a volatile market in these circumstances – not due to a loss of confidence in their CCP. Finally, the respondent notes that a reduction of transaction volume which is not below a certain acceptable level to the CCP does not indicate that the CCP is failing as this is depending on the CCP membership structure, fees might be based on other criteria and not volume of transactions which would mean that a reduction in the volumes would not necessarily translate into a CCP being financially worse off or even more so failing.
78. It is noted by a respondent that indicators which rely on intentions of liquidity providers or clearing members would be even more difficult to define and measure, thus not meeting the requirement of the assessment elements being objective.
79. Another respondent provides a similar argument noting that a decrease in transactions submitted for clearing is not an appropriate indicator to evaluate the operational viability of a CCP given potential "buffer" CCPs might have and/or membership structure whereby fees are not directly linked to volumes of transactions executed with that CCP.
80. One respondent notes that a reduction in the number of contracts or transactions submitted for clearing may reflect a reduction of positions and risk, rather than a judgement by market participants (which could itself be overly conservative and not based on all applicable information) as to the CCP's viability. Such respondent note that there is no exact, quantifiable measure for loss of confidence.
81. One respondent would like to delete point b) from Guideline 6 or at least to strongly advocate that the elements contained in this point are treated as an additional element for consideration for the resolution authority and not the main driver of the assessment due to the methodological problems they entail.
82. Another respondent notes that if clearing members plan to leave the CCP, they have the right to do so as long as they honour their existing obligations towards the CCP. Should the clearing members' decision to leave endanger the existence of the CCP, the CCP can activate its orderly wind-down plan, as it should be clear that a CCP without any

business would not have any critical functions anymore. Therefore, such respondent would argue that the indicators referred to above should only be taken into account as additional elements but not as substantial evidence underlying a failure or like to fail determination

83. Another respondent notes that it is generally reasonable to include the potential loss of confidence of clearing participants and other stakeholders in the assessment but point out the difficulty of measuring confidence and setting appropriate thresholds and therefore recommend assessing this element using both quantitative (e.g. decrease in transactions submitted for clearing) and qualitative indicators (e.g. information gathered through exchanges with clearing members). Such respondent suggest that the assessment should not be limited to the three indicators listed in paragraph 36 of the Consultation Paper, as these may not fully or accurately reflect the level of confidence in the CCP's ability to manage operational and/or financial risks. For instance, there may be other reasons than a loss of confidence explaining a decrease in transactions submitted for clearing hence the loss of confidence can only be an additional, compounding factor in the assessment.

#### IV. Cyber attack

84. One respondent notes that given the consequences of proceeding to an attempt at resolution, it is essential to minimise subjectivity in the extremely challenging circumstances of acting in a timely manner. For instance, it is not clear how one would determine instantaneously whether a CCP was unable to recover from a cyber-attack.

##### II.2.3.2 ESMA's feedback

85. ESMA agrees with the concerns raised by the respondents on the aspect of the loss of confidence and would agree that a normal exit of a CCP should indeed be manageable within the rules of the CCP. The aspect ESMA was considering is where exits could negatively impact the operational viability of the CCP, hence not in business as usual type of situation where a clearing member exits, but more detrimental situations where there is a general loss of confidence of in the CCP that effects the operational viability of the CCP. ESMA is however of the view that where the operational viability of the CCP is negatively affected due to loss of confidence leading to a consistent loss of clearing members making the viability of the CCP uncertain, and this making CCP unable, or likely to be unable, to provide a critical function due to such a loss of confidence, such a situation would need to be assessed. ESMA has amended the proposed Guidelines to ensure the trigger for an assessment is only where the three conditions are met, i.e. where there is a significant decrease in transactions submitted for clearing or significant reduction in clearing members *and* where this is due to a loss of confidence in the CCP including the CCPs ability to manage risks, operationally and/or financially *and* where this decrease in cleared transactions or reduction in clearing member threatens the CCP's viability.

86. ESMA has noted the comment on the difficulty to assess recovery from cyber-attacks, however notes that it is important to include cyber-attacks as an element to be assessed in relation to the CCP capacity to provide critical function. ESMA therefore keeps this clarification under the Guideline. At the same time, ESMA notes this refers to the overall assessment on the CCP's operational capacity to continue to provide critical functions, hence there is no automatic assumption envisaged between a cyber-attack and a resolution process.
87. The revised Guideline 6 is set out in the Guidelines

#### **II.2.4 Determination under Article 22(3)(a) of CCPRRR; proposed Guideline 7 on other requirements for continuing authorisation**

88. In accordance with Article 22(3)(a) of CCPRRR, a CCP should be considered as failing or likely to fail if the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of EMIR.

