



European Securities and  
Markets Authority

# Final Report

**Draft RTS on safeguards for clients and indirect clients (Article 63(2) of  
CCPRRR)**



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## Legislative references and abbreviations

### Legislative references

<i>CCPRRR</i>	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 (OJ L 22, 22.1.2021, p.1)
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### Abbreviations

<i>CCP</i>	Central Counterparty
<i>ESMA</i>	European Securities and Markets Authority
<i>EU</i>	European Union
<i>NCWO</i>	No Creditor Worse Off
<i>OJ</i>	The Official Journal of the European Union
<i>RTS</i>	Regulatory Technical Standards

### Definitions

Unless otherwise specified, the terms used in this Final Report and in this draft RTS have the same meaning as in CCP RRR.

In addition, for the purposes of this Final Report, the following definitions apply:

<i>clearing service provider</i>	any clearing member, client or indirect client providing clearing services in the Union
<i>clearing service user</i>	any client or indirect client using clearing services provided by a clearing service provider

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## Executive Summary

### Reasons for publication

Article 63 of Regulation (EU) 2021/23 ('CCPRRR') stipulates safeguards for clients and indirect clients<sup>1</sup>. Where a contractual arrangement allows clearing members to pass on to their clients the negative consequences of the resolution tools. Those contractual arrangements shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of CCPRRR or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 of CCPRRR to the extent that such proceeds are related to client positions.

Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

Article 63 of CCPRRR also contains the mandate for ESMA to specify in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation is required and the conditions under which it is to be considered proportionate.

ESMA published the Consultation Paper with its draft RTS under Article 63(2) of CCPRRR on 18 November 2021. The consultation ended on 24 January 2022. ESMA also held a public hearing on the Consultation Paper (along with other consultation papers issued by ESMA under CCPRRR) on 14 January 2022.

ESMA has also sought advice from the Securities and Markets Stakeholder Group. This Final Report provides the draft RTS further specifying the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate, in accordance with Article 63 of CCPRRR. The Final Report (and the accompanying draft RTS) assesses and takes into account, where suitable, the feedback provided by the one respondent to the consultation.

### Contents

Section 2 of the Final Report contains an introduction to the mandate and Section 3 contains the conditions for contractual symmetry and the transparency requirements to assist the proportionality assessment were applying the safeguard for clients and indirect clients. Section 4 entails the Annexes, the mandate (Annex I), the cost-benefit analysis (Annex II), SMSG (Annex III) and the draft RTS (Annex IV).

### Next Steps

ESMA will submit the Final Report and draft regulatory technical standards to the European Commission. The Commission has three months to decide whether to adopt the regulatory

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technical standards (in the form of a Commission Delegated Regulation). Following the adoption, the regulatory technical standards are then subject to non-objection by the European Parliament and the Council.

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<sup>1</sup> For the purposes of this paper the definitions of 'client' and 'indirect client' would be as defined in the Commission delegated regulation (EU) 2017/2154 of 22 September 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements.

# 1 Background

1. The objective of the recovery and resolution framework is to ensure that CCPs set out measures to recover from financial distress, to maintain the critical functions of a CCP which is failing or likely to fail while winding up the remaining activities through normal insolvency proceedings, and to preserve financial stability while avoiding a significant adverse effect on the financial system and its ability to serve the real economy and minimising the cost of a CCP failure to taxpayers.
2. Regulation (EU) 2021/23 on recovery and resolution of central counterparties ('CCPRRR') was published in the Official Journal on 22 January 2021 and it entered into force on 12 February 2021<sup>2</sup>.
3. Article 63 of CCPRRR stipulates that where a contractual arrangement allows clearing members to pass on to their clients the negative consequences of the resolution tools those contractual arrangements shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of CCPRRR or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 of CCPRRR to the extent that such proceeds are related to client positions. Those provisions also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients. For the purpose of this Final Report, a clearing service providers should be understood as any clearing member, client or indirect client providing clearing services in the Union and clearing service users should be understood as any client or indirect client using clearing services provided by a clearing service provider.
4. ESMA's mandate is to develop a draft RTS in order to specify, in a transparent manner, the conditions under which the passing on of compensation, cash equivalent of such compensation or of any proceeds stemming from a NCWO (i.e. no creditor worse off, further described under Section 2, *Introduction*) claim is required, and the conditions under which it is to be considered proportionate. ESMA is required to submit the draft regulatory technical standards to the Commission by 12 February 2022.
5. ESMA published the Consultation Paper with its draft RTS under Article 63(2) of CCPRRR on 18 November 2021. The consultation ended on 24 January 2022 and ESMA received one response to the Consultation Paper. ESMA also held a public hearing on the Consultation Paper (along with other consultation papers issued by ESMA under CCPRRR) on 14 January 2022.

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<sup>2</sup> REGULATION (EU) 2021/23 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132  
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3ATOC)

6. ESMA has also sought advice from the Securities and Markets Stakeholder Group. This Final Report provides the draft RTS further specifying the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate, in accordance with Article 63 of CCPRRR. The Final Report (and the accompanying draft RTS) assesses and takes into account, where suitable, the feedback provided by the respondent to the consultation.

## 2 Introduction

7. The resolution process is subject to the no-creditor-worse-off principle<sup>3</sup>, i.e. where the resolution authority uses one or more resolution tools, it shall ensure that shareholders, clearing members and other creditors do not incur greater losses than they would have incurred had the resolution authority not taken resolution action in relation to the CCP at the time the resolution authority considered that the conditions for resolution were met and had the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules.
8. CCPRRR sets out the safeguards for shareholders, clearing members and other creditors and states that where any shareholder, clearing member or other creditor has incurred greater losses than it would have incurred if the resolution authority had not taken resolution action in relation to the CCP and the CCP had been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations or other arrangements in its operating rules, that shareholder, clearing member or other creditor shall be entitled to the payment of the difference<sup>4</sup>.
9. CCPRRR equally sets out safeguards for clients and indirect clients that are not “creditors” of the CCP, stating that where there are contractual arrangements allowing clearing members to pass on to their clients the *negative consequences* of the resolution tools, the contractual arrangements shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of CCPRRR or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 of CCPRRR to the extent that such proceeds are related to client positions. It is noted that these requirements on the contractual arrangements also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients<sup>5</sup>.
10. ESMA notes that the mandate under Article 63 of CCPRRR in relation to the safeguard for clients and indirect client concerns the case of compensation under Article 62 of CCPRRR and the case of compensation under Article 27(6) of CCPRR<sup>6</sup> (i.e. the

