



European Securities and
Markets Authority

Final Report

Guidelines on the assessment of resolvability (Article 15(5) of CCPRRR)

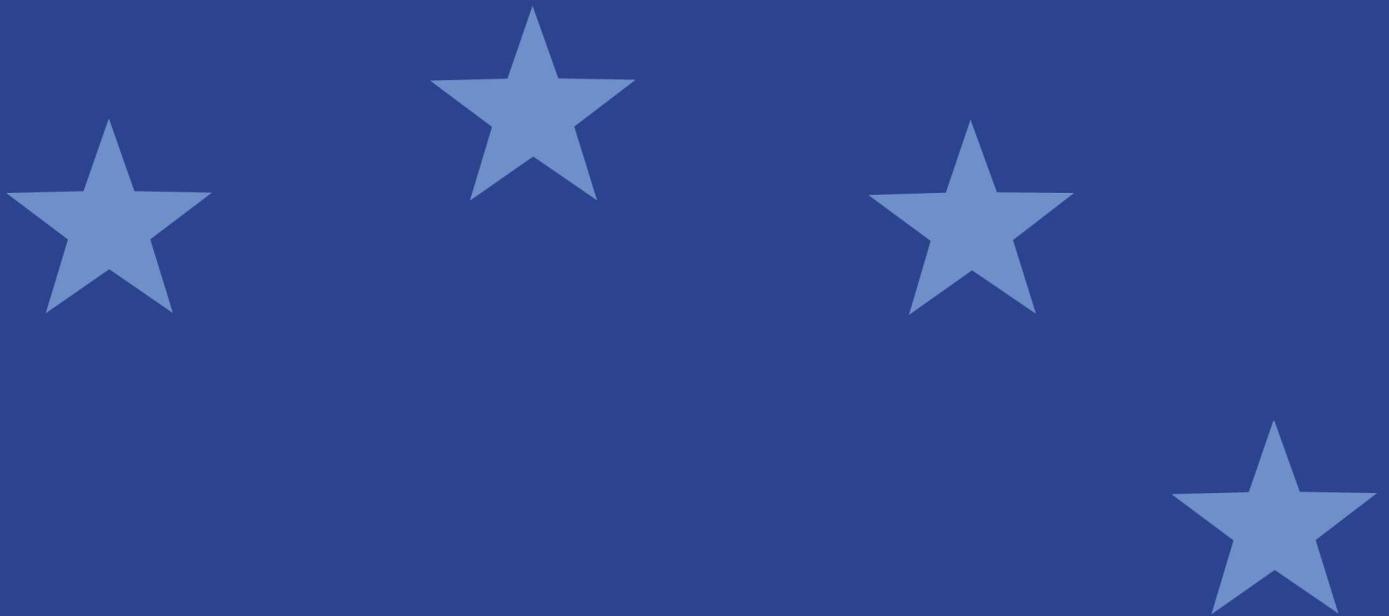


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Executive Summary

Reasons for publication

The resolvability assessment by the resolution authority results in a conclusion on whether a CCP will be considered to be resolvable, hence an important aspect in the preparation of a CCP's resolution planning. In undertaking the review, the resolution authority should, in accordance with Article 15(1) of CCPRRR, assess the extent to which a CCP may be resolved without assuming certain types of financial support, such as extraordinary public financial support or central bank assistance. ESMA, in close cooperation with the ESRB, shall issue Guidelines by 12 August 2022 to promote the convergence of the resolution practices regarding the assessment of the 26 matters set out under Section C of the Annex of CCPRRR that the resolution authorities are to consider when assessing the resolvability of a CCP.

The proposed Guidelines issued in accordance with Article 16 of Regulation (EU) 1095/2010 are dedicated to cover the establishment of a common set of aspects to be assessed under Article 15(5) of CCPRRR in order to promote the convergence of resolution practices regarding the application of Section C of the Annex to CCPRRR.

On 19 May 2022 ESMA launched a public consultation on the draft Guidelines with the deadline for consultation responses on 1 August 2022. This Final Report (and the accompanying guidelines) assesses and takes into account, where suitable the feedback provided by the four respondents to the consultation. Moreover, ESMA also sought advice on the draft Guidelines from the Securities and Markets Stakeholder Group in accordance with Article 16(2) of ESMA Regulation to provide advice.

Contents

Section 1 contains the introduction, Section 2 sets out the scope of the mandate for the Guidelines and Section 3 provides the structure of the Guidelines. Section 4 presents the aspects included in the Guidelines, as well as an overview of the responses received to the public consultation, and ESMA's feedback statement. Section 5 includes the annexes, of which Annex I details the legislative mandate, Annex II provides the cost-benefit analysis, Annex III set out the Advice of the Securities and Markets Stakeholder Group and Annex IV presents the Guidelines.

Next Steps

The Guidelines will apply after their publication by ESMA on its website in the official languages of the European Union.

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.

1. Introduction

1.1 Background

1. The objective of the resolvability assessment is to make authorities and supervised entities aware of the implications of resolution for the financial system, identify factors and conditions affecting the effective implementation of resolution actions and help determine the specific actions necessary to achieve greater resolvability without severe systemic disruption and without taxpayers' exposure to losses while protecting systemically important functions¹. Consequently, the assessment of resolvability is a crucial element of resolution planning as it aims to ensure the suitability and effectiveness of the preferred resolution strategy.
2. According to Recital (29) of Regulation (EU) 2021/23 of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties² (CCPRRR), the resolvability assessment is the basis on which resolution authorities may require changes to the legal or operational structure and organisation of CCPs.
3. Article 15 of CCPRRR provides the framework for the resolvability assessment. Article 15(2) of CCPRRR states that a CCP is *deemed resolvable* where the resolution authority considers it *feasible and credible to either liquidate the CCP under normal insolvency proceedings or to resolve it by applying the resolution tools and exercising the resolution powers*. Article 15(3)(a) of CCPRRR requires the CCP to demonstrate, upon request by the resolution authority, that there are no impediments to the reduction of the value of instruments of ownership following the exercise of resolution powers. Article 15(3)(b) of CCPRRR requires the CCP to demonstrate, upon request by the resolution authority, that its contracts with clearing members of third parties do not enable those clearing members or third parties to successfully challenge the exercise of resolution powers by a resolution authority or otherwise avoid being subject to those powers.
4. ESMA notes that the resolvability assessment by the resolution authority results in a conclusion on whether or not a CCP will be considered resolvable, hence it is an important aspect in the preparation of a CCP's resolution planning. In undertaking the review, the resolution authority should, in accordance with Article 15(1) of CCPRRR, assess the extent

¹ Key Attributes of Effective Resolution Regimes for Financial Institutions, I Annex 3 Resolvability Assessments, Paragraph 2, p. 37, Financial Stability Board, 15 October 2014.

² 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 (Text with EEA relevance) (OJ L 22, 22.1.2021, p. 1).

to which a CCP may be resolved without assuming certain types of financial support, such as extraordinary public financial support or central bank assistance.

5. Under Article 15(6) of CCPRRR, the resolution authority, in coordination with the resolution college, shall make the resolvability assessment at the same time as drawing up and updating the resolution plan in accordance with Article 12 of. Furthermore, the resolution authority should notify ESMA in a timely manner where it considers that a CCP is not resolvable in accordance with Article 15(2) of CCPRRR.
6. For the purpose of the resolvability assessment, Article 15(4) of CCPRRR states that the resolution authority should examine the 26 matters set out in Section C of the Annex to CCPRRR. These matters include the structural, operational, financial, information and cross border aspects of CCP resolvability as well as the credibility aspects of the CCP's resolvability.
7. ESMA is mandated under Article 15(5) of CCPRRR, in cooperation with the European Systemic Risk Board (ESRB), to issue Guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010³ ('ESMA Regulation') to promote the convergence of resolution practices regarding the application of Section C of the Annex to CCPRRR.

1.2 Comparison with existing resolvability assessment frameworks

1.2.1 EBA – Resolution planning in relation to resolvability assessments

8. Article 15 of CCPRRR is written in a similar manner to Article 15 of Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions⁴ (BRRD), regulating resolvability assessments in the context of banking recovery and resolution. There is, however, a difference between Article 15(5) of CCPRRR requiring ESMA to issue Guidelines to *promote the convergence* of resolution practices regarding the application of Section C of the Annex to CCPRRR and Article 15(4) of BRRD mandating the EBA to develop draft regulatory technical standards to *specify the matters and criteria* for the assessment of the resolvability of institutions or groups. Hence, the mandate to ESMA is different from that of EBA in the sense that it

³ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

⁴ 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 (OJ L 173, 12.6.2014, p. 190).

provides for the issuance of Guidelines (and not of RTSs) focusing on ensuring convergence of resolution practices in applying the matters already specified in CCPRRR.

9. EBA issued the draft regulatory technical standards on the content of resolution plans and the assessment of resolvability⁵ on 19 December 2014 and they were adopted on 23 March 2016 by Commission Delegated Regulation (EU) 2016/1075⁶. Section II of Chapter II of the Commission Delegated Regulation specifies the requirements regarding the resolvability assessments by defining the stages of assessment and laying down the feasibility and credibility criteria of a resolution strategy.
10. ESMA also notes the work undertaken recently by EBA in their Final Report on Guidelines on improving resolvability for institutions and resolution authorities under Articles 15 and 16 of BRRD issued in January 2022⁷ (EBA's Resolvability Guidelines) that is based on the Consultation Paper on the Guidelines for institutions and resolution authorities on improving resolvability⁸ issued in March 2021 and which was open for a 3-month consultation period⁹.
11. The proposed Guidelines aim to, where suitable, implement existing international standards on resolvability and consider the best practices developed by EU resolution authorities, in particular in the areas of *Operational Continuity in Resolution, Access to FMs, Funding and liquidity in resolution, bail-in execution, business reorganisation and communication*. ESMA has considered the EBA's Resolution Guidelines in the preparation of these Guidelines to ensure a consistent assessment of resolution plans where suitable.

1.2.2 International work on resolvability assessments

12. Resolution planning has been further assessed and developed in different international fora, such as the Financial Stability Board (FSB). Hence, ESMA has, in the preparation of the Guidelines, also considered the work presented by FSB in the relevant notes and guidance. The FSB published in 2014 the *Key Attributes of Effective Resolution Regimes*

⁵ EBA/RTS/2014/15, 19 December 2014.

⁶ Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of writ-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (Text with EEA relevance). OJ L184, 8.7.2016, p.1.

⁷ https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2022/EBA-GL-2022-01%20Guidelines%20on%20resolvability/1025905/Final%20Report%20on%20Guidelines%20on%20improving%20resolvability%20for%20institutions%20and%20resolution%20authorities.pdf

⁸ <https://www.eba.europa.eu/eba-consults-its-draft-Guidelines-institutions-and-resolution-authorities-improving-resolvability>

⁹ EBA/CP/2021/12, Consultation paper on Guidelines for institutions and resolution authorities on improving resolvability, 13 March 2021, available at:

https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2021/Consultation%20for%20institutions%20and%20resolution%20authorities%20on%20improving%20resolvability/964043/CP%20on%20draft%20GL%20on%20resolvability.pdf

for *Financial Institutions*, Annex 3 of which deals with Resolvability Assessments¹⁰ and in 2016 a discussion on *Essential Aspects of CCP's resolution planning*¹¹ further developing the work done on the *Key Attributes of Effective Resolution Regimes* for financial institutions. There are also other notes or guidance covering resolvability assessments as part of the overall assessment, one of them is the *Guidance on Continuity of Access to Financial Market Infrastructures ("FMIs") for a Firm in Resolution*¹².