##### **Guideline 7 as proposed in the Consultation Paper**

The relevant authorities should consider the likelihood of the CCP to remain a going concern post application of the recovery tools, assess whether the CCP could meet the requirements for continuing authorisation post-recovery as well as whether the CCP's reliability and capacity to provide clearing services has been severely impeded, and base their assessment on the following objective elements:

- a) the ability of the CCP to continue providing clearing services in a manner which does not pose significant risk to the financial system, including having a sizeable pool of clearing participants to avoid significant concentration;
- b) indicators that the stress event that triggered the implementation of the recovery plan is, wholly or in part, due to significant inadequacies in the CCP's risk management framework and/or rulebook;
- c) material deficiencies in the internal controls and other key areas of the governance arrangements suggesting doubt regarding the ability of the CCP to operate in a transparent and effective manner.

89. This assessment on whether the CCP still fulfils requirements for continuing authorisation should be done in conjunction with the forward-looking elements related to financial resources, liquidity arrangements and operational capacity.
90. With regard to Guideline 7(a), the significant concentration of a CCP with respect to its clearing participants can for instance be measured by the number of clearing members

or client clearing accounts, the levels of clearing members' exposures, initial margin or default fund contributions.

91. With regard to Guideline 7(b), the significant inadequacies in the CCP's risk management framework and/or rulebook may refer to the CCP's margins, stress-testing, collateral, default management and/or business continuity policies and procedures.
92. With regard to Guideline 7(c), such deficiencies in the internal controls and other key areas of the governance arrangements of the CCP may be evidenced by:
  - a) fraud or acts of dishonesty such as material misstatements in the financial statements by the staff and/or management of the CCP;
  - b) disregard of the staff and/or management on the business activities and/or risk management framework of the CCP, including the failure to report and act on material weaknesses, deficiencies or issues;
  - c) major reputational depreciation resulting from the non-compliance with 'fit and proper' criteria of individuals with key functions in the CCP;
  - d) major reputational depreciation arising from a lack of transparency in the conduct of business and operations or incomplete/inaccurate disclosure of information; and
  - e) major on-going litigation or disputes to which the CCP is a party.

#### II.2.4.1 Summary of consultation responses

93. There is a general agreement by the respondents with the principles proposed in Guideline 7. However, a few comments are provided, as detailed below.
  - I. Major litigation
94. Some respondents notes that under paragraph 42(e) of the Consultation Paper "major on-going litigation or disputes to which the CCP is a party" should, by itself, not lead to a determination of whether a CCP is failing or likely to fail just because the CCP is involved in a litigation or dispute. The respondents further note that this could only be assessed once the final verdict has come out, which could affect the financial position of the CCP or impede its ability to perform its critical functions, a failing or likely to fail determination can be justified (i.e., 42(e) of the Consultation Paper can only lead indirectly to failing or like to fail determination and hence can be removed). Therefore, this requirement seems highly procyclical, and removing authorisation while a CCP is in recovery or resolution may have unintended adverse consequences for the CMs and as such the respondent would suggest removing this (e) for the final text.

## II. Sizeable pool of clearing participants

95. One respondent is asking what the provision in Guideline 7(a) on a “*sizeable pool of clearing participants*” means in practice. Such respondent understands that it can be measured by number of clearing members, however the respondent sees a need for further specification when a “*sizeable pool*” is reached.

## III. Risk management

96. One respondent notes that some of the elements to be taken into account while assessing the CCP’s situation in light of this Guideline (such as material deficiencies in the internal controls and other key areas of the governance arrangements or major reputational depreciation) are rather vague and not entirely appropriate.
97. It is further noted that many of the points noted in this Guideline, such as the issues with risk management or controls, could be remediated by the CCP if required by the relevant authorities. There may also be a period of time necessary to assess these issues post-recovery and the CCP may need to be given adequate time to address these issues, as applicable. Hence, such respondent notes that it would advocate to delete these elements or at least treat them as additional criteria only and not the main drivers of the assessment.
98. One respondent notes that the availability of viable competing services may reduce the likelihood of the CCP remaining a going concern and that this aspect could be added.

### II.2.4.2 ESMA’s feedback

99. ESMA agrees with some of the aspects raised by the respondents and have made the following adjustments to Guideline 7.
100. The reference to major litigation has been deleted from the proposed Guideline 7 and this aspect has been included under Guideline 4.
101. The reference sizeable pool of participants has been deleted.
102. The elements on risk management and controls have been redrafted to cater for the fact that they need to negatively effect the viability of the CCP.
103. The revised Guideline 7 is set out in the Guidelines.

### **II.3 Provision of information and exchange of information between the competent authority and the resolution authority in the process of determining that a CCP is failing or likely to fail**

104. According to point (h) of Article 18(1) of CCPRRR the competent authority is required to provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP. In addition, pursuant to Article 70(2) of CCPRRR on notification requirements, the competent authority shall inform the resolution authority of any recovery measures, or of any emergency situation referred to in Article 24 of EMIR.
105. In order to facilitate the timely flow of information for the purpose of determining whether a CCP is failing or likely to fail, the competent authority and the resolution authority should assist each other by applying the principles set out below in the Guidelines 8 and 9.
106. The main reason for this is twofold. One aspect is the envisaged dual approach provided for in the CCPRRR, where the determination, whether the CCP is failing or is likely to fail, is to be undertaken by either the competent authority (after consulting the resolution authority) or the resolution authority (after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion), hence timely cooperation is necessary to achieve this objective. The other aspect is that the determination to place a CCP in resolution is to change the status from a CCP that is supervised by the competent authority, to a CCP managed by a resolution authority. Hence, both aspects are equally important to make the determination if the CCP is able to still undertake its obligations using the recovery measures or where resolution is needed to be activated. Therefore, ESMA is of the view that a good cooperation at this point in time is essential for the timely determination whether a CCP is failing or likely to fail.