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<sup>3</sup> Article 60 of CCPRRR No creditor worse off' principle

<sup>4</sup> Article 62 of CCPRRR Safeguard for shareholders, clearing members and other creditors

<sup>5</sup> Article 63 of CCPRRR Safeguard for clients and indirect clients

<sup>6</sup> Article 27 of CCPRRR General provisions on resolution tools

compensation where the resolution authority has decided to require the CCP to compensate non-defaulting clearing members for their losses stemming from the application of loss allocation tools *provided that the non-defaulting clearing member would have been entitled to the payment of the difference referred to in Article 62 of CCPRRR*).

### **3 Safeguard for clients and indirect clients (Article 63 of CCPRRR)**

#### **3.1 Scope of the mandate**

11. The mandate requires ESMA to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.
12. Where contractual arrangements allow clearing members to pass on to their clients the negative consequences of the resolution tools, this is referred to in this Final Report as “contribution pass-on”. Article 63 of CCPRRR states that where there is a contractual agreement for contribution pass-on, the contractual agreement shall also contain, on an equivalent and proportionate basis, the right of clients (or indirect clients) to any recompense or compensation clearing members receive. Compensation in this Final Report refers to compensations established through an Article 62 of CCPRRR claim and any compensation under Article 27(6) of CCPRRR where the resolution authority may require the CCP to compensate non-defaulting clearing members for their losses where stemming from the application of loss allocation tools, and where those losses are in excess of the losses that the non-defaulting clearing member would have borne under their obligations under the CCP’s operating rules, provided that the non-defaulting clearing member would have been entitled to the payment of the difference referred to in Article 62 of CCPRRR.
13. The same principle applies where a client or indirect client have provided clearing services and engaged in contribution pass-on with its clients or indirect clients. The obligation for clearing service providers to pass on compensation to their clearing service users is in line with the contractual symmetry principle.
14. ESMA notes that the scope of the initial right of the clearing service provider to pass-on any negative consequence in the use of the resolution tools, to its clients (or indirect clients) is based on a contractual agreement. This agreed possibility for a clearing service provider to pass on negative consequences to its clearing service user (the contribution pass-on), is outside the remits of the mandate, hence whilst this step is outside the mandate, ESMA would encourage those aspects to be reflected upon by the clearing service providers to ensure any requests for contribution through contribution pass-on is properly managed by the clearing service provider.

15. The reason for ESMA focusing on this is due to the fact that this first step of contribution pass-on is still indirectly important for the mandate, as it establishes the basis for any calculation of a distribution of any compensation. However, any contribution made under a contribution pass-on does not result in a compensation. Hence, once a contribution under a contribution pass-on is established the second step is to confirm that any compensation to be made under Article 62 of CCPRRR or Article 27(6) of CCPRRR is directly linked to the *relevant* contribution made, the one qualifying for compensation.
16. This is to say that any compensation has to be provided under Articles 62 or 27(6) of CCPRRR to be subject to the safeguards under Article 63 of CCPRRR.
17. Hence to be able to establish the conditions under which a compensation is to be considered proportionate this draft RTS includes the aspect on how to inform the clients and indirect clients of the basis of the calculations made to ensure any distribution is proportionate to the *relevant* contribution made. To be able to provide this information the clearing service provider should have all requests for contribution pass-on and contributions made clearly documented.

## 3.2 Conditions for contractual symmetry

18. ESMA suggests that the RTS regulates the minimum requirements to be applied by the clearing service providers in agreeing on reasonable commercial terms the compensation rights of the clients or indirect clients, subject to such a compensation having been confirmed under Article 62 of CCPRRR.

### 3.2.1 Principle 1: Fair and reasonably

19. Reasonable commercial terms shall ensure unbiased and rational contractual arrangements on how compensation should be distributed in a fair, non-discriminatory and transparent manner. This was reflected in the Consultation Paper under Article 2. This approach has been adjusted in the Final Report and the principle of fair, non-discriminatory commercial terms is included under the different Articles of the draft RTS.
20. The contribution (i.e., the contribution pass-on) sets out the basis for the scope of any compensation payable by the clearing service provider to a clearing service user. However, it should be noted that the right for compensation does not equal the contribution made, as compensation is based on the confirmed overall NCWO claim, i.e. the payment of the difference, and any proceeds received are included in a compensation to the extent that such compensation received is related to client positions.

#### **Principle 1: Fair and reasonably from Consultation Paper**

A clearing service provider shall ensure that any passing through of a compensation to clearing service users are made on a fair, reasonable, non-discriminatory and transparent basis.

### 3.2.1.1 Summary of responses

21. The respondent supports a fair and reasonable distribution of compensation and fully agree that clients and indirect clients should receive compensation if they participated in losses, and as long as these losses resulted in compensation payments under a NCWO claim. The respondent notes that compensation should be distributed only to parties who participated in losses that led to actual and justifiable payment of compensation. Otherwise, a distribution would not be fair.
22. The respondent illustrates this by the following example:
  - a) Clients and the clearing service providers incur losses from variation margin gains haircutting (VMGH) in excess of the limit in recovery. Additionally, the resolution authority enforces a recovery cash call for the clearing service providers. As the recovery cash call would have happened in recovery too, there will be no valid no-creditor-worse-off (NCWO) claim for this loss, even though that loss was incurred by the clearing service providers in a resolution scenario. Only the VMGH losses would justify valid NCWO claims.
  - b) Clients and the clearing service providers incur losses from VMGH, but within the limit in recovery. The resolution authority also calls the clearing service providers for a resolution cash call. In this case only the resolution cash call would justify a valid NCWO claim, but not the VMGH losses.
23. The respondent notes that in both examples there are losses that do not justify valid compensation payments under the NCWO safeguard, and a distribution of compensation payments to all parties that incurred losses would in those scenarios not constitute a fair compensation, as in both cases some losses would not justify compensation payments under the NCWO safeguard. The first scenario would disadvantage clients, the second scenario would disadvantage clearing service providers.
24. The respondent also notes that a clearing service provider only compensates its direct clients. Should a client be a clearing service provider itself, it will need to reimburse its clients.

