



European Securities and  
Markets Authority

# Consultation Paper

**Draft RTS on the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources (Article 9(15) of CCPRRR)**





## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

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

ESMA will consider all comments received by 20 September 2021.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

### 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](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### Who should read this paper?

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs) and their clearing members.

## Table of Contents

1	Executive Summary .....	7
2	Background.....	8
3	Scope of the mandate .....	9
4	Methodology for determining the additional amount of pre-funded dedicated own resources and possible investments.....	13
4.1	General considerations – basic elements of the methodology .....	13
4.2	Methodology for determining the appropriate % level of SSITG .....	14
4.2.1	Summary of the proposed Parameters.....	15
4.2.2	Parameters describing the structure and internal organisation of the CCP and the nature, scope and complexity of the CCP’s activities.....	18
4.2.2.1	Nature and complexity of the asset classes cleared (A1) .....	19
4.2.2.2	The CCP’s relationships and interdependencies with other financial market infrastructures and other financial institutions (A2).....	19
4.2.2.3	The internal organisation of the CCP (A3) .....	20
4.2.2.4	The robustness of the CCP’s risk management framework (A4).....	21
4.2.2.5	Weaknesses identified by the CCP’s competent authority (A5).....	21
4.2.3	Parameters linked to the structure of incentives of the CCPs’ stakeholders ....	22
4.2.3.1	The CCP’s ownership and capital structure (B1).....	22
4.2.3.2	Whether and to what extent the remuneration of the senior management is directly and contractually impacted following a default or non-default event (B2) .....	23
4.2.3.3	The clearing member’s and client’s involvement in the CCP’s risk governance	23
4.3	Investment of the additional amount of pre-funded dedicated own resources.....	25
4.3.1	Appropriateness of investment in assets different than those referred in Article 47(1) of EMIR.....	25
4.3.2	List of alternative assets to be considered for investment for the purpose of holding the additional amount of pre-funded dedicated own resources.....	26
4.3.3	Procedures where assets are not readily available.....	27
4.3.3.1	Procedure for triggering recovery measures .....	28
4.3.3.2	Procedure for compensation of non-defaulting clearing members.....	29
4.4	Rules and practices of third country CCPs, and international developments .....	30
5	Annexes.....	33
5.1	Annex I – Legislative mandate to develop technical standards.....	33

5.2	Annex II – Cost-benefit analysis .....	35
5.3	Annex III – Summary of questions.....	46
5.4	Annex IV - Draft RTS on the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources .....	47

## Legislative references

<i>RRR</i>	<i>Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties (OJ L 22, 22.1.2021, p.1)</i>
<i>EMIR</i>	<i>European Market Infrastructures Regulation – Regulation (EU) No 648/2012 of the European Parliament and Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1)</i>
<i>RTS 153/2013</i>	<i>Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards for central counterparties (OJ L 52, 23.2.2013, p.41)</i>

## Abbreviations

CCP	Central Counterparty
CP	Consultation Paper
CPMI	Committee on Payments and Market Infrastructures
EBA	European Banking Authority
EC	European Commission
ESCB	European System of Central Banks
ESMA	European Securities and Markets Authority
FSB	Financial Stability Board
IOSCO	International Organisation of Securities Commissions
NCA	National Competent Authority
OJ	The Official Journal of the European Union
OTC	Over-the-counter
RTS	Regulatory Technical Standards

# 1 Executive Summary

## Reasons for publication

Article 9(14) of RRR introduces a requirement for EU CCPs to use, following a default or a non-default event, an additional amount of its pre-funded dedicated own resources, prior to the use of any other recovery arrangement.

Article 9(15) of RRR mandates ESMA, in close cooperation with EBA and after consulting the ESCB, to develop draft regulatory technical standards (RTS) specifying the methodology for calculation and maintenance of this additional amount of pre-funded dedicated own resources.

ESMA shall submit those draft regulatory technical standards to the Commission 12 months after the RRR entered into force.

## Contents

This consultation paper presents the draft regulatory technical standard specifying the methodology for calculation and maintenance of the additional amount of prefunded dedicated own resources (or 'second skin in the game', SSITG).

In particular, section 4.2 presents the methodology to be applied for calculating the appropriate percentage level of the SSITG. Section 4.2.2 further details the parameters to be assessed for describing a CCP's structure, internal organisation and complexity, while section 4.2.3 specifies the parameters to be assessed for describing the structure of incentives of the CCP's stakeholders.

Section 4.3 describes how EU CCPs may invest the SSITG amount in assets others than the ones referred to in Article 47(1) of EMIR.

Section 4.4 considers third-country CCPs rules and practices with regards to capital requirements, in order to ensure that SSITG requirements do not impede the competitiveness of EU CCPs.

## Next Steps

The consultation will be open until 20 September 2021. ESMA will consider the feedback received to this consultation in Q3 2021 and expects to publish a final report and submission of the draft technical standards to the European Commission for endorsement in Q1 2022.

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## 2 Background

1. The objective of a credible recovery and resolution framework is to ensure, to the greatest extent possible, that EU CCPs set out measures to recover from financial distress, to maintain the critical functions of a CCP which is failing or likely to fail while winding up the remaining activities through normal insolvency proceedings, to preserve financial stability and to avoid a significant adverse effect on the financial system and its ability to serve the real economy while minimising the cost of a CCP failure to taxpayers.
2. The recovery and resolution framework bolsters the preparedness of CCPs and authorities and provides authorities with powers to prepare for the potential resolution of a CCP and deal with the declining health of a CCP in a coordinated manner, thus contributing to the smooth functioning of financial markets.
3. The co-legislators adopted the regulation on recovery and resolution (RRR)<sup>1</sup> on 16 December 2020 and it entered into force on 12 February 2021.
4. Article 9(14) of RRR introduces a requirement for EU CCPs to use, following a default or a non-default event, an additional amount of its pre-funded dedicated own resources (also referred to as “second skin in the game”, SSITG, through this consultation paper), prior to the use of any other recovery arrangement.
5. Article 9(15) of RRR mandates ESMA, in close cooperation with EBA and after consulting the ESCB, to develop draft regulatory technical standards (RTS) specifying the methodology for calculation and maintenance of this additional amount of pre-funded dedicated own resources.
6. It is also noted that when developing technical standards or technical advices under specific mandates received under financial regulations/directives, ESMA shall “*ensure the integration of sustainability factors in an effective and proportionate manner*”. When developing RTS outside the specific remit of sustainable finance, ESMA will consider sustainability factors where appropriate<sup>2</sup>.
7. ESMA noted that sustainability aspects are not expressly included in the mandate in relation to SSITG. As the SSITG is introduced as an incentive for proper risk management, ESMA considered that it would not be relevant to include sustainability factors when designing the methodology for calculating the SSITG. The risk assessed in CCPs is not related to sustainability other than to the extent already covered under the parameters for operational risks. Hence, ESMA is of the view that sustainability

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<sup>1</sup> Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (Text with EEA relevance) (OJ L 22, 22.1.2021, p. 1–102) [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3AFULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.022.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A022%3AFULL)

<sup>2</sup> [https://www.esma.europa.eu/sites/default/files/library/esma22-105-1052\\_sustainable\\_finance\\_strategy.pdf](https://www.esma.europa.eu/sites/default/files/library/esma22-105-1052_sustainable_finance_strategy.pdf)



factors cannot justify the application of a separate sustainability parameter in calculating the SSITG, also bearing in mind that the parameters shall be proportionate and relevant in their application. Similarly, while sustainability factors could be a requirement in relation to the possible assets available for a CCP to invest in to maintain the SSITG, this would further reduce its investment opportunities. In the absence of a mandate, the choice is made to ensure that a suitable range of investments is available to the CCP for investing the SSITG. Hence, while CCPs may use the possibility to ensure sustainability in its investment strategies generally, ESMA is not pursuing such a requirement under this RTS.

8. The requirement for CCPs to maintain additional amount in capital resources under RRR (Article 9(14)) may be compared to the original requirement for the requirement under EMIR for additional resources under Article 45(4) (the “First” Skin in the Game). ESMA has considered Articles 35 and 36 of RTS 153/2013, which define the methodology for the calculation and maintenance of the amount of pre-funded dedicated own resources for the purpose of Article 45(4) of EMIR, which is set at 25% of the minimum capital requirement as calculated in accordance with Article 16 of EMIR.
9. ESMA has noted that banking regulation (CRR<sup>3</sup>, CRD IV<sup>4</sup> or BRRD<sup>5</sup>) does not contain a similar requirement as the SSITG since the capital structure of banks are not comparable to CCPs in this aspect and therefore further assessments of possible additional financial requirements applicable to banks would not be useful to the assessment undertaken in this consultation paper.
10. In preparing this consultation paper, ESMA has taken into account, as much as possible the CPMI-IOSCO guidance on recovery of FMI and the FSB guidance on the resolution of CCPs.

### 3 Scope of the mandate

11. The RRR introduces, ***as an incentive for proper risk management*** and to further reduce the risks of losses for the taxpayer, a new requirement on additional resources. This new requirement is stated in Article 9(14) of RRR, where EU CCPs are required to maintain an additional amount of pre-funded dedicated own resources, to be used in a default or a non-default event, prior to the use of any other recovery arrangements. This additional layer of capital, or “second skin-in-the game” (SSITG), exposes the CCP’s

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<sup>3</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.7.2013, p.1-337)

<sup>4</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p.338-436)

<sup>5</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190-348)

capital before relying on further contributions from clearing members and is meant as an incentive for proper risk management.

12. In accordance with Article 9(14) of RRR, the SSITG shall be used before any of the arrangements referred to in point 15 of Section A of the Annex in the RRR. In other words, it shall be used before any recovery loss allocation tool as defined in the operating rules of the CCP, including recovery cash call or reduction in the value of gains payable by the CCP to non-defaulting clearing members.

**Recital 20**

*[...] As an incentive for proper risk management and to further reduce the risks of losses for the taxpayer, the CCP should use a portion of its pre-funded dedicated own resources as referred to in Article 43 of Regulation (EU) No 648/2012, which can include any capital it holds in addition to its minimum capital requirements, to comply with the notification threshold referred to in the delegated act adopted on the basis of Article 16(3) of Regulation (EU) No 648/2012, as a recovery measure before resorting to other recovery measures requiring financial contributions from clearing members.*

*That additional amount of pre-funded dedicated own resources, which is distinct from the pre-funded own resources referred to in Article 45(4) of Regulation (EU) No 648/2012, should not be lower than 10 % nor higher than 25 % of the risk based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012 irrespective of whether those requirements are lower or higher than the initial capital referred to in Article 16(1) of that Regulation.*

**Article 9(14)**

*Following a default or a non-default event, a CCP shall use an additional amount of its pre-funded dedicated own resources, prior to the use of the arrangements and measures referred to in point 15 of Section A of the Annex to this Regulation. That amount shall not be lower than 10% nor higher than 25% of the risk-based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012.*

*To comply with this requirement, the CCP may use the amount of capital it holds, in addition to its minimum capital requirements, to comply with the notification threshold referred to in the delegated act adopted on the basis of Article 16(3) of Regulation (EU) 648/2012.*

13. As per Article 9(15) of RRR, ESMA has a mandate to develop, in close cooperation with EBA and after consulting the ESCB, a draft RTS specifying the methodology for calculating and maintaining this additional amount of capital. ESMA shall, in developing the methodology for calculation and maintenance of such additional amount, take into account certain factors listed, including structure, internal organisation, scope, complexity of the CCPs' activities and structure of incentives for stakeholders of the CCP. ESMA shall also take into account the appropriateness of certain investment possibilities and the CCPs' competitiveness and level playing field in the development of the methodology designed to establish the value of the additional amount for each EU CCP within the range established by the RRR.

