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**EACH response to the ESMA consultation  
on 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)**

January 2022

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## Introduction

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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 on 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) (hereinafter called "The consultation").

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

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### Guidelines 1 & 2

**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.**

Yes, EACH agrees with the proposed Guidelines 1 and 2. We particularly welcome that the Guidelines recognise that 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. This expert judgment, as opposed to an automatic determination, is important for dealing with what would likely be a very extreme situation such as the resolution of CCP.

However, we would like to stress that, in our opinion, a CCP should only be put in resolution once the CCP's recovery process is exhausted or it is clear that it will be insufficient to restore the CCP's viability. This is reflected in the FSB's guidelines on resolution<sup>1</sup> which prescribe that resolution is triggered when "*recovery plan and any rules and procedures for loss allocation have failed to return the FMI to viability or have not been implemented in a timely manner*", or when recovery measures are "*not reasonably likely to return the FMI to viability or would otherwise be likely to compromise financial stability*". **We suggest that this reference to the FSB guidelines shall be included in the final Guidelines.**

### Guideline 3

**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.**

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<sup>1</sup> [https://www.fsb.org/wp-content/uploads/r\\_141015.pdf](https://www.fsb.org/wp-content/uploads/r_141015.pdf)

EACH response to the ESMA consultation on 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)

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Yes, EACH generally agrees with the proposed Guideline 3. We would particularly stress the qualification "*to the extent the information is available*" under point (c) of Guideline 3, as the information about third-party stakeholders may or may not be readily available.

## Guidelines 4 & 5

**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.**

Yes, EACH agrees with the proposed Guidelines 4 and 5.

## Guideline 6

**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.**

EACH Members would respectfully question point (b) of Guideline 6, which states that "*the loss of confidence of its clearing participants and other stakeholders in the CCP's ability to manage risks, operationally and/or financially*". The rationale behind our position is the following:

- Points 22 and 23 of Section C of the Annex included in the Level 1 text ("*Matters that the resolution authority is to consider when assessing the resolvability of a CCP*") specify that, when assessing the resolvability of a CCP, the resolution authority should assess to what extent the impact of a CCP resolution on the financial system, the economy and on financial market's confidence can be evaluated. Therefore, to our understanding the potential financial market's loss of confidence should be considered as a *consequence* of the resolution that is to be analysed *ex-ante*, rather than a *trigger* for resolution.

In addition, we would like to point out that Article 22(3) of the Level 1 text specifies that a CCP is deemed to be failing or likely to fail if (a) it CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation; (b) it is unable, or is likely to be unable, to provide a critical function; (c) it is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures; (d) it is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due; (e) it requires extraordinary public financial support. A loss of stakeholders' confidence does not seem to be foreseen among the above listed circumstances. This loss of confidence would by definition be unilateral and have commercial or other interests behind, disguised in a different manner.

- The three indicators included in paragraph 36, i.e. a decrease in transactions submitted for clearing, the intention of liquidity providers to decrease the amount of the CCP's liquid resources, as well as the intention of clearing members to terminate their contract with the CCP may not be directly related to the CCP's business activities or its

EACH response to the ESMA consultation on 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)

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inability to perform at the required level. It may rather be linked to clearing members' choice of clearing or other commercial decisions. Furthermore, these indicators may be very challenging to measure and not accurately reflect the level of confidence in the CCP's capacity to manage risks.

In addition, EACH Members are of the opinion that paragraph 35 of the consultation, which states that a CCP's loss of business to the competitors may be a reason to consider the CCP as failing or likely to fail, may have a negative impact on competitiveness as there could be many reasons behind a clearing member's decision to move its business to another CCP. Furthermore, the paragraph refers to the loss of business that should be "*massive and uncontrolled*". However, any clearing member always has the obligation to settle any open positions, and as a consequence even if such member intends to move its business, it can only do so with future trades that offset the original ones. Therefore, it is not clear how this process could result "*uncontrolled*". In addition, it is not fully clear if this paragraph refers to just moving business to another CCP or actually terminating the relation with the CCP. In case of the latter, CCPs usually have notice periods in place with the objective of preventing an uncontrolled loss of business.

If clearing members plan to leave the CCP, they have the right to do so as long as they honour their existing obligations towards the CCP. Should the clearing members' decision to leave endanger the existence of the CCP, the CCP can activate its orderly wind-down plan, as it should be clear that a CCP without any business would not have any critical functions anymore. Therefore, we would argue that the indicators referred to above should only be taken into account as additional elements but not as substantial evidence underlying a failure or like to fail determination

## Guideline 7

**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.**

EACH overall agrees with the proposed Guideline 7. We particularly agree with the reference that "*its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of EMIR*". We believe this is correct as it avoids circumstances of automatic changes towards resolution (e.g. a temporary breach of an authorisation requirement, such as a temporary breach of the EMIR notification threshold, may not automatically mean that the CCP is failing or likely to fail). However, we would like to underline that paragraph 42(e) "*major on-going litigation or disputes to which the CCP is a party*" should, by itself, not lead to failing or likely to fail determination just because the CCP is involved in a litigation or dispute. Only once the final verdict has come out, which could affect the financial position of the CCP or impede its ability to perform its critical functions, a failing or likely to fail determination can be justified (i.e., 42(e) can only lead indirectly to failing or like to fail determination and hence can be removed).

EACH response to the ESMA consultation on 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)

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EACH is also wondering what the provision in guideline 7(a) on a “sizeable pool of clearing participants” means in practice. We understand it can be measured by number of clearing members, however we see a need for further specification when a “sizeable pool” is reached.

## Guidelines 8 & 9

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

EACH agrees with the proposed Guidelines 8 and 9.

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

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**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)?**

Yes, EACH Members agree with Option 2.