### 3.2.1.2 ESMA's feedback

25. ESMA agrees with the respondent that indeed any compensation is linked to a contribution made that is covered by a NCWO claim. ESMA has clarified this in this Final Report and has made minor drafting improvements in the RTS to clarify this point but not made material drafting changes as this aspect is already covered under Article 27(6) and Article 62 of CCPRRR.
26. ESMA also agrees with the understanding by the respondent that each clearing service provider is responsible for the distribution of compensation to its clients but would consider that this is sufficiently clear in the current RTS.

27. ESMA has in the Final Report included the principle 1 within the draft RTS under Articles 3 and 4.

### **3.2.2 Principle 2: Pro-rata, fair and proportionate allocation of compensations**

28. As noted above, a compensation under Articles 63 or 27(6) of CCPRRR is subject to Article 62 of CCPRRR. This means that any compensation may not be reflecting the full contribution (i.e., the contribution pass-on) made under the resolution tools by clearing service users as not all contributions may qualify for compensation under Article 63 and Article 27(6) of CCPRRR.
29. ESMA notes the reference to the right of clients to any compensation clearing members receive from the CCP or any cash equivalent of such compensation or any proceeds they receive following a 'no creditor worse off' claim, *to the extent that these relate to client positions*. This would be understood as a reference to the contribution as a sequence, where the contribution request is proportionate to client positions, but where compensation will be depending on the decision on compensation under Article 62 of CCPRRR.
30. In addressing the proportionality, there is a reference in Article 27(6) of CCPRRR to take into account "any outstanding contractual obligations of the clearing members toward the CCP *and be deducted* from any entitlement to the payment of the difference referred to in Article 62" of CCPRRR hence the payment as calculated under Article 62 of CCPRRR will reflect the overall position by the clearing member, however, the compensation received shall still be distributed to the contributors based on the contribution made that qualifies for compensation under CCPRRR and to be distributed in a proportionate basis.

#### **Principle 2: Pro-rata, fair and proportionate allocation of compensations from Consultation Paper**

Where a compensation derives from a claim under Article 62 of CCPRRR, clearing service providers shall compensate their clearing service users where such clearing service users have contributed under the loss allocation tools.

Where the resolution authority has required a CCP under Article 27(6) of CCPRRR to compensate its clearing members, clearing service providers shall compensate their clearing service users where such clearing service users have contributed under the loss allocation tools.

Any allocation of compensation towards a contribution made by a clearing service user shall be made pro rata towards the contribution made and distributed proportionately and fairly.

### 3.2.2.1 Summary of consultation responses

31. The respondent notes that the wording of Principle 2 is not very clear as compensation should be proportionate to losses that cause and justify compensation under the NCWO safeguard, therefore not to all losses that were passed through to clients. If compensation were to be distributed proportionally to meet all pass-through losses, including those which do not justify a NCWO compensation payment, the requirement of fairness set out in Principle 1 would not be met.
32. Such respondent would also welcome further clarity on what the expectations are on clearing service providers in terms of providing or passing on compensation payments to clients in scenarios where the client relationship has terminated prior to such in scope compensation payments having been made. The respondent assumes that where such compensation payments relate to the period where the client relationship was still in place, they will still have to be passed on.

### 3.2.2.2 ESMA's feedback

33. ESMA notes that there seems to be uncertainties on the scope of contribution pass-on's that qualifies for compensation and ESMA has clarified Article 2 of the draft RTS (that codifies principle 2) to ensure that it is clear that only contributions made under a contractually agreed contribution pass-on and that are thereafter subject to compensation under Article 62 or Article 26(7) of CCPRRR is subject to the requirement for compensation to clients and indirect clients under Article 63 of CCPRRR.
34. ESMA also agrees with the reflection of the respondent that it should be made clear that also a client that is no longer a client at the time of compensation shall have the same right to compensation as the clients that remains clients of the clearing service provider. This is now clear from Article 3(3) of the draft RTS.

### 3.2.3 Principle 3: Set-off

35. Where a clearing service provider is obliged under the contractual agreement to distribute compensation to a clearing service user the clearing service provider may apply set-off but only where such obligation is, at the time of set-off, due and payable by such party. However, where such deduction is applied, at the level of the clearing service provider, the calculation of reimbursements to the clearing service user shall be based on the original amount, i.e., before any deduction or reduction was made by the clearing service provider.

#### **Principle 3: Set-off from Consultation Paper**

A clearing service provider may set-off a compensation payment towards any obligation owed by the client (or indirect client) to the original amount but only where such obligation is, at the time of set-off, due and payable by such party.

However, where such deduction is applied at the level of the clearing service provider towards a clearing service user also acting as a clearing service provider, the calculation of reimbursements to its clearing service users shall be based on the original amount, i.e. before any deduction or reduction was made.

Example 1: The Resolution Authority directs the CCP to reimburse EUR 300 million to one of its CM (CM1). CM1 has 3 clients (C1, C2, C3) to which it should consequently reimburse different amounts. CM1 has a claim against C1 that is due and payable, hence CM1 may deduct the corresponding amount before transferring the remainder of the reimbursement to C1. However, C1 has not contributed itself, but 2 of its clients (i.e. indirect clients) have. This means that C1 should use the original amount, i.e. the original amount of compensation due by CM1 to C1 before the qualifying debt off-set was applied, when calculating the compensation C1 shall provide to its indirect clients.

#### 3.2.3.1 Summary of consultation responses

36. The respondent generally agrees with Principle 3.

#### 3.2.3.2 ESMA's feedback

37. No changes envisaged beside drafting improvements.

### 3.2.4 Principle 4: Segregation

#### **Principle 4: Segregation from Consultation Paper**

Any compensation received by a clearing service provider on behalf of a clearing service user shall, when received, be held separately on a segregated account by the clearing service provider.

#### 3.2.4.1 Summary of consultation responses

38. The respondent generally agrees with Principle 4 and notes that market conditions after a CCP resolution could be very stressed, and that segregation of the compensation, which might partially be client money, could provide comfort to clients that the funds are protected in the event of a follow-up default of their clearing member.