#### **II.3.1.1 Guideline 8 Information provided by the competent authority**

107. According to point (h) of Article 18(1) of CCPRRR the competent authority is required to provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP. In addition, pursuant to Article 70(2) of CCPRRR on notification requirements, the competent authority should inform the resolution authority of any recovery measures, or of any emergency situation referred to in Article 24 of EMIR.
108. To facilitate such exchange of information, the competent authority should also provide the resolution authority with the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR.

**Guideline 8 as proposed in the Consultation Paper**

To facilitate an exchange of information for the purpose of determining whether the CCP is failing or likely to fail, the competent authority should provide the resolution authority with the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR.

In particular, the competent authority should notify the resolution authority and provide it with the following information in respect to the specific CCP:

- a) a summary of the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR;
- b) the complete set of indicators used in the regular review and evaluation of key indicators of the CCP;
- c) all details on the applied supervisory measures and early intervention measures (according to Article 18(1) of CCPRRR), as well as a description of the CCP's compliance with them; and
- (d) details on the recovery options applied by the CCP, where relevant.

In addition, upon identifying the presence of the objective elements listed in Guidelines 3 to 7 of these Guidelines, for the purpose of determining whether the CCP is failing or likely to fail, the resolution authority may request the competent authority to explain whether and how these circumstances have been reflected in the review and evaluation of the CCP.

#### II.3.1.2 Guideline 9 Information provided by the resolution authority

109. Upon the identification of the objective elements in Guidelines 3 to 7 of these Guidelines the resolution authority should, in writing, provide the competent authority with its findings and reasoning in accordance with CCPRRR.

#### **Guideline 9 as proposed in the Consultation Paper**

The resolution authority should, in writing, provide the competent authority with its findings and reasoning upon the identification of any of the objective elements listed in Guidelines 3 to 7 of these Guidelines.

The resolution authority should endeavour to inform the competent authority where relevant, on significant developments in addition to where required under CCPRRR.

### II.3.1.3 Summary of consultation responses

110. There is a general agreement on the proposed information sharing under Guidelines 8 and 9 however a few aspects were noted in the responses and set out below.
111. One respondent notes that information sharing needs to be assessed with respect to the timeliness of information, and the fact that circumstances can change very rapidly in periods of market stress. Such respondent also believes that the information sharing should be bi-directional, with any findings by the resolution authority which may have identified deficiencies in risk management and controls, be communicated back to the relevant supervisory authorities.
112. One respondent agrees provided the information exchanged is based on objective criteria and does not consist of subjective judgements.

### II.3.1.4 ESMA's feedback

113. ESMA agrees that information is time critical but would prefer not to hard-wire any deadlines for information into the Guidelines, but to encourage that information is shared where possible and suitable.
114. ESMA notes the remark on objective criteria for information, however would note that the assessment under these guidelines are indeed based on objective elements to be assessed for a determination on a CCP being failing or likely to fail.
115. Based on this, no substantive changes have been made to Guidelines 8 and 9.

### III. ANNEXES

#### Annex I: Mandate

##### III.1 Legal references

###### Recital 37

The resolution framework should provide for timely entry into resolution before a CCP is insolvent. A CCP should be considered to be failing or likely to fail when it infringes or is likely in the near future to infringe the requirements for continuing authorisation, when its recovery has failed or is likely to fail to restore its viability, when the CCP is unable or is likely to be unable to provide a critical function, when the assets of the CCP are or are likely in the near future to be less than its liabilities, when the CCP is or is likely in the near future to be unable to pay its debts or other liabilities as they fall due, or when the CCP requires extraordinary public financial support. However, the fact that a CCP does not comply with all the requirements for authorisation should not justify by itself the entry into resolution.

###### Article 22

###### Conditions for resolution

1. The resolution authority shall take a resolution action in relation to a CCP provided that all of the following conditions are met:

- (a) the CCP is failing or is likely to fail as determined by any of the following:
  - (i) the competent authority, after consulting the resolution authority;
  - (ii) the resolution authority after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion;

[...]

3. For the purposes of point (a) of paragraph 1, a CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances apply:

- (a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012;
- (b) the CCP is unable, or is likely to be unable, to provide a critical function;
- (c) the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures;

- (d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due;
- (e) the CCP requires extraordinary public financial support.

6. ESMA shall issue guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail by 12 February 2022, taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union.