2. Scope of Mandate

13. The mandate for ESMA is set out in Article 15(5) of CCPRRR and focuses on ensuring the convergence of resolution practices regarding the application of Section C of the Annex to CCPRRR.
14. The 26 different matters that the resolution authorities are to consider when assessing the resolvability of a CCP are set out in Section C of the Annex to CCPRRR.
15. The proposed Guidelines are dedicated to the establishment of a common set of aspects to assess under Article 15 of CCPRRR in order to promote the convergence of resolution practices regarding the application of Section C of the Annex of CCPRRR by issuing Guidelines in accordance with Article 16 of Regulation (EU) 1095/2010.
16. The Guidelines are developed bearing in mind international standards on resolvability as well as the best practices developed by EU resolution authorities on resolvability topics within the BRRD framework (as presented above under Section 1.2.1).
17. Different stages can be identified for the preparation and execution of resolution such as (i) resolution planning, (ii) preparation for resolution (iii) the 'resolution weekend'¹³ and (iv) the closing of the resolution. Resolvability assessment is part of the resolution planning stage and is crucial for the CCP's resolvability improvement.
18. ESMA notes that Article 15(2) of CCPRRR states: "A CCP shall be **deemed resolvable** where the resolution authority considers it **feasible and credible** to either **liquidate it under normal insolvency** proceedings or to **resolve it applying the resolution tools and exercising the resolution powers**".

¹⁰ https://www.fsb.org/wp-content/uploads/r_141015.pdf

¹¹ Essential Aspects of CCP Resolution Planning, Discussion Note, Financial Stability Board, 16 August 2016.

¹² <https://www.fsb.org/wp-content/uploads/P060717-2.pdf>

¹³ The resolution weekend is the phase, preferably taking place when markets are closed, starting with the determination that a CCP is failing or likely to fail. It encompasses all internal processes needed for the adoption of the resolution scheme by the resolution authority.

19. In developing the Guidelines, ESMA has focused on the assessment aimed to resolve the CCP rather than to liquidate the CCP, as the resolvability assessment is significantly different from the liquidation assessment which remains subject to national laws. Hence, these Guidelines focus on resolvability assessments and do not generally apply to the liquidation phase of the resolution process.
20. These Guidelines establish generic aspects for the resolution authority to consider. However, some of the aspects presented in the Guidelines may be more relevant for a certain type of resolution tool than others, and the extent of their application to other resolution tools is left to the discretion of the resolution authorities. Nonetheless, resolution authorities should explain in the resolvability assessment why a Guideline would not be relevant for the CCP to ensure a harmonised application of the Guidelines to the largest extent possible.
21. As noted above, the Guidelines aim to guarantee common practices by providing a common denominator for the assessment of the resolvability of a CCP. Even if a CCP complies with and is in line with the aspects set out in the Guidelines, this does not necessarily mean that the CCP is resolvable, as it is the resolution authorities which have the sole responsibility of making the resolvability assessment on the basis of their expert judgment.
22. ESMA however notes that the resolution authority shall assess the extent to which a CCP is resolvable in coordination with the resolution college in accordance with the procedure set out in Article 17 of CCPRRR, and after consultation with the competent authority.
23. ESMA notes that some of the aspects under the Guidelines come close to crisis management plans that CCPs have established under EMIR. Hence, where for example a CCP has a well-defined and well-functioning crisis management plan, this may be considered by the resolution authority as part of the assessment under the Guidelines as such preparedness may also assist the CCP in being resolvable.
24. On 19 May 2022, ESMA launched a public consultation on the draft Guidelines with the deadline for consultation responses on 1 August 2022. The public consultation aimed at receiving stakeholders' feedback on a list of questions and on the draft Guidelines.
25. This Final Report, and the accompanying Guidelines, assesses and takes into account where suitable the feedback provided by the four respondents to the consultation. Moreover, ESMA also sought advice on the draft Guidelines from the ESMA's Securities and Markets Stakeholder Group in accordance with Article 16(2) of ESMA Regulation but none was received.

2.1 Responses received

26. There was a general agreement of the respondents on the approach taken by ESMA for the proposed Guidelines and how ESMA has interpreted the mandate and the aim of the Guidelines.
27. One respondent noted and appreciated that ESMA has considered existing standards, such as the EBA's Resolution Guidelines in the preparation of these Guidelines where suitable and another respondent appreciated that ESMA has taken international guidance into account.
28. Two respondents expressed their agreement with the focus on resolution rather than insolvency, and one of them further noted that the liquidation assessment would be subject to national provisions.
29. One respondent suggested for ESMA to consider providing a clear process/guideline on how to stop resolution and how from that point onwards the CCP can move to business as usual.
30. Two respondents noted that the assessment will be case-dependent and that some aspects of the Guidelines may not be relevant in all cases.
31. One of the respondents further noted that, for instance, the relevance of a specific Guideline may vary depending on the resolution tool(s) preferred by the respective resolution authority and that therefore, while fully understanding the need for common practices, it is also important to ensure that resolution authorities retain the ability to make the resolvability assessment based on their expert judgement and that there is no automatic link between the compliance status of a CCP with the Guidelines and the outcome of the resolvability assessment.
32. The other respondents clarified further that an undifferentiated approach to the application of the Guidelines may not be fit for purpose and that if a CCP is compliant with certain provisions, this should not necessarily trigger the detection of an issue, the need for remediation, or the consideration of a CCP as unresolvable. Such respondents appreciated that ESMA clarifies that national resolution authorities retain the sole responsibility of making the resolvability assessment on the basis of their expert judgment but nevertheless, wonder whether a resolution authority should be required to justify each deviation from the application of a Guideline in the resolvability assessment and would recommend a less prescriptive approach.

2.2 ESMA feedback statement

33. ESMA notes that the request to ESMA to provide a clear process/guideline on how to stop resolution and how, from that point onwards, the CCP can move to business as usual is outside the scope of the mandate. However, it is also noted that CCPRRR contains provisions in order to prepare for this process, for example, Article 36 of CCPRRR provides the requirement to establish a business reorganisation plan.
34. ESMA agrees that the assessment will be case-dependent, and that the relevance of a certain Guideline may vary depending on the resolution tool(s) applied but also supports the comment made that there is a need for common practices. ESMA has already ensured the ability of the resolution authorities to make the resolvability assessment based on their expert judgement and ESMA agrees that there is no automatic link between the compliance status of a CCP with the Guidelines and the outcome of the resolvability assessment and this is already evidenced by the Guidelines.
35. ESMA has further considered the level of justification needed for each deviation from the application of the Guidelines, however, the Guidelines states that:

“However, in order to ensure a harmonised application of the Guidelines to the extent possible, the resolution authorities should explain, in the resolvability assessment, why a Guideline would not be relevant for the CCP or if additional aspects are used in the resolvability assessment.”

36. ESMA would not find this obligation too burdensome as the resolution authorities have an obligation to comply or explain their compliance with Guidelines, hence the envisaged approach would be in line with this overarching requirement.

3. Structure of the Guidelines

37. The resolution authority shall assess the extent to which a CCP is resolvable and shall examine the matters specified in Section C of the Annex in its assessment. In determining the extent to which a CCP is resolvable, the resolution authority should assess if any shortcomings, uncertainties, restrictions or limitations of the CCP are identified in examining the 26 matters of Section C, and if any such shortcomings, uncertainties, restrictions or limitations may affect the resolvability of the CCP.
38. ESMA’s mandate is to promote the convergence of resolution practices regarding the application of Section C of the Annex to CCPRRR. Hence ESMA shall in addition to providing guidance to promote convergence on the 26 matters as set out in Section C of the Annex, also generally promote convergence on resolution practices in relation to those 26 matters.

39. ESMA has carefully considered how to most effectively provide such guidance, whether to provide guidance in relation to each of the matters or to provide guidance on the overall principles that should apply in assessing the 26 matters under Section C. ESMA has concluded that for the Guidelines to be proportionate and effective in promoting the convergence of resolution practices, it would be more suitable to provide for an overall guidance on how to assess the feasibility of resolving a CCP and to determine whether a CCP is deemed to be resolvable in a resolution.
40. ESMA has therefore introduced a Guideline that applies generally to the assessment of the matters under Guideline 1. The aim is not to conclude on the resolvability of the CCP but to guide the resolution authority in its assessment of the matters and to assist in the determination as to the significance of shortcomings, uncertainties, restrictions or limitations of the CCP identified in examining the 26 matters set out in Section C of the Annex of CCPRRR. Once the significance of an issue is determined it is the resolution authorities which have the sole responsibility of making the resolvability assessment on the basis of their expert judgment.
41. ESMA has further considered the 26 matters and concluded that some of the matters are related and therefore joint Guidelines covering those would ensure proportionality and efficiency.
42. However, to ensure that the Guidelines provide concise and useful guidance on the relevant matters set out in the list in Section C, several of the matters are considered on an individual basis and covered by a Guideline suitable for the matter.
43. The Guidelines do not cover all topics relevant to the resolvability assessment due to the limitations of the mandate and focuses on providing guidance in relation to list of matters set out in Section C of the Annex of CCPRRR in order to promote the convergence of resolution practices. However, the aspects provided for in the Guidelines are not a closed list and the resolution authority may consider other or additional aspects when assessing the resolvability of the CCP under CCPRRR.

3.1 Responses Received

44. There is a general agreement on the structure of the Guidelines and to group common aspects of the 26 matters.

3.2 ESMA feedback statement

45. No changes are envisaged on the structure of the Guidelines.

4. Proposed Guidelines

4.1 Guideline 1 under the Consultation Paper

In determining the extent to which a CCP is resolvable, the resolution authority should assess if any shortcomings, uncertainties, restrictions or limitations of the CCP are identified in examining the 26 matters of Section C of the Annex of CCPRRR, and if any such shortcomings, uncertainties, restrictions or limitations may affect the resolvability of the CCP.

ESMA proposes for the resolution authority to use the following elements as a guide to assess the resolvability of the CCP.

Materiality assessment

ESMA notes that for an identified concern, shortcoming, uncertainty, restriction or limitation to affect the overall assessment of the CCPs resolvability, it would need to constitute a material concern i.e. (i) it would need to be of a significant magnitude, (ii) it would need to be likely to occur (probable) and (iii) the complexity of the issue would need to be likely to negatively affect resolvability.

ESMA therefore would suggest the resolution authority to establish an assessment system, using these 3 parameters in assessing the identified shortcoming, uncertainty, restriction or limitation, and to conclude if the issue is of such an overall materiality that it may affect the resolvability of the CCP.

