



European Securities and  
Markets Authority

# Consultation Paper

**Draft RTS on Business Reorganisation Plans (Articles 37(4) and 38(4) of CCPRRR)**



## **Responding to this paper**

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

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

ESMA will consider all comments received by **1 December 2022**.

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

### **Publication of responses**

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

### **Data protection**

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

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

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



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## Legislative references, abbreviations and definitions

### Legislative references

The following legislative references are used in this Consultation Paper:

BRRD Reorganisation RTS	Commission Delegated Regulation (EU) 2016/1400 of 10 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the minimum elements of a business reorganisation plan and the minimum contents of the reports on the progress in the implementation of the plan
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) 648/2012 of 4 July 2012 of the European Parliament and Council 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> .
EBA Regulation	Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC
BRRD	Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (Text with EEA relevance)Text with EEA relevance <sup>4</sup> .
EBA Reorganisation RTS	Regulation (EU) No 2016/1400 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the minimum elements of a business reorganisation plan

<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 173, 12.6.2014, p. 190-349



	and the minimum contents of the reports on the progress in the implementation of the plan <sup>5</sup> .
EBA Reorganisation Guidelines	Guidelines on business reorganisation plans under Directive 2014/59/EU (BRRD) <sup>6</sup>
FOLTF Guidelines	Guidelines on FOLTF issued under Article 22 of the Regulation (EU) 2021/23,

The following abbreviations are used in this Consultation Paper:

<i>CCP</i>	Central Counterparty
<i>CP</i>	Consultation Paper
<i>EC</i>	European Commission
<i>EEA</i>	European Economic Area
<i>ESFS</i>	European System of Financial Supervision
<i>ESMA</i>	European Securities and Markets Authority
<i>ESRB</i>	European Systemic Risk Board
<i>EU</i>	European Union
<i>FMI</i>	Financial Market Infrastructure
<i>OJ</i>	Official Journal
<i>RTS</i>	Regulatory Technical Standard

Unless otherwise specified, the terms used in this CP have the same meaning as in CCPRRR and EMIR.

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<sup>5</sup> OJ L 228, 23.8.2016, p 1-6

<sup>6</sup> EBA/GL/2015/21

## Executive Summary

### Reasons for publication

With respect to CCPs' business reorganisation plans in accordance with Articles 37(4) and 38(4) of CCPRRR ESMA shall by 12 February 2023:

- develop draft RTS to specify further the minimum elements that should be included in a business reorganisation plan pursuant to Article 37(2) of CCPRRR;
- develop draft RTS to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to Article 38(1) of CCPRRR.

### Contents

This CP contains a draft RTS on how to specify further the minimum elements that should be included in a business reorganisation plan and how to specify the criteria that a business reorganisation plan has to fulfil.

In particular Section 1 explains the background to this proposed draft RTS, Section 2 sets out the proposal with respect to further specifying the minimum elements to be included in the business reorganisation plan, Section 3 sets out the proposal with respect to specify the criteria that a business reorganisation plan has to fulfil, and Section 4 contains the annexes, where Annex I sets out the cost and benefit, Annex II contains the legal mandate, Annex III contains the draft RTS and finally Annex IV contains the summary of questions.

### Next Steps

ESMA will consider the feedback it received to this consultation until 1 December 2022 and expects to publish a final report and submission of the draft technical standards to the European Commission for endorsement in Q1 2023.

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# 1 Background and Mandate

1. The objective of the resolution framework is to ensure that CCPs maintain the continuity of the critical functions and core business lines of a CCP which is failing or likely to fail while avoiding a significant adverse effect on the stability of the financial system and its ability to serve the real economy and ultimately minimising the cost of a CCP failure to taxpayers.
2. Several articles under CCPRRR set out the resolution framework and Articles 36 to 39 of CCPRRR contain in particular the aspects to consider in relation to business reorganisations plans.

## 1.1 The Business reorganisation plan

3. CCPRRR requires that within one month after the resolution authority applied the write-down and conversion tool in accordance with Article 32 of CCPRRR (in respect of instruments of ownership and debt instruments issued by the CCP under resolution or other unsecured liabilities in order to absorb losses, recapitalise that CCP or a bridge CCP, or to support the application of the sale of business tool), the CCP shall, in accordance with Article 36 of CCPRRR, conduct a review of the causes of its failure and submit a review and a business reorganisation plan to the resolution authority (the contents of such business reorganisation plan are indicated under Article 37 of CCPRRR). Where necessary for achieving the resolution objectives, the resolution authority may extend the above mentioned period up to a maximum of two months. The resolution authority shall submit the review and the business reorganisation plan to the competent authority and to the resolution college.
4. In accordance with Article 38 of the CCPRRR, within one month of the submission of the business reorganisation plan by the CCP to the resolution authority pursuant to Article 36(1) of the CCPRRR, the resolution authority and the competent authority *shall assess whether the measures provided for in that plan would reliably restore the long-term viability of the CCP.*
  - a) Where the resolution authority and the competent authority *are satisfied* that the plan would restore the CCP's long-term viability, the resolution authority shall approve the plan.
  - b) Where the resolution authority or the competent authority *are not satisfied* that the measures provided for in the plan would restore the CCP's long-term viability, the resolution authority shall notify the CCP of their concerns and require it to resubmit an amended plan addressing those concerns within two weeks of the notification. The resolution authority shall submit the revised plan to the competent authority and to the resolution college. The resolution authority and the competent authority shall assess the resubmitted plan and the resolution authority shall notify the CCP within one week of the reception of that revised plan whether the concerns are appropriately addressed or whether further amendments are required.

5. The business reorganisation plan is an important tool under CCPRRR and its use is further mentioned under Recital 56 of CCPRRR, noting that also where the position and loss allocation tools are applied with the objective of restoring the viability of the failing CCP the resolution should be accompanied by certain actions, including a subsequent restructuring of the CCP and its activities in a way that addresses the reasons for its failure and were such restructuring should be achieved through the implementation of a business reorganisation plan.
6. The criteria that the business reorganisation plan shall fulfil for the approval by the resolution authority shall, in accordance with Article 38(4) of CCPRRR, be specified by a draft RTS to be developed by ESMA by the 12 February 2023.
7. The content of the business reorganisation plan is set out in Article 37 of CCPRRR. In accordance with paragraph 1 of this Article, the business reorganisation plan shall:
  - a) set out the *measures aiming to restore the long-term viability* of the CCP or parts of its business within a reasonable timeframe.
  - b) in relation to the measures set out under (a), *be based on realistic assumptions* as to the economic and financial market conditions under which the CCP will operate.
  - c) *take account of the current and potential states of the financial markets and reflect best-case and worst-case assumptions*, including a combination of events to identify the CCP's main vulnerabilities and any assumptions shall be compared with appropriate sector-wide benchmarks.
8. In accordance with Article 37(2) of CCPRRR the business reorganisation plan *shall include at least the following elements*:
  - a) *a detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail*;
  - b) *description of the measures to be adopted to restore the CCP's long-term viability and where, in accordance with Article 37(3) of CCPRRR, such measures may include*:
    - (i) the **reorganisation and restructuring** of the activities of the CCP;
    - (ii) changes to the CCP's **operational systems and infrastructure**;
    - (iii) the **sale of assets or of business line**; and
    - (iv) changes to the **CCP's risk management**,
  - c) **a timetable** for the implementation of those measures.

9. ESMA shall, in accordance with, Article 37(4) of CCPRRR specify further the minimum elements that should be included in a business reorganisation plan in a draft RTS.

