



European Securities and  
Markets Authority

# 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) of CCPRRR)**



## Responding to this paper

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

- a) respond to the question stated;
- b) indicate the specific question to which the comment relates;
- c) contain a clear rationale; and
- d) 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'.

## 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 <https://www.esma.europa.eu/data-protection> under the heading Data Protection.

## 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, national competent authorities in charge of the supervision of EU central counterparties, EU authorities involved in the EU CCPs' recovery and resolution process, clearing members and clients of clearing members.

## Table of Contents

<b>Executive Summary</b> .....	5
I. Mandate .....	7
II. Annex I Draft Guidelines on the application of the circumstances under which a central counterparty is deemed to be failing or likely to fail.....	9
II.1 Scope of Guidelines .....	9
II.2 Legislative references and abbreviations.....	9
II.3 Purpose.....	11
II.4 Compliance and reporting obligations .....	11
II.4.1 Status of the Guidelines .....	11
II.4.2 Reporting requirements.....	12
II.5 Draft Guidelines on the application of the circumstances under which a central counterparty is deemed to be failing or likely to fail .....	12
II.5.1 General considerations for the determination under Article 22(3) (a) to (e) of CCPRRR.....	12
II.5.1.1 Guideline 1 Objective elements for determination that a CCP is failing or likely to fail	12
II.5.1.2 Guideline 2 Comprehensive analysis .....	13
II.5.2 Determinations under Article 22(3)(a) to (e) of CCPRRR .....	15
II.5.2.1 Determination under Article 22(3)(c) of CCPRRR; Guideline 3 on availability and adequacy of the CCP's recovery tools .....	15
II.5.2.2 Determination under Article 22(3)(a) and (d) of CCPRRR; Guideline 4 and Guideline 5 on financial resources .....	15
II.5.2.3 Guideline 4 The pre-funded and committed financial resources available to the CCP	16
II.5.2.4 Guideline 5 Liquid resources and liquidity arrangements available to the CCP	17
II.5.2.5 Determination under Article 22(3)(b) of CCPRRR; Guideline 6 on operational capacity of a CCP .....	18
II.5.2.6 Determination under Article 22(3)(a) of CCPRRR; Guideline 7 on other requirements for continuing authorisation .....	19

II.5.3	Provision of information and exchange of information between the competent authority and the resolution authority in the process of determining that a CCP is failing or likely to fail.....	21
II.5.3.1	Guideline 8 Information provided by the competent authority.....	21
II.5.3.2	Guideline 9 Information provided by the resolution authority.....	22
II.6	Annex II: Mapping Table and Mandate.....	23
II.7	Annex III: Cost-benefit analysis.....	25
II.8	Annex IV Summary of Questions.....	29

## **Executive Summary**

### **Reasons for publication**

These Guidelines, developed in accordance with Article 22(6) of 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 ('CCP RRR'), are addressed to competent authorities and aims to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union. When developing those guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU.

The Guidelines provide competent authorities with guidance on the circumstances under which they should determine a CCP being deemed to be failing or likely to fail.

These Guidelines clarify the different circumstances under which a CCP is deemed to be failing or likely to fail, one of the three cumulative conditions set out in Article 22(1) of CCPRRR for triggering a resolution action. In particular, they aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered with respect to the circumstances under which a CCP is deemed to be failing or likely to fail. For this purpose, these Guidelines list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR. These Guidelines do not purport to constrain the ultimate discretion of the competent authority and of the resolution authority in making the determination that a CCP is failing or likely to fail.

These draft Guidelines are issued for public consultation in order to seek the views from all interested stakeholders. In particular, this paper may be specifically of interest for EU central counterparties, national competent authorities in charge of the supervision of EU central counterparties, EU authorities involved in the EU CCPs' recovery and resolution process, clearing members and clients of clearing members.

### **Contents**

Section 1 contains the mandate and background to the Guidelines.

Section 2 sets out the Annexes. Annex I contains the proposed Guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is determined to be failing or likely to fail and the proposed

Guidelines on information sharing. Annex I also contains the scope of the Guidelines, the definitions and abbreviations, the purpose of the Guidelines, i.e. a general description of the mandate and the aim and the draft Guidelines and the compliance and reporting of the Guidelines.