Parameter 1 - Significance of the issue identified

Relevance

ESMA has noted that for an issue to be considered in the resolvability assessment of a CCP, it has to be relevant for the resolvability assessment, i.e., the assessment should consider how the identified shortcoming, uncertainty, restriction or limitation is relevant for the overall assessment.

ESMA notes that, for example, whilst an identified lack of a certain procedure may be an important shortcoming in the overall assessment of the CCPs compliance with procedures, it may be less relevant for the determination on the resolvability of the CCP, hence such a shortcoming would be less relevant in the overall assessment of the CCP's resolvability.

ESMA further notes that whilst an identified shortcoming, uncertainty, restriction or limitation is relevant for the overall assessment it may be in the process of being corrected or mitigated, hence it would again be less relevant to the overall resolvability assessment.

The more relevant an identified issue is to the outcome of the resolvability assessment, the higher the significance allocated to the issue. An issue in the process of being corrected or mitigated in a satisfactory manner would be considered as less relevant by the resolution authority.

Size

ESMA has noted that the size of an issue, such as an identified shortcoming, uncertainty, restriction or limitation, has an impact on the significance assessment in the resolvability assessment of the CCP.

ESMA notes that a big issue, may often result in a high significance. However a big issue on a less relevant aspect of the resolvability assessment may also result in a fairly high significance as due to its size, the issue may affect the resolvability to a larger extent. On the contrary, ESMA notes that significance is not always related to size, as a minor issue, such as a shortcoming on a very important aspect in the assessment of resolvability may have a significant impact on the resolvability of the CCP.

The significance is generally related to size, and the bigger an issue is the more likely is it that the identified issue is considered significant for the resolvability assessment. However, where the issue identified is in relation to a very important aspect of the resolvability assessment, also a minor issue may result in a significant risk, as such identified issue may reduce the chances of a resolution being feasible and credible.

Parameter 2 – Probability or certainty

ESMA notes that the **probability of a risk materialising or the certainty of an identified issue**, would both likely result in a higher significance of the issue compared to where the issue is unlikely to materialise or is uncertain.

ESMA notes that for example in relation to certainty, the **certainty of reviewed material may impact the outcome of the assessment**, for example where the resolution authority has identified uncertainties in the material assessed (such as contradicting information, unclear numbers, unclear references and explanations) and where those uncertainties were not able to be corrected within the resolvability assessment, such uncertainties may increase the significance of the issue.

ESMA would therefore consider that a high degree of certainty for example, in the mapping exercise, increases the chances of a successful resolvability assessment. The contrary would also be true, that where there are clear uncertainties in a mapping exercise and this inability to map would prevent the use of a resolution tool or increase the likelihood of difficulties in applying a resolution tool, this lowers the chances of a successful resolution.

The higher the probability of an issue materialising is and the lower the certainty of the issue identified (i.e. the scope of the issue cannot be verified), the higher is the risk that the identified issue is significant to the resolvability assessment, as issues with a high probability and uncertainties in relation to identified issues raises the risk that the use of a resolution tool would not in the end be successful and therefore reduces the chances of a resolution being feasible and credible.

Parameter 3: Complexity

ESMA has noted that the complexity of an issue, also where in relation to other parts of the CCP or the CCP group, such as an identified shortcoming, uncertainty, restriction or limitation, has an impact on the materiality assessment in the resolvability assessment of the CCP.

ESMA notes that the complexity of an identified issue works in two different ways: complexity in assessment and complexity in the CCP, and both are relevant for the assessment.

Complexity in assessment: Where the issue at hand is not a complex issue, then its significance will depend on other parameters of the assessment, relevance, size and certainty. However, where the issue identified is complex, this may increase the materiality of the issue, as such complexity may at the time of resolvability negatively affect the resolvability even where the issue identified may be minor in size or relevance.

Complexity in the CCP: Where the issue derives from a complexity within the CCP, for example where the mapping of entities within a group or where the preparation to receive certain valuations is complex, this may negatively affect the resolvability of the CCP. Hence where an issue identified derives from the underlying complexity within the CCP (group structure, governance or internal procedures relating to core business lines and critical functions with an entity) this may increase the materiality of the issue in the resolvability assessment.

The more complexity there is in an issue identified or in the CCP's group structure, governance or internal procedures relating to core business lines and critical functions with an entity, the higher the risk that the identified issue is material to the resolvability assessment and reduces the chances of a resolution being feasible and credible.

Guideline 1

In the determination of the CCPs resolvability, the resolution authority should assess if any concerns, shortcomings, uncertainties, restrictions or limitations have been identified in the assessments of the relevant matter and if any of those identified concerns, shortcomings, uncertainties, restrictions or limitations may affect the resolvability of the CCP in a

detrimental or negative manner, using the elements listed under this Guideline 1 for this assessment.

The resolution authority would, by assessing the significance, probability and complexity of the identified issue, decide if the identified issue could be considered to have a material negative impact on the resolvability of the CCP.

The resolution authority should use the method outlined in this Guideline 1 to assess, given the specific characteristics of the CCP and the resolution strategies identified in the plan, the impact of an identified issue on the specific resolvability matter based on the materiality assessment, considering in principle three main parameters listed below.

Parameter 1 – Significance

Relevance

The more relevant an identified issue is for the outcome of the resolvability assessment, the higher the significance allocated to the issue. An issue in the process of being corrected or mitigated in a satisfactory manner would be considered as less relevant by the resolution authority.

Size

The significance is generally related to the size, and the bigger an issue is the more likely is it that the identified issue is considered significant for the resolvability assessment. However, where the issue identified is in relation to a very important aspect of the resolvability assessment, also a minor issue may result in a significant risk, as such identified issue may reduce the chances of a resolution being feasible and credible.

Parameter 2 – Probability

The higher the probability of an issue materialising is and the lower the certainty of the issue identified (i.e. the scope of the issue cannot be verified), the higher is the risk that the identified issue is significant to the resolvability assessment, as issues with a high probability and uncertainties in relation to identified issues raises the risk that the use of a resolution tool would not in the end be successful and therefore reduces the chances of a resolution being feasible and credible.

Parameter 3 – Complexity

The more complexity there is in an issue identified or in the CCP's group structure, governance or internal procedures relating to core business lines and critical functions with

an entity, the higher the risk that the identified issue is material to the resolvability assessment and reduces the chances of a resolution being feasible and credible.

Template to assist the resolution authority in their assessment.

	Issue/s detected	Significance (low, medium, high)	Probability ((low, medium, high)	Complexity ((low, medium, high)
GL 2				
GL 3				
GL 4				
[to be completed]				

4.1.1 Responses received

46. There is a general agreement on Guideline 1 by the respondents.

47. One respondent however noted that whilst he generally agree with the principles (significance, probability, complexity) for the assessment of the materiality of issues detected he questioned the need for a template which would effectively require the competent authority to assign ratings between low, medium, and high for the significance, probability, and complexity of every issue with respect to the Guidelines.

48. Such respondent noted that from a practical perspective, it may be rather difficult and burdensome to assess these principles in isolation and instead of the principle-by-principle issue rating proposed, they would encourage the use of one overall expert rating for each of the 26 matters taking into account all the three principles. Hence, if the CCP does not receive the best rating, the assessment grid would include a description of the issues detected and the conditions for their remediation. The respondent believed such an approach may be more pragmatic than trying to divide the compliance assessment of a matter (or the assessment of a specific issue) into rather abstract sub-categories.

49. Another respondent welcomed the proposed template and the note in the Guidelines that size does not necessarily result in a significant risk and that this should be jointly assessed

with relevance in the context of resolvability. The respondent further noted that in the definition of Parameter 2 (Probability), one could find the use of the word “certainty” a little misleading, as it might be misinterpreted with a very high probability whereas the meaning seems to be “clarity” or “conspicuousness”. The respondent therefore proposed to replace “the lower the certainty of” by “the higher the lack of clarity of”, “the less clearly defined” or something similar.

50. Another respondent noted that whilst understanding ESMA’s intention, they wonder how the ‘size’ of the issue can be measured and that the parameters related to ‘relevance’ and ‘complexity’ look relatively subjective. Such a respondent found that there could be instances where an issue might be complex in nature, but it could be resolved in a straightforward manner contrary to a simpler/straightforward one which could be more challenging. For that reason, the respondent suggested that *the focus should not be so much on the complexity but on the solution* and its impact on the wider market and financial stability.

4.1.2 ESMA feedback statement

51. ESMA notes, in relation to the comment on changing the rating to apply on all 26 measures jointly rather than on separate guidelines in order to ensure the proportionality of the Guidelines, that the use of the template is not mandatory, hence it would be for the resolution authority to decide on the presentation of its assessment of the CCPs resolvability under the Guidelines.

52. ESMA further notes the reflection on the use of the word “certainty” and agrees that the use of the wording could lead to some level of confusion, hence ESMA has changed the wording based on the comment received.

53. ESMA finally notes the comment on the use of “size” and that the focus should be on the solution and impact rather than the issue. ESMA agrees that a reference to size could be improved and has adjusted this in Guideline 1. ESMA has also incorporated an adjustment to reflect the comment that the focus should not be so much on the complexity but on the solution.

4.2 Guidelines 2-12

4.2.1 Responses received

54. There was a general agreement on Guidelines 2-12 by the respondents. However, a few comments have been provided and they are presented below.

4.2.2 Guideline 2

4.2.2.1 Response to Guideline 2 (4)(a) and (c)

4. Whether the mapping of the core business lines and critical operations against the CCP's legal and corporate structures has identified:

a) an alignment between the different clearing services provided by the CCP and how the CCP is organised or if there are no or limited alignments identified;

[..]

c) that the ownership's structure results in complex decision models, reliance on owners or other legal persons within the group for resolution tools, entails complex ownership structures or have owners with complex or public ownerships.

55. One respondent noted that the legislation speaks about an alignment of legal and corporate structures but not of business structures and the respondent therefore disagreed with the inclusion of 'an alignment between the different clearing services'.

56. The respondents also noted that in their opinions, the provision 'that the ownership's structure results in complex decision models, reliance on owners or other legal persons within the group for resolution tools, entails complex ownership structures or have owners with complex or public ownerships' sounds too prescriptive/intrusive into the ownership of the CCP. The respondents believe the Guideline should rather be general, along the lines of 'whether the ownership structure of the CCP could impede the resolvability of the CCP'.

4.2.2.2 ESMA feedback statement Guideline 2 (4)(a) and (c)

57. ESMA notes that point 2 of Annex C under the CCPRRR refers to "the extent to which legal and corporate structures *are aligned with* core business lines and critical operations", hence the CCPs clearing service is its core business line and part of its critical operations, therefore ESMA would not read the regulation as narrowly as one of the respondents and will therefore not limit the scope of Guideline 2(4)(a). However, ESMA notes that the wording could be improved hence has slightly adjusted this Guideline.

58. ESMA has considered the comment on ownership structure in relation to Guideline 2(4)(c) and has amended the wording slightly to accommodate the comment.

4.2.2.3 Response to Guideline 2(5)

5. Whether the mapping has identified clearing services that could more easily be separated from other clearing services of the CCP, or not.

59. One respondent noted that ‘Whether the mapping has identified clearing services that could more easily be separated from other clearing services of the CCP, or not’ seems to lead to CCPs business models with separate business lines (e.g. separate default funds) and the respondent preferred that such reading was not captured.

