
**EACH response to the ESMA consultation
on Draft RTS further specifying the factors
that shall be considered by the competent
authority and the supervisory college when
assessing the CCP recovery plan (Article
10(12) CCPRRR)**

September 2021

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Introduction

The European Association of CCP Clearing Houses (EACH) represents the interests of Central Counterparties (CCPs) in Europe since 1992. CCPs are financial market infrastructures that significantly contribute to safer, more efficient and transparent global financial markets. EACH currently has 19 members from 15 different European countries. EACH is registered in the European Union Transparency Register with number 36897011311-96.

EACH appreciates the opportunity to provide feedback to the ESMA Consultation Paper “Draft RTS further specifying the factors that shall be considered by the competent authority and the supervisory college when assessing the CCP recovery plan (Article 10(12) CCPRRR)” (hereinafter called “The consultation”).

Unless stated otherwise, all references to ‘RTS’ in this response refer to the RTS included as from page 25 of the consultation document.

As a general comment we would like to note that ESMA proposes a long and detailed list of elements that the competent authority and supervisory college should analyse to assess a CCPs’ recovery plan. While this list results from the guidance in Level 1 legislation, we believe it is overly granular and the goal of meeting the Level 1 guidance could be achieved with a lower number of elements to be considered. We fear that some of them relate to CCP’s Business as Usual (BAU) requirements, which are included in the EMIR legislation. While a CCP’s recovery plan should be comprehensive in line with the Level 1 legislation, we believe it should not lead to adding BAU requirements for CCPs (i.e. CCPs either comply with these BAU requirements or their recovery plans are not approved). In our responses to the questions below we detail our comments along these lines on individual factors.

Section 4.2 Article 10(3)(a) of CCPRRR — The CCP specific factors

Question 1: Do you agree with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (a) of Article 10(3) of CCPRRR?

Question 2: Would you add any additional elements and/or delete any? If so, please justify.

- **Criterion 4.2.1 - Overall suitability assessment (Article 2 of the RTS)**
 - **Criterion 4.2.1.a (Article 2.a of the RTS) – The CCP’s communication and disclosure plan;**
 - EACH would appreciate a clarification on whether this criterion implies that the CCP’s recovery plan should be made public.

- **Criteria 4.2.1.b (Article 2.b of the RTS) – Overall timing of the different elements of the recovery plan**
 - This criterion seems to imply that, in addition to the overall recovery timing, a specific timing estimation should be included for the different elements of the recovery plan. This seems rather granular and potentially constraining for a stress situation as the recovery of a CCP may be. We would therefore suggest ESMA to clarify that no specific timing estimation that would lead to a mechanic trigger is needed.
- **Criteria 4.2.1 (Article 2.c of the RTS) - The recovery plans' impact on other services by the CCP**
 - We understand that the recovery plan should be focused on the recovery of the core CCP functions and therefore it may be unnecessary that it looks at other services as these risks being too marginal. We would suggest either deleting this provision in the RTS or qualifying that CCPs should consider the impact on 'critical' rather than 'material' ancillary services.
- **Criteria under 4.2.2 - Assessment of recovery plan scenarios and indicators (Article 3 of the RTS)**
 - EACH believes that these criteria make sense overall and just questions whether the criterion included under Article 3.d may be too restrictive as it requires the CCP to identify suitable times at which appropriate actions referred to in the plan should be taken.
- **Criteria 4.2.4 (Article 5 of the RTS) - CCP's default waterfall**
 - These criteria seem to make sense.
- **Criteria 4.2.6 (Article 7 of the RTS) - The substitutability of the CCP's activities**
 - These criteria seem to make sense. While some CCPs may offer a service that may not be offered by other CCPs authorised in the EU, ESMA's proposal seems to be broad enough to propose that recognised non-EU CCPs can also be considered as substitutes. However, EACH would request ESMA to clarify that, for what concerns RTS Article 7(a) and (b), the provisions only refer to (public) information that the CCP in question has access to, as CCPs cannot judge whether other CCPs could take on some or all of the clearing services of the CCP in question; the CCP could only verify against the ESMA register whether other CCPs are authorised or recognised under EMIR to provide equivalent services.
- **Criteria 4.2.7 (Article 8 of the RTS) - The risk profile of the CCP**
 - RTS Article 8.c.4 – We kindly question the need to include 'the special features of the different services provided by the CCP'. While it is not fully clear to us what these special features refer to, in line with the ESMA

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consultation papers on recovery plan scenarios and indicators¹, we understand that the recovery plan should only focus on the relevant risk types for each CCP. We would therefore refrain from obliging CCPs to consider a certain list of risk types and suggest considering the relevant risk factors for that CCP.

- **Criteria 4.2.8 (Article 9 of the RTS) - The business model of the CCP**
 - These criteria seem to be sensible.

Section 4.3 Article 10(3)(b) of CCPRRR - Overall impact on relevant entities

Question 3: Do you agree with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (b) of Article 10(3) of CCPRRR?