**Recital 56**

*Where the position and loss allocation tools are applied with the objective of restoring the viability of the failing CCP to enable it to continue to operate as a going concern, the resolution should be accompanied by replacement of management, except where retention of management is appropriate and necessary for the achievement of the resolution objectives, and a subsequent restructuring of the CCP and its activities in a way that addresses the reasons for its failure. That restructuring should be achieved through the implementation of a business reorganisation plan, which should be compatible with the restructuring plan that the CCP might be required to submit pursuant to the State aid framework.*

**Article 37**

**Content of the business reorganisation plan**

1. *The business reorganisation plan referred to in Article 36 shall set out measures aiming to restore the long-term viability of the CCP or parts of its business within a reasonable timeframe. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the CCP will operate.*

*The business reorganisation plan shall take account of the current and potential states of the financial markets and reflect best-case and worst-case assumptions, including a combination of events to identify the CCP's main vulnerabilities. Assumptions shall be compared with appropriate sector-wide benchmarks.*

2. *The business reorganisation plan shall include at least the following elements:*

- (a) a detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail;*
- (b) a description of the measures to be adopted to restore the CCP's long-term viability; and*
- (c) a timetable for the implementation of those measures.*

3. *Measures aiming to restore the long-term viability of a CCP may include:*

- (a) the reorganisation and restructuring of the activities of the CCP;*
- (b) changes to the CCP's operational systems and infrastructure;*
- (c) the sale of assets or of business lines;*
- (d) changes to the CCP's risk management.*

4. *ESMA shall by 12 February 2023 develop draft regulatory technical standards to specify further the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 2.*

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

**Article 38**

**Assessment and adoption of the business reorganisation plan**

1. *Within one month of the submission of the business reorganisation plan by the CCP pursuant to Article 36(1), the resolution authority and the competent authority shall assess whether the measures provided for in that plan would reliably restore the long-term viability of the CCP.*

*Where the resolution authority and the competent authority are satisfied that the plan would restore the CCP's long-term viability, the resolution authority shall approve the plan.*

*2. Where the resolution authority or the competent authority are not satisfied that the measures provided for in the plan would restore the CCP's long-term viability, the resolution authority shall notify the CCP of their concerns and require it to resubmit an amended plan addressing those concerns within two weeks of the notification.*

*3. The resolution authority and the competent authority shall assess the resubmitted plan and the resolution authority shall notify the CCP within one week of the reception of that plan whether the concerns are appropriately addressed or whether further amendments are required.*

*4. ESMA shall by 12 February 2023 develop draft regulatory technical standards to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 1.*

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

## 1.2 BRRD

10. Article 52 of the BRRD mandated the European Banking Authority (EBA) to develop and issue, by 3 January 2016 (i) draft regulatory technical standards on the minimum elements to be included in the business reorganisation plan and on the minimum content of the progress reports; and (ii) guidelines on the minimum criteria for the assessment of the business reorganisation plan by the resolution authority, in agreement with the competent authority. EBA issued its final report covering both the RTS and Guidelines on the 17 December 2015<sup>7</sup> and the BRRD Reorganisation RTS<sup>8</sup> was adopted by the European Commission in 2016.

11. Pursuant to Article 52 of the BRRD, EBA may, in addition to the guidelines, specify further in a draft RTS the criteria for the assessment of the business reorganisation plan, taking into account the experience acquired in the application of the guidelines, but EBA has not yet issued such a draft RTS.

12. Both the BRRD and the CCPRRR require the relevant entity (a credit institution or a CCP, as applicable) where required, to draw up and submit to the relevant resolution authority a business reorganisation plan, aimed at restoring the long-term viability by addressing the causes of the institution's failure. In light of such common legal rationale, ESMA has considered the work undertaken by EBA in relation to the business reorganisation plans.

13. However, ESMA notes that besides regulating different types of entities, there are some differences in the mandates provided to ESMA and EBA. In particular the mandate to EBA covers the development of a draft RTS as well as Guidelines (with the possibility for EBA

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<sup>7</sup> <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1312804/9ecf6b00-dbcf-493d-9ff4-016d7442e410/EBA-RTS-2015-12%20RTS%20and%20EBA-GL-2015-21%20GLs%20on%20Business%20Reorganisation%20Plans.pdf?retry=1>

<sup>8</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1400> (Text with EEA relevance) OJ L 228, 23.8.2016, p. 1–6

to develop a draft RTS to specify further the minimum criteria that a business reorganisation plan, taking into account the experience acquired in the application of the guidelines) whilst the mandate to ESMA includes the development of two draft RTSs. In addition, due to the differences in mandates, certain aspects included under the BRRD Reorganisation RTS will not be included in the draft RTS mandated under CCPRRR.

## 2 Elements to be included in the business reorganisation plan (Article 37 of CCPRRR)

14. Article 37(2) of CCPRRR specifies that the business reorganisation plan shall include certain elements and ESMA shall in accordance with Article 37(4) of CCPRRR *specify further the minimum elements* that shall be included in a business reorganisation plan in a draft RTS.

### 2.1 A detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail

15. The business reorganisation plan shall identify the *factors and circumstances* that caused the CCP to fail or be likely to fail in accordance with Article 37(2)(a) of CCPRRR. This fact-based presentation should separate between default events, non-default events and a combination of both.

16. According to Article 22 of CCPRRR the resolution authority shall take a resolution action in relation to a CCP provided that all the conditions set out in this article are met, one of them being that the CCP is failing or is likely to fail. A CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances as set out in Article 22(3) of CCPRRR 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, (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, or (e) the CCP requires extraordinary public financial support.

17. ESMA has issued FOLTF Guidelines<sup>9</sup> 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. These FOLTF Guidelines list a set of objective elements relevant authorities should assess in assessing if the CCP is deemed failing or likely to fail.

18. The detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail referred to under Article 37(2)(a) of CCPRRR should therefore include the material aspects that were considered in assessing the condition set out under Article

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<sup>9</sup> The Final Report on FOLTF: <https://www.esma.europa.eu/document/final-report-guidelines-foltf>.



22(1)(a) of CCPRRR. This would include factors and circumstances to the extent they were assessed under Article 22(3) of CCPRRR and where such factors or circumstances directly or indirectly contributed to the CCP being deemed failing or likely to fail.

**Question 1: Do you agree with how ESMA has further specified the required assessment to identify the factors and circumstances that caused the CCP to fail or to be likely to fail (please also see Article 1 of the draft RTS)? If not, please explain?**

## **2.2 A description of the measures to be adopted to restore the CCP's long-term viability**

19. Article 37(3) of CCPRRR provides further guidance on the content of the business reorganisation plan in specifying measures, to restore the long-term viability of the CCP, that the CCP *may* include in the plan. This Article 37(3) of CCPRRR is to some extent further specifying Article 37(2)(b) of CCPRRR that is included in ESMAs mandate to specify further the minimum elements.
20. ESMA has concluded that it is not the actual measures the CCP will take to restore the long-term viability that are to be provided under the draft RTS. This conclusion derives from the fact that Article 37(3) of CCPRRR exemplifies the actual measures that may be included by the CCP in the plan. The draft RTS, in this situation, cannot therefore go further and specify the actual measures to be adopted by the CCP as the measures will depend on the CCP's business, structure, market presence, clearing services and most importantly, the situation that cased the CCP to fail or to be likely to fail. In addition, to hardwire the actual measures to be adopted into the draft RTS would not likely be proportionate, nor helpful, nor in line with the requirement to provide *minimum elements* in the draft RTS.
21. The draft RTS therefore further specifies the elements that the business reorganisation plan shall provide descriptions on, i.e. the measures to be adopted under the plan.
22. The business reorganisation plan must describe the current and potential states of the financial markets and reflect best-case and worst-case assumptions, including a combination of events to identify the CCP's main vulnerabilities. As noted under Article 37 of CCPRRR, any assumptions must be compared with appropriate sector-wide benchmarks.
23. In order for the measures identified under the business reorganisation plan to be considered credible by the resolution authority and the competent authority the business reorganisation plan shall restore the CCP's long term viability based on prudent and relevant identified measures derived from realistic assumptions.
24. A successful business reorganisation plan must therefore include:
  - (a) an analysis of the CCP's strengths and weaknesses,
  - (b) an analysis of the relevant markets where the CCP provides services;