4.2.2.4 ESMA feedback statement 2(5)

60. ESMA has considered the comment made and has concluded that it is only an assessment as to whether the mapping has found certain clearing services that could more easily be separated from other clearing services. Where a separation could occur more easily, this could simplify the resolvability of the CCP in relation to a certain resolution tool. However, ESMA is not of the view that a separation between clearing services (and default funds) is required for a CCP to be deemed resolvable. Based on this, ESMA does not see a need to adjust the Guideline as proposed.

4.2.3 Guideline 3

4.2.3.1 Response on Guideline 3 (1)

1. Whether the arrangements in place to provide for essential staff to support and maintain the core business lines and the critical operations are adequate and sufficiently robust and if and how such arrangements could be affected by the CCP entering into resolution, for example, by assessing:

a) what is foreseen by the CCP’s staff rules and conditions of employment in case of CCP resolution; and

b) to which extent essential CCP employees’ employment relationships would be upheld in a resolution and to what extent the CCP has obtained legal advice supporting this.

61. Two respondents noted that they interpret the Guideline in a way that the CCP’s employment contracts are to be adjusted to ensure employment of critical personnel even in resolution, as an indirect requirement to explicitly address the scenario of resolution in standard employment contracts with a view to ensuring continued employment of critical

personnel, and that such a requirement would significantly increase the burdens and complexities for CCPs (particularly in cases where different national labour laws need to be taken into account). The respondents would support a more flexible approach to CCPs' staffing rules.

62. The two respondents also noted that the Guideline seems to imply an obligation for CCPs to get legal advice in the following statement *'to which extent essential CCP employees' employment relationships would be upheld in a resolution and to what extent the CCP has obtained legal advice supporting this'* which seems too prescriptive and such respondents would rather support a more flexible approach regarding CCPs staffing rules taking into account that some CCPs operate out of multiple locations with varying labour laws and internal policies, with one respondent suggesting that an internal legal assessment should be sufficient.

4.2.3.2 ESMA feedback statement Guideline 3 (1)

63. ESMA has considered the comments received and would disagree with the view that the Guidelines set out an "indirect requirement". Point 4 of Annex C of CCPRRR already states that the resolution authorities are to consider "the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations;". Therefore, the assessment should include the extent to which the CCP has prepared for its continuation and to maintain core business lines and the critical functions.
64. Based on the above ESMA has not undertaken any major changes to the Guideline 3(1). However, ESMA has included a reference to the aspect of national law that may impact the CCPs possibility to prepare to retain essential staff and clarified that internal legal advice should suffice.

4.2.4 Guideline 4

4.2.4.1 Responses on Guideline 4 (3)

3. Whether a core business line or critical operation is serviced by several legal persons, either within the CCP's group or externally, and if this complexity may affect the robustness or enforceability of the service agreements.

65. Two respondents questioned how the resolution authority would assess whether a core business or critical operation is serviced by multiple legal entities, either within the CCP's group or externally, in order to estimate whether this complexity could affect the robustness or enforceability of the service arrangements, as it would be very difficult to assess this

aspect in a conclusive manner. It would also create a considerable burden on both CCPs and resolution authorities, hence, as this criterion seems too prescriptive and difficult to implement in practice, the respondents proposed to delete it.

4.2.4.2 ESMA feedback statement Guideline 4 (3)

66. ESMA has considered the comment and concluded that it would indeed be a complex assessment and the value added, compared to the assessments already provided under Guideline 4, is limited. Considering that the aspects already included under other parts of Guideline 4 provide sufficient guidance to the resolution authority in assessing the CCP's resolvability, ESMA has deleted Guideline 4(3).

4.2.5 Guideline 7

4.2.5.1 Response to Guideline 7(2)d)

2. Whether the CCP's management information systems:

[...]

d) are managed to ensure the information is reliable and clear and that the information is easy to retrieve in a readable format and that different information can be used together in an efficient manner, is compatible between different systems, and can be easily converted into a format that can be shared for rapid decision making, are automated and the extent to which straight through processing and automated arrangements are in place for the collection of data and the extent to which data inputs may be done manually;

67. One respondent noted that Guideline 7 seems, in its opinion, overly prescriptive.

68. Two respondents noted that, in particular, point (d) implies a broad and rather prescriptive automation requirement for management information systems, in particular relating to the collection of data where the requirement that all data should be automated seems rather prescriptive and although the respondents agreed in principle with the criteria of point d (e.g. reliable, clear, easy to retrieve, etc.), they would suggest a more outcomes-based approach whereby CCPs may continue to provide data manually, in case it is otherwise not feasible. Such flexibility would take into account the broad scope of information which may feed into the Management Information System (MIS) in the context of resolution planning.

4.2.5.2 ESMA feedback statement Guideline 7 (2)d)

69. ESMA has considered the overall comment on prescriptiveness and has concluded that information systems and access to information are crucial aspects in managing a crisis. Thus, ESMA finds the aspects highlighted in Guideline 7 important and relevant to assess. Hence, no major changes have been included.

70. ESMA has considered the comments and agrees in particular with the reflection on manually-provided inputs. Whilst manual processing was already referred to in the Guideline 7(2)d) (new 7(2)e)) this fall-back option has been made clearer in the revised Guideline.

4.2.5.3 Response on Guideline 7 (2)e)

2. Whether the CCP's management information systems:

[...]

e) uses real-time information flows or whether there are delays before the information can be recorded into the CCP's management information systems;

71. Two respondents challenged the need for real-time data, and one respondent noted that it is evident that data for resolution purposes needs to be provided on an ad hoc basis and at short notice, however regarding the use of real-time data, the respondents would rather propose to adopt a less prescriptive approach and allow CCPs to decide where the submission of real-time data or information would be meaningful and feasible, and in which cases it would be sufficient to provide data that is frequently updated (e.g. at predefined intervals). The respondents would therefore propose to delete the criterion in its current form. Similar reflections are made by another respondent who would deem the use of frequently updated information ("near-time") justified as long as the update intervals are predefined and sufficiently narrow. CCPs could exercise judgement as to whether the provision of real-time data would be feasible and also meaningful in terms of the added value compared with near-time data. Also, this respondent would therefore propose to delete the criterion in point 2e).

72. The two respondents also noted that it seems important that, beyond the operational set-up of the MIS, the content and scope of data provided within the MIS is determined by the competent resolution authority and that it could therefore be helpful, if the resolution authority provided a minimum list of data that is required for the purpose of resolution and valuation. One respondent further noted that as the transmission of information would need to be tested in advance also here it would be important for resolution authorities to

determine a clear set of financial data and communicate to the CCP in advance to set it up in its internal systems. This would significantly improve the exchange of information particularly in resolution.

4.2.5.4 ESMA feedback statement Guideline 7 (2)e)

73. ESMA has considered those comments and agrees that Guideline 7(2)g) (new 7(2)f)) and 7(2)a) is sufficient to ensure certain information is relevant and updated continuously. ESMA has therefore deleted Guideline 7(2)e) as there is no need to regulate the extent to which the CCP uses real-time information as long as the information is relevant, accurate and complete.

74. On the second reflection, ESMA agrees that it would be helpful for a pre-agreed list, and has included such a reference under Guideline 7(2)f).

4.2.6 Guideline 9

4.2.6.1 Response to Guideline 9

3. Whether implementing the chosen resolution tool(s) would raise the clearing costs of or reduce the availability of clearing services for clearing members and indirectly their clients.

75. One respondent suggested asking for the resolution authority to also assess the impact of tools on third party entities to identify potential impact just as is the process under the recovery plan.

76. One respondent noted that with regard to Guideline 9, point 3 does not fully cover the “possible impact on clearing members and, where applicable, their clients” as the impacts of the application of resolution tools may go far beyond just raising clearing costs or reducing the availability of clearing services, and also may affect client of clearing members directly (e.g. position allocation tools). The respondent thus believed that the resolution authority should analyse the impacts of the available resolution tools more thoroughly than currently described.

4.2.6.2 ESMA feedback statement on Guideline 9

77. ESMA has considered the comments and agrees with both of them and has amended Guideline 9 accordingly, by including reference to other counterparties than clearing members and by extending the assessment beyond clearing costs and availability of clearing services.

4.2.6.3 Other comments

78. One respondent pointed out that there is currently no expectation to segregate skin in the game (SITG) from other group assets, and the resolution framework should not lead to such requirement in the future.

79. This respondent also suggested including clearing members' liquidity provisions to meet losses in the list of elements the resolution authority should assess which, in the respondents opinion, should be part of the capital arrangements to be looked at.

4.2.6.4 ESMA feedback statement

80. ESMA has considered those comments and agrees to include an assessment to consider the clearing member's liquidity preparedness and did not consider relevant to add considerations about the possible segregation of SITG.

5. Annexes

5.1 Annex I Legislative mandate to develop guidelines

Article 15

Assessment of resolvability

1. The resolution authority, in coordination with the resolution college in accordance with the procedure set out in Article 17, and after consultation with the competent authority, shall assess the extent to which a CCP is resolvable without assuming any of the following:

(a) extraordinary public financial support;

(b) central bank emergency liquidity assistance;

(c) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

2. A CCP shall be deemed resolvable where the resolution authority considers it feasible and credible to either liquidate it under normal insolvency proceedings or to resolve it applying the resolution tools and exercising the resolution powers while ensuring the continuity of the CCP's critical functions and avoiding any use of extraordinary public financial support and, to the maximum extent possible, any significant adverse effect on the financial system and the potential for undue disadvantage to affected stakeholders.

The adverse effects referred to in the first subparagraph shall include broader financial instability or system wide events in any Member State.

The resolution authority shall notify ESMA in a timely manner where it considers that a CCP is not resolvable.

4. For the purposes of the assessment of resolvability referred to in paragraph 1, the resolution authority shall, as relevant, examine the matters specified in Section C of the Annex.

5. By 12 August 2022, ESMA, in close cooperation with the ESRB, shall issue guidelines to promote the convergence of resolution practices regarding the application of Section C of the Annex to this Regulation in accordance with Article 16 of Regulation (EU) No 1095/2010.

6. The resolution authority in coordination with the resolution college shall make the resolvability assessment at the same time as drawing up and updating the resolution plan in accordance with Article 12.

5.2 Annex II - Cost-benefit analysis

Introduction

Pursuant to Article 15(5) of CCPRRR, ESMA shall, by 12 August 2022, in close cooperation with the ESRB, issue Guidelines to promote the convergence of resolution practices regarding the assessment of the 26 matters set out under Section C of the Annex of CCPRRR that the resolution authorities are to consider when assessing the resolvability of a CCP.

The Guidelines should be issued in accordance with Article 16 of Regulation (EU) No 1095/2010 and this article requires ESMA, where appropriate, to analyse the potential costs and benefits relating to proposed Guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the proposed 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 Final Report are of a mandatory nature, i.e. they are envisaged in CCPRRR in order to ensure uniform, consistent and coherent application of Union law.

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 Commission¹⁴.