#### 3.2.4.2 ESMA's feedback

39. No changes envisaged.

### 3.2.5 Principle 5: Pari-passu

#### Principle 5: Pari-passu from Consultation Paper

A clearing service provider shall allocate all compensation received pari-passu between its own house accounts and client accounts.

#### 3.2.5.1 Summary of consultation responses

40. The respondent notes that Principle 5 should be amended to make clear that the allocation of compensation on a pari-passu basis should equally only apply to losses that lead to a justified claim for compensation under the NCWO safeguard.

#### 3.2.5.2 ESMA's feed back

41. As mentioned above, ESMA agrees with this and have adjusted the draft RTS accordingly to make this clearer. ESMA has in addition replaced the term "pari passu" with a statement that the clearing service provider should not apply any subordination clauses and not apply any ranking when distributing any compensation, recompense, cash equivalent thereof or proceeds.

### 3.2.6 Principle 6: Compensation instruments

42. Proportionality is also relevant in relation to types of compensation instruments, such as financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits. The principle is that the composition of the contribution should be the same (equal) between the recipients and proportionate to the contribution.
43. The right of clearing service users is to receive *any recompense or compensation* received under Article 27(6) of CCPRRR or *any cash equivalent of such recompense or compensation* or any proceeds received following a claim made in accordance with Article 62 of CCPRRR to the extent that such proceeds are related to client positions. Article 27(6) of CCPRRR states that the compensation referred to in the first subparagraph may take the form of instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits and that the amount of instruments issued to each affected non-defaulting clearing member shall be proportionate to the excess loss identified. Article 62 of CCPRRR refers to *payment of the difference*. Reading Articles 62, 63 and 27(6) of CCPRRR jointly, ESMA would understand that the form of compensation includes cash compensation as well as other forms of financial instruments as listed above.
44. However as the list of instruments that may be used to compensate clearing members, clients and indirect clients is very wide, this may have two effects: (i) different instruments bear different risks, where cash risk is generally low and a claim in the CCP's future profit

generally bears a high risk, and (ii) there may be cases where for some of the clearing service users, a type of instrument may cause problem, such as registration of such instruments in different systems.

45. In relation to the different risks in relation to the different form of compensation, the clearing service provider shall divide the different types of instruments equally between the clearing service users.
46. The Consultation Paper further proposed that in relation to the second situation, the clearing service provider may provide a substitution to the clearing service user, by which it would pass on the compensation in a different form. Such transformation shall be done on the basis of a reasonable valuation and not be imposed on the clearing service user. However, this approach has been amended, as set out below, following the response to the consultation paper.

**Principle 6: Compensation instruments from Consultation Paper**

The clearing service provider shall divide the different types of instruments equally between the clearing service users.

The clearing service provider may offer a substitution to the clearing service user, by which it would pass on the compensation in a different form. Such transformation shall be done on the basis of a reasonable valuation and not be imposed on the clearing service user.

Example 2: Where the clearing member and two of its clients shall share the compensation made by the CCP of EUR 10 million, and where the compensation consists of EUR 1 million as a cash payment, EUR 3 million as debt instruments, EUR 3 million as instruments recognising a claim in the CCPs future and finally EUR 3 million in financial instruments, the clearing member cannot allocate the cash and the financial instruments (assuming those bear the lowest risk) to itself and then distribute the remaining instruments to the clients, but have to split each type of instrument or cash between the parties, equally. Assuming they have all contributed with 10 million each, each of the clearing member, the client 1 and the client 2 will each receive (i) EUR 333, 000 as a cash payment, (ii) EUR 1 million in debt instruments, (iii) EUR 1 million in instruments recognising a claim in the CCPs future and (iv) finally EUR 1 million in financial instruments.

### 3.2.6.1 Summary of consultation responses

47. The respondent notes that provided the compensation is allocated fairly (i.e. only for losses that led to compensation under the NCWO safeguard), the respondent agrees that the different types of instruments should be divided equally between clearing service users. The respondent however believes that clearing service providers should not be required to provide compensation in substituted instruments, especially not when doing so would be at the expense of and would be disadvantageous to the clearing service provider (notwithstanding the fact that the clearing service provider may provide transformation services to a compensated client).

48. Hence such respondent welcomes the clause that the clearing service provider could “distribute the instruments to an alternative addressee as directed by the clearing service user”: and notes that this implies that the clearing service user is being able to sell the asset to another party, which provides the possibility of achieving the best market price.
49. The respondent notes that while supporting the idea that a clearing service provider supports any requests from clearing users to substitute unwanted compensation instruments into a different type of instrument, the respondent equally believes there should not be a legal requirement for the clearing service provider to do so. The respondent believes the best outcome would be market based: allowing the client to sell whatever compensation is not desirable or would not be in line with its investment policies.

#### 3.2.6.2 ESMA’s feedback

50. ESMA initially saw benefit of applying two options, the substitution and the re-directed delivery that could be used for many situations and indeed as pointed out by the respondent in selling a compensation provided in an instrument that the clearing service user may not be able receive or may not be interested to hold.
51. ESMA has carefully considered if by providing the two options, the substitution and the re-directed delivery, the draft RTS is made unnecessary complex. ESMA has concluded that indeed a process for substitution may not provide added benefit for the clearing service user compared to the possibility to direct the delivery of the instruments to another party.
52. In addition, ESMA has provided the possibility that where a clearing service provider is unable to accommodate the clearing service user request for change in recipient it should provide the reason for this and that the clearing service provider, in this situation, should sell the relevant instruments to a reasonable price using a fair market price and transfer the amount received to the clearing service user instead of the financial instruments that were initially to be delivered.
53. ESMA has amended the RTS accordingly.

### 3.3 Transparency requirements to assist the proportionality assessment

#### 3.3.1 Disclosure

54. Article 63 of CCPRRR states that contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive, hence the possibility for any contribution pass-on and following compensations are subject to contractual agreement, and it is within the remits of the parties to agree on.