14. ESMA has, based on this, established a methodology where, as an incentive for proper risk management, different aspects of the CCPs' risk management have an impact on the level of the additional amount required to be allocated by an EU CCP however, ESMA is mindful of EU CCPs already being compliant with EMIR's requirements hence any risk assessment has to be calibrated carefully bearing this in mind. The aspects further specified by ESMA are following the factors listed by the RRR under Article 9(15) (a) to (b). ESMA is not including investment aspects (Article 9(15)(c)) under the methodology aiming at undertaking the calculation of the percentage to be applied by the CCP in determining the SSITG, but rather as part of the methodology for maintenance of the SSITG, setting out investment possibilities for EU CCPs. International developments under Article 9(15)(d) are not included in the methodology but assessed separately under section 4.4.

**Article 9(15) first paragraph**

*ESMA shall, in close cooperation with EBA and after consulting the ESCB, develop draft regulatory technical standards specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with paragraph 14. When developing those technical standards, ESMA shall take into account all of the following:*

- (a) the structure and the internal organisation of CCPs and the nature, scope and complexity of their activities;*
- (b) the structure of incentives of the shareholders, management and clearing members of CCPs and of the clients of those clearing members;*
- (c) the appropriateness for CCPs, depending on the currencies in which the financial instruments they clear are denominated, the currencies accepted as collateral and the risk stemming from their activities, in particular where they do not clear OTC derivatives as defined in point (7) of the first subparagraph of Article 2 of Regulation (EU) No 648/2012, to invest that additional amount of dedicated own resources in assets other than those referred to in Article 47(1) of that Regulation; and*
- (d) the rules applying to and the practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of internationally active Union CCPs, and the competitiveness of Union CCPs compared to third-country CCPs providing clearing services in the Union.*

15. In addition, in accordance with Article 9(15), second subparagraph, of RRR ESMA is also tasked with specifying two procedures applicable where CCPs are allowed to invest their additional amount of prefunded dedicated own resources in assets other than those referred to in Article 47(1) of EMIR. Those two procedures will be included in the draft RTS.

**Article 9(15) second subparagraph**

*Where ESMA concludes, on the basis of the criteria referred to in point (c) of the first subparagraph of this paragraph 15, that it shall be possible for certain CCPs to invest this additional amount of pre-funded*

*dedicated own resources in assets other than those referred to in Article 47(1) of Regulation (EU) 648/2012, it shall also specify:*

- (a) the procedure through which, in the event that those resources are not immediately available, CCPs may resort to recovery measures that require the financial contribution of non-defaulting clearing members;*
- (b) the procedure that CCPs shall follow to subsequently reimburse the non-defaulting clearing members referred to in point (a) up to the amount to be used in accordance with paragraph 14 of this Article*

## **4 Methodology for determining the additional amount of pre-funded dedicated own resources and possible investments**

### **4.1 General considerations – basic elements of the methodology**

16. This section presents the core elements of the methodology for the computation of the SSITG. ESMA proposes to leverage on Articles 35 and 36 of RTS 153/2013, which define the methodology for the calculation and maintenance of the amount of pre-funded dedicated own resources for the purpose of Article 45(4) of EMIR (the “First” Skin in the Game).
17. Based on this, the following elements could, for the calculation part, be similar to the first SITG:
- Calculation formula: the amount of additional pre-funded dedicated own resources will be calculated by multiplying the amount of capital calculated in accordance with Article 16(2) of EMIR, by the corresponding x% ranging from 10% to 25% and set according to the methodology described in the RTS. Therefore, as capital requirements evolve for the CCP, the amount of SSTIG will evolve mechanically in proportion.
  - Frequency of the review: the minimum amount of additional prefunded resources shall be revised every time the CCP’s capital requirements are revised or each time one of the parameters of the calculation formula is modified, and at least on a yearly basis.
  - Dealing with multiple defaults funds (‘DF’): in a default scenario where the CCP has established more than one default fund, the additional pre-funded dedicated own resources shall be allocated to each of the DFs in proportion to the size of each default fund and used for defaults arising in the different market segments to which the DF refers to. In a non-default scenario, the full amount of the SSITG should be used by the CCP.
18. For the maintenance part, ESMA also proposes to use requirements similar to the first SITG and the basic elements could be the following:
- Notification of the NCA: the CCP shall immediately inform its competent authority if the amount of SSITG falls below the required amount. The CCP should also describe and explain the reason for the breach, as well as the measures it will undertake to replenish the SSITG.
  - Delay for replenishing the SSITG: the CCP shall have one month to reinstate the level of SSITG.

- Multiple defaults within the notification period: where additional defaults events occur before the CCP has reinstated its SSITG level, only the residual amount of SSITG shall be used to cover for potential additional losses.

***Question 1: Do you agree with the proposed approach to define the basic elements of the methodology for the calculation and maintenance of the additional amount of pre-funded dedicated own resources? If not, please explain why and how you would suggest changing the basic elements of the formula?***

## **4.2 Methodology for determining the appropriate % level of SSITG**

19. According to Article 9(15) of RRR, the draft RTS shall describe the elements to be taken into account when determining the actual level of requested SSITG, which shall range from 10% to 25% of the risk-based capital.
20. Accordingly, the draft RTS specifies a detailed list of parameters that would reflect both the level of complexity of the CCP's activities and its structure of incentives vis-à-vis shareholders, senior management and clearing members. When assessing these parameters and combining them together, the CCP would then determine the adequate level of SSITG, ranging from 10% to 25% of the risk-based capital.
21. The methodology should allow to distinguish between CCPs with a complex risk profile for which a high SSITG (close to 25%) is appropriate, and for CCPs with less complex risk profiles and very good management of risks above the requirements under EMIR, which SSITG should remain close to the 10% minimum. It is however noted that whilst the methodology aims at differentiating among CCPs for their degree of risk, it does not create a tiering of EU CCPs.
22. ESMA notes that smaller CCPs, whose risk-based capital requirements are lower than the EMIR 7.5 million EUR initial capital requirement, already have a relatively high % of SITG as a proportion of their risk-based capital.
23. ESMA further notes that the size of the CCP is not, by itself, a criterion for the sizing of the SSITG percentage, as the objective of the SSITG calculation is to focus on the elements identified by the mandate, as opposed to the establishment of a tiering of EU CCPs depending on their size.
24. In order to ensure a certain level of comprehensiveness and transparency of the SSITG determination, ESMA suggests relying on a schematic formula for combining all the elements to be taken into account.
25. The methodology presented in this consultation paper relies on two building blocks:
  - the formula used to compute the percentage of SSITG, which will be defined as the sum of all parameters, floored at 10% and capped at 25%.

- the parameters to be taken into account in the formula, which will need to be computed individually

$$SSITG\% = \max(10\%; (\min(25\%; \sum_{i=1}^n A_i + \sum_{i=1}^m B_i)))$$

26. Each parameter is assigned a value (expressed in percentage points), which will depend on the CCP's assessment. Some parameters are binary functions of the CCP's characteristics (i.e. additional percentage points are assigned or not to the SSITG calculation where the CCP meets or doesn't meet the criterion). Some parameters are more proportional, and take a value within a given range, based on the CCP's assessment. The addition of all parameters will yield the final SSITG percentage level. The SSITG final percentage should be rounded to the closest whole number.
27. The list of parameters is exhaustive and fixed, meaning that all parameters will have to be used and assessed to calculate the SSITG percentage.
28. ESMA has considered the case where the CCP would like to voluntarily apply the maximum amount of SSITG (25%). In that scenario, the CCP would not be required to undertake the calculation of the percentage of the SSITG based on the detailed parameters set out in the draft RTS, but rather could rely on simple multiplication of its capital with 0.25.
29. As the SSITG is part of a CCP's recovery plan, it will be assessed and approved in accordance with the procedure described under Articles 10 and 11 of the RRR.

**Question 2: Do you agree with the schematic formula combining a set of parameters assessed by the CCP? If not, please explain why and how you would suggest changing the formula?**

#### 4.2.1 Summary of the proposed Parameters

TABLE 1 - SUMMARY OF THE PROPOSED PARAMETERS

L1 ref.	Parameter	Indicators to be assessed	Assessment	Indicator value
9(15)(a) Structure, internal organisation, and nature, scope and complexity of	A1 Nature and complexity of the asset classes cleared	Number of asset classes cleared by the CCP	Number	1% per asset class (5% max)
		Are there more than one asset class under the same default fund?	Yes / No	2%

the CCP's activities		Does the CCP clear assets denominated in or offer settlement in more than 1 currency?	Yes / No	1%	
		Does the CCP clear assets denominated in or offer settlement in at least 1 non-EU currency	Yes / No	1%	
		Does the CCP offer physical settlement of derivatives contracts?	Yes / No	1%	
		Does the CCP offer physical settlement of commodities derivatives contracts?	Yes / No	1%	
	A2 Scope and complexity of the CCP's activities		Does the CCP have more than 5 interdependencies with trading venues, payment systems and settlement systems?	Yes / No	1%
			Do the top 5 clearing members of the CCP represent more than 40% of the CCP's prefunded resources (aggregated across all services and default funds)?	Yes / No	1%
			Do clearing members established outside the EU represent more than 20% of the CCP's clearing membership (by collateral)?	Yes / No	1%
			Does the CCP participate in an interoperability arrangement?	Yes / No	2%
	A3 Internal organisation of the CCP		Did the Board take more than 3 decisions over the last 3 years where the recommendation or advised position of the Risk Committee was not followed?	Yes / No	2%
			The lowest common reporting line of the model validation team if internal with model development is at Board level	Yes / No	1%
			Percentage of staff in second line of defence risk functions (expressed as a % of total Full Time Equivalent (FTEs), including outsourced functions)	% of FTEs (minimum at 20% / max at 0%)	[0%;2%]