2. Cost-benefit analysis

Below are detailed the different corresponding policy options on how to promote the consistent application of the triggers for the use of the measures referred to in Article 15(4) of CCPRRR.

The resolvability assessment by the resolution authority results in a conclusion on whether a CCP will be considered to be resolvable, hence it is an important aspect in the preparation of a CCP's resolution planning. In undertaking the review the resolution authority should, in accordance with Article 15(1) of CCPRRR, assess the extent to which a CCP may be resolved without assuming certain types of financial support, such as extraordinary public financial support or central bank assistance.

The proposed Guidelines are dedicated to cover the establishment of a common set of aspects to assess under Article 15 of CCPRRR in order to promote the convergence of resolution

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN>

practices regarding the application of Section C of the Annex to CCPRRR by issuing Guidelines in accordance with Article 16 of Regulation (EU) 1095/2010.

<p>Specific objective</p>	<p>A CCP shall be deemed resolvable where the resolution authority considers it feasible and credible to resolve it by applying the resolution tools and exercising the resolution powers while ensuring the continuity of the CCP's critical functions and avoiding any use of extraordinary public financial support.</p> <p>The Guidelines are dedicated to covering the establishment of a common set of aspects to assess under Article 15 of CCPRRR in order to promote the convergence of resolution practices regarding the application of Section C of the Annex to CCPRRR.</p>
<p>Policy option 1</p>	<p>To specify principles as guidelines for the resolution authorities to apply when assessing the extent to which a CCP is resolvable.</p>
<p>How would this option achieve the objective?</p>	<p>This option would likely fulfil the mandate as it would aim to promote the convergence of resolution practices regarding the application of Section C of the Annex to CCPRRR. It would however create a lower level of convergence as the actual aspects considered by the resolution authority to determine the resolvability would be determined by the resolution authority.</p>
<p>Policy option 2</p>	<p>To provide, in the Guidelines, the main aspects for the resolution authority to consider in determining the CCPs resolvability, but to leave the actual decision model for the resolution authority to determine.</p>
<p>How would this option achieve the objective?</p>	<p>This option would meet the mandate as it would promote the consistent application of the Section C of the Annex to CCPRRR and would create a high level of supervisory convergence as the aspects listed for the resolution authorities to consider would be harmonised.</p>
<p>Policy option 3</p>	<p>To provide, in the Guidelines, the main aspects for the resolution authority to consider in determining the CCPs resolvability as well</p>

	<p>a model on how to evaluate the aspects using indicators or a pre-agreed model to conclude on the resolvability of the CCP.</p>
<p>How would this option achieve the objective?</p>	<p>This option would meet the mandate as it would promote the consistent application of the Section C of the Annex to CCPRRR and would create a very high level of supervisory convergence as the aspects listed for the resolution authorities to consider would be harmonised as well as providing clear guidance on how to assess and conclude upon them.</p> <p>This option would in ESMA's view risk to result in an assessment that is not able to consider the CCPs specificities enough and may therefore result in burdensome and too rigid assessment considering the complexity of the resolvability assessment. However, the Guidelines may in the future be complemented with further guidance if a lack of convergence or harmonisation in the resolvability assessment are identified, and hence further guidance on also <i>how</i> the resolution authority assess the resolvability may be provided in the future to enhance convergence.</p>
<p>Which policy option is the preferred one?</p>	<p>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 application of early intervention measures and given that Option 3 would risk leaving too little room for the resolution authority to decide on resolvability considering the CCP being assessed and this detailed approach would likely to be pre-mature at this stage.</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 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.</p>

Impacts of the proposed policies:	
Policy option 1	
Benefits	It will provide the principles for the resolution authority to determine on resolvability of the CCP.
Regulator's costs	Probably quite high as the resolution authorities have to create the list of indicators and monitor them.
Compliance costs	For the CCP no compliance costs.
Policy option 2	
Benefits	It will provide the resolution authority with a predetermined list of aspects to consider and monitor and, based on this assessment, will lead the resolution authority to determine on the resolvability of the CCP.
Regulator's costs	Moderate costs to monitor the triggers and indicators.
Compliance costs	For the CCP, no compliance costs.
Policy option 3	
Benefits	The Guidelines will provide the resolution authority with a predetermined list of aspects to consider as well as with a predetermined methodology on how to assess the aspects listed.
Regulator's costs	Moderate costs to monitor the triggers and indicators.
Compliance costs	For the CCP, no compliance costs.

	<p>The costs for Option 2 can be summarised as the cost of the resolution authority to monitor the aspects and to determine on the resolvability of the CCP.</p> <p>The cost of implementing an ongoing monitoring and assessment will vary depending on the nature of existing procedures of the competent authority and a one-off cost may be required to accommodate for those triggers and corresponding indicators to be assessed.</p> <p>ESMA notes that the costs are envisaged for by the CCPRRR.</p> <p>On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs.</p>
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5.2.1 Responses received on cost and benefit analysis

81. Overall, two respondents preferred Option 1 to Option 2, whilst two other respondents generally agreed with the choice of Option 2.
82. One respondent noted that Section C of the Annex to the CCPRRR already provides an extensive list of criteria for resolution authorities to refer to and that the broad mandate, i.e. “to promote the convergence of resolution practices regarding the application of Section C” lends itself to different interpretations. It does not further specify, for example, whether the Guidelines are intended to further set out process-related aspects, general principles applicable to the review of all 26 matters, or a methodology to assess compliance with all the individual 26 matters themselves (“sub-matters”). Against this background, the respondent agreed with ESMA’s assessment that all the policy options 1-3 would likely meet the mandate.
83. The respondent then noted that the Guidelines therefore could be more principles-based while still ensuring an appropriate level of convergence and noted that a principles-based approach would allow resolution authorities to duly take into account the specificities of the respective CCPs and applicable domestic provisions without being constrained by a requirement to justify any deviation from specifications of the 26 matters (contained in Guideline 2 to 12). Based on this, the respondent noted that the preferred policy option is policy option 1, whereby ESMA would specify overall principles (as in Guideline 1) for the assessment, while leaving the further definition of the 26 matters to the discretion of resolution authorities.

84. The other respondent supporting Option 1 noted that none of the three policy options explored would fall short of meeting the rather broad legislative mandate (promote convergence regarding the application of Section C). The respondent further notes that the 26 matters themselves already ensure an appropriate level of convergence and any further specification would be rather case-specific. A key benefit of policy option 1, in the view of this respondent, is that setting general principles applicable to all matters would ensure competent authorities are able to consider the CCP's respective specificities in their assessment against the 26 matters.
85. One respondent also noted, that to the best of its knowledge, the cost for competent authorities would be limited also under Option 1, as they may already have methodologies in use for resolvability assessments that are based on similar criteria (particularly for CCPs subject to banking regulation). Beyond their own previous experience, there is a growing body of guidance for resolvability assessments that resolution authorities can build on when further setting out the 26 matters listed in the CCPRRR.

5.2.2 ESMA Feedback Statement

86. ESMA notes in the responses the difficult balance between convergence and adaptability. Considering the comments provided ESMA is of the understanding that two respondents would support guidelines setting out principles for the resolution authorities to apply when assessing the extent to which a CCP is resolvable. However, whilst this option is likely to meet the aim of the mandate, it would create a lower level of convergence in the application of Section C of the Annex of CCPRRR.
87. ESMA deems that the preferred policy choice for the Guidelines would cover for both – sufficiently detailed guidance for resolution authorities that would in turn ensure a higher degree of convergence and a level playing field. While ESMA notes the request to ensure the ability of the resolution authority to assess the resolvability based on the specifics of the individual CCP, it notes that the requirement is to comply or explain, hence asking for a clarification would be in line with the overall regulatory requirements. Therefore, no change has been made.

5.3 Annex III – Advice of the Securities and Markets Stakeholder Group

In accordance with Article 16(2) of ESMA Regulation, ESMA has requested the advice of the Securities and Markets Stakeholder Group (SMSG). The SMSG has not provided any comment.

5.4 Annex IV –Guidelines

Guidelines

Guidelines on the assessment of resolvability (Article 15(5) of CCPRRR)



Who?

1. Scope

Who?

1. These Guidelines apply to resolution authorities.

What?

2. These Guidelines apply in relation to Article 15 of Regulation (EU) 2021/23 on CCP resolution and recovery (CCPRRR). These Guidelines establish a common set of aspects for resolution authorities to consider when applying the 26 matters provided in Section C to the Annex of CCPRRR during the conduct of resolvability assessments.

When?

3. These Guidelines apply as from the moment the official translations thereof in EU official languages are published on ESMA's website.

2. Legislative references, abbreviations and definitions

Legislative references

The following legislative references are used in these Guidelines:

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 ¹⁵
EMIR	Regulation (EU) 648/2012 of 4 July 2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories ¹⁶
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 ¹⁷ .

The following abbreviations are used in these Guidelines:

<i>CCP</i>	Central Counterparty
<i>CP</i>	Consultation Paper
<i>EC</i>	European Commission

¹⁵ OJ L 22, 22.1.2021, p. 1–102

¹⁶ OJ L 201, 27.7.2012, p.1

¹⁷ OJ L 331, 15.12.2010, p. 84



<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

4. Unless otherwise specified, the terms used in these Guidelines have the same meaning as in CCPRRR and EMIR.

3. Purpose

5. These Guidelines are based on Article 15(5) of CCPRRR. The objective of these Guidelines is to promote convergence of resolution practices regarding the application of Section C in accordance with Article 16(1) of the Regulation (EU) No 1095/2010.
6. In order to achieve this objective ESMA should in addition to providing guidance to promote convergence on the 26 matters as set out in Section C, also generally promote convergence on resolution practices in relation to those 26 matters. However, even if a CCP complies with and is in line with the aspects presented by the Guidelines, it does not necessarily mean that the CCP is resolvable, as it is the resolution authorities which have the sole responsibility of making the resolvability assessment on the basis of their expert judgment.
7. As the Guidelines establish generic aspects for the resolution authority to consider, some of the aspects presented in the Guidelines may be more relevant for a certain type of resolution tool than others, and the extent of their application to other resolution tools is left to the discretion of the resolution authorities. The Guidelines does not provide an exhaustive list and the resolution authority may consider other or additional aspects when assessing the resolvability of the CCP under Article 15 of CCPRRR.
8. However, in order to ensure a harmonised application of the Guidelines to the extent possible, the resolution authorities should explain, in the resolvability assessment, why a Guideline would not be relevant for the CCP or if additional aspects are used in the resolvability assessment.

4. Compliance and reporting obligations

Status of the Guidelines

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

Reporting requirements

11. Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent 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.
12. In case of non-compliance, competent 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.

5. Guidelines on CCP assessment of resolvability

5.1 Introduction to the Guidelines

ESMA notes that Section C of Annex to CCPRRR contains references to both, ‘critical functions and ‘critical operations’ whereas in the different matters listed in section C of its Annex it is the latter that is mostly used. Considering the definition of critical functions provided under CCPRRR it is understood that critical operation(s) of a CCP form part of critical functions as defined under CCPRRR.

