

Response Form to the Consultation Paper

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



Responding to this paper

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

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

ESMA will consider all comments received by **24 January 2022**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input - Consultations’.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_FOLTF_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_FOLTF_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_FOLTF_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open consultations” → “Consultation on the application of the circumstances under which a CCP is deemed to be failing or likely to fail”).

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper?

All interested stakeholders are invited to respond to this consultation. In particular, this paper may be specifically of interest for EU central counterparties, clearing members and clients of clearing members.

General information about respondent

Name of the company / organisation	CCP12 - The Global Association of Central Counterparties
Activity	Central Counterparty
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	International

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_FOLTF_00>

The Global Association of Central Counterparties (“CCP12”) appreciates the opportunity to comment on the European Securities Markets Authority’s (“ESMA”) Consultation Paper on draft Guidelines on the application of the circumstances under which a CCP is deemed to be failing or likely to fail.

About CCP12

CCP12 is the global association for CCPs, representing 41 members who operate around 60 individual central counterparties (CCPs) globally across the Americas, EMEA and the Asia-Pacific region.

CCP12 promotes effective, practical, and appropriate risk management and operational standards for CCPs to ensure the safety and efficiency of the financial markets it represents. CCP12 leads and assesses global regulatory and industry initiatives that concern CCPs to form consensus views, while also actively engaging with regulatory agencies and industry constituents through consultation responses, forum discussions and position papers.

For more information, please contact the office by e-mail at office@ccp12.org or through our website by visiting ccp12.org.

CCP12 Members



<ESMA_COMMENT_FOLTF_00>

Questions

Q1 : Do you agree with the proposed Guidelines 1 and 2, specifying the general considerations in determining if a CCP is failing or likely to fail? If not, please explain.

<ESMA_QUESTION_FOLTF_01>

In the context of determining if a CCP is failing or likely to fail, there should be safeguards for CCPs protecting them from too early or unnecessary intervention by the resolution authorities which could very well lead to their inappropriate takeover or other harmful treatment to the detriment of the CCPs and their participants. It is important that no single criterion from the guidelines should automatically trigger resolution.

Early intervention should always be a last resort because it can undermine the incentives that characterize the central clearing model and creates uncertainty as to how the CCP's rulebook will operate. Ultimately, these outcomes could undermine financial stability by pre-emptively pushing the CCP into resolution.

Given these potential negative outcomes, CCP12 is highly concerned by the prospect of a resolution authority intervening before the CCP has had the opportunity to fully exhaust the arrangements and tools provided for under its recovery plan and rulebook. CCPs have worked with clearing members, regulators, and market participants to develop these arrangements and tools, which are embedded in CCPs' rulebooks to help balance incentives and inform market participants' expectations during a CCP's recovery. They have been carefully calibrated to address stress events and appropriately incentivize the active participation of market participants in the default management and recovery process. Accordingly, the CCPs' rulebooks provide not only the proper balance of incentives for all participants, but also as much certainty as is possible during periods of stress.

In the event that the CCP and market circumstances warrant intervention, the resolution authority should have the right and not the obligation to intervene.

<ESMA_QUESTION_FOLTF_01>

Q2 : Do you agree with the proposed Guideline 3, considering the availability and adequacy of the CCP's recovery tools in determining if a CCP is failing or likely to fail? If not, please explain.

<ESMA_QUESTION_FOLTF_02>

CCP12 would like to push back on the consideration of the adequacy of the CCP's recovery tools in determining if a CCP is failing or likely to fail. CCPs carefully design their recovery plans ex ante and the plans are subject to scrutiny and approval of the competent authority, supervisory college and resolution authority which should guarantee their adequacy. CCPs should not be prevented later from executing these plans or interrupted in their actions undertaken in line with these approved plans within the recovery phase. It is important to allow

CCPs to perform their default management processes and apply their recovery tools to the highest possible degree as explained above.

<ESMA_QUESTION_FOLTF_02>

Q3 : Do you agree with the proposed Guidelines 4 and 5, considering the financial resources of the CCP's in determining if a CCP is failing or likely to fail? If not, please explain.

<ESMA_QUESTION_FOLTF_03>

CCP12 would generally agree with the proposed guidelines considering the financial resources of the CCP's in determining if a CCP is failing or likely to fail as long as the criteria warranting resolution authorities' intervention are met.