55. The reference in the mandate “to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements,” shall be considered in light of the limitations set out above. ESMA concludes that the mandate suggests a transparency beyond the contractual parties to the agreement as it requests ESMA to specify the conditions for compensation in a transparent manner, hence possibly to the market, the CCP and the relevant authorities, but within the remits of any confidentiality of a contractual arrangement and noting that the mandate does not refer to a public disclosure.
56. A compensation claim can only arise once a NCWO claim has been awarded under Article 62 of CCPRRR and will follow the procedure under CCPRRR and be subject to public disclosure in accordance with the principles laid out in CCPRRR. ESMA would therefore not establish any additional requirement for public disclosure on compensation.
57. Also, as the relationship between clearing service providers and clients or indirect clients are subject to requirements under other regulations, there may be a requirement under those regulations to publicly disclose some main features of the obligation to contribute to CCPs under the resolution loss allocation tools.

### **3.3.2 Principle 7: Transparency - notice requirements**

58. ESMA initially suggested that to ensure qualifying compensations are proportionate, the clearing service providers should be subject to some transparency requirements towards the clearing service users and towards the resolution authority in relation to the distribution of compensations.
59. ESMA envisages that where any contribution is required to be made by clearing service users, in accordance with the agreed terms, and where such contribution is to be provided to the CCP (directly or indirectly) by clearing service providers, there are clear benefits of a documentation trail.
60. The consultation paper provided the proposal that the notice to a clearing service user in relation to compensation allocations should contain the information listed below, however this approach has been slightly amended following the response to the consultation paper:
  - a) A copy of the decision of the resolution authority to require the CCP to provide compensation to the clearing members;
  - b) A copy of the decision by the resolution authority that the clearing service provider is entitled to the payment of the difference referred to in Article 62 of CCPRRR;
  - c) Information on the compensation received by the clearing service provider before any set-off or other deductions were made (if any);
  - d) A simulation evidencing how such compensation amount will be proportionally distributed between the clearing service users having made contributions;

- e) Information on the form under which the compensation amount has been provided to the clearing service provider, separating between cash or any other form of financial instruments, or through instruments of ownership, debt instruments or instruments recognising a claim on the future profits of the CCP;
  - f) Information on the composition of the compensation amount for the clearing service users and details on the overall distribution of the compensation amount between clearing service users and house accounts and the combination of different types of cash or instruments provided based on the initial compensation received by the clearing service provider; and
  - g) Any calculation of interest or any other relevant term effecting the compensation.
61. It was also proposed in the Consultation Paper that where the clearing service provider provides written notices to its clearing service users, the resolution authority should be provided, by the clearing service provider, a weekly summary of all such written notices provided to its clearing service users identifying and providing details on compensation provided or to be provided to such clearing service users based on the contributions made by such clearing service users in accordance with the agreed terms between the parties.
62. This proposed transparency was intending to assist the resolution authority to ensure the conditions under the RTS are met and to inform the resolution authority of the end-allocation of compensations.

**Principle 7: Transparency - notice requirements from Consultation Paper**

Contribution allocation should be subject to a clear documentation trail and the clearing service provider shall provide notices specifying contribution, allocation and the composition of the compensation received to clearing service users. Such notices shall also be shared with the resolution authority.

3.3.2.1 Summary of consultation responses

63. The respondent agrees that there are clear benefits of a documentation trail and agrees with the proposals in the consultation, other than the requirement of a simulation in Article 5 (2) d) “A simulation evidencing how such compensation amount will be proportionally distributed between the clearing service users having made contributions”.
64. The respondent notes that more clarity would be required concerning this “simulation exercise” and what it entails and whether this would affect confidentiality requirements and that under no circumstances should one client be able to see position sizes or losses of other clients or their clearing service provider. A “simulation exercise” could be acceptable if it is performed with made-up numbers for illustration purposes only.

65. Equally, the respondent notes that Article 5 (2) f) could lead to information about portfolios and losses of the clearing service provider and other clients being shared.

#### 3.3.2.2 ESMA's feedback

66. ESMA agrees with the respondent and had indeed in mind that “dummy” numbers were to be used in the simulation referred to under point (d) above. However, ESMA notes that the numbers would be in correct proportions as the aim of this transparency was not to share exposure, losses or actual contributions of other clients but to provide an overview of how the client's contribution was compensated compared to other contributors. Hence, reflecting upon this further in light of the comments received, ESMA notes that it may be difficult to provide this information without revealing some information on positions, losses or contributions. In addition, ESMA notes that the information under point (f) may also lead to information about portfolios and losses could be shared.
67. Hence, to ensure such sensitive information would not be able to be detected in such a simulation exercise under point (d) or under the composition of compensation under point (f), ESMA concluded that such information should be further limited and qualified. The slight loss of transparency would be justified by the protection of confidentiality of exposures, losses and actual contributions of entities.
68. ESMA has also deleted the reference to the weekly notices to be shared with the resolution authority by the clearing service provider as outside the aim of the draft regulation on safeguards to ensure contractual symmetry and would relate to the overall supervision framework of the resolution authority.
69. The draft RTS has been amended accordingly.

## 4 Annexes

### 4.1 Annex I Legal References

#### 4.1.1 Legal Mandate

##### Article 63

##### Safeguard for clients and indirect clients

1. Contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

2. ESMA shall develop draft regulatory technical standards in order to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in the paragraph 1 is required, and the conditions under which it is to be considered proportionate.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

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

#### 4.1.2 Other relevant provisions of CCPRRR

##### Recital

(48) Recovery and resolution actions can indirectly affect clients and indirect clients that are not creditors of the CCP, to the extent that costs of recovery and resolution have been passed to those clients and indirect clients under the applicable contractual arrangements. Therefore, the impact of a CCP recovery and resolution scenario on clients and indirect clients should also be addressed through the same contractual arrangements with the clearing members and clients that provide them with clearing services. This can be achieved by ensuring that, if contractual arrangements allow clearing members to pass on to their clients the negative consequences of the resolution tools, those contractual arrangements also include, on an equivalent and proportionate basis, the right of clients to any compensation clearing members receive from the CCP or any cash equivalent of such compensation or any proceeds they receive following a ‘no creditor worse off’ claim, to the extent that these relate to client positions. Such provisions should also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

## **Article 62 Safeguard for shareholders, clearing members and other creditors**

Where, in accordance with the valuation carried out under Article 61, any shareholder, clearing member or other creditor has incurred greater losses than it would have incurred had the resolution authority not taken resolution action in relation to the CCP and had the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations or other arrangements in its operating rules, that shareholder, clearing member or other creditor shall be entitled to the payment of the difference.