	A4 The robustness of the CCP's risk management framework	Percentage of the number of clearing services for which margins back-tests performance is below the CCP's target over the last 12 months	% (minimum at 0% / max at 100%)	[0%;4%]
		Number of days the CCP has been unable to process new trades for 1 hour or more over the last 12 months	Number (days) [Max at 10 days]	[0%;2%]
		Number of days the CCP has experienced at least one payment incident over the last 12 months, excluding incidents which are the sole responsibility of clearing members	Number (days) [Max at 10 days]	[0%;2%]
	A5 Weaknesses identified by the NCA	The CCP has at least 1 pending material remedial actions following findings from the NCA on prudential matters	Yes / No	1.5%
		The CCP has at least 1 pending material remedial actions on other matters, for which it exceeded the delay set by the NCA in the remedial plan.	Yes / No	1.5%
	9(15)(b) structure of incentives of the shareholders, management and clearing members of CCPs and of the clients of those clearing members	B1 The CCP's ownership and capital structure	Does the CCP have a majority shareholder unrated or rated below investment grade (excluding publicly owned (directly/indirectly) companies)?	Yes / No
Does the CCP have any material contractually agreed financial support (being either prefunded or legally binding and enforceable) from its parent company in the event of a default or non-default event, including committed lines, or insurance contracts?			Yes / No	2%
B2 To what extent the remuneration		Average percentage of the CCP's senior management total variable remuneration subject to claw backs in the event of losses in excess of margins in a default and/or non-default events	% [minimum at 50% / peaks at 0%]	[0%;2%]

	of the senior management is directly and contractually impacted following a default or non-default event	Percentage of the senior management subject to variable remuneration claw back in case of default losses (expressed as a % of senior management FTEs <sup>6</sup> )	% [minimum at 100% / max at 0%]	[0%;1%]
		Percentage of the senior management subject to variable remuneration claw back in case of non-default losses and/or production incidents (expressed as a % of senior management FTEs)	% [minimum at 100% / max at 0%]	[0%;1%]
B3	The clearing members' and clients' involvement in the CCP's risk governance	If clearing members are involved in the investment decision process, do they bear potential investment or custody losses?	Yes / No	2%
		Are there incentives for clearing members and clients to participate in the default management process?	Yes / No	1.5%
		Among incentives, are there financial incentives or penalties to participate in auctions, or forced allocations rules where auctions fail	Yes / No	1.5%

#### 4.2.2 Parameters describing the structure and internal organisation of the CCP and the nature, scope and complexity of the CCP's activities

30. For the purpose of assessing the structure and internal organisation of a CCP, as well as the nature, scope, and complexity of its activities, ESMA suggests relying on 5 main parameters, that reflect (i) the nature and complexity of the assets cleared; (ii) the CCP's relationships and interdependencies with other FMIs and financial institutions; (iii) the CCP's internal organisation; (iv) the robustness of the CCP's risk management framework, and (v) any weakness linked to pending remedial actions.
31. Each parameter's value would be assessed based on several quantitative indicators, combination of which would yield the final parameter's value.

<sup>6</sup> For this type parameter, it is suggested to use Full Time Equivalent (FTEs) as the basis for comparison instead of the number of staff employed, in order a to ensure the comparability of results.

#### **4.2.2.1 Nature and complexity of the asset classes cleared (A1)**

32. This parameter's value should increase with the number and complexity of the asset classes cleared by a CCP. For this purpose, ESMA has considered the additional complexity linked to the number of asset classes, the currencies of the asset classes cleared, and the settlement mode of the derivatives cleared.
33. When determining this parameter's value, the CCP shall assess the following 6 indicators:
- The number of different asset classes cleared by the CCP. Each different asset class would account for an additional 1%, with a cap set at 5%.
  - Are there are more than one asset class under the same default fund? If yes, an additional 2% would apply.
  - Does the CCP clear asset classes denominated in / or offer settlement in more than one currency? If yes, an additional 1% would apply.
  - Does the CCP clear asset classes denominated in / or offer settlement in at least 1 non-EU currency? If yes, an additional 1% would apply.
  - Does the CCP offer physical settlement of derivatives contracts? If yes, an additional 1% would apply.
  - Does the CCP offer physical settlement of commodities derivatives contracts? If yes, an additional 1% would apply.
34. Overall, depending on the CCP's characteristics, this parameter would range within [1%;11%].

#### **4.2.2.2 The CCP's relationships and interdependencies with other financial market infrastructures and other financial institutions (A2)**

35. This parameter shall increase with the number and complexity of a CCP's interdependencies with other financial market infrastructures and financial institutions within or outside the EU, including the links with entities from the same group.
36. For the purpose of this assessment, ESMA has considered a CCP's links with financial markets infrastructures (trading venues, payment systems and settlement systems), the concentration of the CCP's clearing membership, the international nature of a CCP's membership basis, and any link with an interoperable CCP.
37. When determining this parameter's value, the CCP shall assess the following 4 indicators:

- Does the CCP have more than 5 interdependencies with trading venues, payment systems and settlement systems? If yes, an additional 1% would apply.
- Do the top 5 clearing members of the CCP represent more than 40% of the CCP's prefunded resources (aggregated across all services and default funds)? If yes, an additional 1% would apply.
- Do clearing members established outside the EU represent more than 20% of the CCP's clearing membership (by collateral)? If yes, an additional 1% would apply.
- Does the CCP participate in an interoperability arrangement? If yes, an additional 2% would apply.

38. Overall, depending on the CCP's assessment, this parameter would range within [0%;5%].

#### **4.2.2.3 The internal organisation of the CCP (A3)**

39. The value of this parameter shall reflect the efficiency of the CCP's internal organisation, and in particular the weight and independence of the CCP's risk management functions (including risk committee) in the day to day operations of the CCP.

40. When determining this parameter's value, the CCP shall assess the following 3 indicators:

- Did the Board take more than 3 decisions over the last 3 years where the recommendation or advised position of the Risk Committee was not followed? If yes, an additional 2% would apply. While acknowledging that a disagreement between the Board and the Risk Committee is possible and does not necessarily reveal any malfunctioning within the CCP's organisation, it is understood that such repeated decisions may suggest that the CCP's governing bodies are not functioning properly. In particular, ESMA noted that in accordance with Article 28 of EMIR, every time the Board decides not to follow the advice of the risk committee it shall notify its competent authority, hence suggesting that such decisions should remain exceptions.
- Is the model validation team reporting directly to the Board? If no, an additional 1% would apply.
- What is the percentage of staff in second line of defence risk function (expressed as a % of FTEs, including outsourced functions)? This indicator would range linearly within [0%;2%], reaching a minimum value where the risk function represents 20% of total FTEs.

41. Overall, depending on the CCP's assessment, this parameter would range within [0%;5%].

#### **4.2.2.4 The robustness of the CCP's risk management framework (A4)**

42. This parameter shall reflect the overall appropriateness and conservativeness of a CCP's risk management framework, including margin adequacy (as illustrated by back tests) and operational resilience.

43. When determining this parameter's value, the CCP shall assess the following 3 indicators:

- The proportion of clearing services (as a percentage of the total number of clearing services of the CCP) for which the margin back-tests performance is below the CCP target over the last 12 months. This indicator would range linearly within [0%;4%], reaching a maximum value where 100% of clearing services have back tests results below target. For the purpose of this indicator, the reference is the CCP's internal target and not EMIR minimum requirements. It is understood that where a CCP sets its internal risk-tolerance above EMIR minimum requirements, its performance should be assessed against this risk-target for consistency.
- The number of days the CCP has been unable to process new trades for 1 hour or more over the last 12 months. This indicator would range linearly within [0%;2%], reaching a maximum value at 10 days.
- The number of days on which the CCP has experienced at least one payment incident for more than 1 hour over the last 12 months, excluding incidents which are the sole responsibility of clearing members. This indicator would range linearly within [0%;2%], reaching a maximum value at 10 days.

44. Overall, depending on the CCP's assessment, this parameter would range within [0%;6%].

#### **4.2.2.5 Weaknesses identified by the CCP's competent authority (A5)**

45. This parameter would reflect any material pending remedial actions following findings from the CCP's competent authority.

46. When determining this parameter's value, the CCP shall assess the following 2 indicators:

- Does the CCP have at least 1 pending material<sup>7</sup> remedial actions following findings from the NCA on prudential matters? If yes, an additional 1.5% would apply.

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<sup>7</sup> A remedial action shall be considered as "material" where it has been allocated the highest priority based on the CCP's internal materiality matrix and / or based on the NCA's own classification.

- The CCP has at least 1 pending material remedial actions on non-prudential matters, which was not resolved within the delay set by the NCA in the remedial plan? If yes, an additional 1.5% would apply.

47. Overall, depending on the CCP's assessment, this parameter would range within [0%;3%].

***Question 3: Do you agree with the list of parameters to describe the structure and the internal organisation of CCPs and the nature, scope and complexity of a CCP's business? If yes, are there additional parameters that should be added to the list? If not, please explain why and how you would suggest assessing the internal organisation of CCPs and the nature, scope and complexity of a CCP's business in the methodology?***

#### **4.2.3 Parameters linked to the structure of incentives of the CCPs' stakeholders**

48. In accordance with point (b) of the first subparagraph of Article 9(15) of RRR, when developing the methodology ESMA shall take into account the structure of incentives of the CCPs' shareholders, the CCPs' management, the clearing members of the CCPs and the clients of those clearing members.
49. The assessment of the structure of incentives of the CCP shall be used to modulate the % level of the SSITG (e.g. should the assessment reveal that shareholders assets are committed beyond the regulatory requirement, this could be an argument in favour of not further increasing the SSITG).
50. For the purpose of assessing the structure of incentives of the CCP, ESMA suggests relying on 3 main parameters, that reflect (i) the CCP's ownership and capital structure; (ii) the extent to which the remuneration of the senior management is directly and contractually impacted following a default or non-default event; (iii) the clearing members' and clients' involvement in the CCP's risk governance.

##### **4.2.3.1 The CCP's ownership and capital structure (B1)**

51. This parameter takes into account any direct/indirect or inherent risks due to the CCP's direct or indirect ownership or capital structure.
52. When determining this parameter's value, the CCP shall assess the following 2 indicators:
- Does the CCP have a majority shareholder unrated or rated below investment grade (excluding publicly owned (directly/indirectly) companies)? If yes, an additional 2% would apply.
  - Does the CCP have any material contractually agreed financial support (being either prefunded or legally binding and enforceable) from its parent company in the

event of a default or non-default event, including committed lines, or insurance contracts? If no, an additional 2% would apply.

53. Overall, depending on the CCP's assessment, this parameter would range within [0%;4%].

#### **4.2.3.2 Whether and to what extent the remuneration of the senior management is directly and contractually impacted following a default or non-default event (B2)**

54. This parameter value shall depend on the link between the level of remuneration of the senior management and the performance of the CCP.