When developing those guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU

### III.2 Mapping

The table below shows how the above objective elements listed in Guideline 1 map to the requirements laid down in Article 22(3) of CCPRRR.

<b>Guidelines</b>	<b>Provisions in CCPRRR</b>
Guideline 1(a) and 3	Art 22(3)(c)
Guideline 1(b) and 4	Art 22(3)(a) and (d)
Guideline 1(c) and 5	Art 22(3)(a) and (d)
Guideline 1(d) and 6	Art 22(3)(b)
Guideline 1(e) and 7	Art 22(3)(a)

## Annex II: Cost-benefit analysis

### 1. Introduction

Pursuant to the sixth paragraph of Article 22 of CCPRRR, ESMA shall, by 12 February 2022, issue Guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail, taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union. When developing those Guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU.

Article 16 of the ESMA Regulation requires ESMA, where appropriate, to analyse the potential costs and benefits relating to Guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the Guidelines.

The objective of performing a cost-benefit analysis is to assess the costs and benefits of the various policy or technical options which were analysed during the process of drafting the Guidelines.

The Guidelines included in this Consultation Paper are of a mandatory nature as provided for in Article 22(6) of CCPRR in view of clarifying the application of Article 22(3) of CCPRR.

In carrying out a cost-benefit analysis on the Guidelines it should be noted that the main policy decisions have already been taken under the primary legislation (CCPRRR) and the impact of such policy decisions have already been analysed to some extent by the Impact Assessment by the European Commission<sup>7</sup>.

### 2. Cost-benefit analysis

Below are detailed the different corresponding policy options on how to promote convergence of supervisory and resolution practices as required under Article 22(6) of CCPRRR regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail as referred to in Article 22(1) and (3) of CCPRRR.

<p><b>Specific objective</b></p>	<p>The resolution authority shall take a resolution action in relation to a CCP provided that all of the conditions set out under Article 22(1) of CCPRRR are met, including the requirement that the CCP is failing or is likely to fail as determined by the competent authority, after consulting the resolution authority, or the resolution authority</p>
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<sup>7</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN>

	<p>after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion.</p> <p>Article 22(3) states that a CCP shall be deemed to be failing or likely to fail where one or more of five listed circumstances apply, including where the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012 and where the CCP is unable, or is likely to be unable, to provide a critical function.</p> <p>The Guidelines shall promote convergence of supervisory and resolution practices regarding the application of the circumstances under Article 22(3) of CCPRRR. Guidelines 1-7 list elements that the competent authority or the resolution authority should consider in determining if a CCP is to be deemed failing or likely to fail.</p> <p>The Guidelines are complemented by Guidelines 8 and 9 reinforcing a good cooperation between the authorities in view of the determination of the CCP is failing or likely to fail, as all relevant information of the CCP for making such determination, is essential for the decision making.</p>
<b>Policy option 1</b>	To clarify principles as guidelines to promote convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail under Article 22(3) of CCPRRR.
How would this option achieve the objective?	This option would likely meet the mandate as it would promote convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail, it would however create a lower level of convergence as the actual triggers would be determined by the competent authorities.
<b>Policy option 2</b>	To list a set of objective elements the relevant authority should consider in determining if a CCP is deemed failing or likely to fail based on Article 22(3) of CCPRRR with the aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered.

	To also provide guidance on the cooperation between the competent authority and the resolution authority in the process of determining if a CCP is failing or likely to fail.
How would this option achieve the objective?	This option would meet the requirements of ESMA's mandate as it would promote convergence of supervisory and resolution practices regarding the assessment of the circumstances under which a CCP is deemed to be failing or likely to fail where the Guidelines would list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR. This option would also ensure a good cooperation between the national competent authority and the resolution authority in this decision if a CCP is failing or likely to fail.
Which policy option is the preferred one?	Option 2, given that Option 1 could be seen as too vague and may fall short of the aim in ensuring convergence in the assessments on the determination on resolution.
Proportionality considerations	In determining the elements listed in these Guidelines that are to be considered by the competent authority or the resolution authority to determine if the CCP is considered failing or likely to fail, all of the elements are based on assessing the CCP's specific situation by reflecting on the CCPs business, its clearing participants, its viability to provide its services and its position in the overall market. The approach is proportionate as the elements for the determination are objective, taking into account the circumstances laid down in CCPRRR while giving the authorities the sufficient flexibility to make the determination based on the specificities of concerned CCP.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	ESMA is responsible for issuing the Guidelines and the mandate given to ESMA is of a mandatory nature, i.e. the Guidelines are envisaged in CCPRRR in order to ensure uniform, consistent and coherent application of Union law.