- (c) an analysis of the need for, and extent of, reorganisation and restructuring of the activities of the CCP;
  - (d) an analysis of the need for, and extent of, reorganisation and restructuring of the activities of the CCP;
  - (e) an analysis of the need for, and extent of, changes to the CCP's operational systems and infrastructure;
  - (f) an analysis of the need for, and extent of, the sale of assets or of business lines;
  - (g) an analysis of the need for, and extent of, changes to the CCP's risk management.
25. Business reorganisation plans must consider the recovery plan, to the extent that the measures are still relevant to the restoration of the long-term viability of the CCP.
26. Fluctuations are an inherent part of the economic cycle, therefore a business reorganisation plan has to include analyses of alternative measures and scenarios, with appropriate changes in the key underlying assumptions. These measures and scenarios shall include worst-case and best-case scenario(s), provided that long-term viability is restored within a reasonable timescale, although this may be longer under those scenarios than the period required under a more likely scenario.
27. Although long-term viability should be restored under any of the envisaged measures and identified scenarios, the development of full alternative reorganisation measures and scenarios for all identified scenarios, based on a wide range of assumptions, would incur disproportionate costs for the CCP, and where alternative scenarios should in principle be less likely to occur than the scenarios identified as more likely, therefore such worst-case or best-case scenarios may be provided with less details and analysis compared to the more likely scenarios.
28. Recital 56 of CCPRRR notes that in certain situations the resolution should be accompanied by the replacement of management and such restructuring should be achieved through the implementation of a business reorganisation plan; hence where suitable the business reorganisation plan has to address a restructuring aimed at the replacement of management.

### ***2.2.1 The reorganisation and restructuring of the activities of the CCP***

29. Where the CCP includes measures under the business reorganisation plan on reorganisation and restructuring of the CCP, the business reorganisation plan shall, where relevant for the business reorganisation of the CCP, include descriptions of the CCP's assessment of how the business and clearing service of the CCP would look like after the reorganisation and why certain changes to the CCP's activities have been included in the plan.
30. Where the CCP includes measures under the business reorganisation plan on reorganisation and restructuring of the CCP, the plan should similarly provide details, to

the extent known to the CCP, on how such business reorganisation of the CCP could materially affect the markets where the CCP operates, primarily focusing on clearing members (and to the extent known to the CCP) clients and indirect clients and relevant trading venues.

31. Also, if the CCP includes measures under the business reorganisation plan on adjusted business and clearing services, the business reorganisation plan should specify how the adjusted business and clearing service would be envisaged to work with the CCPs interoperability arrangements (if any) and with other entities linked to the CCP, including service providers. In this case, the business reorganisation plan should also explain how the CCP would be able to continue providing clearing services, with a focus on critical functions and core business lines and how the clearing services could be materially impacted by the business reorganisation plan.

### **2.2.2 Changes to the CCP's operational systems and infrastructure**

32. Where the CCP includes measures under the business reorganisation plan on the CCP's operational systems and infrastructure, then the business reorganisation plan shall, where relevant for the business reorganisation of the CCP, include descriptions of any changes envisaged to the organisation of the CCP as well as, where relevant, a presentation of the changes to the CCPs governance, organisation and employees.
33. Where the CCP includes measures under the business reorganisation plan on the CCP's operational systems and infrastructure, the business reorganisation plan shall, where relevant for the business reorganisation of the CCP, include descriptions of any material effects identified due to the measures envisaged under the business reorganisation plan to change the structure of the CCP's ownership and managers incentive structures.

### **2.2.3 The sale of assets or of business line**

34. Where the CCP includes measures under the business reorganisation plan on the sale of assets or of business line(s) including any wound down of a business line, it should, where relevant for the business reorganisation of the CCP, include descriptions of;
  - a) how those measures should be undertaken and the contractual terms and commercial agreement for the sale, to the extent known at this point in time by the CCP;
  - b) how the plan takes into account and ensures continuity of the CCP's legal and technical arrangement and how the plan supports the transfer of its functions, including by providing for advance agreement with other FMIs or relevant service providers;
  - c) how, to the extent known by the CCP, the critical functions and core business lines could be separated from non-critical functions and the material effects of separating such services, portfolios and participants under the business



reorganisation plan and the description shall also contain details as to why this measure would likely to be successful;

d) how the measures to facilitate the portability of positions and related assets of the clearing members and clients from the CCP to another CCP will be applied; and

e) if there are service arrangements or other contractual arrangements provided by group entities to the CCP, how those arrangements could be materially affected by a sale of assets or business lines.

35. Where the CCP includes measures under the business reorganisation plan on the sale of assets or of business line(s), for the parts of the CCP that will not be wound down or sold, the business reorganisation plan shall indicate ways to remedy any shortcomings in their operation or performance that may have an impact on their long-term viability, even if these shortcomings are not directly related to the failure of the CCP.

#### **2.2.4 Changes to the CCP's risk management**

36. Where the CCP includes measures under the business reorganisation plan on changes to the CCP's risk management it must, where relevant for the business reorganisation of the CCP, include descriptions of, the material changes to the CCP's risk management envisaged under the measures, including changes to the capital and capital structure of the CCP, the prudential requirements of the CCP and other requirements of the CCP, including organisational aspects such as organisational structure, business continuity and outsourcing, as well as material changes to the CCP's conduct of business rules including the composition of the CCP's membership and changes as to segregation and portability.

**Question 2: Do you agree with how ESMA has further specified the descriptions to be provided under the business reorganisation plan related to the measures to be adopted under the plan (please see Articles 2-6 of the draft RTS)? If not, please explain?**

### **2.3 A timetable for the implementation of the business reorganisation plan**

37. In accordance with Article 37(1) of CCPRRR, the business reorganisation plan must include measures aiming to restore the long-term viability within a reasonable timeframe and Article 37(2) of CCPRRR states that the plan must specify a timetable for the implementation of the measures set out under the business reorganisation plan. The timetable should include the times allocated under the business reorganisation plan to implement the measures required as well as the envisaged steps to be taken by the CCP to implement each material aspect of the business reorganisation plan with details on the estimated duration of the reorganisation period and the important milestones.

38. The CCP must ensure that timeframes identified are suitable, relevant and effective, by taking into account relevant processes and procedures.



**Question 3: Do you agree with how ESMA has further specified the timetable and the aspects to be considered in the implementation of the business reorganisation plan (please see Article 7 of the draft RTS)? If not, please explain?**

### **3 Criteria that the business reorganisation plan must fulfil**

39. For the purposes of the approval of the business reorganisation plan pursuant to Article 38(1) of CCPRRR the resolution authority and the competent authority must assess the business reorganisation plan and decide whether the measures provided for in that plan would reliably restore the long-term viability of the CCP.

40. The criteria that the reorganisation plan must fulfil in order to be approved by the resolution authority should be specified by ESMA in a draft RTS pursuant to Article 38(4) of CCPRRR. The criteria are set out in Articles 8 to 13 of the draft RTS.