Annex II set out a mapping table of legislative references and the legal mandate in Article 22(6) of CCPRRR, Annex III contains the cost and benefit assessment, and Annex IV provides a summary of the questions.

### **Next Steps**

The consultation will be open until 24 January 2022. ESMA will consider the feedback received to the consultation in Q1 2022 and expects to publish the guidelines and the final report by spring 2022.

## I. Mandate

1. The CCP Recovery & Resolution Regulation (CCPRRR) was published in the Official Journal on 22 January 2021 and entered into force on 12 February 2021<sup>1</sup>.
2. The recovery and resolution framework further reinforces the preparedness of CCPs and national authorities with the aim to mitigate financial distress and provide national authorities and ESMA with further insight into CCPs' preparations for stress scenarios. It also provides national authorities with powers to prepare for the potential resolution of a CCP and to deal with the declining health of a CCP in a coordinated manner, thus, to contribute to the smooth functioning of financial markets.
3. These Guidelines are based on Article 22(6) of CCPRRR. The objective of these Guidelines is to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail.
4. These Guidelines clarify the different circumstances under which a CCP is deemed to be failing or likely to fail, one of the three cumulative conditions set out in Article 22(1) of CCPRRR for triggering a resolution action. In particular, they aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered with respect to the circumstances under which a CCP is deemed to be failing or likely to fail. For this purpose, these Guidelines list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR.

### Recital 37

The resolution framework should provide for timely entry into resolution before a CCP is insolvent. A CCP should be considered to be failing or likely to fail when it infringes or is likely in the near future to infringe the requirements for continuing authorisation, when its recovery has failed or is likely to fail to restore its viability, when the CCP is unable or is likely to be unable to provide a critical function, when the assets of the CCP are or are likely in the near future to be less than its liabilities, when the CCP is or is likely in the near future to be unable to pay its debts or other liabilities as they fall due, or when the CCP requires extraordinary public financial support. However, the fact that a CCP does not comply with all the requirements for authorisation should not justify by itself the entry into resolution.

---

<sup>1</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)

Article 22

3. For the purposes of point (a) of paragraph 1, a CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances apply:

(a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012;

(b) the CCP is unable, or is likely to be unable, to provide a critical function;

(c) the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures;

(d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due;

(e) the CCP requires extraordinary public financial support. Article 22(6)

6. ESMA shall issue guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail by 12 February 2022, taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union.

When developing those guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU.

5. Pursuant to Article 16(1) of ESMA Regulation, ESMA may issue Guidelines in order to establish consistent, efficient and effective supervisory practices. The scope of these Guidelines is with this aim expanded beyond the scope set forth by Article 22(6) of CCPRRR, by introducing Guidelines 8 and 9 covering the consultation and information exchange between the competent authority and the resolution authority for the purpose of making a determination that a CCP is failing or likely to fail. The additional guidance provided in Guidelines 8 and 9 is limited to the information exchange between authorities established in the same jurisdiction and its provisions are without prejudice to any rules for exchanging information between authorities across jurisdictions.
6. These Guidelines do not purport to constrain the ultimate discretion of the competent authority and of the resolution authority in making the determination that a CCP is failing or likely to fail. The identification that an objective element enlisted in one of the Guidelines has materialised in respect of a particular CCP should not lead the competent authority nor the resolution authority, as the case may be, to the automatic determination that the CCP is failing or likely to fail or result in an automatic application of resolution tools. Similarly, the objective elements listed in these Guidelines are not exhaustive and should remain open since not all crisis circumstances can be reasonably foreseen.



7. When developing these proposed guidelines, ESMA also took into account the Guidelines EBA FOLTF issued in accordance with Article 32(6) of Directive 2014/59/EU.

## **ANNEXES**

### **II. Annex I Draft Guidelines on the application of the circumstances under which a central counterparty is deemed to be failing or likely to fail**

#### **II.1 Scope of Guidelines**

##### **Who?**

8. These Guidelines will apply to competent authorities, as defined in Article 22 of EMIR, and to resolution authorities, as defined in Article 2(3) of CCPRRR, when they determine whether a central counterparty is failing or likely to fail.