Impacts of the policies:	
<b>Policy option 1</b>	
Benefits	It will provide guidance on principles for the relevant authority to determine on resolution actions.
Regulator's costs	Probably quite high as the authority has to create the list of indicators based on the principles and monitor them.
Compliance costs	For the CCP no compliance costs.
<b>Policy option 2</b>	
Benefits	It will provide the relevant authority with a predetermined list of objective elements the relevant authority should consider in determining if a CCP is deemed failing or likely to fail with the aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered.
Regulator's costs	Moderate costs to monitor the objective elements.
Compliance costs	For the CCP no compliance costs.
Conclusion	<p>The costs for Option 2 can be summarised as the cost of the relevant authority to monitor the objective elements on the determination of resolution actions.</p> <p>The cost of implementing an ongoing monitoring and assessment will vary depending on the nature of existing procedures of the authority and a one-off cost may be required to accommodate for a system to accommodate for those objective elements to be assessed.</p> <p>ESMA notes that the costs are envisaged for by CCPRRR.</p> <p>On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs.</p>

## **Summary of consultation responses**

The respondents generally agree with Option 2.

One respondent notes the effort to create more convergence between EU competent authorities. Another respondent welcomes the fact that the ‘failing-or-likely-to-fail’ determination remains an expert judgement and is not automatically triggered by any of the objective elements alone (as outlined in paragraph 22 of the Consultation Paper).

One respondent again notes the objectivity of certain elements, for example considering the difficulty with measuring items such as clearing members’ intentions or CCP reputational depreciation. Such respondent does not believe that a one-size-fits-all approach would be a desirable solution or in line with differences across CCPs that exist and would advocate for a removal of some ambiguous criteria as stated above or for their treatment as only secondary elements of the assessment.

### **ESMA’s feedback**

ESMA notes that Option 2 is supported by the respondents.

ESMA further notes, as explained above, that the proposed Guidelines have been redrafted to take into account the comments received.

It is clear from the Guidelines that the elements are to be assessed by the competent authority or the resolution authority in the determination whether a CCP should be considered to be failing or likely to fail, hence an assessment by the authority based on the situation at hand is necessary, and there is no automatic determination that a CCP is deemed to be failing or likely to fail.



### **Annex III: SMSG's Advice**

In accordance with Article 16 of ESMA Regulation, ESMA has requested the advice of the Securities and Markets Stakeholder Group (SMSG). The SMSG has not provided any comment.



## **Annex IV Guidelines on the application of the circumstances under which a central counterparty is deemed to be failing or likely to fail**

# **Guidelines**

**On the application of the circumstances under which a central counterparty is deemed to be failing or likely to fail (Article 22(6) of CCPRRR)**



## **I. Scope of Guidelines**

### **Who?**

These Guidelines will apply to competent authorities, as defined in Article 22 of EMIR, and to resolution authorities, as defined in Article 2(3) of CCPRRR, when they determine whether a central counterparty is failing or likely to fail.

### **What?**

Guidelines 1-7 apply in relation to Article 22(3) of CCPRRR. Guidelines 8 and 9 apply in relation to Article 22(1)(a) of CCPRRR.

### **When?**

These Guidelines apply from two months after the date of publication on ESMA's website in the official languages of the European Union.

## II. Legislative references and abbreviations

For the purposes of these Guidelines the term ‘relevant authorities’ will be used in lieu of ‘the competent authority and/or the resolution authority’.

### Legislative references

CCP Recovery and Resolution Regulation (CCPRRR)	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 <sup>8</sup>
EMIR	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <sup>9</sup>
ESMA Regulation	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 <sup>10</sup>
Directive 2014/59/EU	Directive 2014/59/EU of the European Parliament and 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
RTS 153/2013	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 <sup>11</sup>

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<sup>8</sup> OJ L 22, 22.1.2021, p. 1–102

<sup>9</sup> OJ L 201, 27.7.2012, p. 1

<sup>10</sup> OJ L 331, 15.12.2010, p. 84

<sup>11</sup> OJ L 52, 23.2.2013, p. 41



Guidelines EBA FOLTF

Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU

### **Abbreviations**

*EU*

European Union

*ESMA*

European Securities and Markets Authority

*CCP*

Central Counterparty

*ESFS*

European System of Financial Supervision

### **III. Purpose**

1. These Guidelines are based on Article 22(6) of CCPRRR except for Guidelines 8 and 9 which are based on Article 16(1) of ESMA Regulation. The objective of these Guidelines is to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail.
2. These Guidelines clarify the different circumstances under which a CCP is deemed to be failing or likely to fail, one of the three cumulative conditions set out in Article 22(1) of CCPRRR for triggering a resolution action. In particular, they aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered with respect to the circumstances under which a CCP is deemed to be failing or likely to fail. For this purpose, these Guidelines list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR.
3. Given the need to provide guidance on the consultation and information exchange between the competent authority and the resolution authority for the purpose of making a determination if a CCP is failing or likely to fail, the scope of the final Guidelines is expanded beyond the scope set forth by Article 22(6) of CCPRRR. Thus, ESMA has decided to issue Guidelines 8 and 9 in accordance with Article 16(1) of ESMA Regulation in line with which ESMA may issue guidelines with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law.