#### **3.1 Viability performance criteria**

41. The business reorganisation plan has to fulfil certain viability performance criteria, including the ability of the CCP to undertake the measures under the business reorganisation plan, and that by implementing the plan the CCP will be able to restore the viability, has the ability to provide clearing services without risk to the financial system. Another criterion is that the CCP will meet all prudential and other requirements and be able to continue its operational processes and contract and service continuation.

#### **3.2 Financial performance criteria**

42. The business reorganisation plan has to fulfil certain financial performance criteria including that the CCP have secured the funding, will maintain financial resilience; will be able to operate covering its costs and have identified any financial impediments, including an ongoing litigation or a dispute which could negatively affect the financial position of the CCP and therefore the long-term viability of the CCP.

#### **3.3 Awareness and commitment**

43. The business reorganisation plan has to show that the senior management and board of the CCP, who are ultimately responsible for the reorganisation plan, support the business reorganisation plan, are committed to implement it and have appointed one or more persons responsible for carrying out the business reorganisation plan.

44. In addition the resolution authority and the competent authority must verify that the CCP management have sought the cooperation and support, where deemed relevant, of key internal and external stakeholders to the business reorganisation plan, including the risk committee, the major clearing members (and where possible, significant clients and indirect clients).

### 3.4 Credibility

45. The business reorganisation plan has to demonstrate with a high level of confidence that its application will restore the long-term viability of the CCP, in particular capturing the clearing services and business lines that are not to be wound down or sold. Such demonstration has to rely on credible assumptions, a well-considered business reorganisation strategy underpinning the business reorganisation plan. Any assumptions and performance indicators are to be compared with appropriate sector-wide benchmarks and should be in line with available macro-economic forecasts.
46. The business reorganisation plan has to clearly reflect the detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail in the first place and how the CCP has considered the different suitable measures based on if the situation is resulting from default events, different types of non-default events or a combination of both. The worst-case or best-case scenario included in the business reorganisation plan have to reflect a significant, albeit plausible, change in the underlying assumptions in comparison to the more likely scenarios.

### 3.5 Appropriateness of the business reorganisation plan

47. The business reorganisation plan is to be consistent, to the extent possible, with the assessments carried out by the resolution authority and the competent authority in the period leading up to the establishment of the business reorganisation plan and with the valuation that informed the determination of whether the conditions for resolution were met in accordance with Article 22(1) of CCPRRR.
48. Any analysis made by the CCP of the external operating environment included in the business reorganisation plan must refer to the analysis of opportunities and threats in the relevant markets determined by the resolution authority and competent authority when carrying out their tasks and the business reorganisation plan must be feasible and realistic.
49. Considering the time constrains the CCP and the authorities operate under, the reorganisation has to be undertaken in a swift manner, whilst taking into account the need to allow sufficient time to implement the reorganisation plan in the most effective way, in order to restore long-term viability and the need to maintain financial stability.

### 3.6 Consistency

50. The business reorganisation plan is to be consistent with any business plans that have been prepared by the CCP. Where the business reorganisation plan includes measures already featuring in the latest versions of previously prepared recovery plan for the CCP, these should be limited to elements which remain relevant following that CCP's failure and resolution, and to remain relevant considering the situation in the relevant markets.

**Question 4: Do you agree with how ESMA has further specified the criteria to be fulfilled for the approval of the business reorganisation plan under this draft RTS (please see Articles 8-13 of the draft RTS). If not, please explain?**





## 4 Annexes

### 4.1 Annex I Cost and Benefit

#### 1. Introduction

Pursuant to Article 37(4) and Article 38(4) of CCPRRR, the Commission is empowered to adopt a delegated act to supplement the CCPRRR by further specifying the minimum elements that should be included in a business reorganisation plan as well as to specify the criteria that a business reorganisation plan is to fulfil to be approved by the resolution authority pursuant to Article 38(1) of CCPRRR.

ESMA shall develop draft regulatory technical standards further specifying the minimum elements that should be included in a business reorganisation plan as well as to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to Article 38(1) of CCPRRR in accordance with Articles 37(4) and 38(4) of CCPRRR and ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2023.

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

- The main policy decisions have already been taken under the primary legislation (CCPRRR) and the impact of such policy decisions have already been analysed to some extent by the Impact Assessment by the European Commission<sup>10</sup>;
- ESMA does not have the power to deviate from its specific mandate provided by the Commission;
- ESMA policy options should be of a pure technical nature and not contain strategic decisions or policy choices and their content is limited by the legislative acts on which they are based.

#### 2. Background

ESMA shall develop draft regulatory technical standards further specifying the minimum elements that should be included in a business reorganisation plan as well as to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to Article 38(1) of CCPRRR in accordance with Articles 37(4) and 38(4) of CCPRRR and ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2023.

#### 3. Policy Options

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<sup>10</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN>



Considering the empowerment to ESMA to further specify the minimum elements set out under Article 37(2) of CCPRRR that should be included in a business reorganisation plan as well as to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority, the variables on which ESMA can complement are fairly limited and the actual policy option is how to specify the elements and criteria.

#### 4. Cost-benefit analysis

##### PART I

Below are detailed the different corresponding policy options on how to specify further the minimum elements under Article 37(2) of CCPRRR.

<b>Specific objective</b>	<p>The business reorganisation plan sets out the measures aiming to restore the long-term viability of the CCP or parts of its business within a reasonable timeframe.</p> <p>When establishing the business reorganisation plan the CCP shall include the elements set out in Article 37(2) of CCPRRR and as further specified under this draft RTS.</p>
<b>Policy option 1</b>	<p>Further specifying the elements by providing detailed measures that shall be included under the business reorganisation plan, for example, the draft RTS providing a description of the measures to be adopted by the CCP to restore the CCP's long-term viability; and providing a timetable for the implementation of those measures.</p>
How would this option achieve the objective?	<p>This option would in ESMA's view meet the requirements under the mandate. However, the measures listed in the draft RTS to apply to all CCPs would probably be "one size fits all", not sufficiently reflecting on the CCP's specificities and would not reflect on the reason for the failure (or near failure) by the CCP in the first place, as the measures would be pre-designed.</p>
<b>Policy option 2</b>	<p>Further specifying the elements by providing requirements on how the CCP shall design the measures to be adopted in the business reorganisation plan and on the aspects to be considered in the establishment of the measures, to ensure they are relevant to the CCP as well as relevant to the situation.</p>
How would this option achieve the objective?	<p>This option would in ESMA's view be satisfactory for several reasons. One is that the business reorganisation plan would be relevant and suitable to the CCP and another is that it would give the CCP the power to decide on the actual measures to be included under the business reorganisation plan, based on the application of the elements further specified under the draft RTS.</p>

<p>Which policy option is the preferred one?</p>	<p>Policy option 2, given that option 1 would likely to be too detailed and would create a business reorganisation plan not suitable for the CCP at hand and not drafted with the aim of restoring the viability of the particular CCP. However, the more detailed the requirements are the higher convergence of the measures and the more time efficient the application of the elements may be, but, in this case, at the cost of a business reorganisation plan that should be relevant to meet the aim to restore the long-term viability of the CCP.</p> <p>Option 2 would ensure a correct amount of convergence in the establishment of the business reorganisation plan without pre-deciding on suitable measures to be adopted by the CCP.</p>
<p>Proportionality</p>	<p>ESMA believes that the balance achieved under the draft RTS in further specifying the minimum elements, that should be included in a business reorganisation plan, meets the expectations where ESMA shall, in accordance with the principle of proportionality, take due account of the nature, scale and complexity of the risks inherent in the business of a CCP and provides the necessary flexibility which should allow CCPs to establish appropriate reorganisation plans.</p> <p>The draft RTS based on Option 2 would therefore be considered proportionate, as it would provide flexibility to the CCP to elect suitable measures by providing clear requirements that the CCP shall include under the business reorganisation plan and would ensure that the measures are suitable to the CCP without causing, to the best of the CCP's knowledge, any unforeseen material negative effects.</p>
<p>Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?</p>	<p>ESMA is empowered to provide a draft regulatory technical standard to the Commission.</p>