55. When determining this parameter's value, the CCP shall assess the following 3 indicators:

- The average percentage of the CCP's senior management total variable remuneration subject to claw backs in the event of losses in excess of margins in a default and/or non-default events. This indicator would decrease linearly within [0%;2%], from a maximum where there is no claw back arrangement, to a minimum where the claw back applies to at least 50% of variable remuneration.
- The proportion of the senior management subject to variable remuneration claw back in case of default losses (expressed as a % of senior management FTEs). This indicator would decrease linearly within [0%;1%], reaching a minimum value where all senior managers are subject to claw back in a default event.
- The proportion of the senior management subject to variable remuneration claw back in case of non-default losses and/or production incidents (expressed as a % of SM FTEs). This indicator would decrease linearly within [0%;1%], reaching a minimum value where all senior managers are subject to claw back in a non-default event.

56. Overall, depending on the CCP's assessment, this parameter would range within [0%;4%].

#### **4.2.3.3 The clearing member's and client's involvement in the CCP's risk governance**

57. This parameter shall depend on the involvement of the clearing members/clients in the CCP's risk management decisions.

58. When determining this parameter's value, the CCP shall assess the following 3 indicators:

- If clearing members are involved in the investment decision process, would they bear investment or custody losses if such were to materialise from the decisions taken? If no, an additional 2% would apply.

- Are there incentives for clearing members and clients to participate in the default management process? If no, an additional 1.5% would apply.
- Among incentives, are there financial incentives or penalties to participate in auctions, or forced allocations rules where auctions fail? If no, an additional 1.5% would apply.

59. Overall, depending on the CCP's assessment, this parameter would range within [0%;5%].

***Question 4: Do you agree with the list of parameters to describe the structure of incentives of a CCP's shareholders, management, clearing members and clients? If yes, are there additional parameters that should be added to the list? If not, please explain why and how you would suggest assessing the incentives in the methodology?***



## **4.3 Investment of the additional amount of pre-funded dedicated own resources**

### **4.3.1 Appropriateness of investment in assets different than those referred in Article 47(1) of EMIR**

60. In accordance with point (c) of the first subparagraph of Article 9(15) of RRR, when specifying the methodology for the calculation and maintenance of the SSITG, ESMA shall consider the appropriateness for CCPs to invest the amount of SSITG in assets other than those referred to under Article 47(1) of EMIR, i.e. cash or highly liquid instruments with minimal market and credit risk.
61. This provision should allow EU CCPs to mitigate the impact of the SSITG requirement on their level of own resources, as they will be authorised to make use of more relaxed investment possibilities by investing in some additional assets which are potentially riskier or less liquid. ESMA notes that it shall only apply to the amount of SSITG held in excess of the 10% EMIR notification buffer. Since the 10% buffer is requested under Article 16(3) of EMIR, it shall remain invested in accordance with Article 47(1) of EMIR.
62. Given the nature of this provision, ESMA concluded that the investment aspect should not be taken into account in the calculation methodology but rather be reflected in the RTS when specifying the conditions for the maintenance of the SSITG. The draft RTS should therefore specify whether it would be appropriate for some CCPs to invest the SSITG amount in other assets.
63. When assessing the appropriateness for EU CCPs to invest in additional assets for the purpose of the SSITG, ESMA considered the currencies in which the financial instruments cleared are denominated, the currencies accepted as collateral and the risk stemming from the CCPs' activities, in particular where they do not clear OTC derivatives.
64. In its assessment, ESMA identified two hurdles in establishing specific conditions to assess the appropriateness for a CCP to invest in certain investments. First it could be seen as a tiering of EU CCPs, which is not the intention behind the requirement to provide additional resources under the Article 9(14) of RRR. Secondly, it proved overly complex to identify applicable risk criteria to determine if a CCP may rely on wider investment possibilities. In particular, assuming that EU CCPs comply with EMIR, it is unclear what additional risk assessment would be deemed legitimate to differentiate between CCPs, without in fact introducing extra burdensome requirements.
65. Based on the above, ESMA concluded that it shall be considered as appropriate for all EU CCPs to benefit from additional investment possibilities to satisfy the additional own resources requirement under Article 9(14) of RRR.

66. However, to ensure that the risk is properly managed, ESMA suggested that the list of additional investments available for EU CCPs for the SSITG purpose would be limited and strictly specified in the draft RTS (as further described in section 4.3.2).

67. Also, in accordance with Article 9(15) of RRR, before being able to rely on such additional assets for investment, a CCP shall put in place the necessary procedures further defined in the draft RTS and described in section 4.3.3. Having established such sufficient procedures is a precondition for a CCP to, use additional assets for investments for as long such procedures are in place.

**Question 5: Do you agree with the proposal that all EU CCPs may rely on alternative investments for the purpose of maintaining the SSITG?**

**Question 6: Do you agree that this list of alternative investments shall be specified in the draft RTS?**

#### **4.3.2 List of alternative assets to be considered for investment for the purpose of holding the additional amount of pre-funded dedicated own resources**

68. Article 47(1) of EMIR requires CCPs to invest their financial resources “*only in cash or in highly liquid financial instruments with minimal market and credit risk*”. Article 43 of RTS 153/2013 further specifies that the financial instruments the CCP invests in should be debt instruments which meet the conditions defined in Annex II of the RTS.

##### *Annex II*

(a) *they are issued or explicitly guaranteed by:*

(i) *a government;*

(ii) *a central bank;*

(iii) *a multilateral development bank as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC;*

(iv) *the European Financial Stability Facility or the European Stability Mechanism where applicable*

(b) *the CCP can demonstrate that they have low credit and market risk based upon an internal assessment by the CCP. In performing such assessment, the CCP shall employ a defined and objective methodology that shall not fully rely on external opinions and that takes into consideration the risk arising from the establishment of the issuer in a particular country;*

(c) *the average time-to-maturity of the CCP's portfolio does not exceed two years;*

(d) *they are denominated in one of the following currencies:*

(i) *a currency the risks of which the CCP can demonstrate that it is able to manage; or*

(ii) *a currency in which the CCP clears transactions, in the limit of the collateral received in that currency;*

(e) *they are freely transferable and without any regulatory constraint or third party claims that impair liquidation;*

(f) *they have an active outright sale or repurchase agreement market, with a diverse group of buyers and sellers, including in stressed conditions and to which the CCP has reliable access;*

(g) *reliable price data on these instruments are published on a regular basis.*

69. By exemption to these conditions, the RTS should define the list of assets that could be invested in by EU CCPs for the purpose of maintaining the SSITG.
70. ESMA noted that the criteria of Annex II of RTS 153/2013 on the debt instruments that can be eligible for investment are particularly strict, especially regarding the requested low average time-to-maturity (2 years). A first option could therefore have been to slightly ease the conditions of Annex II, for example by extending average the time-to-maturity up to 5 years. However, this option would have had a limited impact on the investment possibilities of CCPs.
71. ESMA also noted that the wording of Article 47 of EMIR referring to “*highly liquid financial instruments with minimal market and credit risk*” for CCPs’ investments is very similar to Article 46 of EMIR that refers to “*highly liquid collateral with minimal market and credit risk*” for collateral collected from clearing members. However, the investment scope as specified under RTS 153/2013 has been defined as stricter than the list of collateral that can be accepted from clearing members, as this list includes not only cash but financial instruments and gold that meet the conditions of Annex I of RTS 153/2013.
72. As a solution to broaden the scope of investment for the purpose of SSITG, ESMA therefore considered aligning the CCP’s investment possibilities with some elements taken from the list of eligible collateral accepted by the CCP from clearing members. This would ease the SSITG requirement for the CCP (being allowed to diversify its assets), while still guaranteeing that it has the adequate framework and procedures to manage the risks associated with those assets and their liquidation in times of stress.
73. However, in order to ensure that the types of assets remain suitable for the CCP’s investment, some assets listed in Annex I of RTS 153/2013 would need to be excluded from the scope of eligible investments.
74. ESMA therefore concluded that the draft RTS would further specify that for the purpose of maintaining the SSITG in excess of the 10% floor requirement, the CCP may consider instruments already accepted as collateral from its clearing member, as set out in the CCP’s internal collateral policy, with the exception of bank guarantees, derivatives and equities.

**Question 7: Do you agree with the proposed list of additional investments for the purpose of maintaining the additional amount of pre-funded dedicated own resources under Article 9(14) of RRR? If not, please explain why? If yes, is there any type of asset that you would like to add to or remove from the list?**

#### **4.3.3 Procedures where assets are not readily available**

75. Under Article 9(15) of RRR, second subparagraph, where ESMA has determined in the RTS that it shall be possible to invest the amount of SSITG in alternative assets, it shall specify two procedures to be applied in the event that these resources are not readily available. Under these circumstances the CCP shall be able to trigger recovery

measures and request financial contributions from the non-defaulting clearing members, which shall then be compensated for the amount corresponding to the uncovered SSITG.

76. Hence, the draft RTS in accordance with Article 9(15) of RRR, second subparagraph, should also define these two set of procedures, in order to specify:

- (1) how a CCP may resort to recovery measures, and require financial contribution of non-defaulting clearing members, in the event that the resources invested in alternative assets are not immediately available; and
- (2) how the CCP shall subsequently reimburse the non-defaulting clearing members referred to in point up to the amount of SSITG.

77. As noted above, a CCP shall put in place the necessary procedures before being able to use such additional assets for investments. Where a CCP has not established sufficient procedures the CCP cannot use additional assets for investments until such procedures are in place.

#### **4.3.3.1 Procedure for triggering recovery measures**

78. Where a part of the SSITG amount is not immediately available, the CCP shall undertake the following steps.

- immediately notify its competent authority, including a detailed description of the amount unavailable (which may be an estimate, as the CCP should not wait for an exact calculation before informing the NCA) and the reason for this situation.
- notify as early as possible the clearing members that all or part of the SSITG is not immediately available and to the extent possible provide an estimation of the amount required to be provided by the clearing members and the measures envisaged to be used.
- start applying recovery measures that may require financial contributions from non-defaulting clearing members (e.g. through a dedicated recovery cash call).
- ensure that the amount of financial resources collected from non-defaulting clearing members cover the non-available share of the CCP's SSITG. The non-defaulting clearing members contributions should be proportional to their default fund contributions.

79. ESMA notes that to ensure the procedure is enforceable it shall be included in the rulebook of the CCP.

**Question 8: Do you agree with the proposed procedure for triggering specified recovery measures where all or part of the CCP's pre-funded dedicated own resources allocated to cover SSITG are not readily available for CCPs? If not, please explain why?**

#### **4.3.3.2 Procedure for compensation of non-defaulting clearing members**

80. A CCP that has resorted to recovery measures in order to cover all or part of the unavailable SSITG amount should reimburse the non-defaulting clearing members. The procedure to reimburse such members shall contain the following elements:

- the nature of the reimbursement (cash payments only); and
- the rules for reimbursement, and in particular the timing of the reimbursement and the seniority of the reimbursement against other payments of the CCP such as existing debts and dividends.