##### **What?**

9. These Guidelines will apply in relation to Article 22 (3) of CCPRRR.

##### **When?**

10. These Guidelines will apply from [dd month yyyy].

#### **II.2 Legislative references and abbreviations**

For the purposes of these Guidelines the term 'relevant authorities' will be used in lieu of 'the competent authority and/or the resolution authority'.

##### **Legislative references**

CCP Recovery and  
Resolution Regulation  
(CCPRRR)

Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU)

2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132<sup>2</sup>

**EMIR** Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories<sup>3</sup>

**ESMA Regulation** Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC<sup>4</sup>

**RTS 153/2013** Commission Delegated regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties<sup>5</sup>

**Directive 2014/59/EU** Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

**Guidelines EBA FOLTF** Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU

## Abbreviations

**EU** European Union

---

<sup>2</sup> OJ L 22, 22.1.2021, p. 1–102

<sup>3</sup> OJ L 201, 27.7.2012, p. 1

<sup>4</sup> OJ L 331, 15.12.2010, p. 84

<sup>5</sup> OJ L 52, 23.2.2013, p. 41

ESMA	European Securities and Markets Authority
CCP	Central Counterparty
ESFS	European System of Financial Supervision

## II.3 Purpose

11. These Guidelines are based on Article 22(6) of CCPRRR. The objective of these Guidelines is to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail.
12. These Guidelines clarify the different circumstances under which a CCP is deemed to be failing or likely to fail, one of the three cumulative conditions set out in Article 22(1) of CCPRRR for triggering a resolution action. In particular, they aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered with respect to the circumstances under which a CCP is deemed to be failing or likely to fail. For this purpose, these Guidelines list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3) of CCPRRR.
13. Pursuant to Article 16(1) of ESMA Regulation, ESMA may issue Guidelines in order to establish consistent, efficient and effective supervisory practices. The scope of these Guidelines is with this aim expanded beyond the scope set forth by Article 22(6) of CCPRRR, by introducing Guidelines 8 and 9 covering the consultation and information exchange between the competent authority and the resolution authority for the purpose of making a determination that a CCP is failing or likely to fail. The additional guidance provided in Guidelines 8 and 9 is limited to the information exchange between authorities established in the same jurisdiction and its provisions are without prejudice to any rules for exchanging information between authorities across jurisdictions.

## II.4 Compliance and reporting obligations

### II.4.1 Status of the Guidelines

14. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and resolution authorities must make every effort to comply with these Guidelines.

15. Competent authorities and resolution authorities to which these Guidelines apply should comply by incorporating them into their national legal and/or supervisory and resolution frameworks as appropriate.

#### II.4.2 Reporting requirements

16. Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities and resolution authorities to which these Guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the Guidelines.
17. In case of non-compliance, competent authorities and resolution authorities must also notify ESMA within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages of their reasons for not complying with the Guidelines.
18. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

### **II.5 Draft Guidelines on the application of the circumstances under which a central counterparty is deemed to be failing or likely to fail**

#### II.5.1 General considerations for the determination under Article 22(3) (a) to (e) of CCPRRR.

19. When the resolution authority makes the determination whether a CCP is failing or likely to fail, it should consider the Guidelines 1 to 7 and in particular the objective elements listed in Guidelines 3 to 7 of these Guidelines in relation to the CCP's recovery tools, financial resources, liquidity, operational capacity and other aspects with respect to the requirements for continuing authorisation based on the information that the resolution authority has at its disposal.

##### II.5.1.1 Guideline 1 Objective elements for determination that a CCP is failing or likely to fail

20. Guideline 1 provides for general consideration that apply in the process of determining a CCP failing or likely to fail under Guidelines 3-7.

Guideline 1

For the purpose of making a determination that a CCP is failing or likely to fail, in accordance with the circumstances laid down in Article 22(3)(a)-(e) the relevant authorities should assess the available objective elements relating to each of the following areas as further specified in these Guidelines:

- a. the availability and adequacy of the CCP's recovery tools;
- b. the pre-funded and committed financial resources still available to the CCP;
- c. the liquid resources and liquidity arrangements still available to the CCP;
- d. the operational capacity of the CCP; and
- e. other requirements for continuing authorisation.

