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| 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](http://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](http://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](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/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 | LSEG |
| Activity | Central Counterparty |
| Are you representing an association? |[ ]
| Country/Region | UK |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_FOLTF\_00>

LSEG welcomes the opportunity to respond to ESMA’s consultation on Draft Guidelines on the application of the circumstances under which a CCP is deemed to be failing or likely to fail. We would like to make the following key observations:

* We believe that regarding the timing of whether a CCP is failing or likely to fail, the CCP in question should already be towards the end of the recovery process and it should be clear that its available resources are exhausted to a large extend or that they are insufficient to restore its viability. CCPs should not be prevented from executing their recovery 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.
* Regarding the assessment of market conditions that may impede the CCP converting between collateral assets classes as swiftly as necessary to meet its related obligations or realising the value of the collateral it holds under such conditions, we believe that such assessment during extreme market volatility would be hard to conduct. Therefore, we don’t believe that this should be part of the assessment to determine a CCP in resolution since there are many external factors that could influence the result of that market assessment which could wrongly place a CCP in resolution.
* We don’t agree with ESMA’s proposal to assess *“the loss of confidence of its clearing participants and other stakeholders in the CCP’s ability to manage risks, operationally and/or financially”.* Members’ choices on where to clear is strictly a commercial decision. Their decision to move existing contracts to a different CCP is “controlled” through their contractual obligations under a CCP’s rulebook, therefore there cannot be circumstances whereby “*loss of business to a competitor CCP could be uncontrollable*” as noted in paragraph 35.

<ESMA\_COMMENT\_FOLTF\_00>

**Questions**

1. : 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>

We agree with ESMA’s proposed guidelines 1 & 2, specifying the general considerations in determining if a CCP is failing or likely to fail. We believe, as noted in the guidelines, that such determination is only made after a comprehensive assessment of both qualitative and quantitative objective elements based on information available at such time.

We would also highlight that, as noted in previous responses on this issue, regarding the timing of such determination, the CCP in question should already be towards the end of the recovery process and it should be clear that its available resources are exhausted to a large extend or that they are insufficient to restore its viability. CCPs should not be prevented from executing their recovery 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.

<ESMA\_QUESTION\_FOLTF\_01>

1. : 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>

LSEG agrees 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. We note that in addition to the ability of stakeholders to cover potential liquidity shortfalls in the recovery other liquidity providers such as credit facilities provided by the Central Bank should also be considered.

<ESMA\_QUESTION\_FOLTF\_02>

1. : 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>

We broadly agree with the proposed guidelines 4 & 5, considering the financial resources of the CCP’s in determining if a CCP is failing or likely to fail.

Regarding the assessment of market conditions that may impede the CCP converting between collateral assets classes as swiftly as necessary to meet its related obligations or realising the value of the collateral it holds under such conditions, we believe that such assessment during extreme market volatility would be hard to conduct. In addition, a CCP will always place its holdings on high graded and highly liquid collateral asset classes however market conditions at such time would usually dictate the value and rate at which assets can be liquidated. However, we don’t believe that this should be part of the assessment to determine a CCP in resolution since there are many external factors that could influence the result of that market assessment which could wrongly place a CCP in resolution.

Therefore, we believe that ESMA’s assessment should be limited to the market conditions but not to the CCP’s ability to convert between asset classes.

<ESMA\_QUESTION\_FOLTF\_03>

1. : 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>

We don’t agree with ESMA’s proposal to assess *“the loss of confidence of its clearing participants and other stakeholders in the CCP’s ability to manage risks, operationally and/or financially”.* We believe that such assessment goes beyond ESMA’s mandate under Level 1 text and is not an indication that a CCP is failing or is likely to fail.

Members’ choices on where to clear is strictly a commercial decision. Their decision to move existing contracts to a different CCP is “controlled” through their contractual obligations under a CCP’s rulebook, therefore there cannot be circumstances whereby “*loss of business to a competitor CCP could be uncontrollable*” as noted in paragraph 35.

Furthermore, if there is a decrease in transactions submitted for clearing within a particular service or the majority of clearing members decide to terminate contracts within that service, the CCP can activate its orderly wind-down plan, as it should be clear that a CCP without any business would not have any critical functions anymore. Finally, a decrease in transactions submitted for clearing is not an appropriate indicator to evaluate the operational viability of a CCP given potential “buffer” CCPs might have and/or membership structure whereby fees are not directly linked to volumes of transactions executed with that CCP.

<ESMA\_QUESTION\_FOLTF\_04>

1. : 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 agree with the proposed guideline 7, specifying other requirements for continuing authorisation in determining if a CCP is failing or likely to fail. We would however note that, paragraph 42(e) “*major on-going litigation or disputes to which the CCP is a party” should, by itself*, not lead to a determination of whether a CCP is failing or likely to fail just because the CCP in involved in a litigation or dispute. This could be only once the final decision has come out, and only if it affects the financial position of the CCP justified i.e. its viability. Therefore, this requirement seems highly procyclical, and removing authorisation while a CCP is in Recovery or Resolution may have unintended adverse consequences for the CMs. As such we would suggest removing for the final text.

<ESMA\_QUESTION\_FOLTF\_05>

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

<ESMA\_QUESTION\_FOLTF\_06>

We agree with the proposed guidelines 8 & 9 on information sharing the resolution and competent authority.

<ESMA\_QUESTION\_FOLTF\_06>

1. : 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 option 2 in an effort to create more convergence between EU competent authorities.

<ESMA\_QUESTION\_FOLTF\_07>

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

<ESMA\_QUESTION\_FOLTF\_08>

N/A

<ESMA\_QUESTION\_FOLTF\_08>