<p><b>Impacts of the proposed policies:</b></p>	
<p><b>Policy option 1</b></p>	

Benefits	It would further specify the measures of the business reorganisation plan.
Regulator's costs	The costs for competent authorities would be low as the business reorganisation plan would be drafted by the CCP.
Compliance costs	The compliance costs for CCPs would be moderate, however already envisaged by the CCPRRR due to the detailed requirements set out under Article 37(2) of CCPRRR.
<b>Policy option 2</b>	
Benefits	It would further specify the elements to be used in considering the suitable measures to be included in the business reorganisation plan.
Regulator's costs	The costs for competent authorities would be low as the business reorganisation plan is drafted by the CCP.
Compliance costs	The compliance costs for CCPs would be moderate, although higher than under Option 1 as the CCP would have to decide on suitable measures considering the elements, however the elements are already envisaged by CCPRRR due to the detailed requirements set out under Article 37(2) of CCPRRR.

**Question 5: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?**

**Question 6: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.**

## PART II

Below are detailed the different corresponding policy options on how to specify the criteria under Article 38 of CCPRRR that a business reorganisation plan should fulfil for approval by the resolution authority.

<b>Specific objective</b>	The resolution authority and the competent authority shall assess whether the measures provided for in the plan would reliably restore the long-term viability of the CCP by considering the criteria that a business reorganisation plan should fulfil for approval by the resolution authority. The criteria are set out in the draft RTS.
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<b>Policy option 1</b>	Specifying the criteria by providing high level requirements the business resolution plan should fulfil, with the aim to restore the CCP's long-term viability.
How would this option achieve the objective?	This option would in ESMA's view probably not meet the requirements under the mandate as it would not provide enough details to ensure a convergent assessment between authorities in assessing the business resolution plan. This would also likely fall short of the requirement to specify the criteria the plan shall fulfil.
<b>Policy option 2</b>	Specifying the criteria by providing detailed requirements the business resolution plan should fulfil, with the aim to restore the CCP's long-term viability.
How would this option achieve the objective?	This option would in ESMA's view be satisfactory for several reasons. One is that the business reorganisation plans would be assessed based on the same criteria to ensure a level-playing field and shared competences among the authorities in assessing such plans, as the assessment will be undertaken in a time crucial situation.
Which policy option is the preferred one?	Policy option 2, given that option 1 would likely to be too high level and would fall short of establishing a common set of criteria to apply.
Proportionality	A draft RTS based on Option 2 would be proportionate as the draft RTS, in accordance with the principle of proportionality, takes due account of the nature, scale and complexity of the risks inherent in the business of a CCP and where those specificities are reflected in the criteria used for the assessment. The criteria therefore provide a reasonable set of criteria to use in assessing the business resolution plan without being too prescriptive nor be too high level but to also ensure convergence in the assessment of the business reorganisation plan.
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 empowered to provide a draft regulatory technical standard to the Commission.

<b>Impacts of the proposed policies:</b>	
<b>Policy option 1</b>	
Benefits	It would provide high level principles in relation to the criteria to be fulfilled in order for the business resolution plan to be approved.
Regulator's costs	The costs for competent authorities would be high as the actual criteria to apply based on the high-level criteria under the draft RTS would have to be established by the authority.
Compliance costs	The compliance costs for CCPs would be low but redrafting costs may occur as the criteria leave a high level of discretion to the authority in the application, hence changes may be required of the plan to fulfil such criteria for approval.
<b>Policy option 2</b>	
Benefits	It would provide the criteria the business reorganisation plan shall be assessed against and fulfil to be approved.
Regulator's costs	The costs for competent authorities would be moderate and the assessment is already envisaged under the regulation.
Compliance costs	The compliance costs for CCPs would be low.

**Question 7: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?**

**Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.**



## 4.2 Annex II Legal Mandate

### *Article 37*

#### **Content of the business reorganisation plan**

1. The business reorganisation plan referred to in Article 36 shall set out measures aiming to restore the long-term viability of the CCP or parts of its business within a reasonable timeframe. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the CCP will operate.

The business reorganisation plan shall take account of the current and potential states of the financial markets and reflect best-case and worst-case assumptions, including a combination of events to identify the CCP's main vulnerabilities.

Assumptions shall be compared with appropriate sector-wide benchmarks.

2. The business reorganisation plan shall include at least the following elements:

- (a) a detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail;
- (b) a description of the measures to be adopted to restore the CCP's long-term viability; and
- (c) a timetable for the implementation of those measures.

3. Measures aiming to restore the long-term viability of a CCP may include:

- (a) the reorganisation and restructuring of the activities of the CCP;
- (b) changes to the CCP's operational systems and infrastructure;
- (c) the sale of assets or of business lines;
- (d) changes to the CCP's risk management.

4. ESMA shall by 12 February 2023 develop draft regulatory technical standards to specify further the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 2.

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

### *Article 38*

#### **Assessment and adoption of the business reorganisation plan**

1. Within one month of the submission of the business reorganisation plan by the CCP pursuant to Article 36(1), the resolution authority and the competent authority shall assess whether the measures provided for in that plan would reliably restore the long-term viability of the CCP.

Where the resolution authority and the competent authority are satisfied that the plan would restore the CCP's long-term viability, the resolution authority shall approve the plan.

2. Where the resolution authority or the competent authority are not satisfied that the measures provided for in the plan would restore the CCP's long-term viability, the resolution authority shall notify the CCP of their concerns and require it to resubmit an amended plan addressing those concerns within two weeks of the notification.

3. The resolution authority and the competent authority shall assess the resubmitted plan and the resolution authority shall notify the CCP within one week of the reception of that plan whether the concerns are appropriately addressed or whether further amendments are required.



4. ESMA shall by 12 February 2023 develop draft regulatory technical standards to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 1.

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



### 4.3 Annex III Draft RTS

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

of [ ]

supplementing Regulation (EU) No 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the minimum elements to be included in a business reorganisation plan and the criteria to be fulfilled for its approval by the resolution authority

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to 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 and in particular Articles 37(4) and 38(4) thereof,

Whereas:

- (1) Restoring the long-term viability of the CCP following the application of the relevant resolution tools would be achieved where, at the latest by the end of the business reorganisation period, the CCP is capable of fulfilling all the relevant prudential and other regulatory requirements on a forward-looking basis, and that it has a viable business model that is also sustainable in the long-term.
- (2) A successful reorganisation plan should derive from considering the event triggering the resolution authority to take a resolution action under Article 22(1) of Regulation (EU) No 2021/23. Such event described in factors and circumstances represents an important variable for the establishment of the business reorganization plan and for the identification of the appropriate business reorganisation measures. The business reorganisation plan should include measures best corresponding to the triggering event which may be a default of a clearing member or a non-default event caused by, for example, a cyber failure.
- (3) In order for a business reorganisation plan to be considered credible by the resolution authority and the competent authority, it should restore the CCP's long term viability based on prudent assumptions. A successful reorganisation plan should therefore include a comprehensive analysis of the CCP, its strengths and weaknesses, as well as the relevant markets where the CCP provides services and the instruments cleared in light of appropriate sector-wide benchmarks and available macro-economic forecasts for clearing such instruments.

(4) Business reorganisation plans should use information contained in the recovery plan to ensure continuity in the considerations of the viability and continuity of the CCP clearing services, to the extent that such information is still relevant for the restoration of the long-term viability of the CCP.