21. Annex 1 of these Guidelines provides a mapping between each area listed in Guideline 1, as further specified in Guidelines 3 to 7, and the circumstances laid down in Article 22(3) of the CCPRRR.

22. In accordance with Article 22(1) (a) of CCPRRR, the determination that a CCP is failing or is likely to fail can be done by any of the following:

- a. the competent authority, after consulting the resolution authority; or
- b. the resolution authority after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion.

#### II.5.1.2 Guideline 2 Comprehensive analysis

23. Also Guideline 2 provides for general consideration that apply in the process of determining a CCP failing or likely to fail under Guidelines 3-7.

##### Guideline 2

The relevant authorities should, decide whether the CCP is failing or likely to fail on the basis of a comprehensive assessment of both qualitative and quantitative objective elements, taking into account all circumstances and information available at such time and to the extent relevant for the CCP.

24. The objective elements listed in these Guidelines should be carefully analysed on a comprehensive basis. The determination that a CCP is failing or likely to fail should remain

an expert judgement and should not be automatically derived from any of the objective elements alone. Furthermore, the set of objective elements listed in these Guidelines does not prevent the relevant authorities from taking into account other considerations signalling that a CCP is failing or likely to fail.

25. The prevailing circumstances requiring the CCP to undertake recovery measures and/or the relevant authorities to undertake the assessment needed to decide on the resolution of the CCP should be taken into consideration. Typical circumstances which may result in the failure of the CCP include:

a) the inability of the CCP to manage the default of one or more clearing members (i.e. default events);

b) the inability of the CCP to address a non-default event resulting in unmanageable losses for the CCP. A large range of events could lead to non-default losses (i.e. non-default events), such as those related to:

(i) the failure of, or loss of access to, one or more non-clearing counterparties, such as liquidity providers, settlement banks or platforms, custodians, investment agents, concentration banks or service providers;

(ii) custodial risk;

(iii) settlement risk;

(iv) investment risk;

(v) operational risk events (e.g. IT failures, fraud, cyber-attacks, mistakes in margin calls, erroneous booking of an investment trade);

(vi) legal risk.

26. These events could occur in isolation or jointly and the recovery tools and resources available to the CCP to manage these events could differ. Consequentially, when determining whether the CCP is failing or is likely to fail, the relevant authorities should apply the objective elements in these Guidelines to the extent justified depending on the prevailing circumstances of the CCP.

**Question 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.**

## II.5.2 Determinations under Article 22(3)(a) to (e) of CCPRRR

### II.5.2.1 Determination under Article 22(3)(c) of CCPRRR; Guideline 3 on availability and adequacy of the CCP's recovery tools

27. In accordance with Article 22(3)(c) of CCPRRR, a CCP should be considered as failing or likely to fail if the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures.

#### Guideline 3

When assessing the ability of the CCP to restore its viability through the implementation of its recovery measures, the relevant authorities should base their determination on objective elements including:

- a. the recovery tools and measures that have been exercised by the CCP and their success in bringing the CCP closer to a matched book, restoring its financial position, addressing or allocating losses or covering liquidity shortfalls;
- b. the recovery tools and measures that are still available to the CCP and the ability of the CCP to exercise them, including the CCP's legal powers and operational capacity to do so;
- c. the ability of stakeholders who are called to bear losses, to incur costs or contribute to cover liquidity shortfalls when the recovery plan is implemented and continue participating in the CCP's recovery according to their contractual obligations, and the potential financial stability risks related to the potential inability of these stakeholders to bear the losses and costs, to the extent the information is available.

**Question 2: 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.**

### II.5.2.2 Determination under Article 22(3)(a) and (d) of CCPRRR; Guideline 4 and Guideline 5 on financial resources

28. In accordance with Article 22(3)(a) and (d) of CCPRRR, a CCP shall be deemed to be failing or likely to fail where one of the following circumstances apply:

- (a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of EMIR; or

(d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due.

29. While both Guidelines 4 and 5 provide guidance on the application of Article 22(3)(a) and (d) of the CCPRRR, they actually refer to different types of financial resources of the CCP; where Guideline 4 lists objective elements to be assessed with respect to the stock of available financial resources at the CCP, Guideline 5 focuses on the forecasted flows of liquid resources that will impact the liquidity risk profile of the CCP and the level of liquid resources available to the CCP.

