



European Securities and
Markets Authority

Response Form to the Consultation Paper

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



Responding to this paper

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

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

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

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

Instructions

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

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

Publication of responses

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

Data protection

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

Who should read this paper?

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

General information about respondent

Name of the company / organisation	Eurex Clearing
Activity	Central Counterparty
Are you representing an association?	<input type="checkbox"/>
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_FOLTF_00>

Eurex Clearing is an EMIR-authorized central counterparty (CCP) and a subsidiary of the Deutsche Börse Group. Eurex Clearing provides clearing services for cash and derivatives markets in listed and over-the-counter (OTC) financial instruments.

Therefore, Eurex Clearing welcomes the opportunity to contribute to ESMA's consultation regarding the draft Guidelines on the application of the circumstances under which a CCP is deemed to be failing or likely to fail. As shown in our responses below, we generally agree with all of the Guidelines and only intend to highlight a few aspects that we consider relevant in particular in relation to Guidelines 3 and 6.

We trust that our comments provide a useful contribution to finalize the draft Guidelines and remain at ESMA's disposal for any comments or questions.

<ESMA_COMMENT_FOLTF_00>

Questions

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

<ESMA_QUESTION_FOLTF_01>

We generally agree with ESMA's proposed Guidelines 1 and 2. In particular, we welcome that the Guidelines recognise that the determination of whether 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.

<ESMA_QUESTION_FOLTF_01>

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

<ESMA_QUESTION_FOLTF_02>

We generally agree with the proposed Guideline 3. We would particularly like to highlight the qualification 'to the extent the information is available' under point c) of Guideline 3 and point out that the information to be required from a CCP for the assessment of this element should only include information readily available at the CCP.

<ESMA_QUESTION_FOLTF_02>

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

<ESMA_QUESTION_FOLTF_03>

Yes, we agree with the proposed Guidelines 4 and 5.

<ESMA_QUESTION_FOLTF_03>

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

<ESMA_QUESTION_FOLTF_04>

We agree with the proposed Guideline 6 overall.

In our view, it is generally reasonable to include the potential loss of confidence of clearing participants and other stakeholders in the assessment. At the same time, we would like to point out the difficulty of measuring confidence and setting appropriate thresholds. We would therefore recommend assessing this element using both quantitative (e.g. decrease in transactions submitted for clearing) and qualitative indicators (e.g. information gathered through exchanges with clearing members). The assessment should not be limited to the three indicators listed in paragraph 36, as these may not fully or accurately reflect the level of confidence in the CCP's ability to manage operational and/or financial risks. For instance, there may be other reasons than a loss of confidence explaining a decrease in transactions submitted for clearing.

Due to these shortcomings, we would argue that the loss of confidence can only be an additional, compounding factor in the assessment.

<ESMA_QUESTION_FOLTF_04>

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

<ESMA_QUESTION_FOLTF_05>

We overall agree with the proposed Guideline 7.

<ESMA_QUESTION_FOLTF_05>

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

<ESMA_QUESTION_FOLTF_06>

We agree with the proposed Guidelines 8 and 9 on information sharing.

<ESMA_QUESTION_FOLTF_06>

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

<ESMA_QUESTION_FOLTF_07>

We agree with the proposed Option 2 as it includes some helpful elements to consider while ensuring sufficient discretion for the competent authority and the resolution authority to determine that a CCP is failing or likely to fail.

<ESMA_QUESTION_FOLTF_07>

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

<ESMA_QUESTION_FOLTF_08>

As per our previous answers, no comment.

<ESMA_QUESTION_FOLTF_08>