(5) Fluctuations are an inherent part of the economic cycle. Any business reorganisation plan should therefore be subject to analyses of alternative scenarios, with appropriate changes in the key underlying assumptions to include worse-case and best-case assumptions. Although long-term viability should be restored under any assumption used to establish a scenario, the development of full alternative reorganisation strategies would incur disproportionate costs for the CCP, in particular as such alternative scenarios in principle should be less likely to occur.

(6) When assessing the business reorganisation plan, the competent authority and the resolution authority should ensure that the viability performance criteria and financial performance criteria of the business reorganisation plan are fulfilled to provide for the CCP long term viability.

(7) When assessing the business reorganisation plan, the competent authority and the resolution authority should ensure that the business reorganisation plan shows that the parties ultimately responsible for the establishment and execution of the business reorganisation plan are supportive and committed to the implementation of the business plan and that equally key internal and external stakeholders are aware and supportive, including critical service providers such as settlement providers, platform providers any other entities that are essential or critical for the CCP in providing clearing services.

(8) When assessing the business reorganisation plan, the competent authority and the resolution authority should ensure that the different scenarios under the business reorganisation plan are credible, ranging from best-case to worst case assumptions.

(9) When assessing the business reorganisation plan, the competent authority and the resolution authority should ensure that the plan appropriately reflects the specificities of the CCP as well as the clearing market where the CCP offers its clearing services.

(10) Finally, when assessing the business reorganisation plan, the competent authority and the resolution authority should consider the consistency of the business reorganisation plan by comparing it with the CCPs earlier business plans either prepared under the CCPs business as usual or where required by regulatory or legal obligations.

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

(12) ESMA has in developing the draft technical standards further specifying the elements under this regulation, to the extent such provisions provide relevant guidance for this regulation, taken into account the relevant provisions on the establishment of business reorganisation plans for banks, and in particular the delegated regulatory technical standards (EU) 2016/1400<sup>11</sup> adopted under Article 52(12) of Directive 2014/59/EU<sup>12</sup>.

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<sup>11</sup> OJ L 228, 23.8.2016, p. 1–6

<sup>12</sup> OJ L 173, 12.6.2014, p. 190–348



(13) ESMA has respected the principle of proportionality, by ensuring that the draft technical standards do not establish the measures to be included under the business reorganisation plan but further specifies the elements of analysing the factors and circumstances for the failure or likely failure, description of the measures and providing aspects to identify the time table, thereby preserving flexibility for the CCP to adapt the business reorganisation plan to the specificities of the CCP.

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

HAS ADOPTED THIS REGULATION:

## **TITLE I**

### **FURTHER SPECIFICATIONS FOR THE ELEMENTS OF THE BUSINESS REORGANISATION PLAN**

#### **SECTION I**

##### **THE ELEMENT OF ANALYSING OF THE FACTORS AND CIRCUMSTANCES**

###### *Article 1*

###### **Factors or circumstances that caused the CCP to fail or to likely to fail**

1. The business reorganisation plan shall include, as a minimum, a detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail containing all of the following:
  - (a) a detailed description clearly separating between default events, non-default events and a where there is a combination of both;
  - (b) a detailed assessment of the conditions, circumstances and elements provided for under Article 22(1)(a) and Article 22(3) of the Regulation (EU) No 2021/23 where such circumstances or elements directly or indirectly contributed to the CCP being deemed failing or likely to fail;
  - (c) a short description of the recovery measures and resolution actions taken or applied by the CCP or the resolution authority, before the submission of the business reorganisation plan.

#### **SECTION II**

##### **THE MINIMUM ELEMENTS TO BE INCLUDED IN THE BUSINESS ORGANISATION PLAN**

###### *Article 2*

### **Description of the measures to be adopted to restore the CCP's long-term viability**

1. The business reorganisation plan shall include, at least, the following elements of the description of the measures to be adopted to restore the CCP's long-term viability:

(a) how the measures to be adopted reflect the strengths and weaknesses of the CCP, in particular in relation to the CCPs clearing service(s) offered by reference to the economic and market environment in which it operates;

(b) how the measures to be adopted, have considered the detailed analysis undertaken in accordance with Article 1 and contains a description as to the extent to which the measures are derived from the factors and circumstances identified therein;

(c) how the measures to be adopted, have included any of the measures previously identified in the recovery plan, when such measures remain valid for the CCP's strategy to restore its long-term viability;

(d) how the business reorganisation plan, in establishing the measures to be adopted, have used the relevant information in relation to; established assumptions, envisaged clearing services, envisaged operational viability and capacity of the CCP, taking into account of service providers as well as linked entities and other FMIs, and the envisaged effect on market and financial stability, in developing each of the measures under the business reorganisation plan and the envisaged performance of the CCP under each measure to ensure the suitability of the measures to be adopted to restore the CCP's long-term viability.

(e) what are the conditions which will trigger the application of the measures to be adopted by the CCP;

(f) how the measures to be adopted take into account;

(i) any material effects on clearing members, and their direct and indirect clients, and interdependencies with other linked FMIs and trading venues,

(ii) any material effects on the functioning of the CCP, including netting sets and collateral requirements;

(iii) the necessity for continuity of the CCP's legal and technical arrangement; and

(iv) any material changes, to the extent the information is available to the CCP during at the stage of the business reorganisation planning, envisaged to the recovery plan,

(g) to ensure the suitability of the measures to be adopted to restore the CCP's long-term viability.

The level of information in the description provided on different measures may vary depending on the likeliness of the measures to be adopted under the business reorganisation plan.

2. Any assessments and assumptions made, including the consideration of the viable performance criteria and financial performance criteria, set out under Article 8 and Article 9, to identify the measures to be adopted under the business reorganisation plan, shall be described and compared with the appropriate sector-wide benchmarks for the instruments cleared and should reflect upon available macro-economic forecasts for clearing such instruments.

3. The business reorganisation plan shall include a description of the analysis made of the assumptions identifying best-case and worst-case scenarios and the measures deriving there from. Restoration of the CCP's long-term viability shall be possible under all scenarios, although the period for implementation, the measures and the financial performance may differ.



4. Where several measures are included in the business reorganisation plan, it shall include:

- (a) a justification of the different measures including a description of the different assumptions applied;
- (b) a description of how each of them will restore, jointly or independently, the long-term viability of the CCP;
- (c) a description of the applied hierarchy in the application of the measures.

5. The business reorganisation plan shall include a high-level description of any material alternative set of measures disregarded in the process of establishing the business reorganisation plan.

### *Article 3*

#### **The reorganisation and restructuring of the activities of the CCP**

Where the business reorganisation plan includes a measure referred to in Article 37(3)(a) of the Regulation (EU) No 2021/23 it shall include at least the following elements of the description in relation to the reorganisation and restructuring of the activities of the CCP:

- (a) a description of the reorganised business and clearing service as planned by the business reorganisation plan;
- (b) an explanation for the envisaged changes, as well as their contribution to achieving the objective of the reorganisation of the CCP;
- (c) a description of the impact of the business reorganisation plan on the critical functions and core business lines, in particular in relation to the ability of the CCP to continue to provide clearing services;
- (d) a description of the extent to which the outsourcing arrangements covering part of the CCP's critical functions and core business lines, including where another entity undertakes price determination, provides systems for the clearing, margin calculations or other essential parts of the CCP's operations, and how such critical functions and core business lines will remain operational;
- (e) a description of how the business reorganisation plan will affect the markets the CCP operates in, and the clearing services offered by the CCP;
- (f) a description of how the adjusted business and clearing service will work, where the CCP has interoperability arrangements, where applicable, as well as with other entities linked to the CCP, including service providers, and how the CCP will be able to continue providing its critical functions and services where dependent on such entities.