#### II.5.2.3 Guideline 4 The pre-funded and committed financial resources available to the CCP

##### Guideline 4

In conjunction with the assessment of the CCP's recovery tools, when determining whether the CCP is likely to be unable to pay its debts or other liabilities as they fall due, the relevant authorities should assess the pre-funded and committed financial resources available to the CCP and base this assessment on objective elements, including:

- a) the amount of both pre-funded and separately committed financial resources available to the CCP to undertake recovery in each case to the extent they meet the financial resources requirements imposed on the CCP in accordance with Article 43 of EMIR and Article 35 of the RTS 153/2013;
- b) an assessment of market conditions that may impede the CCP converting between collateral asset classes as swiftly as necessary to meet its related obligations or realising the value of the collateral it holds under the prevailing market conditions;
- c) in relation to committed financial resources, the ability of the committed parties (such as clearing members, the parent company, shareholders or liquidity providers) to actually transfer the committed amounts to the CCP within the timeframe required under the prevailing conditions;
- d) in relation to its pre-funded financial resources (CCP's own contributions and/or contributions of its clearing members), the ability of the CCP to replenish them within a reasonable time frame to a level that can deliver continuity of critical functions and meet regulatory compliance;
- e) where the prevailing circumstances of the CCP involve a default event, indicators that the CCP could only return to a matched book by actions that would require resources in excess of its available pre-funded and committed financial resources;



- f) where the prevailing circumstances of the CCP involve a default event and/or a non-default event, the sufficiency of the pre-funded and committed resources to meet the realised and expected losses and, if necessary, recapitalise the CCP; and
- g) where the prevailing circumstances of the CCP involve a non-default event, the sufficiency of its capital and the willingness and ability of the committed parties to absorb the realised and expected losses or recapitalise the CCP following the loss event.

30. The objective elements to assess with respect to the pre-funded and committed financial resources will depend on the content of the recovery plan, which may vary from one CCP to another. Some recovery plans may, for instance, contain parental guarantees or commitments to inject capital at the start or during the recovery process.

31. Where the prevailing circumstances of the CCP involve a non-default event, most CCPs would in addition to the resources envisaged under CCPRRR, rely on capital injections from parent companies, shareholders or insurance policies to address uncovered non-default losses. Some CCPs have developed arrangements to allocate certain business risk losses – such as losses associated with the investment and custody of participant assets – to their clearing participants beyond some predefined thresholds.

#### II.5.2.4 Guideline 5 Liquid resources and liquidity arrangements available to the CCP

##### Guideline 5

The relevant authorities should determine, according to the CCP's operating rules and considering the relevant market conditions, whether the CCP is likely to meet its settlement obligations in all relevant currencies as they fall due and/or is able to recourse to its usual liquidity tools.

This assessment should be based on objective elements, including amongst others, significant adverse developments affecting the available liquidity risk profile and the liquid resources of the CCP, and its compliance with the minimum requirements for liquidity as stipulated in Article 44 of EMIR, as further specified by Article 32 of the RTS 153/2013.

The assessment should consider, where relevant:

- (a) forecasted contractual inflows arising from payments due to the CCP, both in relation to cleared positions and other business activities;

- (b) forecasted outflows arising from payments due from the CCP, including withdrawals of collateral and settlement obligations;
- (c) liquid resources available to the CCP and its ability to convert between asset classes and currencies as necessary to meet its obligations;
- (d) liquidity lines or other arrangements available to the CCP and the certainty of these arrangements in the prevailing market and economic conditions.

32. The liquidity tools to be considered could for instance include foreign exchange arrangements and full market access (i.e. the ability to buy and/or sell securities immediately or to make use of repos and reverse repos).

**Question 3: 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.**

II.5.2.5 Determination under Article 22(3)(b) of CCPRRR; Guideline 6 on operational capacity of a CCP

33. In accordance with Article 22(3)(b) of CCPRRR, a CCP should be considered as failing or likely to fail if the CCP is unable, or is likely to be unable, to provide a critical function.