### **Article 27(6)**

The resolution authority may require the CCP to compensate non-defaulting clearing members for their losses stemming from the application of loss allocation tools, where those losses are in excess of the losses that the non-defaulting clearing member would have borne under their obligations under the CCP's operating rules, provided that the non-defaulting clearing member would have been entitled to the payment of the difference referred to in Article 62.

The compensation referred to in the first subparagraph may take the form of instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits.

The amount of instruments issued to each affected non-defaulting clearing member shall be proportionate to the excess loss referred to in the first subparagraph. It shall take account of any outstanding contractual obligations of the clearing members toward the CCP and be deducted from any entitlement to the payment of the difference referred to in Article 62.

The amount of instruments shall be based on the valuation conducted in accordance with Article 24(3).

## 4.2 Annex II Cost-benefit analysis

### 1. Introduction

Pursuant to the third subparagraph of paragraph 2 of Article 63 of CCPRRR the Commission is empowered to adopt a delegated act to supplement the CCPRRR to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.

### 2. ESMA shall develop draft regulatory technical standards

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022. The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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

- The main policy decisions have already been taken under the primary legislation (CCPRRR) and the impact of such policy decisions have already been analysed to some extent by the Impact Assessment by the European Commission<sup>7</sup>;
- ESMA does not have the power to deviate from its specific mandate provided by the Commission;
- ESMA policy options should be of a pure technical nature and not contain strategic decisions or policy choices and their content is limited by the legislative acts on which they are based.

### 2. Background

Safeguard for clients and indirect clients entails the obligation for contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools to also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of CCPRRR or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 of CCPRRR to the extent that such proceeds are related to client positions. Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

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<sup>7</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN>

### 3. Policy Options

The empowerment to ESMA is to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.

ESMA has considered how to specify the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.

### 4. Cost-benefit analysis

Below is detailed the different corresponding policy options on how to further specify the factors through different elements.

<p><b>Specific objective</b></p>	<p>Safeguard for clients and indirect clients entails the obligation for contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools to also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance and that this obligation also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.</p> <p>The empowerment to ESMA is to specify, in a transparent manner, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds is required, and the conditions under which it is to be considered proportionate.</p> <p>ESMA notes that the mandate under CCPRRR is limited to the compensation phase of the process and does not cover the “contribution pass-on” phase.</p>
<p><b>Policy option 1</b></p>	<p>To specify the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate providing <i>7 principles</i> to ensure the compensation is provided in fairness, in a proportionate manner and with transparency and traceability and where those principles have established themselves into requirements for how compensation shall be allocated and distributed among those clients and indirect clients, the clearing service users, that has contributed to the CCP directly or indirectly, through contribution pass-on.</p>

<p>How would this option achieve the objective?</p>	<p>This option would in ESMA's view be satisfactory for several reasons, one is that all main principles of fairness, proportionality, transparency and traceability is ensured as they have established themselves into requirements under the RTS and that contractual agreements shall be compliant with those requirements hence adhere to the overarching principles.</p>
<p><b>Policy option 2</b></p>	<p>To specify the conditions under which the passing on of compensation is required, and the conditions under which it is to be considered proportionate by providing <i>more than the 7 principles</i> to ensure the compensation is provided in fairness, in a proportionate manner and with transparency and traceability and where those principles have established themselves into requirements for how compensation shall be allocated and distributed among those clients and indirect clients, the clearing service users, that has contributed to the CCP directly or indirectly, through contribution pass-on.</p>
<p>How would this option achieve the objective?</p>	<p>This option would in ESMA's view be satisfactory to some extent, as it would provide some additional requirements as to the requirements to be included in the contractual agreements to ensure the overarching aim of establishing contractual arrangements that ensure fair and proportionate compensation and in addition ensures transparency and traceability.</p> <p>However, this could be seen as less proportionate as the requirements to be included in the contractual agreements are extended, to further protect the clients and indirect clients that have contributed through "contribution pass-on".</p>
<p>Which policy option is the preferred one?</p>	<p>Policy option 1, as this option would provide the minimum requirements for the contractual agreement to include to ensure the overarching aim of fairness, proportionality, transparency and traceability without limiting the freedom to contract more than is justified by the overall goal to ensure clients and indirect clients that have contributed are compensated in a fair and proportionate manner.</p> <p>In relation to option 2, ESMA is of the view that to include additional requirements may not be justified on balance if further reducing the freedom to contract.</p>
<p>Is the policy chosen within the sole responsibility of ESMA? If not, what</p>	<p>ESMA is empowered to provide a draft regulatory technical standard to the Commission which has the responsibility to define</p>

other body is concerned / needs to be informed or consulted?	how to ensure the policy option chosen for its Delegated Act achieves its aim under the CCPRRR.
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Impacts of the proposed policies:	
<b>Policy option 1</b>	
Benefits	It will provide requirements that all contracts will have to include where a clearing service provider provides clearing services to a client or indirect client.
Regulator's costs	For the regulator no compliance costs beside the normal supervision to ensure the requirements are complied with.
Compliance costs	The costs for the clearing service provider will be overall notable, however, given that the requirement to ensure compensation to be distributed to clients and indirect clients are set out in Article 63 of CCPRRR the costs derive from the implementation of CCPRRR. The cost of Option 1 is considered balanced as the seven principles have established themselves in a limited set of requirements, that are for the clearing service provider to ensure are included in contractual agreement with clients and indirect clients.
<b>Policy option 2</b>	
Benefits	It will provide additional requirements that all contracts will have to include where a clearing service provider provides clearing services to a client or indirect client.
Regulator's costs	For the regulator no compliance costs beside the normal supervision to ensure the requirements are complied with.
Compliance costs	The costs for clearing service provider will be overall notable, however, given that the requirement to ensure compensation to be distributed to clients and indirect clients are set out in Article 63 of CCPRRR the costs derive from the implementation of CCPRRR.  The cost of Option 2 could be considered too high considering quite a few contractual requirements would have to be included in the contractual agreements with the clients and the indirect clients

	and where the freedom to contract is equally reduced by those mandatory requirements.
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#### **4.2.1 Summary of Consultation Responses**

The respondent support Option 1 in the cost-benefit analysis with principle-based rules that are not overly prescriptive and give clients and their clearing service provider full contractual freedom to and agree on contractual terms to document the contribution pass-on.