### *Article 4*

#### **Changes to the CCP's operational systems and infrastructure**

Where the business reorganisation plan includes a measure referred to in Article 37(3)(b) of the Regulation (EU) No 2021/23, it shall include at least the following elements of the description in relation to the changes to the CCP's operational systems and infrastructure:

- (a) a presentation of the material operational systems and infrastructure identified to be impacted, and how they are to be impacted by the business reorganisation plan;
- (b) a presentation of any changes envisaged to the organisation of the CCP;
- (c) a presentation of the changes to the structure of the CCP's ownership and any changes to the managers incentive structures; and
- (d) where relevant, a presentation of the changes to the CCPs governance, organisation and employees.

### *Article 5*

#### **The sale of assets or of business lines**

1. Where the business reorganisation plan includes a measure referred to in Article 37(3)(c) of Regulation (EU) No 2021/23 it shall include, at least, the following elements of the description in relation to the wind down or sale of assets or of business lines:

(a) description of the measures identifying which of the CCP's relevant business lines or assets and the relating liabilities, rights and obligations, will be wound up or sold, including:

- (i) a description of the relevant conditions for the winding down or sale;
- (ii) the method for the winding down or sale, including the underlying assumptions and any possible expected losses;
- (iii) the expected timescale; and
- (iv) any financing or services provided by or to the remaining CCP.

(b) where part of the business line or asset form part of the CCPs critical functions or core business lines, a description of how, to the extent the information is available to the CCP, such critical functions or core business lines may be separated from other critical or non-critical functions or core business lines in economic, operational and legal terms;

(c) where part of the business line or asset form part of the CCPs critical functions or core business lines, a description of, to the extent the information is available to the CCP, any possible material effects of such separation of assets on clearing members and, to the extent that the information is available, their direct and indirect clients, trading venues and other FMIs and CCPs;

(d) where possible to identify, a description of any material effects, due to the wind down or sale of relevant business line or assets of some, but not all, of the positions of the CCP, on:

- (i) netting sets, operations or legal arrangements, for clearing members and, to the extent that the information is available, their direct and indirect clients;
- (ii) the calculation of collateral requirements and in particular variation margins and how such winding down or sale may materially affect the collateral requested by clearing members, and, to the extent that the information is available, their direct and indirect clients;

(iii) the price of allocating and transferring such positions and transactions to another CCP;

(iv) an explanation of the elected portability of positions and related assets to another CCP, where envisaged, and a description of (i) how likely the portability is to be successful and (ii) the measures to be taken to facilitate the portability of positions and related assets of the clearing members and clients from the CCP to another CCP; and

(v) a description of (i) how the CCP keeps the relevant data on positions in client omnibus and segregated accounts in accordance with Regulation (EU) No 648/2012 up to date under the business reorganisation and (ii) how the CCP is able to provide details rapidly during the reorganisation to ensure that all positions and transactions, including client positions, where identifiable, at the CCP may be identified and potentially transferred successfully;

(e) if there are service arrangements or other contractual arrangements provided by group entities, a description of how the group entities will be affected;

(f) a description of how the business reorganisation plan takes into account and ensures continuity of the CCP's legal and technical arrangements and how the plan supports the transfer of its functions, including a description of any agreements entered into with other FMIs or relevant service providers in preparation for the application of the business reorganisation plan.

2. For the parts of the CCP that will not be wound down or sold, the business reorganisation plan shall indicate ways to remedy any shortcomings in their operation or performance that may have an impact on their long-term viability, even if these shortcomings are not directly related to the failure of the CCP.

### *Article 6*

#### **The changes to the CCP's risk management**

Where the business reorganisation plan includes a measure referred to in Article 37(3)(d) of Regulation (EU) No 2021/23 it shall include the following elements of the description in relation to the changes to the CCP's risk management:

(a) a description of how the CCP envisages to comply with the prudential requirements of the CCP, including changes in the default fund methodologies, margin and liquidity risk management frameworks, investment policies, collateral policies and settlement and whether any changes are envisaged to the risk management of the CCP;

(b) a description of how the CCP envisages to comply with other regulatory requirements of the CCP, including organisational aspects such as organisational structure, business continuity and outsourcing, as well as material changes to the CCPs managements, conduct of business rules including the composition of the CCPs membership and changes as to segregation and portability;

(c) a description of how the CCP envisages to comply with the liquidity requirements, including meeting all its payment obligations, in all relevant currencies, as they fall due and the extent to which the CCP is able to have recourse to its liquidity tools according to its operating rules and considering the relevant market conditions;

(d) a description of how the CCP envisages to comply with the requirements to hold pre-funded and committed financial resources available to the CCP, and

(e) a description of how the CCP envisages to comply with the requirements to have the ability to replenish its pre-funded financial resources and if any changes are envisaged to the risk management of the CCP.

## **SECTION III**

### **TIMETABLE FOR IMPLEMENTATION OF MEASURES**

#### *Article 7*

##### **Timetable**

1. The business reorganisation plan shall include a timetable for the implementation of the measures set out under the business reorganisation plan, covering at least each of the following aspects:

(a) the overall timeline and the times allocated under the business reorganisation plan to implement the measures required;

(b) a list of the envisaged main actions and steps, with allocated timelines, to be taken by the CCP to implement each material aspect of the business reorganisation plan;

(c) a description of the estimated target duration timeline of the implementation of the reorganisation measures to be taken in accordance with the business reorganisation plan;

(d) a detailed timeline of planned interactions with the resolution authority and the competent authority;

(e) a description of the timeline for communication to the public bearing in mind the internal and external communication strategy of the CCP for the implementation of the measures set out under the business reorganisation plan;

(f) a description of the timeline for communication to relevant external stakeholders involved in the implementation of the measures under the business reorganisation plan, such as labour unions or organisations.

2. The CCP shall ensure that the timelines referred to in paragraph 1 of this Article are suitable, relevant and effective.

## **TITLE II**

### **CRITERIA FOR APPROVAL OF BUSINESS REORGANISATION PLANS**

#### *Article 8*

##### **Viability performance criteria**

1. The business reorganisation plan shall fulfil each of the following viability performance criteria:

(a) evidence that the CCP will be able, in accordance with its internal rules and regulations, to undertake the measures as set out in the business reorganisation plan;

(b) that the CCP, by implementing the business reorganisation plan will be able, within a reasonable timeframe, to restore the long-term viability and to continue to provide clearing services in accordance with Regulation (EU) No 648/2012 in a manner which:

(i) does not pose significant risk to the financial system, considering in particular an assessment of concentration due to the composition of clearing participants;

(ii) provides a clearing service which is stable and viable, considering in particular:

1. the estimated flow of transactions that will be submitted for clearing to the CCP;
2. the estimated number of clearing members at the CCP;
3. the CCP's ability to ensure liquidity in the instruments cleared;
4. the material contractual agreements that will be maintained, and the extent to which, such contracts contain contractual resilience clauses, resolution-proof clauses and limitations of termination rights in a business reorganisation;
5. the internal agreements that will be maintained during the application of the business reorganisation plan, including descriptions of any arms' length pricing structures and planned continued access to operational assets; and
6. the envisaged continuation of services to the CCP following the application of the business reorganisation plan, evidenced by letters of commitments of the service providers and where no such letters have been received, the CCPs assessment that the termination of such service will not be detrimental to the CCP's operational or financial viability;

(c) that the business reorganisation plan includes a description of the method for determining the value and marketability of the critical functions and assets such as the core business lines, operations and assets of the CCP, mainly focusing on aspects that could have an impact on the valuation such as volatility in the market, inaccessibility and/or uncertainty of the market prices, time constraints and legal aspects;

