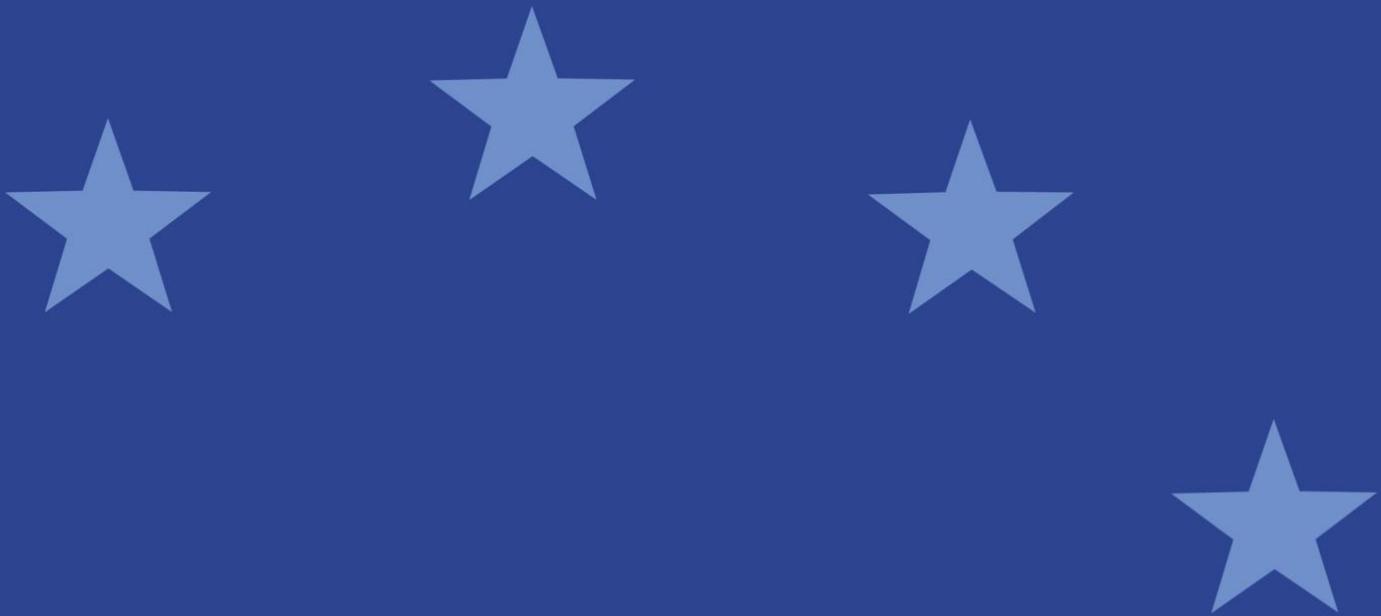




European Securities and
Markets Authority

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 | Futures Industry Association and International Swaps and Derivatives Association |
| Activity | Banking sector |
| Are you representing an association? | <input checked="" type="checkbox"/> |
| Country/Region | International |

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_FOLTF_00>

The Futures Industry Association (FIA) and the International Swaps and Derivatives Association (ISDA), together the Associations, represent the largest number of global and national participants in clearing, banking and financial markets. The Associations appreciate this opportunity to comment on this consultation.

We applaud ESMA for its enormous efforts and impressive work it has delivered on the consultations on CCP resolution, providing a thorough and comprehensive analysis for each of them.

We overall agree with the consultation paper and the draft guidelines, and make some technical comments. Our main concern is that several clearing members exiting a CCP does not necessarily have to mean that entering into resolution is essential provided that the process is managed orderly, and the CCP fulfils its authorisation requirements and is likely to meet them in the future.

This consultation response covers the positions of our members that are clearing members and their clients. The paper does not reflect the views of many CCPs, and many of the CCPs are in disagreement with the views expressed herein.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. Our membership includes clearing firms, exchanges,

clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

Our mission: To support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 960 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.

<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 agree with the general considerations proposed in Guidelines 1 and 2 as long as such assessment is made in a timely manner and before a CCP can deteriorate further.

We recognise that some objective elements are easier to identify in a timely manner than others (e.g. the failure of settlement bank as compared to the liquid resources and liquidity arrangements still available to the CCP), and believe it would be valuable for the relevant authority to monitor data that may serve as early warning signals such as participants closing out positions, or transaction volumes dropping below a certain threshold in order to be able to apply the consideration in Guidelines 1 and 2.

<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 agree with the principles highlighted in Guideline 3 but believe that specific consideration should be given to the recovery tools still available to the CCP, and the implications on overall market stability should they be exercised in making an assessment on whether a CCP is able to restore its viability.

In periods of extreme market stress, the use of a given recovery tool may restore the viability of a CCP, but at the cost of market stability, which may achieve more harm than good, and may put the viability of other market participants, including other CCPs, at risk.

We also note that the principle of assessing the ability of stakeholders who are called to bear losses to actually incur these losses may form part of the impact assessment of a recovery tool on market stability, but it is important to formulate how this will be done in a period of market stress, and within the limited available time given the information available to the relevant authorities will likely be stale. Again, we highlight the need for early warning indicators in order to be able to obtain the relevant and current information from stakeholders such as capital ratios and liquidity status, in order to be able to make an accurate assessment.

<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>

We agree with the proposed guidelines, but reiterate the points on timeliness of the determination and any potential impact on market stability of any approaches that rely on other stakeholders and parties absorbing losses to restore the viability of a CCP.

We would also add that a non-default event may erode the trust in a CCP, which may impact the long-term viability of the CCP if market participants choose to move positions and financial resources to competing services if any exist. It is important that this information is considered by using approaches identified in paragraph 36, such as observing quantitative data like clearing volumes, trends in margins held at the CCP and the availability of an alternative service at a different CCP, alongside qualitative information arising from discussions with clearing members and clients.

On paragraphs 35 and 26 we propose to add a caveat that clearing members leaving the CCP will not necessarily mean a resolution is necessary as long as the process is managed orderly and the CCP fulfils authorisation requirements and is likely to do so in the future.

<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 principles proposed in Guideline 6.

<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 agree with the principles proposed in Guideline 7. We would add that the availability of viable competing services may reduce the likelihood of the CCP remaining a going concern.

We would also like to refer to the points made in questions 2 and 3 with respect to viability and market stability.

<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>

Whilst we have no objection to the information sharing proposed in Guidelines 8 and 9, in particular the qualitative aspects such as the recovery options used and available to the CCP, we refer back to earlier points with respect to the timeliness of information, and the fact that circumstances can change very rapidly in periods of market stress.

We also believe that the information sharing should be bi-directional, with any findings by the resolution authority which may have identified deficiencies in risk management and controls, be communicated back to the relevant supervisory authorities.

<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 Option 2.

<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>

We do not advocate for a different approach.

<ESMA_QUESTION_FOLTF_08>