The respondent however notes that they believe that there should not be overly prescriptive requirements for clearing service providers and clients in relation to the documentation of the contribution pass-on to impact their contractual freedom to document this concept in their clearing documentation. In this context, the respondent believe it is worth nothing that market standard documentation currently already provides for this pass-on mechanism by a clearing service provider to a client. Should the requirement become too prescriptive, it may cause a need to repaper a significant amount of client clearing agreements, which would create an unduly administrative burden.

#### **4.2.2 ESMA's feed back**

ESMA finds Option 1 supported and notes the general reflection on contractual freedom to be upheld.



### **4.3 Annex III SMSG's advice**

In accordance with Article 10 of ESMA Regulation, ESMA has requested the advice of the Securities and Markets Stakeholder Group (SMSG). The SMSG has not provided any comment.

## 4.4 Annex IV - Draft RTS

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

**supplementing Regulation (EU) No 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 by specifying the conditions under which a compensation can be passed to clients and indirect clients and the conditions under which ha compensation is to be considered proportionate**

of [ ]

**(text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to the 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 in particular of Article 63(2), thereof,

Whereas:

- (1) This Regulation should apply to all clearing service providers providing clearing services within the Union where such entities fall under the obligation pursuant to Article 63 of Regulation (EU) 2021/23 to ensure that where their contractual arrangements include the right to require contributions they also include the obligation to share any qualifying compensations, recompense, cash equivalent thereof or proceeds. This Regulation provides the different conditions that are to be reflected by the contractual arrangements between the clearing service provider and the clearing service user, specifying the terms of the required passing on of any compensation, recompense, cash equivalent thereof or proceeds.
- (2) Where the contribution of the clearing service users qualifies for compensation, recompense, cash equivalent thereof or proceeds in accordance with Article 63 of the Regulation (EU) 2021/23, such compensation, recompense, cash equivalent thereof or proceeds should be able to take the form of cash, financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profit in order to ensure a fair, reasonable and equal distribution between the clearing service users.
- (3) To ensure equivalent and proportionate distribution of compensation, recompense, cash equivalent thereof or of any proceeds, the clearing service user should be protected by obligating the clearing service provider to distribute the different forms of compensation pro rata in a fair and non-discriminatory manner in relation to the qualifying contribution made and to compensate all clearing service users, including those that are no longer clients of the clearing service provider.
- (4) To further ensure a fair, equivalent and proportionate distribution of compensation, recompense, cash equivalent thereof or of any proceeds, a clearing service user should receive its compensation calculated by its clearing service provider without any set-off. Where a set-off is applied towards the clearing service provider by its clearing service provider (where an entity acts as clearing service user and clearing service provider), any compensation paid to the clearing service user should be calculated based on the compensation before any such set-off has been applied.
- (5) All compensations should be distributed in a fair and non-discriminatory manner between clearing service users also in relation to any house accounts of the clearing service provider. For the same reasons, the clearing service provider should not apply any subordination clauses and not apply any ranking when distributing any compensation, recompense, cash equivalent thereof or proceeds.
- (6) Market conditions during a resolution phase are likely to be very stressed. Therefore, to protect the clearing service users, a clearing service provider should, when receiving compensation on behalf of a clearing service user, hold such contribution separately on a segregated account. This would ensure transparency and provide comfort to clearing service users that the funds are protected in the event of a follow-up default of their clearing service provider.

- (7) The list of instruments that may be used to compensate clearing members, clients and indirect clients is very wide and different instruments bear different risks. To ensure a fair and equal distribution of compensation, the clearing service provider should divide the different types of instruments included in the compensation equally between the clearing service users and house accounts.
- (8) To protect the clearing service user, where the clearing service user is not able to receive a certain type of instrument or would prefer not to for other reasons, the clearing service provider should upon request by the clearing service user, to the extent possible, transfer the relevant instrument to another recipient, appointed by the clearing service user, or failing this, undertake, where possible, to sell the relevant instruments in the market to a third party at arm's length terms at the prevailing market price and thereafter transfer the proceeds of the sale to the clearing service user instead of the financial instruments that were initially to be delivered.
- (9) To ensure transparency and traceability, a clearing service provider should inform the clearing service user, to the best of its knowledge, of any decision taken in the resolution process to compensate for qualifying contributions made. Such information should aim to provide the clearing service users with an understanding of the scope of the decision made for contribution under the Regulation (EU) 2021/23, the composition of the compensation and how its compensation has been calculated by the clearing service provider. For the same reasons, all clearing service providers should inform the clearing service users, where possible, without breaching any confidentiality restrictions, on the overall distribution of compensations, recompense, cash equivalent thereof or proceeds and on the composition of them, to ensure that the clearing service user understands how the contribution made results in the compensation received.
- (10) Further to the definitions of Regulation (EU) 2021/23, some specific definitions to technical terms are necessary to ensure that this Regulation provides clarity as to the entities covered while avoiding unnecessary repetitions. Therefore, the terms clearing service providers and clearing service users are introduced.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council, ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

## *Article 1*

### **Definitions**

For the purposes of this Regulation the following definitions apply:

‘Clearing service provider’ means any clearing member, client or indirect client providing clearing services, directly or indirectly, in the Union.

‘Clearing service user’ means any client or indirect client using clearing services provided by a clearing service provider.

## *Article 2*

### **Right to compensation**

- (1) Where a clearing service user has the right to the compensation, recompense, cash equivalent thereof or proceeds, credited or awarded to a clearing service provider in accordance with Article 62 or Article 27(6) of Regulation (EU) 2021/23, such compensation, recompense, cash equivalent thereof or proceeds may take the form of cash, financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP’s future profit.
- (2) For the purpose of paragraph 1, the clearing service provider shall:
  - a) inform the clearing service user in accordance with Article 5; and
  - b) distribute any compensation, recompense, cash equivalent thereof or proceeds in accordance with Article 3 and Article 4.