81. ESMA has identified the following requirement that a procedure should contain:

- the CCP shall take all measures to liquidate the assets in a reasonable timeframe, and no later than one month after the notification of the funds' unavailability. For the avoidance of doubt, the amounts due to the non-defaulting clearing members shall not be impacted by the actual proceeds of the sale of the assets.
- the reimbursement shall be made in cash only, in the currency in which the payments were made by the non-defaulting clearing members.
- the reimbursement amounts shall be paid by the CCP to the relevant clearing members after the servicing of operational costs, of any due and payable debt obligation, and of any recompense due in accordance with Article 20(2) of the RRR and related RTS.
- the reimbursement shall be made in a reasonable timeframe, and repayments shall occur until all amounts have been recouped by non-defaulting clearing members.
- where the reimbursement extends over more than 6 months from the first cash call collected from the non-defaulting clearing members, an annual interest shall be paid on the amounts due. The interest rate shall be the ECB rate for principal refinancing operations plus 2 percentage points.

**Question 9: Do you agree with ESMA's proposed procedure for the compensation of non-defaulting clearing members? If not, please explain why?**

#### 4.4 Rules and practices of third country CCPs, and international developments

82. In accordance with point (d) of the first subparagraph of Article 9(15) of RRR, when developing the methodology, ESMA shall take into account the rules and practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of Union CCPs, internationally and compared to third-country CCPs providing clearing services in the Union.
83. The 2012 Principles for Financial Market Infrastructures (PFMI) and associated guidance recommend that a CCP should “*determine and expose an amount of its own financial resources to absorb losses resulting from a participant default.*” This principle, which is a regulatory requirement under EMIR (25% “skin in the game”), has been implemented by many CCPs internationally, with some differences across jurisdictions.
84. However, whilst the idea of the second skin in the game has been evoked in several forums, ESMA notes that there is currently no guidance at an international level on the use of a second tranche of skin in the game before the recovery phase. In addition, ESMA is not aware of any jurisdiction that would have imposed a requirement similar to the requirement under RRR, hence Article 9(14) of RRR would therefore make the European Union the first to impose a regulatory requirement for a SSITG in such a format.
85. In that context, it is important to ensure that the SSITG requirement does not impede the competitiveness of EU CCPs. To do so, ESMA decided to assess the impact that the SSITG requirement may have on the capitalisation level of the 13 authorised EU CCPs, and compare it with the capital level of a selection of the main international CCPs recognized under EMIR and providing clearing services within the EU.

##### *CCP’s own funds as a proportion of the total financial resources*

86. As a first step, based on public CPMI-IOSCO public quantitative disclosure data<sup>8</sup>, ESMA compared the level of skin in the game requirements (4.1.1 reporting field, “prefunded own capital to be used before members contributions”) with the level of resources contributed by the clearing members (4.1.4, prefunded aggregate participants contributions). Overall, and while acknowledging that data quality may differ between CCPs, the analysis confirms that the SITG generally only represents a limited share of the resources available for the CCP in case of default.
87. On average, the EMIR “first skin in the game” of EU CCPs represents around 3% of the financial resources contributed by the clearing members, with very heterogeneous levels across EU CCPs. When comparing these numbers with a subset of international

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<sup>8</sup> Data reported as of 31.12.2019

CCPs, ESMA noted that the level of skin in the game for such international CCPs, expressed as a share of the CMs financial resources, are comparable or higher than for EU CCPs, even in jurisdictions where there is no explicit regulatory requirement.

**TABLE 2 : SITG AS A % OF CM RESOURCES, Q4 2019 QUANTITATIVE DISCLOSURE DATA**

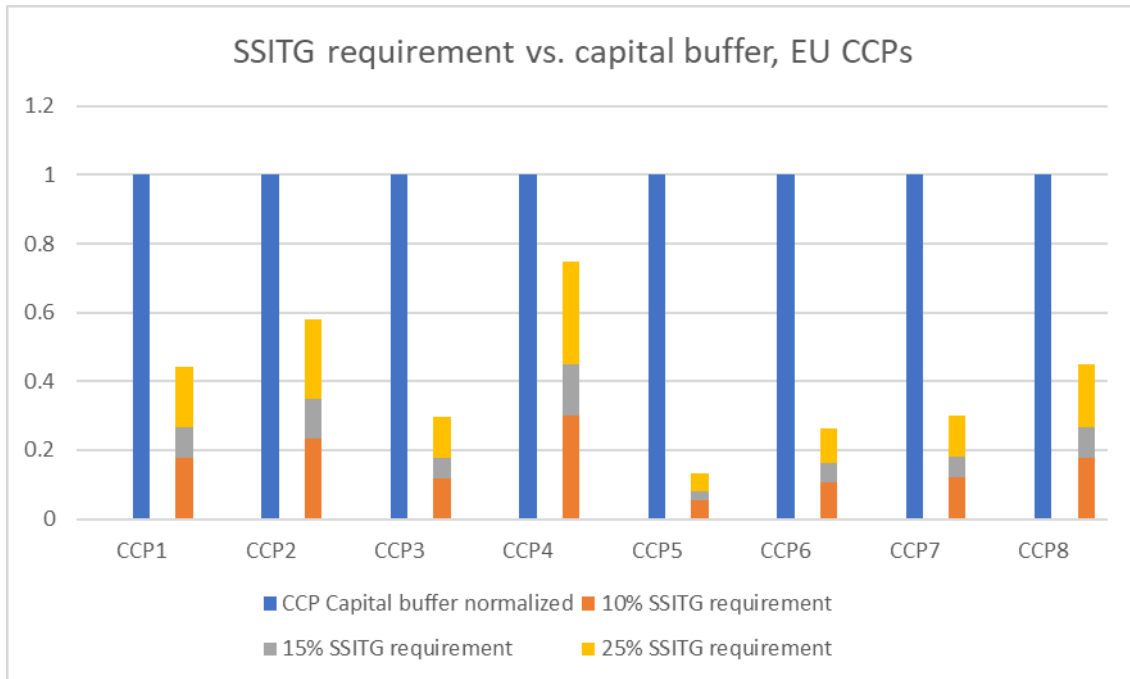
CCP	Country	SITG as % of CM resources
<b>Average EU CCPs</b>	EU	<b>2.7%</b>
<b>CC&amp;G</b>	IT	0.3%
<b>Eurex</b>	DE	5.5%
<b>EuroCCP</b>	NL	1.9%
<b>LCHSA</b>	FR	0.7%
<b>International CCPs</b>		
<b>CME US IRS</b>	US	4.2%
<b>LCH Ltd Swapclear</b>	UK	0.80%
<b>ICEU F&amp;O</b>	UK	5.7%
<b>ICEU CDS</b>	UK	3.7%
<b>ICE US F&amp;O</b>	US	10.26%
<b>ICE CC CDS</b>	US	1.89%
<b>ASX Clear Futures</b>	AU	60.00%
<b>LME</b>	UK	2.37%
<b>JSCCC IRS</b>	JP	1.4%

#### *SSITG impact on EU CCPs' capital position*

88. In order to understand the impact of the SSITG requirement on the capital position of EU CCPs, ESMA used EMIR data to assess the additional amount of capital that would need to be used for this purpose.
89. First, based on the CCPs' capital requirement under Article 16 of EMIR, ESMA assessed the theoretical SSITG amounts respectively for a 10%, 15% and 25% requirement.
90. Then, ESMA compared these amounts with (i) the actual amount of EMIR skin in the game held by EU CCPs and (ii) the CCPs' capital buffer, defined as the difference between the CCP's capital position and its total capital requirement under EMIR (including Article 16 of EMIR requirement, 110% regulatory buffer, skin in the game and any other additional requirement).
91. Overall, the analysis shows (see Figure 1) that even when applying a maximum 25% SSITG, all EU CCPs would be able to cover their SSITG requirement with their existing capital resources, as their capital buffer would be sufficient to cover for the extra capital requirement.

92. In details, for the 8 EU CCPs which data was analysed at this stage, a 25% SSITG requirement would represent:

- less than 30% of the capital buffer for 4 CCPs;
- less than 60% of the capital buffer of 7 CCPs;
- 75% of the capital buffer of 1 single CCP.



**FIGURE 1: SSITG REQUIREMENTS VS EU CCPs' CAPITAL BUFFER, NORMALIZED**

*Preliminary conclusion*

93. Based on the data presented above, ESMA concludes that it is unlikely that the implementation of the SSITG requirement would significantly impede the competitiveness of EU CCPs.

**Question 10: Do you have access to different data and analysis that would contradict ESMA's conclusion that no further adjustment of the SSITG level based on competitiveness consideration is needed?**

**Question 11: Do you have any additional data that you may share in order to assess the impact of this requirement on the EU CCPs' competitiveness?**



## 5 Annexes

### 5.1 Annex I – Legislative mandate to develop technical standards

Article 9(15) of RRR states:

*“ESMA shall, in close cooperation with EBA and after consulting the ESCB, develop draft regulatory technical standards specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with paragraph 14. When developing those technical standards, ESMA shall take into account all of the following:*

- (a) the structure and the internal organisation of CCPs and the nature, scope and complexity of their activities;*
- (b) the structure of incentives of the shareholders, management and clearing members of CCPs and of the clients of clearing members;*
- (c) the appropriateness for CCPs, depending on the currencies in which the financial instruments they clear are denominated, the currencies accepted as collateral and the risk stemming from their activities, in particular where they do not clear OTC derivatives as defined in point (7) of Article 2 of Regulation (EU) No 648/2012, to invest that additional amount of dedicated own resources in assets other than those referred to in Article 47(1) of that Regulation; and*
- (d) the rules applying to and the practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of internationally active Union CCPs, and the competitiveness of Union CCPs compared to third-country CCPs providing clearing services in the Union.*

*Where ESMA concludes, on the basis of the criteria referred to in point (c) of the first subparagraph, that it is appropriate for certain CCPs to invest that additional amount of pre-funded dedicated own resources in assets other than those referred to in Article 47(1) of Regulation (EU) No 648/2012, it shall also specify*

- (a) the procedure through which, in the event that those resources are not immediately available, CCPs may resort to recovery measures that require the financial contribution of non-defaulting clearing members;*
- (b) the procedure that CCPs shall follow to subsequently reimburse the non-defaulting clearing members referred to in point (a) up to the amount to be used in accordance with paragraph 14 of this Article*

*ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 12 February 2022.*



*The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.*

## 5.2 Annex II – Cost-benefit analysis

### 1. Introduction

Pursuant to the Article 9(15), fourth subparagraph, of RRR the Commission is empowered to adopt a delegated act to supplement the RRR specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with Article 9(14) of RRR.