#### **III.1 Compliance and reporting obligations**

#### **III.2 Status of the Guidelines**

4. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and resolution authorities must make every effort to comply with these Guidelines.
5. Competent authorities and resolution authorities to which these Guidelines apply should comply by incorporating them into their national legal and/or supervisory and resolution frameworks as appropriate.

#### **III.3 Reporting requirements**

6. Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities and resolution authorities to which these Guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the Guidelines.

7. In case of non-compliance, competent authorities and resolution authorities must also notify ESMA within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages of their reasons for not complying with the Guidelines.
8. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

## IV. Guidelines

Guidelines 1-2 provide general considerations that should apply in the process of determining whether a CCP is to be deemed failing or likely to fail as described in Guidelines 3-7.

Guideline 3 provides guidance on the application of Article 22(3)(c) of CCPRRR in determining if a CCP is unable or is likely to be unable to restore its viability through the implementation of its recovery measures.

Guidelines 4 and 5 both provide guidance on the application of Article 22(3)(a) and (d) of CCPRRR. They however refer to different types of financial resources of the CCP. Guideline 4 lists objective elements to be assessed with respect to the stock of available financial resources at the CCP. Guideline 5 focuses on the forecasted flows of liquid resources that will impact the liquidity risk profile of the CCP and the level of liquid resources available to the CCP.

Guideline 6 provides guidance on the application of Article 22(3)(b) of CCPRRR in determining if a CCP is unable, or is likely to be unable, to provide a critical function.

Guideline 7 provides guidance on the application of Article 22(3)(a) of CCPRRR in determining if the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of EMIR.

In order to facilitate the timely flow of information for the purpose of determining whether a CCP is failing or likely to fail, the competent authority and the resolution authority should assist each other by applying Guidelines 8 and 9. Hence, Guidelines 8 and 9 clarify the provision of information and exchange of information between the competent authority and the resolution authority in the process of determining whether a CCP is failing or likely to fail.

### IV.1 Guideline 1 Objective elements for determination that a CCP is failing or likely to fail

Guideline 1 provides general guidance on the considerations to be assessed in the process of determining if a CCP failing or likely to fail under Guidelines 3-7 by the relevant authority.

#### **Guideline 1**

For the purpose of making a determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3)(a)-(e) of CCPRRR the relevant authorities should assess the available objective elements relating to each of the following areas which application is further clarified in these Guidelines:

- a. the ability of the CCP to restore its viability through implementation of the CCP's recovery tools;
- b. the pre-funded and committed financial resources still available to the CCP;
- c. the liquid resources and liquidity arrangements still available to the CCP;
- d. the operational capacity of the CCP; and
- e. other requirements for continuing authorisation.

## IV.2 Guideline 2 Comprehensive analysis

Guideline 2 provides guidance on the general considerations to be assessed in the process of determining if a CCP is failing or likely to fail under Guidelines 3-7 by the relevant authority.

### **Guideline 2**

The relevant authorities should, decide whether the CCP is failing or likely to fail on the basis of a comprehensive assessment of both qualitative and quantitative objective elements listed in these Guidelines, taking into account all circumstances and information available at such time and to the extent relevant for the CCP.

The determination that a CCP is failing or likely to fail should remain an expert judgement and should not be automatically derived from any of the objective elements alone.

Furthermore, the set of objective elements listed in these Guidelines does not prevent the relevant authorities from taking into account other considerations signalling that a CCP is failing or likely to fail.

Typical circumstances which may result in the failure of the CCP include:

- a) the inability of the CCP to manage the default of one or more clearing members (i.e. default events);
- b) the inability of the CCP to address a non-default event resulting in unmanageable losses for the CCP. A large range of events could lead to non-default losses (i.e. non-default events), such as those related to:
  - (i) the failure of, or loss of access to, one or more non-clearing counterparties, such as liquidity providers, settlement banks or platforms, custodians, investment agents, concentration banks or service providers;

- (ii) custodial risk;
- (iii) settlement risk;
- (iv) investment risk;
- (v) operational risk events (e.g. IT failures, fraud, cyber-attacks, mistakes in margin calls, erroneous booking of an investment trade);
- (vi) legal risk.

These events could occur in isolation or jointly and the recovery tools and resources available to the CCP to manage these events could differ.

#### **IV.3 Guideline 3 on availability and adequacy of the CCP's recovery measures - a determination under Article 22(3)(c) of CCPRRR**

##### **Guideline 3**

When determining whether the CCP is unable, or is likely to be unable to restore its viability through the implementation of its recovery measures, the relevant authorities should base their determination on objective elements including:

- a. the recovery measures that have been exercised by the CCP and their success in bringing the CCP closer to a matched book, restoring its financial position, addressing or allocating losses or covering liquidity shortfalls;
- b. the recovery measures that are still available to the CCP and the ability of the CCP to exercise them, including the CCP's legal powers and operational capacity to do so;
- c. the availability of credit facilities provided by a Central Bank;
- d. the ability of stakeholders who are called to bear losses account taken of all of the following aspects:
  - i. to incur costs or contribute to cover liquidity shortfalls when the recovery plan is implemented;
  - ii. to continue participating in the CCP's recovery according to their contractual obligations; and

- iii. the potential financial stability risks related to the potential inability of these stakeholders to bear the losses and costs, to the extent the information is available.