## *Article 3*

### **Distribution of compensation**

- (1) A clearing service user shall have the right to any compensation, recompense, cash equivalent thereof or proceeds pursuant to Article 63 of Regulation (EU) 2021/23 in any of the following cases:
  - a) where the clearing member, having requested contribution from a client, receives compensation, recompense, cash equivalent thereof or proceeds;
  - b) where the client to the clearing member having requested contribution from its client (an indirect client) receives compensation, recompense, cash equivalent thereof or proceeds from the clearing member providing clearing services to it; and
  - c) where the indirect client having requested contribution from its client (also an indirect client) receives compensation, recompense, cash equivalent thereof or proceeds from the clearing service provider providing clearing services to it.

- (2) Any compensation, recompense, cash equivalent thereof or proceeds shall be distributed by the clearing service provider to its clearing service users pro rata in a fair and non-discriminatory manner in relation to the contribution made that qualifies for compensation, recompense, cash equivalent thereof or proceeds under Article 63 of Regulation (EU) 2021/23.
- (3) The clearing service provider shall compensate all clearing service users that have made a relevant contribution, even where such clearing service user is no longer a clearing service user of the clearing service provider receiving the compensation, recompense cash equivalent thereof or proceeds.
- (4) The clearing service provider shall calculate the compensation, recompense, cash equivalent thereof or proceeds to be distributed with each clearing service user entitled to compensation in a transparent manner and inform each of them separately in accordance with Article 5(2)(c).
- (5) Compensations shall be distributed between clearing service providers own house accounts and client users accounts, on the basis of a calculation of the relevant contribution made, which qualifies for compensation, and by applying no discrimination or ranking between different recipients. The clearing service provider shall not compensate its own contribution that qualifies for compensation before compensating the contributions made by a clearing service user that qualifies for compensation, recompense, cash equivalent thereof or proceeds under Article 63 of Regulation (EU) 2021/23.
- (6) A clearing service provider may apply deductions or set-off towards the compensation, recompense, cash equivalent thereof or proceeds where the other obligation is due and payable by the recipient of such compensation. However, where the recipient is also a clearing service provider, the calculation of the distribution of the compensation towards its clearing service users shall be calculated based on the compensation before any such deductions or set-off were made.
- (7) A clearing service provider shall hold any compensation, recompense, cash equivalent thereof or proceeds received pursuant to Article 63 of Regulation (EU) 2021/23, on a separate and segregated account to ensure such assets are not comingled with any other assets of the clearing service provider until all due compensations are fully distributed.

#### *Article 4*

### **Type of compensation and delivery**

- (1) Where the compensation, recompense, cash equivalent thereof or proceeds consists of different instruments, such as cash, instruments of ownership, debt instruments or any other instruments recognising a claim on the future profits of the CCP in resolution, the clearing service provider shall separate the compensation by type of instrument, and thereafter allocate and distribute each type of instrument equally in a non-discriminatory manner, based on the contribution made, between the clearing service users and any house account, entitled to compensation.
- (2) Where, as a result of the application of paragraph 1, the clearing service provider,
  - (a) is unable to deliver the relevant compensation to the clearing service user in the form of the mix of instruments, due to settlement restrictions or due to another impediment to the transfer of some instruments that cannot be corrected by the clearing service user within 3 business days of being notified of the impediment, the clearing service provider shall request the clearing service user to provide an alternative recipient for the relevant instruments within 5 business days, or
  - (b) has been informed by the clearing service user to distribute the instruments to an alternative recipient as directed by the clearing service user, the clearing service provider shall transfer the compensation amount to such recipient directed by the clearing service user, to the extent possible and at the reasonable cost of the clearing service user.
- (3) The clearing service provider shall inform the clearing service user in writing within 3 business days of being informed of the change in recipient if the clearing service provider is unable to accommodate the clearing service user request for change in recipient and the reason for this. In this situation the clearing service provider shall sell the relevant instruments on an established securities market to a third party at arm's length terms at the prevailing market price for the time of the transaction and transfer the proceeds of the sale to the clearing service user, instead of the financial instruments that were initially to be delivered, with the deduction of any reasonable costs for the sale.

#### *Article 5*

### **Compensation information**

1. The clearing service provider shall inform, in writing, the clearing service users that have made a contribution, of any compensation, recompense, cash equivalent thereof or proceeds determined in accordance with Article 62 of the Regulation (EU) 2021/23 related to the clearing service users' contribution.
2. The notification referred to under paragraph 1 shall contain, at least, the following information stated in a clear and precise manner:
  - a) A copy of the decision by the resolution authority that the clearing member is entitled to the payment of the difference referred to in Article 62 of Regulation (EU) 2021/23;
  - b) A copy of the decision of the resolution authority requiring the CCP to provide compensation to the clearing members that have incurred excess losses as defined under Article 27(6) of

Regulation (EU) 2021/23 also clarifying how this amount is deducted from any entitlement to the payment of the difference referred to in Article 62 of Regulation (EU) 2021/23;

- c) Information of the compensation, recompense, cash equivalent thereof or proceeds that are to be made available to the clearing service user and of the methodology used to calculate the compensation, recompense, cash equivalent thereof or proceeds based on the contribution made that qualifies for such compensation, recompense, cash equivalent thereof or proceeds under Article 63 of Regulation (EU) 2021/23;
- d) Information on the compensation, recompense, cash equivalent thereof or proceeds received by the clearing service provider before any set-off or other deductions were made (if any) in accordance with Article 3(6) above;
- e) Information on the form under which the compensation, recompense, cash equivalent thereof or proceeds have been provided to the clearing service provider, separating between cash or any other form of financial instruments, including through instruments of ownership, debt instruments or instruments recognising a claim on the future profits of the CCP as detailed under Article 4(1) and information on the composition of the compensation for the clearing service user;
- f) Subject to any confidentiality restrictions, general details on the overall distribution of the compensation, recompense, cash equivalent thereof or proceeds between the clearing service users to the clearing service provider and between house accounts; and
- g) Any calculation of interest or any other relevant term affecting the compensation, recompense, cash equivalent thereof or proceeds.

#### *Article 6*

#### **Entry into force**

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

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

Done at Brussels, XXX