(d) that the valuations under the business reorganisation cover both the assets and business lines of the CCP that are to be wound down or sold, as well as assets and business lines remaining within the CCP;

(e) that any proceeds from the divestment of assets or business lines envisaged by the business reorganisation plan shall be calculated prudently and with reference either to a reliable benchmark or to a valuation, such as an expert valuation, a market sounding exercise or the value of similar assets or business lines;

(f) that the CCP, by implementing the business reorganisation plan, will be able to fulfil all the applicable prudential and other regulatory requirements on a forward-looking basis and in particular:

(i) that the CCP will no longer be breaching any requirement or is avoiding a likely infringement from materialising; and



(ii) that the CCP ensures the continuous functioning of the CCP's operational processes as referred to in point (m) of paragraph 7 of Article 12 of Regulation (EU) No 2021/23;

(g) that, where the resolution shall be accompanied by the replacement of management and where such restructuring shall be achieved through the implementation of a business reorganisation plan, the business reorganisation plan shall address a restructuring aimed at the replacement of management;

(h) that, to the best knowledge of the CCP, the implementation of the measures set out by the business reorganisation plan would not have a material negative effect on market and financial stability;

(i) that the CCP has not identified issues relating to Union or national competition rules that could arise due to the implementation of the business reorganisation plan.

### *Article 9*

#### **Financial performance criteria**

1. The business reorganisation plan shall fulfil each of the following financial performance criteria:

- (a) that the CCP has identified the funding requirements under the plan and secured the sources of such funding, ensuring, in particular, that the parties agreeing to provide committed financial resources, such as the parent undertaking, clearing members, shareholders or liquidity providers of the CCP, will be able to transfer the committed amounts to the CCP within the timeframe required in accordance with the terms and conditions agreed by such parties;
- (b) that the CCP has identified and included in the plan how the CCP will maintain financial resilience;
- (c) that the CCP will be able to operate covering all its costs including an establishment of a post-reorganisation balance sheet showing the CCP post reorganisation and providing details on the new debt and capital structure and the effects of the write-down and conversion tools based on the valuation conducted pursuant to Article 24(3) and Article 61(1) of Regulation (EU) No 2021/23 to the extent such valuation has been finalised at the time of the establishment of the business reorganisation plan;
- (d) that the CPP has identified and mitigated any financial impediments, including where the CCP is party to an ongoing litigation or a dispute which could negatively affect the financial position of the CCP.

### *Article 10*

#### **Awareness and commitment**

1. The business reorganisation plan shall fulfil each of the following criteria:

(a) it will evidence that the senior management and the members of the board of the CCP are aware and committed to:

- (i) implement the business reorganisation plan; and



(ii) have appointed one or more persons responsible for carrying out the business reorganisation plan and have identified the individual(s) assigned to senior management role(s) of such department(s);

(b) it will evidence the awareness, commitment, cooperation and support of the following key internal and external stakeholders to the business reorganisation plan:

(i) the risk committee;

(ii) the clearing members and their direct and indirect clients where possible to identify; and

(iii) the interoperable CCPs and critical service providers.

#### *Article 11*

### **Credibility of the business reorganisation plan**

1. The business reorganisation plan shall apply assumptions that are credible and ranging from best-case to worst case and which ensure that the business reorganisation plan implements a reorganisation strategy that is realistic, appropriate, and takes into account the opportunities and threats to the CCP in the relevant market.

2. The business reorganisation plan shall apply assumptions which are based on the relevant market where the CCP provides clearing services, the clearing offerings by relevant peer CCPs and shall be compared with appropriate sector-wide benchmarks relevant for CCPs.

3. All assumptions, including worst-case or best-case assumptions, shall result in plausible scenarios. The changes applied to establish worst- case or best-case assumptions shall focus, in particular, on aspects that are relevant for the CCP under the business reorganisation plan to ensure proportionality and efficiency.

4. The business reorganisation plan shall not, even under the worst-case or best-case scenarios, include resolution tools beyond the scope of the resolution scheme under implementation.

#### *Article 12*

### **Appropriateness of the business reorganisation plan**

1. The business reorganisation plan shall be consistent, to the extent possible, with the assessments carried out by the resolution authority and the competent authority in the period leading up to the establishment of the business reorganisation plan and with the valuations used for the determination of whether the conditions for resolution were met in accordance with Article 22(1) of the Regulation (EU) No 2021/23.

2. The business reorganisation plan shall link the measures under the business reorganisation plan to the outcome of the analysis undertaken of the factors and circumstances that caused the CCP the CCP to fail or to be likely to fail and shall link the measures under the business reorganisation plan to the event causing the resolution plan to be triggered, separating between default events, non-default events and a combination of the two, depending on the circumstances of the situation.

3. The analysis of the external operating environment included in the business reorganisation plan shall be consistent, to the extent possible, with the analysis of opportunities and threats in the relevant markets, as determined by the resolution authority and competent authority when carrying out their tasks.



4. The business reorganisation plan shall, not adversely affect the critical functions or core business lines of the CCP or the functioning of the financial system and overall financial stability.

5. The business reorganisation plan shall be feasible and realistic. It shall ensure the following:

(a) mitigation of any potential implementation impediments, such as labour law or other contractual arrangements;

(b) that the planned measures, the timetable for its implementation and the assessment of the performance criteria, have taken into account the specificities of the CCP, including business organisation and clearing services, the links with, clearing members, and to the extent the information is available, clients and indirect clients of the CCP, trading venues, creditors and critical service providers and any material interdependencies of the CCP with other entities relevant to the CCP or interoperability arrangements with other FMIs;

(c) the business reorganisation plan shall take into account the situation in the relevant markets where the CCP provide clearing services; and

(d) the valuation used to calculate any expected proceeds from the selling of assets or business lines envisaged by the business reorganisation plan shall be prudent, reliable and realistic.

6. The business reorganisation plan shall be short and concise to able to be implemented in a rapid and swift manner, taking into account the need to allow sufficient time to implement the business reorganisation plan in the most effective way.

#### *Article 13*

#### **Consistency of the business reorganisation plan**

1. The business reorganisation plan shall be aligned with previous business plans that have been prepared by the CCP, where suitable, or shall explain why the business reorganisation plan materially deviates from such other business plans.

2. Where the business reorganisation plan includes measures already featuring in the latest versions of previously prepared recovery plan for the CCP, these shall be limited to elements which remain relevant following that CCP's failure and resolution and shall remain relevant considering the effective economic and financial market conditions under which the CCP will operate.

3. The business reorganisation plan shall respect the resolution objectives laid down in Articles 21 of the Regulation (EU) No 2021/23.

#### *Article 14*

#### **Entry into force**

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

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

Done at Brussels, XXX





## **4.4 Annex IV Summary of questions**

**Question 1: Do you agree with how E6MA has further specified the required assessment to identify the factors and circumstances that caused the CCP to fail or to be likely to fail (please also see Article 1 of the draft RTS) ? If not, please explain?**

**Question 2: Do you agree with how ESMA has further specified the descriptions to be provided under the business reorganisation plan related to the measures to be adopted under the plan (please see Articles 2-6 of the draft RTS)? If not, please explain?**

**Question 3: Do you agree with how ESMA has further specified the timetable and the aspects to be considered in the implementation of the business reorganisation plan (please see Article 7 of the draft RTS)? If not, please explain?**

**Question 4: Do you agree with how ESMA has further specified the criteria to be fulfilled for the approval of the business reorganisation plan under this draft RTS (please see Articles 8-13 of the draft RTS). If not, please explain?**

**Question 5: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?**

**Question 6: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.**

**Question 7: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?**

**Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.**