<ESMA_QUESTION_FOLTF_03>

Q4 : Do you agree with the proposed Guideline 6, considering the operational capacity of the CCP in determining if a CCP is failing or likely to fail? If not, please explain.

<ESMA_QUESTION_FOLTF_04>

CCP12 would partially agree with points a) and c) of Guideline 6, bearing in mind our response to Question 1.

We would also like to express our strong reservations regarding point b) of the Guideline referring to the loss of confidence of the CCP's clearing participants and other stakeholders in the CCP's ability to manage risks, operationally and/or financially. The relevant authorities are supposed to assess the circumstances and events which could negatively impact the CCP's operational capacity to continue providing critical functions basing this assessment on objective elements that can be measured. The loss of confidence in the CCP is supposed to be evidenced by a decrease in transactions submitted for clearing, the intention of liquidity providers to decrease the amount of the CCP's liquid resources or the intention of clearing members to terminate their contracts with the CCP.

When it comes to a decrease in transactions submitted for clearing, we identify a few issues with this element. First of all, a loss of confidence is not an objective measure that can be quantified easily, and it would be very difficult to set a reasonable threshold of such a decrease to apply this indicator in a consistent manner. Second of all, a decrease in transactions submitted for clearing can result from members' risk assessments in what is likely to be a volatile market in these circumstances – not due to a loss of confidence in their CCP. Also, a reduction of transaction volume which is not below a certain acceptable level to the CCP does not indicate that the CCP is failing. Depending on the CCP membership structure, fees might be based on other criteria and not volume of transactions which would mean that a reduction in the volumes would not necessarily translate into a CCP being financially worse off or even more so failing. Other indicators which rely on intentions of liquidity providers or clearing

members would be even more difficult to define and measure, thus not meeting the requirement of the assessment elements being objective.

Therefore, we would propose to delete point b) from Guideline 6 or at least strongly advocate that the elements contained in this point are treated as an additional element for consideration for the resolution authority and not the main driver of the assessment due to the methodological problems they entail.

<ESMA_QUESTION_FOLTF_04>

Q5 : Do you agree with the proposed Guideline 7 specifying other requirements for continuing authorisation in determining if a CCP is failing or likely to fail? If not, please explain.

<ESMA_QUESTION_FOLTF_05>

We find the elements to be taken into account while assessing the CCP's situation in light of this Guideline (such as having a sizeable pool of clearing participants to avoid significant concentration or material deficiencies in the internal controls and other key areas of the governance arrangements or major reputational depreciation) rather vague and not entirely appropriate. Many of the points noted in this Guideline, such as issues with risk management or controls, could be remediated by the CCP if required by the relevant authorities. There also may be a period of time necessary to assess these issues post-recovery and the CCP may need to be given adequate time to address these issues, as applicable.

Similar to our response to Question 5, we would advocate to delete these elements or at least treat them as additional criteria only and not the main drivers of the assessment.

<ESMA_QUESTION_FOLTF_05>

Q6 : Do you agree with the proposed Guidelines 8 and 9 on information sharing? If not, please explain.

<ESMA_QUESTION_FOLTF_06>

CCP12 generally agrees with the proposed Guidelines 8 and 9 on information sharing.

<ESMA_QUESTION_FOLTF_06>

Q7 : Do you agree with the proposed Option 2? If not please explain. If yes, have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 1)?

<ESMA_QUESTION_FOLTF_07>

We agree with the overall aim of listing a set of objective elements the relevant authority should consider in determining if a CCP is deemed to be failing or likely to fail. However, in addition to our comments noted above, we have some doubts regarding the relevance of certain points

in the guidelines and the objectivity of certain elements, considering the difficulty with measuring items such as clearing members' intentions or CCP reputational depreciation. We do not believe that a one-size-fits-all approach would be a desirable solution or in line with differences across CCPs that exist. That is why we would advocate for a removal of some ambiguous criteria as stated above or for their treatment as only secondary elements of the assessment.

<ESMA_QUESTION_FOLTF_07>

Q8 : If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

<ESMA_QUESTION_FOLTF_08>

No comment. / Not applicable.

<ESMA_QUESTION_FOLTF_08>