ESMA shall, in close cooperation with EBA and after consulting the ESCB, develop draft regulatory technical standards to specify this methodology and ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022. ESMA has established cooperation arrangements with EBA and ESCB.

### 2. Background

Article 9(14) of RRR introduces a requirement for EU CCPs to maintain and use, following a default or a non-default event, an additional amount of its prefunded dedicated own resources (or second skin-in-the-game, SSITG), prior to the use of any other recovery arrangement. This additional layer of capital is thought as an incentive for proper risk management and should be set between 10% and 25% of the CCP's risk-based capital requirement as calculated under Article 16 of EMIR.

Under Article 9(15) of RRR, ESMA is mandated to develop draft RTS specifying the methodology for calculation and maintenance of this additional amount of prefunded dedicated own resources whilst taking into account certain elements:

- (i) The structure and internal organisation of CCPs, as well as the nature, scope and complexity of their activities;
- (ii) The structure of incentives of the CCP's shareholders, the CCP's management, the clearing members and the clients;
- (iii) The appropriateness for CCPs to invest the SSITG amount in alternative assets other than those allowed under Article 47(1) of EMIR;
- (iv) The rules and practices of third-country CCPs, to ensure that the SSITG requirement does not impair the competitiveness of EU CCPs.

Several options have been considered by ESMA in the process of developing the proposed methodology for calculating and maintaining the SSITG percentage level. In this consultation paper ESMA proposes a set of parameters and ranges to be used by the CCPs in setting the % to be applied to determine the additional amount of pre-funded dedicated own resources a CCP has to hold and apply in accordance with Article 9(14) of RRR.

### 3. Policy Options

Considering the empowerment to ESMA to specify the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources, the variable on which ESMA can complement is fairly limited and the actual policy option is to provide a well-considered methodology balancing the different interests between mainly CCPs and clearing members as well as respecting the fundamental principles of transparency and proportionality whilst ensuring the envisaged aim of this additional amount of own resources is achieved.

#### 4. Cost-benefit analysis

The overall objective is to guarantee that the recovery plans should ensure that the CCP's capital is exposed to losses caused by both default and non-default events, before losses are allocated to clearing members. As an incentive for proper risk management and to further reduce the risks of losses for the taxpayer, the CCP should use a portion of its pre-funded dedicated own resources as referred to in Article 43 of EMIR, which can include any capital it holds in addition to its minimum capital requirements, to comply with the notification threshold referred to in the delegated act adopted on the basis of Article 16(3) of EMIR, as a recovery measure before resorting to other recovery measures requiring financial contributions from clearing members.

ESMA notes, in particular, that the request for additional amounts may be more burdensome for some CCPs than others and that likely smaller CCPs may find the new requirement more of a concern than larger CCPs. It is already noted that RRR provides some possibility for relief by allowing for an extended use of investments to meet the requirement of this pre-funded additional amount and also by allowing CCPs to “reduce” the additional amount by the same amount where their first tranche of SITG is higher because of the capital floor (with a floor of the SSITG of 10% of capital). Besides, ESMA's empowerment is to specify a methodology based on risk elements, and not the size of the CCP. Hence whilst ESMA has carefully considered the complexity around the applicability of these additional pre-funded dedicated own resources for some smaller CCPs there could be no general reduction in the identified percentage for smaller CCPs as the assessment is purely risk based in a specific scenario.

##### a) Methodology for calculation of the percentage

Below are detailed the different corresponding policy options on how to specify the methodology for the calculation of the additional amount of pre-funded dedicated own resources.

<p><b>Specific objective</b></p>	<p>Ensuring that the determination of the percentage to be applied to determine the additional amount of pre-funded dedicated own resources a CCP has to hold and apply in accordance with Article 9(14) of RRR is well balanced and effective to ensure this additional amount works as an incentive for proper risk management and to further reduce the risks of losses for the clearing members and taxpayers.</p>
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<b>Policy option 1</b>	Using a simplified methodology where CCPs would be differentiated based on their size (e.g. volumes cleared), and the RTS would define thresholds according to which the SSITG percentage level would be set (e.g. “big” CCPs would be requested a SSITG close to 25%, and small CCPs closer to 10%).
How would this option achieve the objective?	This “one-size-fits-all” option would not in ESMA’s view be satisfactory for several reasons, one is that a risk of a CCP is not linear to the size of a CCP, and another is that RRR sets out certain elements to be taken into account in setting the methodology and whilst they are not required to be all hard-wired into the actual methodology, ESMA understands that most of the elements (in particularly under Article 9(15), first subparagraph, point (a) and (b)) provides a good basis for a risk driven methodology to be developed from.
<b>Policy option 2</b>	Using a methodology with detailed, objective and transparent parameters and fixed percentages.
How would this option achieve the objective?	This option would provide certainty in its application as the CCP would be able to rely on clear and transparent parameters to make the SSITG percentage determination.
<b>Policy option 3</b>	Using a methodology with a set list of parameters which value would vary within fixed ranges. This methodology would leave room for assessment within the ranges but with an obligation to assess the listed parameters in the determination in order to set each parameter value within the selected range.
How would this option achieve the objective?	This option would probably not be achieving the result of a simple and executable methodology to be applied by the CCP, as whilst the parameters are set and the range of percentages are fixed, there would be too much assessment to be undertaken by the CCP to ensure convergence and such a methodology would not be proportionate as it would require an attentive and arguably time consuming assessment process by the CCP.
Which policy option is the preferred one?	Policy option 2, given that option 1 is not suitable to base a risk driven methodology, and option 3 would not provide the CCP with a simple executable and fair methodology and would also be to resource intense for the CCPs to apply.
Is the policy chosen within the sole responsibility of ESMA? If not, what	ESMA is empowered to provide a draft regulatory technical standard to the Commission which has the liability to define how to

other body is concerned / needs to be informed or consulted?	ensure the policy option chosen for its Delegated Act achieves its aim under the RRR.
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<b>Impacts of the proposed policies:</b>	
<b>Policy option 1</b>	
Benefits	It will provide a transparent and simple determination of the percentage based on CCPs' size to determine the additional amount of pre-funded dedicated own resources.
Regulator's costs	The costs for competent authorities will be very low.
Compliance costs	The costs for the CCP would be too low or too high depending on if the percentage based on size would correctly reflect the risk of the CCP. If not, the CCP may have costs to hold and maintain an amount that is not reflecting its risks and in addition may have to undertake its own assessments to ensure the CCP has a suitable level of additional amount meeting the expectations of the market and in particular its clearing members.
<b>Policy option 2</b>	
Benefits	It will provide a transparent and simple allocation of the percentage based on fixed parameters and fixed percentages.
Regulator's costs	The costs for competent authorities will be low as the calculation will be performed by the CCP.
Compliance costs	The costs for the CCP could be relatively high, as they will need to perform the assessment. Also, the methodology would need to be sufficiently clear and detailed to avoid imposing unnecessarily high level of additional resources on CCPs which risk would not be appropriately evaluated.
<b>Policy Option 3</b>	
Benefits	It would ensure that the basis for the percentage should reflect the risk of the CCP.

Regulator's costs	The costs for regulators will be low as the calculation will be performed by the CCP.
Compliance costs	The costs for the CCP could be high as the methodology may entail several assessments and procedures to follow to ensure the CCP have applied the methodology correctly.

b) Methodology for maintenance and investment of the additional amount of SSITG

Under Article 9(15) of the RRR, ESMA shall consider the appropriateness for CCPs to invest and maintain the amount of the additional amount of pre-funded dedicated own resources in assets other than those referred to under Article 47(1) of EMIR, i.e. cash or highly liquid instruments with minimal market and credit risk.

This provision should allow EU CCPs to mitigate the impact of the requirement for additional resources on their level of own resources, as they will be authorized to make use of a more relaxed investment possibilities.

It is first noted that should ESMA conclude, on the basis of the criteria referred to in point (c) of the first subparagraph of the Article 9(15), that it is appropriate for certain CCPs to invest that additional amount of pre-funded dedicated own resources in assets other than those referred to in Article 47(1) of EMIR. As elaborated on under *Section 4.3.1 Appropriateness of investments in assets different than those referred to in Article 47(1)* ESMA concluded that it shall be considered appropriate for all EU CCPs to benefit from additional investment possibilities to satisfy the additional own resources requirement under Article 9(14) of RRR but that, in accordance with Article 9(15) of RRR, before being able to rely on such additional assets for investment, a CCP shall put in place the necessary procedures further defined in the draft RTS and described in section 4.3.3. Where a CCP has not established sufficient procedures, it cannot use additional assets for investments until such procedures are in place. However, ESMA notes that the need for such procedures will ultimately depend on the scope of the investments to be available for the CCP to invest in and will be further assessed after the consultation and in the preparation of the final report.

ESMA also notes that the options provided below are just three out of many other alternatives and the chosen approach will need to be finetuned in the final report, however ESMA is of the view that the options provided below clearly visualise the factors that need to be balanced against each other in setting the investment policy for the additional amount of pre-funded dedicated own resources. This should be borne in mind in assessing the scope of a revised investment policy, the balance between different interests and the proportionality aspects that can be identified on many levels such as in light of possible obligations placed on clearing members to temporarily provide resources and for CCPs to be able to use additional secure and liquid capital resources to fulfil the new requirement of an additional amount under paragraph 14 of Article 9 of RRR.

When assessing this provision, ESMA considered mainly three options to widen the list of investments available for the purpose of the SSITG.