#### Guideline 6

The relevant authorities should assess the circumstances and events which could negatively impact the CCP's operational capacity to continue providing critical functions, even without infringing financial resources and liquidity arrangements, and base this assessment on objective elements, including amongst others:

- a) the CCP's inability to fulfil its obligations towards its participants, including to call, receive or transfer back collateral, and/or to undertake recovery measures, due to persistent operational constraints;
- b) the loss of confidence of its clearing participants and other stakeholders in the CCP's ability to manage risks, operationally and/or financially; or
- c) the CCP's inability to recover from an operational event (such as a cyber-attack) or to address severe operational constraints in a timely manner.

34. In the context of fulfilling its obligations towards its participants, including calling, receiving or transferring back collateral, the CCP's operational constraints may arise from the failure of systems, the failure or loss of access to settlement banks, a cyber-attack or an event that means the CCP lacks available or sufficiently experienced operational staff and an event which could negatively impact the CCP's operational capacity to continue providing critical functions may also create a risk for financial stability.
35. To be considered as failing or likely to fail, a CCP's loss of business to competitors should:
- a) be massive and uncontrolled by the CCP; or
  - b) represent a risk to the viability of the CCP, with a possible sudden insolvency of the CCP if it is unable to fulfil its obligations.
36. The CCP's loss of clearing participants and other stakeholders' confidence, leading to a situation where the CCP is no longer able to carry out its business activities, may be evidenced by:
- a) a decrease in transactions submitted for clearing;
  - b) the intention of liquidity providers to decrease the amount of the CCP's liquid resources;  
or
  - c) the intention of clearing members to terminate their contracts with the CCP.
37. A CCP may be unable to address severe operational constraints in a timely manner, where for instance business continuity plans prove not to be adequate to restore the CCP's operations.

**Question 4: 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.**

II.5.2.6 Determination under Article 22(3)(a) of CCPRRR; Guideline 7 on other requirements for continuing authorisation

38. In accordance with Article 22(3)(a) of CCPRRR, a CCP should be considered as failing or likely to fail if the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of EMIR.

#### Guideline 7

The relevant authorities should consider the likelihood of the CCP to remain a going concern post application of the recovery tools, assess whether the CCP could meet the requirements for continuing authorisation post-recovery as well as whether the CCP's reliability and capacity to provide clearing services has been severely impeded, and base their assessment on the following objective elements:

- a) the ability of the CCP to continue providing clearing services in a manner which does not pose significant risk to the financial system, including having a sizeable pool of clearing participants to avoid significant concentration;
- b) indicators that the stress event that triggered the implementation of the recovery plan is, wholly or in part, due to significant inadequacies in the CCP's risk management framework and/or rulebook;
- c) material deficiencies in the internal controls and other key areas of the governance arrangements suggesting doubt regarding the ability of the CCP to operate in a transparent and effective manner.

39. This assessment on whether the CCP still fulfils requirements for continuing authorisation should be done in conjunction with the forward-looking elements related to financial resources, liquidity arrangements and operational capacity.

40. With regard to Guideline 7(a), the significant concentration of a CCP with respect to its clearing participants can for instance be measured by the number of clearing members or client clearing accounts, the levels of clearing members' exposures, initial margin or default fund contributions.

41. With regard to Guideline 7(b), the significant inadequacies in the CCP's risk management framework and/or rulebook may refer to the CCP's margins, stress-testing, collateral, default management and/or business continuity policies and procedures.

42. With regard to Guideline 7(c), such deficiencies in the internal controls and other key areas of the governance arrangements of the CCP may be evidenced by:

- a) fraud or acts of dishonesty such as material misstatements in the financial statements by the staff and/or management of the CCP;
- b) disregard of the staff and/or management on the business activities and/or risk management framework of the CCP, including the failure to report and act on material weaknesses, deficiencies or issues;

- c) major reputational depreciation resulting from the non-compliance with 'fit and proper' criteria of individuals with key functions in the CCP;
- d) major reputational depreciation arising from a lack of transparency in the conduct of business and operations or incomplete/inaccurate disclosure of information; and
- e) major on-going litigation or disputes to which the CCP is a party.