ESMA further notes the use of the terminology “service level agreement” under matters 5, 7, 8 and the use of “service agreement” under matter 6. As the term “service agreements” generally also caters for the service level agreements and the important aspect for the assessment under the Guidelines is to ensure all relevant service agreements (be them under the ‘chapeau’ of service level agreement or not), are captured. ESMA therefore under the Guidelines 4 and 5, use “service agreement” to cater for both type of agreements, to ensure a content driven assessment focusing on the aim of Guidelines 4 and 5.

5.2 Guideline 1 – Principles for the resolvability assessments

The resolution authority should use the method described hereunder as guidance to assess the resolvability of the CCP.

Materiality assessment

ESMA notes that, for an identified concern, shortcomings, uncertainty, restriction or limitation to affect the overall assessment of the CCPs resolvability, it would need to constitute a material concern i.e. (i) it would need to be of a significant magnitude, (ii) it would need to be likely to occur (probable) and (iii) the complexity of the issue would need to be likely to negatively affect resolvability.

ESMA therefore would suggest that the resolution authority establishes an assessment system, using 3 parameters in to assess the identified shortcoming, uncertainty, restriction or limitation, and to conclude on whether the issue is of such an overall materiality that it may affect the resolvability of the CCP.

Guideline 1

In the determination of the CCPs resolvability, the resolution authority should assess whether any concerns, shortcomings, uncertainties, restrictions or limitations have been identified in the assessments of the relevant matter and whether any of those identified concerns, shortcomings, uncertainties, restrictions or limitations may affect the resolvability of the CCP in a detrimental or negative manner, using the elements listed under this Guideline 1 for this assessment.

The resolution authority should, by assessing the significance, probability and complexity of the identified issue, determine whether the identified issue could be considered to have a material negative impact on the resolvability of the CCP.

The resolution authority should use the method outlined in this Guideline 1 to assess, given the specific characteristics of the CCP and the resolution strategies identified in the plan, the impact of an identified issue on the specific resolvability matter based on the materiality assessment, considering in principle three main parameters listed below.

The resolution authority may use the template provided and score the guidelines independently by assigning ratings between low, medium, and high for the significance, probability, and complexity of every issue with respect to the Guidelines. However, the resolution authority may also assign in its assessment an overall rating to the overall resolvability of the CCP and use the template to further specify certain aspects that are materially relevant for assessment. The resolution authority may also not use the template at all but establish its own template for its assessments.

Parameter 1 – Significance

The significance of an issue is concluded based on a joint assessment based on the relevance of the issue and the scope of the issue identified.

Relevance

The more relevant an identified issue is for the outcome of the resolvability assessment, the higher the significance allocated to the issue. An issue that is easily resolved, even if complex in nature, or that is in the process of being corrected or mitigated in a satisfactory manner, would be considered as less relevant by the resolution authority.

Scope of issues identified

The significance is related to the scope of the issue identified, and the more severe the impact of an issue on the CCP, the more likely it is that the identified issue is

considered significant for the resolvability assessment. Where the issue identified is in relation to a very important aspect of the resolvability assessment, even a minor issue may result in a significant risk, as such identified issue may reduce the chances of a resolution being feasible and credible.

Parameter 2 – Probability

The higher the probability of an issue materialising and the less clarity over the issue identified (for instance if the scope of the issue cannot be verified), the higher the risk that the identified issue is significant to the resolvability assessment, as an identified issue with a high probability and lack of clarity as to its consequences increases the risk that the use of a resolution tool would not in the end be successful and therefore reduces the chances of a resolution being feasible and credible.

Parameter 3 – Complexity

The more complexity there is in an issue identified or in the CCP’s group structure, governance or internal procedures relating to core business lines and critical functions with an entity, the higher the risk that the identified issue is material to the resolvability assessment and reduces the chances of a resolution being feasible and credible.

Template to assist the resolution authority in their assessment.

	Issue/s detected	Significance (low, medium, high)	Probability ((low, medium, high)	Complexity ((low, medium, high)
GL 2				
GL 3				
GL 4				
GL 5				
GL 6				

GL 7				
GL 8				
GL 9				
GL 10				
GL 11				
GL 12				

5.3 Guideline 2 - Matters 1-3: Mapping and alignment of core business lines and critical operations

ESMA notes that whilst ‘critical operations’ is used under matters 1-3 it is understood that critical operation(s) of a CCP form part of the *critical functions* as defined under CCPRRR.

ESMA understands that the reference to “legal persons” in matter 1, should include all legal persons, either within the CCP group or outside the CCP’s group structure, that are important to the CCP, because they provide services or would be otherwise involved with the CCP’s core business lines and critical operations or because the CCP is dependent on such legal persons for the functioning of its core business lines and critical operations. Hence the assessment under matter 1 should result in an understanding of the mapping undertaken by the CCP and provide information on the identified legal persons which have been mapped to the CCP’s core business lines and critical operations as well as on whether there are core business lines and critical operations that cannot be mapped to a legal person and the reason for this.

ESMA understands matter 2 to be focused on the CCP’s legal and corporate structures, i.e. legal entities forming part of the CCP’s group and the CCP’s internal organisation and group structure, and understands that the aim is to assess the extent to which the CCP’s legal and corporate structures are aligned with core business lines and critical operations identified under the resolution plan and used in the mapping under matter 1.

Matter 3 is closely linked to matter 2, in that this assessment considers similar aspects as under matter 2 but with the difference that here the assessment focuses on the actual risk that the CCP’s structure could, and the extent to which it could, prevent the use of resolution tools.

Guideline 2 provides for a common set of aspects the resolution authority should use to assess matters 1 – 3 set out in Section C of Annex to CCPRRR.

Guideline 2

The resolution authority should consider the extent to which (i) the CCP is able to map core business lines and critical operations to legal persons, (ii) corporate structures are aligned with core business lines and critical operations and (iii) the legal structure of the CCP inhibits the application of the resolution tools due to complexity of the group (matters 1-3 of Section C of CCPRRR Annex) by assessing the following aspects:

(1) Whether and to what extent the CCP has identified its core business lines and critical operations.

(2) Whether and to what extent the CCP has mapped its core business lines and critical operations to legal persons and whether the mapping of the CCP is comprehensive and up-to-date.

(3) Whether legal persons, such as critical or essential service providers, have been identified in the mapping and whether the mapping describes the scope and provide details of the core business lines and critical operations mapped to each such identified legal person.

(4) Whether the mapping of the core business lines and critical operations against the CCP's legal and corporate structures has identified:

- a) alignments between, on one side, the different clearing services provided by the CCP and, on the other side, the organisation of the CCP, or whether there are limited alignments or no alignments identified;
- b) that there are several legal persons within the CCP group structure and the extent to which the number of legal persons raises the complexity of the group or whether there are other indications that the CCPs structure is overly complex; and
- c) whether the ownership structure of the CCP could impede the resolvability of the CCP:, for example, whether it is found that the ownership's structure results in complex decision models, reliance on owners or other legal persons within the group for the use of resolution tools, entails complex ownership structures or involves owners with complex or public ownerships.

(5) Whether the mapping has identified clearing services that could more easily be separated from other clearing services of the CCP, or not.

5.4 Guideline 3 - Matter 4: Arrangements to provide for essential staff, infrastructures and capital

The aim of this Guideline 3 is to provide guidance on how the resolution authority should assess the feasibility, and the credibility of the arrangements the CCP has established to provide for essential staff, infrastructure, funding, liquidity and capital are to support and maintain the core business lines and the critical operations.

The main focus of this Guideline 3 would be to identify risks in the established arrangements, such as the risk of them not being upheld as envisaged in a resolution or the risk of them being vulnerable to certain measures or events.

Guideline 3 provides for a common set of aspects the resolution authority should use to assess matter 4 as set out in Section C of Annex to CCPRRR.

Guideline 3

The resolution authority should consider the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations (matter 4 of Section C of CCPRRR Annex), by assessing the following aspects:

(1) Whether the CCP has arrangements in place to provide for essential staff to support and maintain the core business lines and the critical operations and whether such arrangements are adequate and sufficiently robust bearing in mind the extent to which such arrangements could be subject to limitations derived from national law for example, by assessing:

- a) what is provided in the CCP's staff rules and conditions of employment in case of CCP resolution; and
- b) to which extent the employment relationships of essential CCP employees would be upheld in a resolution and whether the CCP has obtained internal or external legal advice supporting this.

(2) Whether the arrangements in place to provide for continued access to vital infrastructures such as premises, telecommunication services, IT, software licenses and other material intellectual property right licenses, hardware, such as servers and other IT equipment, and power are adequate and robust to support and maintain the core business lines and the critical operations of the CCP in order to allow for the CCP to continue the operations of the core business lines and critical operations.

To assess the robustness of the relationship with the different infrastructures, the assessment would need to cover how the arrangements with such infrastructures could be affected by a resolution. The resolution authority should, for example, assess the following:

- a) the possibility to terminate, suspend or modify the access rights to those infrastructures due to the resolution of the CCP;
- b) the continued access to relevant infrastructures where the CCP may transfer in part or in full its clearing services under the resolution tools; and
- c) the continuity of access to critical infrastructures during resolution for a reasonable period of time by the current service provider and under the same terms and conditions.

(3) Whether the arrangements in place to provide for funding in supporting and maintaining a core business line or critical operation are adequate and the extent to which such arrangements would remain valid in a resolution and the extent to which they are transferable in case the sale of business tool or the bridge CCP tool is used. The resolution authority should, for example, assess the following:

- a) the extent to which the CCP has made pre-arrangements for pre-paying the relevant services for a reasonable period; and
- b) whether the funds for such pre-payment are sufficiently protected and ensured via sufficiently liquid assets.

(4) Whether the arrangements in place to provide liquidity to the CCP are well structured in order to remain valid in a resolution and whether appropriate arrangements have been made (e.g. dedicated cash accounts) by the CCP for a swift and seamless identification of liquidity sources allocated to a particular core business line or critical operation of the CCP.

(5) Whether the arrangements in place to provide for capital to support the core business lines and the critical operations provide dedicated funds in the CCP's capital structure and whether such capital would likely remain valid in a resolution and whether such arrangements are structured on a per core business line and critical operation basis. The resolution authority should, for example, assess the following:

- a) the amount of the protected dedicated (including uncommitted) funds of the CCP for the support and maintenance of each core business line and critical operation;
- b) the extent to which the clearing members' own liquidity arrangements are adequate and enforceable in order to ensure that they would be able to honour their obligations towards the CCP; and
- c) the extent to which the relevant financial resources are held in a segregated way from other group assets.

5.5 Guideline 4 - Matters 5 and 6: Service agreements robustness and enforceability

The aim of this Guideline 4 is to provide guidance on how the resolution authority should assess the feasibility and credibility of the arrangements adopted by the CCP to ensure the robustness and enforceability of the CCP's service agreements in the event of resolution (be them under the “chapeau” of service level agreements or not).

Therefore, the main focus of this Guideline 4 would be to ascertain the existence of and where identified, the robustness of the service agreements and in addition, whether the CCP's service agreements provide for appropriate arrangements to ensure that the provision of services under the service agreements would not be likely to be interrupted, terminated or negatively affected by the resolution of the CCP, and would remain fully enforceable in a resolution scenario.