Considering that this assessment will be undertaken in a situation of market stress, within a time limit and based on the information available at this point in time, it is important that the competent authority and the resolution authority pre-assesses those aspects by, in particular, identifying stakeholders who are called to bear losses and identifies thresholds or other indicators such as capital ratios and liquidity status that can be applied swiftly to assess such stakeholder's ability to contribute.

#### **IV.4 Guideline 4 Pre-funded and committed financial resources available to the CCP - a determination under Article 22(3)(a) and (d) of CCPRRR**

##### **Guideline 4**

When determining whether a CCP is unable or likely to be unable to pay its debts or other liabilities as they fall due, the relevant authorities should assess the pre-funded and committed financial resources available to the CCP and base this assessment on objective elements, including:

- a. the amount of both pre-funded and separately committed financial resources available to the CCP to undertake recovery in each case to the extent they meet the financial resources requirements imposed on the CCP in accordance with Article 43 of EMIR and as further specified by Article 35 of RTS 153/2013;
- b. whether the CCP has the ability to convert between collateral asset classes as necessary to meet its related obligations or to realise the value of the collateral it holds;
- c. whether a major litigation or disputes to which the CCP is a party, could negatively affect the financial position of the CCP impeding its ability to pay its debt and other liabilities and to perform its critical functions;
- d. in relation to committed financial resources, the ability of the parties agreeing to provide committed financial resources (such as clearing members, the parent company, shareholders or liquidity providers) to actually transfer the committed amounts to the CCP within the timeframe required in line with the conditions agreed by such parties;
- e. in relation to its pre-funded financial resources (CCP's own contributions and/or contributions of its clearing members), the ability of the CCP to replenish them within a reasonable time frame to a level that can deliver

continuity of critical functions and to meet compliance with regulatory requirements;

- f. where the prevailing circumstances of the CCP involve a default event, indicators that the CCP could only return to a matched book by actions that would require resources in excess of its available pre-funded and committed financial resources;
- g. where the prevailing circumstances of the CCP involve a default event and/or a non-default event, the sufficiency of the pre-funded and committed resources to meet the realised and expected losses and, if necessary, to recapitalise the CCP; and
- h. where the prevailing circumstances of the CCP involve a non-default event, the sufficiency of its capital and the willingness and ability of the committed parties to absorb the realised and expected losses or recapitalise the CCP following the loss event.

The objective elements to assess with respect to the pre-funded and committed financial resources will depend on the content of the recovery plan, which may vary from one CCP to another.

#### **IV.5 Guideline 5 Liquid resources and liquidity arrangements available to the CCP - a determination under Article 22(3)(a) and (d) of CCPRRR**

##### **Guideline 5**

The relevant authorities should determine, according to the CCP's operating rules and considering the relevant market conditions, whether the CCP is likely to meet its obligations in all relevant currencies as they fall due and/or is able to have recourse to its usual liquidity tools.

This assessment should be based on objective elements, including amongst others, significant adverse developments affecting the available liquidity risk profile and the liquid resources of the CCP, and the CCP's compliance with the minimum requirements for liquidity laid down in Article 44 of EMIR, as further specified by Article 32 of RTS 153/2013.

The relevant authorities should base their assessment on the following objective elements where relevant:

- a. forecasted contractual inflows arising from payments due to the CCP, both in relation to cleared positions and other business activities;

- b. forecasted outflows arising from payments due from the CCP, including withdrawals of collateral and settlement obligations;
- c. liquid resources available to the CCP and its ability to convert between asset classes and currencies as necessary to meet its obligations;
- d. liquidity lines or other arrangements available to the CCP and the certainty of these arrangements in the prevailing market and economic conditions.

The liquidity tools to be considered could for instance include foreign exchange arrangements and full market access (i.e. the ability to buy and/or sell securities immediately or to make use of repos and reverse repos).

#### **IV.6 Guideline 6 on operational capacity of a CCP – a determination under Article 22(3)(b) of CCPRRR**

##### **Guideline 6**

The relevant authorities should determine whether the CCP is unable, or is likely to be unable, to provide a critical function by assessing the circumstances and events which could negatively impact the CCP's operational capacity to continue providing critical functions, without infringing financial resources and liquidity arrangements.

The relevant authority should base this assessment on objective elements, including amongst others:

- a. the CCP's inability to fulfil its obligations towards its clearing members, including to call, receive or transfer back collateral, and/or to undertake recovery measures, due to material and persistent operational constraints;
- b. the CCP's inability to recover from an operational event (such as a cyber-attack) or to address severe operational constraints in a timely manner;
- c. a significant decrease in transactions submitted for clearing or significant reduction in clearing members due to a loss of confidence in the CCP including the CCP's ability to manage risks, operationally and/or financially and this decrease in cleared transactions or reduction in clearing members threatens the CCP's viability;
- d. an evidenced intention of liquidity providers to decrease the amount of the CCP's liquid resources which would threaten the CCP's operational viability; and

- e. the CCP's inability to address severe operational constraints in a timely manner, including where the business continuity plans prove not to be adequate to restore the CCP's operations.