**Question 5: 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.**

### II.5.3 Provision of information and exchange of information between the competent authority and the resolution authority in the process of determining that a CCP is failing or likely to fail

43. Without prejudice to Article 8 and Article 22(2) of the CCPRRR, in order to facilitate the timely flow of information for the purpose of determining whether a CCP is failing or likely to fail, the competent authority and the resolution authority should assist each other by applying the principles set out below in the Guidelines 8 and 9.

#### II.5.3.1 Guideline 8 Information provided by the competent authority

44. According to point (h) of Article 18(1) of CCPRRR the competent authority is required to provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP. In addition, pursuant to Article 70(2) of CCPRRR on notification requirements, the competent authority should inform the resolution authority of any recovery measures, or of any emergency situation referred to in Article 24 of EMIR.

45. To facilitate such exchange of information, the competent authority should also provide the resolution authority with the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR.

#### Guideline 8

To facilitate an exchange of information for the purpose of determining whether the CCP is failing or likely to fail, the competent authority should provide the resolution authority with the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR.

In particular, the competent authority should notify the resolution authority and provide it with the following information in respect to the specific CCP:

- a) a summary of the outcomes of the review and evaluation performed pursuant to Article 21 of EMIR;
- b) the complete set of indicators used in the regular review and evaluation of key indicators of the CCP;
- c) all details on the applied supervisory measures and early intervention measures (according to Article 18(1) of CCPRRR), as well as a description of the CCP's compliance with them; and
- (d) details on the recovery options applied by the CCP, where relevant.

In addition, upon identifying the presence of the objective elements listed in Guidelines 3 to 7 of these Guidelines, for the purpose of determining whether the CCP is failing or likely to fail, the resolution authority may request the competent authority to explain whether and how these circumstances have been reflected in the review and evaluation of the CCP.

#### II.5.3.2 Guideline 9 Information provided by the resolution authority

46. Upon the identification of objective elements specified in Guidelines 3 to 7 of these Guidelines the resolution authority should, in writing, provide the competent authority with its findings and reasoning in accordance with CCPRRR.

##### Guideline 9

The resolution authority should, in writing, provide the competent authority with its findings and reasoning upon the identification of any of the objective elements listed in Guidelines 3 to 7 of these Guidelines.

The resolution authority should endeavour to inform the competent authority where relevant, on significant developments in addition to where required under CCPRRR.

**Question 6: Do you agree with the proposed Guidelines 8 and 9 on information sharing? If not, please explain.**

## II.6 Annex II: Mapping Table and Mandate

The table below shows how the above objective elements listed in guideline 1 map to the requirements laid down in Article 22(3) of CCPRRR.

<b>Guidelines</b>	<b>Provisions in CCPRRR</b>
Guideline 1(a) and 3	Art 22(3)(c)
Guideline 1(b) and 4	Art 22(3)(a) and (d)
Guideline 1(c) and 5	Art 22(3)(a) and (d)
Guideline 1(d) and 6	Art 22(3)(b)
Guideline 1(e) and 7	Art 22(3)(a)

## Article 22

### Conditions for resolution

1. The resolution authority shall take a resolution action in relation to a CCP provided that all of the following conditions are met:

- (a) the CCP is failing or is likely to fail as determined by any of the following:
  - (i) the competent authority, after consulting the resolution authority;
  - (ii) the resolution authority after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion;

[...]

3. For the purposes of point (a) of paragraph 1, a CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances apply:

- (a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012;
- (b) the CCP is unable, or is likely to be unable, to provide a critical function;
- (c) the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures;
- (d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due;
- (e) the CCP requires extraordinary public financial support.

6. ESMA shall issue guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail by 12 February 2022, taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union.

When developing those guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU



## II.7 Annex III: Cost-benefit analysis

### 1. Introduction

Pursuant to the sixth paragraph of Article 22 of CCPRRR, ESMA shall, by 12 February 2022, issue Guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail, taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union. When developing those guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU.

Article 16 of the ESMA Regulation requires ESMA, where appropriate, to analyse the potential costs and benefits relating to proposed Guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the proposed Guidelines.

The objective of performing a cost-benefit analysis is to assess the costs and benefits of the various policy or technical options which were analysed during the process of drafting the Guidelines.

