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**EACH response to the ESMA consultation  
on Draft Guidelines on the assessment of  
resolvability (Article 15(5) of CCPRRR)**

August 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 18 members from 14 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 assessment of resolvability (Article 15(5) of CCPRRR) (hereinafter called “The consultation”)<sup>1</sup>.

## Section 2. Scope of Mandate

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**Question 1: Do you agree with the general approach of the Guidelines and how ESMA has interpreted the mandate and the aim of the Guidelines? If not, please explain why.**

EACH broadly agrees with ESMA’s approach and interpretation of the mandate and the aim of the Guidelines. In particular, EACH agrees with the focus on resolvability rather than insolvency and the taking into account of international guidance as indicated in paragraph 12. However, we would kindly suggest considering a clear process/guideline on how to stop resolution and how from that point onwards the CCP can move to business as usual.

As stated by ESMA, some aspects of the Guidelines may not be relevant in all cases. Hence, an undifferentiated approach to the application of the Guidelines may not be fit for purpose. If a CCP is not in line with certain provisions, this should not necessarily trigger the detection of an issue, the need for remediation, or the consideration of a CCP as unresolvable. In this context, we appreciate that ESMA clarifies that NCAs retain the sole responsibility of making the resolvability assessment on the basis of their expert judgment. Nevertheless, we wonder whether a resolution authority should be required to justify each deviation from the application of a Guideline in the resolvability assessment and would recommend a less prescriptive approach.

## Section 3. Structure of the Guidelines

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**Question 2: Do you agree with structure of the Guidelines? If not, please explain why.**

EACH overall agrees with the structure of the guidelines.

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<sup>1</sup> [https://www.esma.europa.eu/sites/default/files/library/esma91-372-1621\\_guidelines\\_resolvability\\_-\\_annex\\_section\\_c\\_article\\_155\\_ccprrr\\_public\\_0.pdf](https://www.esma.europa.eu/sites/default/files/library/esma91-372-1621_guidelines_resolvability_-_annex_section_c_article_155_ccprrr_public_0.pdf)

## Section 4.2. Annex II - Cost-benefit analysis

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**Question 3: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?**

EACH would prefer Option 1. Generally, we share ESMA's assessment that none of the three policy options explored would fall short of meeting the rather broad legislative mandate (promote convergence regarding the application of Section C). In our view, the 26 matters included in the draft Guidelines themselves already ensure an appropriate level of convergence and any further specification would be rather case-specific. A key benefit of policy option 1, i.e. setting general principles applicable to all matters is that it would ensure competent authorities are able to consider the CCP's respective specificities in their assessment against the 26 matters.

**Question 4: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.**

Please see answer to Question 3.

## Section 5.2. Guideline 1 – Principles for the resolvability assessments

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**Question 5: Do you agree with Guideline 1 providing principles on the overall assessment of a CCPs resolvability to ensure convergence to the extent possible. If not, please explain why.**

While understanding ESMA's intention, we wonder how the 'size' of the issue can be measured. The parameters related to 'relevance' and 'complexity' look relatively subjective. EACH Members find that they could have instances where an issue might be complex in nature, but it could be resolved in a straightforward manner contrary to a simpler/straightforward one which could be more challenging. For that reason, we suggest that the focus should not be so much on the complexity but on the solution and its impact on the wider market and financial stability.

## Sections 5.3 to 5.13. Guidelines 2 to 12

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**Question 6: Do you agree with Guidelines 2 to 12 providing the resolution authority with guidance on what to consider when assessing a CCPs resolvability. If not, please explain why. Please provide comments by referring to the Guideline you are providing comments on.**

Guideline 2

- The legislation speaks about an alignment of legal and corporate structures<sup>2</sup> but not of business structures. We therefore respectfully disagree with the inclusion of *'an alignment between the different clearing services'*.
- In our opinion, the provision *'that the ownership's structure results in complex decision models, reliance on owners or other legal persons within the group for resolution tools, entails complex ownership structures or have owners with complex or public ownerships'* sounds too prescriptive/intrusive into the ownership of the CCP. We believe it should rather be general, along the lines of *'whether the ownership structure of the CCP could impede the resolvability of the CCP'*.
- Similarly to what mentioned above, the point *'Whether the mapping has identified clearing services that could more easily be separated from other clearing services of the CCP, or not'* seems to lead to CCPs business models with separate business lines (e.g. separate default funds). EACH would respectfully prefer ESMA to be agnostic about this.

### Guideline 3

- The Guideline seems to imply an obligation for CCPs to get legal advice in the following statement *'to which extent essential CCP employees' employment relationships would be upheld in a resolution and to what extent the CCP has obtained legal advice supporting this.'*

We would rather support a more flexible approach regarding CCPs staffing rules taking into account that some CCPs operate out of multiple locations with varying labor laws and internal policies. If ESMA understands GL 3(1)(b) as an indirect requirement to explicitly address the scenario of resolution in standard employment contracts with a view to ensuring continued employment of critical personnel, such a requirement would significantly increase the burdens and complexities for CCPs (particularly in cases where different national labor laws need to be taken into account). The requirement to obtain legal advice seems unduly prescriptive and in any case, an internal legal assessment should be sufficient.

In addition, we would like to point out that there is currently no expectation to segregated SITG from other group asset, and the resolution framework should not lead to such requirement in the future. We would also like to kindly suggest including clearing members' liquidity provisions to meet losses in the list of elements the resolution authority should assess which, in our opinion, should be part of the capital arrangements to be looked at.

### Guideline 4 (3)

- We propose to delete the requirement to assess whether a core business or critical operation is serviced by multiple legal entities, either within the CCP's group or externally, and to gauge, if this complexity could affect the robustness or enforceability of the service arrangements, as it would be very difficult to assess this aspect in a

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<sup>2</sup> Section C, point 2 of CCP Recovery and Resolution Regulation: *When assessing the resolvability of a CCP, the resolution authority shall consider the following: (1) [...]; (2) the extent to which legal and corporate structures are aligned with core business lines and critical operations; [...].* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0023&from=EN>

conclusive manner. It would also create a considerable burden on both CCPs and resolution authority.

#### Guideline 7

- This Guideline seems, in our opinion, overly prescriptive.
- In particular, point 2(d) implies a broad and rather prescriptive automation requirement for management information systems, in particular relating to the collection of data. Although we agree in principle with the criteria of point 2d (e.g. reliable, clear, easy to retrieve, etc.), we would suggest a more outcomes-based approach whereby CCPs may continue to provide data manually, in case it is otherwise not feasible. Such flexibility would take into account the broad scope of information which may feed into the MIS in the context of resolution planning.
- As it relates to the requirement to use real-time data (point 2e), we would deem the use of frequently updated information (“near-time”) justified as long as the update intervals are predefined and sufficiently narrow. CCPs could exercise judgement as to whether the provision of real-time data would be feasible and also meaningful in terms of the added value compared with near-time data. We would therefore propose to delete the criterion 2e. In addition, the transmission of information would need to be tested in advance. To do so, it is important for resolution authorities to determine a clear set of financial data and communicate to the CCP in advance to set it up in its internal systems. This will significantly improve the exchange of information particularly in resolution.

#### Guideline 9

- EACH suggests asking for the resolution authority to also assess the impact of tools on third party entities to identify potential impact just as is the process under the recovery plan.