In the context of fulfilling its obligations towards its participants, including calling, receiving or transferring back collateral, the CCP's operational constraints may arise from the failure of systems, the failure or loss of access to settlement banks, a cyber-attack or an event that means the CCP lacks available or sufficiently experienced operational staff and an event which could negatively impact the CCP's operational capacity to continue providing critical functions may also create a risk for financial stability.

#### **IV.7 Guideline 7 on the determination with respect to other requirements for continuing authorisation – a determination under Article 22(3)(a) of CCPRRR**

##### **Guideline 7**

In determining if an infringement, or likely infringement, would justify the withdrawal of the authorisation of a CCP pursuant to Article 20 of EMIR the relevant authorities should consider the likelihood of the CCP to remain a going concern post application of the recovery tools, and assess whether the CCP could meet the requirements for continuing authorisation post-recovery as well as whether the CCP's reliability and capacity to provide clearing services has been severely impeded.

The relevant authorities should base their assessment on objective elements, including amongst others:

- a. Whether the CCP has the ability to continue providing clearing services in a manner which does not pose significant risk to the financial system, including an assessment of concentration due to the composition of clearing participants;
- b. Whether the CCP has the ability to undertake changes, wholly or in part, to ensure the CCP is no longer breaching the requirement that led to the infringement or avoiding a likely infringement from materialising, such as significant inadequacies in the CCP's risk management framework or rulebook, that led to the implementation of the recovery plan;
- c. Whether the material deficiencies in the internal controls and other key areas of the governance arrangements would negatively affect the ability of the CCP to operate in a compliant, transparent and effective manner.

This assessment on whether the CCP still fulfils requirements for continuing authorisation should be done in conjunction with the forward-looking elements related to financial resources, liquidity arrangements and operational capacity.

With regard to Guideline 7(a), the significant concentration of a CCP's clearing participants due to the composition of clearing members and clients, and such a concentration can for instance be measured by the number of clearing members or client clearing accounts, the levels of clearing members' exposures, initial margin or default fund contributions.

With regard to Guideline 7(b), the significant inadequacies in the CCP's risk management framework and/or rulebook may refer to the CCP's margins, stress-testing, collateral, default management and/or business continuity policies and procedures.

With regard to Guideline 7(c), such deficiencies in the internal controls and other key areas of the governance arrangements of the CCP may be evidenced by:

a) fraud such as material misstatements in the financial statements by the staff and/or management of the CCP;

b) disregard of the staff and/or management in relation to business activities and/or risk management framework of the CCP, including the failure to report and act on material weaknesses, deficiencies or issues;

c) major reputational depreciation resulting from the non-compliance with 'fit and proper' criteria of individuals with key functions in the CCP; and

d) major reputational depreciation arising from a lack of transparency in the conduct of business and operations or incomplete/inaccurate disclosure of information.

#### **IV.8 Guideline 8 Information provided by the competent authority**

*In accordance with Article 22(2) of CCPRRR "for the purposes of point (a)(ii) of paragraph 1, the competent authority shall provide the resolution authority on its own initiative and without delay with any information that may give an indication that the CCP is failing or likely to fail. The competent authority shall also provide the resolution authority upon request with any other information needed in order to perform its assessment.*

In order to allow the resolution authorities to determine whether a CCP is failing or likely to fail, the competent authorities should provide all the necessary information to the resolution authorities. In this respect, Guideline 8 clarifies the type of information to be provided by the competent authority to the resolution authority.

#### **Guideline 8**

For the purpose of determining whether the CCP is failing or likely to fail, the competent authority should provide the resolution authority with the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR.

In particular, the competent authority should notify the resolution authority and provide it with the following information in respect to the specific CCP:

- a. a summary of the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR;
- b. the complete set of indicators used in the regular review and evaluation of key indicators of the CCP;
- c. all details on the applied supervisory measures and early intervention measures (according to Article 18(1) of CCPRRR), as well as a description of the CCP's compliance with them; and
- d. details on the recovery options applied by the CCP, where relevant.

In addition, upon identifying the presence of the objective elements listed in Guidelines 3 to 7 of these Guidelines, for the purpose of determining whether the CCP is failing or likely to fail, the resolution authority may request the competent authority to explain whether and how these circumstances have been reflected in the review and evaluation of the CCP.

### **IV.9 Guideline 9 Information provided by the resolution authority**

Guideline 9 clarifies the type of information to be provided to the competent authorities by the resolution authorities in order to ensure timely determination whether a CCP is failing or likely to fail.

#### **Guideline 9**

The resolution authority should, in writing, provide the competent authority with its findings and reasoning upon the identification of any of the objective elements listed in Guidelines 3 to 7 of these Guidelines.