<b>Specific objective</b>	Ensuring that the investments are suitable to provide CCPs with some additional investments options but at the same time ensure the investments are safe and liquid as the clearing members will be required to compensate the CCP where the additional amount of pre-funded resources are not available when needed to be used by the CCP. Hence there is a balance to be found between the CCPs' ability to fund the additional amounts and for the clearing members to be protected to ensure the aim of the additional amount to provide a "buffer" is upheld.
<b>Policy option 1</b>	To extend the average time-to-maturity of eligible investments from 2 years to 5 years.
How would this option achieve the objective?	<p>It would provide the CCP with a very limited set of additional possible investments, hence the balance would probably be in the favour of the clearing members as the risk here for them to be required to contribute under the recovery measures to compensate where such additional resources are not immediately available, is very limited, if not, non-existing.</p> <p>Also, ESMA notes that it is unclear if the procedure as envisaged under Article 9(15), second subparagraph, of RRR would be needed here as the additional investments are very limited.</p>
<b>Policy option 2</b>	To align the list of assets eligible for investments for the purpose of the additional amount of pre-funded dedicated own resources with the list of eligible collateral accepted by the CCP, with the exemptions of bank guarantees, derivatives and equities.
How would this option achieve the objective?	<p>It would provide the CCP with a limited set of additional possible investments, however here the balance would probably be more balanced between the CCP and the clearing members as the risk for them to be required to contribute under the recovery measures to compensate where such additional resources are not immediately available, is limited.</p> <p>Also, ESMA notes that it is unclear if the procedure as envisaged under Article 9(15), second subparagraph, of RRR would be needed here as the additional investments are limited.</p>



<p><b>Policy option 3</b></p>	<p>To extend the scope of eligible assets not only to the CCP’s eligible collateral but also to additional alternative assets on the CCP’s balance sheet (e.g. real estate assets).</p>
<p>How would this option achieve the objective?</p>	<p>It would provide the CCP with a significant new set of additional possible investments, however here the balance would probably be to the benefit of the CCP as there may be (depending ultimately on the list of eligible extended investment possibilities,) a risk that the investment is not immediately available and therefore clearing members may be required to contribute under the recovery measures to compensate where such additional resources are not available when needed.</p> <p>Here there is a clear need for a procedure as envisaged under Article 9(15), second subparagraph, of RRR.</p>
<p>Which policy option is the preferred one?</p>	<p>After having considered the risks associated with the different potential extensions of eligible investments, ESMA has concluded that Option 2 is the most appropriate. Indeed, this solution would ease the requirement for additional resources, while still guaranteeing that the CCP has the adequate framework and procedures to manage the risks associated with those assets and their liquidation in times of stress.</p> <p>Extending only the average time- to-maturity (Option 1) was not considered as sufficiently material to really ease the requirement on CCPs to provide for the additional amount of pre-funded dedicated own resources, while extending the list of investments to alternative non-liquid assets as presented in Option 3, was considered as creating a risk in the CCP and a unproportionally burden on the clearing members.</p>
<p>Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?</p>	<p>ESMA is empowered to provide a draft regulatory technical standard to the Commission which has the liability to define how to ensure the policy option chosen for its Delegated Act achieves its aim under RRR.</p>

**Impacts of the proposed policies:**

<b>Policy option 1</b>	
Benefits	It will provide very limited extension of investment possibilities.
Regulator's costs	The costs for competent authorises and regulators will be very low.
Compliance costs	<p>The costs for the CCP may be high depending on its capital position overall.</p> <p>The cost for clearing members will be low in relation to the risk of them providing resources where the additional amount is unavailable, but may be high if the CCP would need to raise it fees to finance this additional amount, and this could in the end challenge the survival of the CCP.</p>
<b>Policy option 2</b>	
Benefits	It will provide an extension of investment possibilities, however yet quite limited and manageable from a risk perspective.
Regulator's costs	The costs for competent authorises and regulators will be very low.
Compliance costs	<p>The costs for the CCP may be notable depending on its capital position overall.</p> <p>The cost for clearing members will be fairly low in relation to the risk of them providing resources where the additional amount is unavailable but may be somewhat higher if the CCP would need to raise it fees to finance this additional amount.</p>
<b>Policy Option 3</b>	
Benefits	It may provide a notable extension of investment possibilities (depends on the final list).
Regulator's costs	The costs for competent authorises and regulators may be notable.
Compliance costs	<p>The costs for the CCP could be low as it allows for the CCP to use its available resources to meet the requirement of the additional amount of pre-funded dedicated own resources.</p> <p>The cost for clearing members will be potentially high in relation to the risk of them providing resources where the additional amount</p>

	is unavailable, but this approach is less likely to generate additional or higher fees.
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c) Rules and practices of third country CCPs, and international developments

In accordance with Article 9(15), first subparagraph, point (d) of RRR, when developing the methodology, ESMA shall take into account the rules and practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of Union CCPs, internationally and compared to third-country CCPs providing clearing services in the Union.

ESMA initially notes that RRR already introduces the requirement of an additional amount of pre-funded dedicated own resources to be provided by the CCP, hence the scope of ESMA’s empowerment is only to provide a methodology to determine the actual percentage to be applied by the CCP within the range specified in Article 9(14) of RRR.

A detailed assessment of this aspect of ESMA’s mandate may be found under Section 4.4 “Rules and practices of third country CCPs, and international developments.

ESMA considered 2 options as set out below.

<b>Specific objective</b>	ESMA shall consider specifying in the methodology the rules applying to and the practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of internationally active Union CCPs, and the competitiveness of Union CCPs compared to third-country CCPs providing clearing services in the Union.
<b>Policy option 1</b>	To include the competitiveness as an additional parameter in the methodology to enable the competent authority to adjust the percentage level based on an assessment of the competitiveness of the CCP.
How would this option achieve the objective?	It would provide the ability to consider the competitiveness of the CCP in setting the percentage that decides the additional amount of pre-funded dedicated own resources. The drawback would be that as this type of parameter is difficult to assess in a consistent manner across CCPs.
<b>Policy option 2</b>	Based on the data available, ESMA would run an analysis of current practices at international level in terms of similar amounts

	requested by CCPs and assessing the capitalization of EU vs. international CCPs.
How would this option achieve the objective?	This analysis would demonstrate whether the requirement for an additional amount of pre-funded dedicated own resources is likely to impede the EU CCPs' competitiveness, and therefore whether the methodology needs to be further adapted (e.g. by lowering the requirement) or not.
Which policy option is the preferred one?	<p>Option 2, as ESMA concluded that Option 1 may not be appropriate, as it may lead to divergent applications across EU CCPs.</p> <p>ESMA has run a first assessment of the impact that the additional amount of pre-funded dedicated own resources on EU CCPs' level of capitalisation and this assessment is presented in Section 4.4 and this has allowed ESMA to preliminary conclude that it is unlikely that the implementation of the SSITG requirement would significantly impede the competitiveness of EU CCPs and hence there is no need to further adjust the SSITG methodology based on competitiveness considerations.</p>
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	ESMA is empowered to provide a draft regulatory technical standard to the Commission which has the liability to define how to ensure the policy option chosen for its Delegated Act achieves its aim under RRR.

<b>Impacts of the proposed policies:</b>	
<b>Policy option 1</b>	
Benefits	It would allow the methodology to take into consideration competitiveness in setting the percentage of the additional amount of pre-funded dedicated own resources.
Regulator's costs	The costs may be high in assessing how the CCP's competitiveness may be impacted by the additional amount required under Article 9(14) of RRR.

Compliance costs	
<b>Policy option 2</b>	
Benefits	It would not allow an assessment on CCP level but would assume that overall, there are no disadvantages of applying the additional amount of pre-funded dedicated resources in accordance with the range provided for under RRR.
Regulator's costs	The costs for competent authorises will be none.
Compliance costs	The costs for the CCP will be none.

***Question 12: Do you identify other benefits and costs not mentioned above associated to the proposed approach under each specified aspect of the methodology?***

***Question 13: If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.***

### 5.3 Annex III – Summary of questions

**Question 1:** *Do you agree with the proposed approach to define the basic elements of the methodology for the calculation and maintenance of the additional amount of pre-funded dedicated own resources? If not, please explain why and how you would suggest changing the basic elements of the formula?*

**Question 2:** *Do you agree with the schematic formula combining a set of parameters assessed by the CCP? If not, please explain why and how you would suggest changing the formula?*

**Question 3:** *Do you agree with the list of parameters to describe the structure and the internal organisation of CCPs and the nature, scope and complexity of a CCP's business? If yes, are there additional parameters that should be added to the list? If not, please explain why and how you would suggest assessing the internal organisation of CCPs and the nature, scope and complexity of a CCP's business in the methodology?*

**Question 4:** *Do you agree with the list of parameters to describe the structure of incentives of a CCP's shareholders, management, clearing members and clients? If yes, are there additional parameters that should be added to the list? If not, please explain why and how you would suggest assessing the incentives in the methodology?*

**Question 5:** *Do you agree with the proposal that all EU CCPs may rely on alternative investments for the purpose of maintaining the SSITG?*

**Question 6:** *Do you agree that this list of alternative investments shall be specified in the draft RTS?*

**Question 7:** *Do you agree with the proposed list of additional investments for the purpose of maintaining the additional amount of pre-funded dedicated own resources under Article 9(14)? If not, please explain why? If yes, is there any type of asset that you would like to add to or remove from the list?*

**Question 8:** *Do you agree with the proposed procedure for triggering specified recovery measures where all or part of the CCP's pre-funded dedicated own resources allocated to cover SSITG are not readily available for CCPs? If not, please explain why?*

**Question 9:** *Do you agree with ESMA's proposed procedure for the compensation of non-defaulting clearing members? If not, please explain why?*

**Question 10:** *Do you have access to different data and analysis that would contradict ESMA's conclusion that no further adjustment of the SSITG level based on competitiveness consideration is needed?*

**Question 11:** *Do you have any additional data that you may share in order to assess the impact of this requirement on the EU CCPs' competitiveness?*

**Question 12:** *Do you identify other benefits and costs not mentioned above associated to the proposed approach under each specified aspect of the methodology?*

**Question 13:** *If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.*

## **5.4 Annex IV - Draft RTS on the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources**

### **COMMISSION DELEGATED REGULATION (EU) No .../..**

**supplementing Regulation (EU) No 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with Article 9(14)**

**of [ ]**

**(text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties<sup>9</sup>, and in particular of Article 9 (15), fourth subparagraph thereof,

Whereas:

- (1) In order for the CCPs to use the additional amount of pre-funded dedicated own resources, such amount is to be adapted to each CCP. This Regulation should provide the methodology for the calculation of the additional amount, expressed as a percentage within the range of 10 % and 25 % of the risk-based capital calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories<sup>10</sup>.
- (2) The methodology should allow distinguishing between CCPs with a complex risk profile for which a higher level of additional pre-funded dedicated own resources, close to 25%, may be needed, and CCPs with less complex risk profiles or more conservative management of risks for which the amount of additional pre-funded dedicated own resources should remain close to 10%.

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<sup>9</sup> OJ L 22, 22.1.2021, p. 1

<sup>10</sup> OJ L 201, 27.7.2012, p. 1

- (3) The methodology should be applied by the CCP and should define sufficiently clear and objective parameters in order to avoid assessment difficulties and allow for a consistent application across CCPs. The parameters should allow to adapt the additional amount of pre-funded dedicated own resources to the structure and internal organisation of the CCP, as well as the nature, scope and complexity of its activities, and the structure of incentives of its stakeholders.
- (4) A CCP should not undertake the calculation based on specific parameters of the methodology where it decides to voluntarily apply the maximum amount of additional pre-funded dedicated own resources at 25% level.
- (5) The calculation of the percentage to be applied for determining the additional amount of pre-funded dedicated own resources under the methodology should be a cumulative sum of all percentage points assigned to each parameter. The percentage to be applied for each parameter is defined as the sum of the relevant quantitative indicators. A wide range has been assigned to the most significant parameters in the assessment of the risks and complexity of a CCP, while a narrower range has been assigned to parameters which refer to a specific risk aspect of the CCP.
- (6) The methodology for the maintenance of these additional pre-funded dedicated own resources should allow CCPs to mitigate the impact of the requirement for such additional resources, by enabling them to invest such additional pre-funded dedicated own resources in assets other than those considered in the CCP's investment policy. It should be appropriate for all CCPs to benefit from additional investment possibilities, provided that they implement the appropriate procedures to mitigate the risk of such assets not being immediately available.
- (7) In order to mitigate the impact of the additional pre-funded dedicated own resources on CCPs, the CCP's investment possibilities for this purpose should be partially aligned with some elements the list of eligible collateral accepted by the CCP from clearing members, as it would still guarantee that the CCP has the adequate framework and procedures to manage the risks associated with those assets and their liquidation in times of stress. Some assets which are eligible as collateral should however remain excluded from the list of eligible investments, as they are not suitable for a CCP's investment.
- (8) In developing the draft regulatory technical standards, ESMA analysed the rules applying to and the practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of internationally active Union CCPs, and the competitiveness of Union CCPs compared to third-country CCPs providing clearing services in the Union. Based on such analyses ESMA concluded that the methodology proposed for the calculation of additional amount of pre-funded dedicated own resources for



Union CCPs should not impede on competitiveness on internationally active Union CCPs.