The Guidelines included in this Consultation Paper are of a mandatory nature as provided for in Article 22(6) of CCPRR in view of clarifying the application of Article 23(3) of CCPRR.

In carrying out a cost-benefit analysis on the Guidelines it should be noted that the main policy decisions have already been taken under the primary legislation (CCPRRR) and the impact of such policy decisions have already been analysed to some extent by the Impact Assessment by the European Commission<sup>6</sup>.

### 2. Cost-benefit analysis

Below are detailed the different corresponding policy options on how to promote convergence of supervisory and resolution practices as required under Article 22(6) of CCPRRR regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail as referred to in Article 22(1) and (3) of CCPRRR.

<b>Specific objective</b>	The resolution authority shall take a resolution action in relation to a CCP provided that all of the conditions set out under Article 22(1) are met, including the requirement that the CCP is failing or is likely to fail as determined by the competent authority, after consulting the resolution authority, or the resolution authority after consulting
---------------------------	--

<sup>6</sup> <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=SWD%3A2016%3A0368%3AFIN>

	<p>the competent authority, where the resolution authority has the necessary tools for reaching that conclusion; [...].</p> <p>Article 22(3) states that a CCP shall be deemed to be failing or likely to fail where one or more of five listed circumstances apply, including where the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012 and where the CCP is unable, or is likely to be unable, to provide a critical function.</p> <p>The Guidelines shall promote convergence of supervisory and resolution practices regarding the application of the circumstances under Article 22(3) under which a CCP <i>is deemed to be failing or likely to fail</i>.</p>
<b>Policy option 1</b>	To clarify principles as guidelines to promote convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail under Article 22(3) of CCPRRR.
How would this option achieve the objective?	This option would likely meet the mandate as it would promote convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail, it would however create a lower level of convergence as the actual triggers would be determined by the competent authorities.
<b>Policy option 2</b>	To list a set of objective elements the relevant authority should consider in determining if a CCP is deemed failing or likely to fail based on Article 22(3) of CCPRRR with the aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered.
How would this option achieve the objective?	This option would meet the requirements of ESMA's mandate as it would promote convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail where the Guidelines would list a set of objective elements that should support the determination that a CCP is failing or likely to fail, in

	accordance with the circumstances laid down in Article 22(3) of the CCPRRR.
Which policy option is the preferred one?	Option 2, given that Option 1 could be seen as too vague and may fall short of the aim in ensuring convergence in the assessments on the determination on resolution.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	ESMA is responsible for issuing the Guidelines and the mandate given to ESMA is of a mandatory nature, i.e. the Guidelines are envisaged in CCPRRR in order to ensure uniform, consistent and coherent application of Union Law.

Impacts of the proposed policies:	
<b>Policy option 1</b>	
Benefits	It will provide guidance on principles for the relevant authority to determine on resolution actions.
Regulator's costs	Probably quite high as the competent authority has to create the list of indicators based on the principles and monitor them.
Compliance costs	For the CCP no compliance costs.
<b>Policy option 2</b>	
Benefits	It will provide the relevant authority with a predetermined list of objective elements the relevant authority should consider in determining if a CCP is deemed failing or likely to fail with the aim to promote the convergence of supervisory and resolution practices with respect to how and when resolution should be triggered.

Regulator's costs	Moderate costs to monitor the objective elements.
Compliance costs	For the CCP no compliance costs.
Conclusion	<p>The costs for Option 2 can be summarised as the cost of the relevant authority to monitor the objective elements on the determination of resolution actions.</p> <p>The cost of implementing an ongoing monitoring and assessment will vary depending on the nature of existing procedures of the authority and a one-off cost may be required to accommodate for a system to accommodate for those objective elements to be assessed.</p> <p>ESMA notes that the costs are envisaged for by the CCPRRR.</p> <p>On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs.</p>

**Question 7: 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)?**

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

## **II.8 Annex IV Summary of Questions**

**Question 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.**

**Question 2: 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.**

**Question 3: 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.**

**Question 4: 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.**

**Question 5: 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.**

**Question 6: Do you agree with the proposed Guidelines 8 and 9 on information sharing? If not, please explain.**

**Question 7: 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)?**

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