Guideline 4 provides for a common set of aspects the resolution authority should use to assess matters 5 - 6 set out in Section C of Annex of CCPRRR.

Guideline 4

The resolution authority should consider the extent to which service agreements exist, are robust and remain fully enforceable in the event of resolution of the CCP (matters 5 and 6 of Section C of CCPRRR Annex), by assessing the following aspects:

- (1) Whether the CCP has a record of the different service providers and the service agreements relevant for the CCP to ensure its core business lines and the critical operations.
- (2) Whether and to what extent, the service agreements relevant for the CCP to ensure its core business lines and the critical operations specifically provide for the situation where the CCP enters into resolution, and to what extent the critical operations and core business lines contain specific arrangements to ensure the service agreements are robust and remain fully enforceable in the CCPs resolution, and whether those specific arrangements would be suitable and efficient to achieve the aim of remaining fully enforceable in the event of resolution of the CCP. The resolution authorities should, for example, assess the following:
 - a) The extent to which the service agreements that remain fully enforceable in the event of CCP's resolution cover appropriately and sufficiently the main parts of the services needed by the CCP (or part of the CCP) to continue to provide the core business lines and the critical operations,

- b) The extent to which the service agreements relevant for the CCP contain limitations or restrictions on the applicability and enforceability of certain service agreement or part of service agreements, in the resolution of a CCP,
- c) The extent to which the terms and conditions (including pricing for the service and other crucial aspects of the agreement) remain unchanged and unaffected by the CCP entering into resolution.

5.6 Guideline 5 - Matters 7 and 8: Adequate governance structure, service agreements

The resolution authorities should ascertain whether the organisational units/persons within the CCP governance structure are adequately involved regarding the management of the service agreements to ensure compliance with internal policies applicable to the service agreements, hence whether appropriate checks and balances exist in order to ensure that the service agreements are entered into and managed in compliance with the CCP's internal policies. As noted above, the term "service agreement" will be used in the Guidelines to cover all types of service agreements (be them under the "chapeau" of service level agreement or not). The resolution authorities should ascertain whether the CCP has a process for transitioning the services provided under its service agreements to third parties (for example in relation to the sale of a business tool or of bridge CCP tool) in the event of separation of core business lines or critical functions. In case of CCP resolution, the existence of such a transition process will be crucial to the implementation of the sale of business or bridge CCP resolution tool.

Guideline 5 provides for a common set of elements and aspects the resolution authority should use to assess matters 7 - 8 set out in Section C of Annex to CCPRRR.

Guideline 5

The resolution authority should consider the extent to which the governance structure of the CCP is appropriate to manage and ensure compliance with the CCP's internal policies with respect to its service agreements and whether the CCP has a process for transitioning the services provided under service agreements to third parties in the event of the separation of core business lines or critical functions (matters 7 and 8 of Section C of CCPRRR Annex), by assessing the following aspects:

(1) Whether the internal guidance on the required content of service agreements in relation to the CCP's core business lines or critical functions provide adequately clear parameters,

quantitative and qualitative, against which the relevant service agreements can be monitored.

(2) Whether the arrangements and governance structures in place are adequate to ensure compliance with internal policies for each service agreement, considering for example whether:

- a) there is a centralised management function or a dedicated manager of the service agreements within the organisational unit, managing the service agreements in relation to the relevant core business line or critical functions;
- b) the organisational unit and the reporting lines of the designated manager for each service agreement are clearly defined in the governance or management structure of the CCP; and
- c) legal and/or the compliance functions are involved or consulted to ensure compliance with the internal policies for service agreements.

(3) Whether the service agreements are transferable (or renewed or restated, as the case may be under the relevant law governing the contract), including in the situation where the sale of business or the bridge CCP resolution tool are envisaged to be used by the resolution authority. To assess the transferability, the resolution authority should assess the extent to which:

- a) the service agreements regulate the possibility to transfer a relevant service to a new CCP by the resolution authority in a resolution;
- b) the service agreements provide for support in the transfer or termination of contracts occurring during resolution;
- c) the CCP's migration process arrangements are foreseen in the terms of the service agreements, in case of the CCP's resolution; and
- d) there are impediments of a legal nature to the transition of the services for example in relation to the CCP's client side, such as in relation with personal data protection or repapering requirements.

5.7 Guideline 6 - Matter 9: Contingency plans and continuity of access to payment and settlement systems

It is essential for the CCP to have procedures and arrangements in place to ensure the continuity of the CCP's critical functions. Furthermore, CCPs, payment system operators and

settlement system operators should set out in their contractual relations or operating rules processes to regulate the terms under which a CCP undergoing resolution may continue to access such payment and settlement systems.

The resolution authority should assess the feasibility and credibility of the contingency plans ensuring continued access to payment and settlement systems.

Guideline 6 provides for a common set of elements and aspects the resolution authority should use to assess matter 9 set out in Section C of Annex to CCPRR.

Guideline 6

The resolution authority should consider the extent to which there are contingency plans and measures in place to ensure continuity of access to payment and settlement systems (matter 9 of Section C of CCPRR Annex), by assessing the following aspects:

Whether the contingency plan adequately ensures the continued access to payment and settlement systems and whether the contingency plan foresees the steps to take, in case of the CCP's resolution, to ensure continued access to payment and settlement systems, considering for example:

- a) Whether the actions foreseen under the contingency plans are adequate to continue meeting the substantive obligations applying to the CCP and to maximise the likelihood of continued access to payment and settlement systems and continued service provision to the CCP;
- b) Whether the contingency plan is detailed enough to cater for different scenarios in accessing payment and settlement systems in a resolution, and whether the contingency plan includes details on how changes could impact the access to the systems, such as changing settlement bank and identifying substitutes (from a commercial bank money cash settlement to central bank money settlement) and the timing of such changes (overnight or intra-day);
- c) Whether the contingency plan has accurately identified the substantive obligations under the payment and/or settlement system operator's operating rules in the relevant jurisdictions, that would apply in a resolution scenario, such as additional (or extraordinary) financial, information, and operational requirements; and
- d) If the contingency plan also ensures the continuity in access to payment and settlement systems in a situation where the CCP in resolution transfers part of its services, both for the legacy part of the CCP as well as the parts that will be transferred.

5.8 Guideline 7 - Matters 10 to 13: Resolvability from an information related perspective

Accuracy and completeness of information and the continuous flow of information during the resolution process from the CCP to the resolution authority and vice versa are determinant factors for a successful CCP resolution.

Guideline 7 provides for a common set of elements and aspects the resolution authority should use to assess matters 10-13 set out in Section C of Annex to CCPRR.

Guideline 7

The resolution authority should consider the extent to which there are adequate management information systems to ensure that the resolution authorities are able to gather accurate and complete information regarding the core business lines and critical operations in order to facilitate rapid decision making and that the management information systems can provide the information essential for the effective resolution of the CCP at all times even under rapidly changing conditions. The resolution authority should also consider the extent to which the CCP has tested its management information systems under stress scenarios and whether the CCP can ensure the continuity of its management information systems both for the affected CCP and for the new CCP in case the critical operations and core business lines are separated from the rest of the operations and business lines (matters 10 to 13 of Section C of CCPRRR Annex). The resolution authority should consider this by assessing the following aspects:

(1) Whether the information contained in the management information system(s) regarding the core business lines and critical operations (including information on ownership of assets and infrastructure, pricing, contractual rights and agreements as well as outsourcing arrangements) is relevant, adequate and sufficiently comprehensive to ensure informed rapid decision making.

(2) Whether the CCP's management information systems:

- a) are adequately set up and well designed to provide accessible, relevant, accurate and complete information regarding the core business lines and critical operations;
- b) applies processes to ensure that the information collected and stored in the management information system(s) is focused, well structured, tiered and labelled so as to ensure relevant information can be identified in an effective and rapid manner in times of rapid decision making or quickly changing conditions;

- c) applies search functions that cover different management information systems to ensure the availability of relevant information at a short notice;
- d) ensure that the information is reliable and clear and can be retrieved in a readable format and that different information can be used together in an efficient manner, is compatible between different systems, and can be converted into a format that can be shared for rapid decision making,
- e) apply automated arrangements and processes for the collection of data and where such automated processes are not available, the extent to which such data inputs may be done manually;
- f) ensure information is updated either continuously or at pre-defined intervals, less often in a BAU mode, more often in a recovery situation and that measures are implemented to keep certain information, as agreed with the resolution authority, up to date on a continuous basis in a resolution phase;
- g) applies an adequate categorisation of the information according to its usefulness in a resolution, where information essential to a successful resolution such as information in relation to the choice, activation and use of resolution tools is updated in priority to other types of information to ensure the relevance, accurateness and accessibility of relevant information in a resolution;
- h) has the capacity to provide the information essential for the effective resolution of the CCP at all times even under rapidly changing conditions including information on each clearing member(s) and/or client positions per financial instrument cleared as well as the amount of the corresponding margins and financial collateral arrangements posted;
- i) is structured in a way to ensure (where suitable) the continuity of information sharing and storing within the management information systems in a resolution, where for example the resolution tools may result in (i) critical operations and core business lines being separated from the rest of the operations and business lines, (ii) a new CCP, (iii) bridge CCP or (iv) any other result of the resolution tool applied; and
- j) provides a comprehensive and searchable repository of the material service agreements and provides adequate information on (i) the type of services provided under the agreement and whether the service agreement is needed to perform critical functions and core business lines, (ii) the type of providers (intra-group, outsourced or bought in service) and which legal persons provide and which legal person receive the services, and (iii) the service agreements identified to assist in the drawing-up of transitional service agreements in cases

where they would be affected by a resolution tool, such as the sale of business or bridge CCP resolution tool.

(3) Whether the resolution authority will have relevant access to management information systems and information necessary to take the appropriate decisions and to apply resolution powers; in particular the extent to which the resolution authority has:

- a) full access to the information useful, necessary or crucial to take the appropriate decisions and to apply resolution powers;
- b) independent access to management information systems through internet portals during resolution;
- c) the extent to which there are applied limitations of external access to such management information systems and whether certain information can only be accessed at the premises of the CCP; and
- d) the possibility for the resolution authority to share the information within the authority, to independent valuers appointed under CCPRRR and other entities in the application of the resolution tools, for example the extent to which information can be managed, downloaded and shared both within the system as well as outside the system, as the possibility to share information where needed may be of crucial importance in a time constrained resolution situation.

(4) Whether the CCP has tested the CCP's management information systems under stress scenarios as defined by the resolution authority, and whether such testing includes the frequency of such tests and scope of such tests, and how any shortcomings or identified limitations are registered and followed up on and whether the information in the management information system is adequately tested, monitored and quality checked on a reoccurring basis.