Question 4: Would you add any additional elements and/or delete any? If so, please justify.

- **Criteria 4.3.1 (Article 10 of the RTS) - General links of the CCP**
 - EACH appreciates the reference to the assessment taking into account the significance and materiality (RTS Article 10.b) of the links that the CCP has with other entities. However, we would appreciate receiving a clarification on what it is meant by '*financial resources exchanged*' and the types of financial resources that should be considered for this purpose given that the nature and maturity of such exchanges affect the risk.
- **Criteria 4.3.2 (Article 11 of the RTS) - Overall impact of the recovery plan on the CCP's clearing members, and to the extent the information is available, their clients and indirect clients**
 - Criteria 4.3.2.b – EACH kindly questions whether the cost of clearing, a commercial feature unrelated to the CCP's risk management structure, is relevant for this assessment and suggests removing it.
 - Regarding RTS Article 11(b), we would like to highlight that the CCP can only provide this to a certain point as agreed in the CCP's rulebook. However, the CCP cannot be held responsible for managing the financial situation of the clearing members.
 - In addition, we would like to make it clear that Article 11(c) of the RTS should refer to the relevant knowledge of the recovery plan by clearing members, i.e. clearing members should be made aware of the obligations they have with how they are affected by certain recovery options (e.g. cash call or variation margin gain haircutting), rather than the elements that have no impact on them, such

¹ Draft Guidelines on CCP recovery plan scenarios (Article 9(12) CCPRRR):

https://www.esma.europa.eu/sites/default/files/library/esma70-151_3404_guidelines_ccprrr_recovery_plan_scenarios_0.pdf

Draft Guidelines on CCP recovery plan indicators (Article 9(5) CCPRRR):

https://www.esma.europa.eu/sites/default/files/library/esma70-151-3421_guidelines_ccprrr_recovery_plan_indicators.pdf

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as the identification of critical functions. While we fully support such level of targeted transparency, we believe CCPs should have the flexibility to determine how to make its clearing members aware of this, as there are different ways in which this could be done, e.g. rulebooks, risk committees, due diligence procedures, etc.

- **Criteria 4.3.3 (Article 12 of the RTS) - Overall impact of the recovery plan on any linked FMIs**
 - EACH generally agrees with this criterion.
- **Criteria 4.3.4 (Article 13 of the RTS) - Overall impact on financial markets, including trading venues, served by the CCP**
 - EACH generally agrees with this criterion.
- **Criteria 4.3.5 (Article 14 of the RTS) - Overall impact on the financial system of any Member State and the Union as a whole**
 - Criteria 4.3.5.b – The results of ESMA’s cross-CCP stress-testing exercises may not always be suitable to be considered in the CCP’s recovery plan, but they may rather be considered for the default management process prior to the recovery phase. We suggest this is reflected in the text of the RTS.
 - Criteria 4.3.5.c – We believe that this criterion is similar to the one included in 4.2.3.b and 4.3.1.a. We therefore wonder whether it is appropriate to repeat it here.

Section 4.4 Article 10(3)(c) of CCPRRR – Incentives (Article 15 of the RTS)

Question 5: Do you agree with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (c) of Article 10(3) of CCPRRR?

Question 6: Would you add any additional elements and/or delete any? If so, please justify.

- EACH is of the opinion that the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (c) of Article 10(3) of CCPRRR is too detailed, does not necessarily take into account the variety of arrangements established by CCPs and could therefore make the recovery unnecessarily extensive. We believe that the list of elements to be assessed by authorities and colleges should guide competent authorities in assessing the adequacy of the recovery plan in creating appropriate incentives for the various stakeholders involved. These elements should not be understood as a tool for implicitly prescribing specific solutions or arrangements, as this would be interpreted as a way of introducing additional requirements for CCPs, not referenced in level 1.
- Further on this point, it is unclear how those CCPs that do not meet the conditions set out in Article 15 would be impacted by the current proposal, e.g.: (i) would a CCP be obliged to implement certain practices if, for example, it does not foresee clients’ participation in default management auctions or does not have in place a default

advisory committee as indicated in Article 15.c?; or (ii) what if a CCP does not include incentive measures in the context of auctions in its operating rules as indicated in Article 15.d? We suggest ESMA to kindly clarify these.

- We also kindly request clarification on the assessment in Article 15(a) and (b) of how to incentivise additional voluntary contributions. We believe that any additional voluntary contributions should only be assessed where a CCP has chosen to incentivize voluntary contributions when implementing specific recovery tools.
- Finally, we consider that certain elements to be assessed appear to refer to EMIR BAU activities (e.g. default management arrangements) rather than to the recovery phase. This is particularly the case for Article 15.f and therefore questions the need for it. We also question the need for the concept of 'properly structured participation' which seems rather general and could likely lead to divergent interpretation by NCAs. We would therefore suggest deleting it.
- We believe that further clarity regarding Article 15.h would be welcome, especially regarding the services relative to the mitigation of losses in the event of recovery.