(5) Whether the CCP can ensure the continuity of its management information systems in relation to its core business lines and critical operations to both the CCP under resolution as well as other entities involved through the application of resolution tools. In undertaking this assessment the resolution authority should assess:

- a) the extent to which the CCP's management information system(s) allows for a separation of information depending on whether it is in relation to a certain part of the CCP's core business lines or critical operations from the rest of the operations and business lines;
- b) the extent to which the CCP maintains back-up management information systems as part of a redundancy protocol for business continuity purposes and

to which extent such systems could be used in a situation where core business lines and/or critical operations are separated from the rest of the operations and business lines;

- c) whether, to allow for the sale of business tool or the bridge CCP tool to be implemented, any software or IP licenses would need to be duplicated, amended or renewed by the CCP; and
- d) the extent to which the management information system allows for a continuous flow of information between the rest of the CCP's operations and business lines and any separated critical operations and core business lines, if needed, in order to ensure continuity of the CCP's critical functions.

5.9 Guideline 8 - Matters 14 to 17: Intra-group guarantees or transactions

The aim of Guideline 8 is to provide guidance on how the resolution authority should assess the risks in a resolution stemming from the intragroup relationships (guarantees and transactions) and ascertain if the CCP's resolution is feasible in light of such intragroup relationships. ESMA notes that it seems envisaged that the intra-group guarantees should be assessed both ways, i.e. when they are provided by and provided to the CCP.

Guideline 8 provides for a common set of elements and aspects the resolution authority should use to assess matters 14-17 set out in Section C of Annex to CCPRR.

Guideline 8

The resolution authority should consider the extent to which there are intra-group guarantees provided or received or intra-group transactions entered into at market conditions and whether the risk management systems concerning those guarantees are robust, the extent to which the use of any intra-group guarantees or transactions increases the risk of contagion across the group and could have a negative impact on another part of its group, in particular where such group comprises other FMIs in the resolution of the CCP (matters 14 to 17 of Section C of CCPRRR Annex), by assessing the following aspects:

- (1) Whether (i) intra-group guarantees or (ii) intra-group transactions, are performed at market conditions, and in undertaking this assessment the resolution authority should consider the following:

- a) the extent to which intra-group guarantees are entered into at arm's length market conditions, considering the price and terms of the guarantee;
 - b) the extent to which intra-group transactions are entered into at arm's length market terms, considering the price and terms of the transaction;
 - c) the extent to which the use of any intra-group guarantees or transactions increases the risk of contagion across the group, considering aspects such as allocation of obligation and losses with the group; and
 - d) the extent to which the resolution of the CCP could have a negative impact on another part of its group, in particular where such group comprises other FMIs, considering aspects such as whether intra-group guarantees or transactions are entered into on favourable terms and how this may have an impact in a resolution.
- (2) Whether the CCP's risk management systems covers such intra-group guarantees and whether the system is adequate and robust. This may be assessed by considering how the risk management system quantifies and illustrates the risk stemming from such guarantees in cases where the CCP (i) is the guarantor or (ii) benefits from such an intra-group guarantee, and what type of arrangements there are in place to manage risks under such intra-group guarantees and whether these arrangements are centralised at group level and if such guarantees could constitute a material wrong-way risk.
- (3) Whether the CCP's risk management systems cover such intra-group transactions and whether the system is adequate and robust, this may be assessed by considering how the risk management system quantifies and illustrates the amount of liabilities and exposures which are likely to stem from any intra-group transactions.

5.10 Guideline 9 - Matters 19 and 22: Application of resolution tools

The aim of Guideline 9 is to provide guidance on how the resolution authority should assess the feasibility of CCP resolution considering the ability and credibility to use the resolution tools as envisaged under the resolution plan.

Guideline 9 provides for a common set of elements and aspects the resolution authority should use to assess matters 19 and 22 set out in Section C of Annex to CCPRR.

Guideline 9

The resolution authority should consider the feasibility and credibility of applying resolution tools in such a way that meets the resolution objectives, given the tools available, the CCP's structure and the possible impacts of the use of resolution tools on clearing members and, where applicable, their clients, other counterparties and employees and possible actions that third-country authorities may take (matters 19 and 22 of Section C of CCPRRR Annex), by assessing the following aspects:

- (1) Whether the resolution tools are suitable to the CCP.
- (2) The extent to which the foreseen application of the resolution tools would be able to ensure that the resolution objectives set out under Article 21 of CCPRRR are met;
- (3) Whether implementing the chosen resolution tool(s) would affect clearing members and, where applicable, their clients, by, for example, increasing clearing costs, creating additional costs or obligations or reducing the availability of clearing services.
- (4) Whether implementing the chosen resolution tool(s) could have a negative impact on counterparties to the CCP (other than clearing members and clients) or internal stakeholders, such as employees.
- (5) Whether third-country authorities may take actions such as to freeze assets of the CCP or its financial collateral or oppose to their transferability in case the sale of business tool or the bridge CCP tool are used.

5.11 Guideline 10 - Matter 20: Issuance of new instruments of ownership

The aim of Guideline 10 is to provide guidance on the feasibility and credibility of a potential new issuance of instruments of ownership in compliance with the no creditor worse off principle as enshrined in Article 33(1) of CCPRRR and if any specific requirements are needed. This Guideline has cross border dimensions in cases where foreign shareholders, established in third country jurisdictions, are involved and where additional requirements may need to be considered.

Guideline 10 provides for a common set of elements and aspects the resolution authority should use to assess matter 20 set out in Section C of Annex to CCPRR.

Guideline 10

The resolution authority should consider any specific requirements needed to issue new instruments of ownership as referred to in Article 33(1) of CCPRRR (matter 20 of Section C of CCPRRR Annex), by assessing the following aspects:

- (1) Whether the CCP's current ownership structure could be the source of contagion risk in case issuance of new instruments as referred to in Article 33(1) of CCPRRR is decided, and more specifically whether credit institutions, clearing members of the CCP or other financial institutions are among the qualifying shareholders.
- (2) Whether and the extent to which the CCP is owned by its clearing members and more specifically any statutory exceptions from the priority of claims that may be provided for in the applicable national law where the new issuance of ownership is used as a resolution tool as well as any contagion risk that may arise from using such tool.
- (3) Whether statutory exceptions from the priority of claims exist in the laws of any relevant third-country jurisdiction (e.g. for foreign investors/shareholders or foreign/foreign owned clearing members) and where this might raise conflict of law issues and thus increase the legal risk aspects in the issuance of new instruments as referred to in Article 33(1) of CCPRRR.
- (4) Whether compliance with requirements applicable to initial public offerings impact the timing of issuing new instruments of ownership and the timely pay-up of such instruments in the accounts of the CCP, account taken of the resolution's timeline and milestones.

5.12 Guideline 11 - Matters 18 and 21: Resolvability from a cross border perspective

The aim of Guideline 11 is to provide guidance on how the resolution authority should assess the feasibility of CCP resolution from a cross border perspective. In this context the resolution authority should assess the feasibility and credibility of the arrangements of the CCP in a cross-border context and more specifically the extent to which decisions made for the purposes of resolution may be recognised and enforced in other jurisdictions and notably in third countries.

Guideline 11 provides for a common set of elements and aspects the resolution authority should use to assess matters 18 and 21 set out in Section C of Annex to CCPRR.

Guideline 11

The resolution authority should consider whether third-country authorities have the resolution tools necessary to support resolution actions, the scope for coordinated action with third-country authorities and whether there are arrangements and means through which resolution could be hampered where the CCP has clearing members or collateral arrangements established in different jurisdictions (matters 18 and 21 of Section C of CCPRRR Annex), by assessing the following aspects:

- (1) Whether the third country has a framework that provides for the possibility to recognise the application of resolution tools and enforce resolution actions taken by resolution authorities in the EU where such an action is affecting persons or entities in such third country.
- (2) Whether the law in the relevant third country jurisdiction can impede resolution actions taken under CCPRRR, such as where the third country may challenge the right of the resolution authority to terminate some or all contracts of the CCP under resolution or to apply Variation Margins Gains Haircutting in resolution.
- (3) Whether the CCP's agreements governed by the laws of a third country are clearly identified in a list mentioning the identity of the CCP's counterparty.
- (4) Whether there exist adequate processes for coordination and communications and assurances on actions to be taken between the resolution authority of the CCP and the third-country authority involved due to establishment of clearing members, clients, service providers or due to the location of assets either invested or posted as collateral under financial collateral arrangements.
- (5) Whether there exist appropriate means for the recognition and enforcement in a third country of the resolution decisions taken by resolution authorities in the EU.
- (6) Whether the laws of the relevant third country jurisdiction(s) provide for a compensation for expropriation or other remedy protecting the right to property in case write-down and/or conversion powers are implemented in the context of resolution.

5.13 Guideline 12 - Matters 23 to 26: Impact on the financial systems, market confidence and payment and settlement systems

The aim of Guideline 12 is to provide guidance on how the resolution authority should assess the credibility of CCP resolution. In this context the resolution authority should assess, to the extent possible and to the best of the resolution authority's knowledge, the impact of CCP resolution actions on the CCP's providers, clients and stakeholders, payment and settlement systems, financial markets, the financial system and the economy in general.

Guideline 12 provides for a common set of elements and aspects the resolution authority should use to assess matters 23 – 26 set out in Section C of Annex to CCPRR.

Guideline 12

The resolution authority should consider the extent to which (i) the impact of the CCP's resolution on the financial system and on financial market's confidence can be adequately evaluated, (ii) the resolution of the CCP could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy, (iii) contagion to other CCPs or to the financial markets could be contained through the application of the resolution tools and the exercise of the resolution powers; and (iv) the resolution of the CCP could have a significant effect on the operation of payment and settlement systems (matters 23 to 26 of Section C of CCPRRR Annex), by assessing, to the extent the resolution authority has information and data, the following aspects:

- (1) Whether the resolution of the CCP could have a significant effect, adverse, direct or indirect, on the financial system, market confidence, the economy or the operation of payment and settlement systems. This may be where such measures may negatively affect or constrain the normal functioning of financial markets, and/or other financial market infrastructures (serviced or not by the CCP), or the financial system as a whole. This may also be where a generalised suspension of trading and clearing or limitations on trading derivatives cleared by the CCP in resolution may be made necessary.
- (2) Whether the CCP's resolution may trigger any potential material disturbance of the financial markets' functioning or significantly negatively impact the financial market transaction costs.
- (3) Whether the likely negative effect of the application of the CCP's resolution tools on the financial systems, real economies or the operation of payment and settlement systems of any Member State identified or of the Union could restrict the possibility to apply a certain resolution tool.
- (4) Where the application of resolution tools is likely to affect the financial system and the financial markets' confidence and, whether those effects can be adequately evaluated, by establishing scenarios, methodologies and indicators.
- (5) Whether the application of the CCP's resolution tools may impact the real economy, and the availability of financial services in the short to medium term, locally or globally for a particular class of derivatives or with respect to all of the CCP's core business lines where that CCP is in a situation of de facto monopoly or oligopoly.

- (6) Whether adequate ring-fencing of any interoperability arrangements in place between the CCP undergoing resolution and other CCPs may limit any adverse effects of applying the resolution tools and manage aspects of contagion.
- (7) Whether the likely contagion to other CCPs or to the financial markets may be able to be contained by applying the foreseen resolution tools and exercise the resolution powers and the likely impact of the CCP's resolution on the Securities Settlement System Operator and the Payment System Operator servicing the CCP and more generally whether the involved payment and/or settlement systems could suffer losses stemming from CCP resolution and the amount of such losses.