(9) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(10) ESMA has developed the draft technical standards in cooperation with the European Banking Authority (EBA) and after consulting the European System of Central Banks (ESCB). In accordance with Article 10 of Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)<sup>11</sup>, ESMA has conducted open public consultations on such draft regulatory technical standards, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

### **Calculation of the additional amount of the CCP's pre-funded dedicated own resources**

1. A CCP shall calculate the additional amount of pre-funded dedicated own resources referred to in Article 9(14) of Regulation (EU) No 2021/23 by multiplying the risk-based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012 and Commission Delegated Regulation (EU) No 152/2013<sup>12</sup> with the percentage level determined in accordance with Article 2.
2. The CCP shall review the determination of the percentage level, as determined in accordance with Article 2, at any time it deems necessary, and at least on a yearly basis.
3. The CCP may decide to voluntarily apply the maximum 25% percentage to calculate the additional amount of pre-funded dedicated own resources referred to in Article 9(14) of Regulation (EU) No 2021/23, and in that event it would not be required to perform the determination of the percentage level in accordance with Article 2.
4. The CCP shall review the additional amount of pre-funded dedicated own resources calculated under paragraph 1 on a yearly basis, each time the CCP's capital requirement under Article 16(2) of Regulation (EU) 648/2012 is revised, and each time the percentage level evolves after conducting a review in accordance with paragraph 2.

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<sup>11</sup> OJ L 331, 15.12.2010, p. 84.

<sup>12</sup> Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties, OJ L 52, 23.2.2013, p. 41

5. The CCP shall, where it has established more than one default fund for the different classes of financial instruments it clears, allocate the additional amount of pre-funded dedicated own resources calculated under paragraph 1 to each of the default funds in proportion to the size of each default fund and the allocation shall be separately indicated in its balance sheet. The additional amounts allocated to a default fund shall be used for defaults arising in the market segments to which the default funds refer. In the case of a non-default event, the CCP shall allocate the full amount of the additional amount of pre-funded dedicated own resources calculated under paragraph 1 against the losses incurred as a result of the non-default event.

### *Article 2*

#### **Determination of the percentage level of the additional amount of the CCP's pre-funded dedicated own resources**

1. The percentage level (P) referred to in Article 1(1) shall be calculated by the CCP as follows:

$$P = \max(10\%; (\min(25\%; \sum_{i=1}^5 A_i + \sum_{i=1}^3 B_i)))$$

Where the 'A' stands for parameters to be determined in accordance with Articles 3 to 7, 'B' stands for parameters to be determined in accordance with Article 8 to 10. Parameters  $A_1$  to  $A_5$  reflect the structure, internal organisation as well as the nature scope and complexity of a CCP's activities, and the parameters  $B_1$  to  $B_3$  reflect the structure of incentives of the CCP's shareholders, management and clearing members, including clients of those clearing members.

2. The final percentage level (P) value shall be rounded to the closest whole number.

### *Article 3*

#### **The nature and complexity of asset classes cleared**

The parameter  $A_1$  on the nature and complexity of asset classes cleared shall range from 1% to 11%. It shall be calculated as follows:

$$A_1 = I_{assets} + I_{DF} + I_{FX} + I_{TCFX} + I_{settl} + I_{commo}$$

Where:

$I_{assets}$  is an indicator reflecting the number of different asset classes cleared by the CCP. It shall be calculated as  $I_{assets} = \max(5, N_{assets}) \times 1\%$ , where  $N_{assets}$  is the number of different asset classes cleared by the CCP.

- $I_{DF}$  is an indicator reflecting the CCP's default fund structure.  $I_{DF} = 2\%$  if the CCP has more than 1 asset class under the same default fund, and 0% otherwise;
- $I_{FX}$  is an indicator linked to the number of currencies cleared by the CCP.  $I_{FX} = 1\%$  if the CCP clears assets labelled in or offers settlement in more than 1 currency, and 0% otherwise;
- $I_{TCFX}$  is an indicator linked to the number of non-EU currencies cleared by the CCP.  $I_{TCFX} = 1\%$  if the CCP clears assets labelled in or offers settlement in at least 1 non-EU currency, and 0% otherwise;
- $I_{settl}$  is an indicator linked to the settlement mode of derivatives.  $I_{settl} = 1\%$  if the offers physical settlement of derivatives contracts, and 0% otherwise;
- $I_{commo}$  is an indicator linked to the settlement of commodities derivatives.  $I_{commo} = 1\%$  the CCP offers physical settlement of commodities derivatives contracts, and 0% otherwise;

#### Article 4

### The CCP's relationships and interdependencies with other financial market infrastructures and other financial institutions

This parameter  $A_2$  reflects the CCP's relationships and interdependencies with other financial market infrastructures and other financial institutions and shall range from 0% to 5%. It shall be calculated as follows:

$$A_2 = I_{FMI} + I_{CMS} + I_{int} + I_{interop}$$

Where:

- $I_{FMI}$  is an indicator linked to the number of interdependencies.  $I_{FMI} = 1\%$  if the CCP has more than 5 interdependencies with trading venues, payment systems and settlement systems, and 0% otherwise;
- $I_{CMS}$  is an indicator linked to the concentration of the CCP's clearing membership.  $I_{CMS} = 1\%$  if the CCP's top 5 clearing members represent more than 40% of the CCP's total prefunded resources, aggregated across all services and default funds, and 0% otherwise.
- $I_{int}$  is an indicator linked to the CCP's clearing membership.  $I_{int} = 1\%$  if clearing members established outside the EU represent more than 20% of the CCP's clearing membership (as measured by the total of collateral), and 0% otherwise.

$I_{interop}$  is an indicator linked to the CCP's interoperability link.  $I_{interop} = 2\%$  if the CCP participates in an interoperability arrangement, and 0% otherwise.

#### Article 5

### The internal organisation of the CCP

This parameter  $A_3$  reflects the efficiency of the CCP's internal organisation and shall range from 0% to 5%. It shall be calculated as follows:

$$A_3 = I_{RiskCo} + I_{reporting} + I_{Riskstaff}$$

Where:

$I_{RiskCo}$  is an indicator linked to the interaction between the Board and the Risk Committee  $I_{RiskCo} = 2\%$  if the CCP's Board has taken more than 3 decisions over the last 3 years where the recommendation or advised position of the Risk Committee was not followed, and 0% otherwise;

$I_{reporting}$  is an indicator reflecting the reporting level of the model validation team.  $I_{reporting} = 0\%$  if the model validation team reports directly at Board level, 1 % otherwise;

$I_{Riskstaff}$  is an indicator reflecting the proportion of staff allocated to second line risk function. Its value shall range between 0% and 2%, and shall be set as  $I_{Riskstaff} = \max(0, 0.02 \times (1 - (1/0.2) \times P_{risk}))$  where  $P_{risk}$  is the proportion of second line risk FTEs as part of the total CCP's FTEs, including outsourced functions. This indicator shall take its maximum value where the proportion is equal to 0%, and minimum value at 20%.

#### Article 6

### The robustness of the CCP's risk management framework

This parameter  $A_4$  reflects the robustness of the CCP's risk management framework, and shall range from 0% to 6%. It shall be calculated as follows:

$$A_4 = I_{BT} + I_{incident} + I_{payments}$$

Where:

$I_{BT}$  is an indicator reflecting the adequacy of the CCP's margins as assessed by its back-tests. Its value shall range between 0% and 4%, and shall be set as  $I_{BT} = 0.04 \times P_{BT}$  where  $P_{BT}$  is the percentage of the CCP's clearing services

(calculated as the number of clearing services meeting the criterion compared to the total number of clearing services of the CCP) for which margin back-tests performance is below the CCP's internal risk target over the last 12 months. This indicator shall reach its maximum value where  $P_{BT}$  is at 100%.

$I_{incident}$  is an indicator reflecting the operational robustness of the CCP. Its value shall range between 0% and 2%, and shall be set as  $I_{BT} = 0.02 \times N_{days}/10$  where  $N_{days}$  is the number of days on which the CCP has been unable to process new trades for 1 hour or more over the last 12 months. This indicator shall reach its maximum value where  $N_{days} = 10$  days.

$I_{payments}$  is an indicator reflecting the operational robustness of the CCP, based on the number of payments incidents. Its value shall range between 0% and 2%, and shall be set as  $I_{payments} = 0.02 \times N_{days}/10$  where  $N_{days}$  is the number of days on which the CCP has experienced at least one payment incident lasting more than 1 hour over the last 12 months, excluding incidents which are the sole responsibility of clearing members. This indicator shall reach its maximum value where  $N_{days} = 10$  days.

#### Article 7

### Pending remedial actions following findings by the CCP's competent authority

This parameter  $A_5$  is linked to the number of material pending remedial actions following findings from the CCP's competent authority, and shall range from 0% to 3%. It shall be calculated as follows:

$$A_5 = I_{prudential} + I_{other}$$

Where:

$I_{prudential}$  is an indicator linked to the pending actions on prudential matters.  $I_{prudential} = 1.5\%$  if the CCP has at least 1 pending material remedial actions following findings from its competent authority, on prudential matters, 0% otherwise;

$I_{other}$  is an indicator linked to the pending actions on non-prudential matters.  $I_{other} = 1.5\%$  if the CCP has at least 1 pending material remedial actions on non-prudential matters following findings from its competent authority, for which it exceeded the delay set by the NCA in the remedial plan, 0% otherwise;

For the purpose of this Article, a remedial action shall be considered as material where it has been allocated the highest priority based on the CCP's internal materiality matrix and / or based on the competent authority's own classification.

### Article 8

#### The CCP's ownership, capital structure and profitability

This parameter  $B_1$  is linked to the CCP's ownership and capital structure. It should be calculated as follows:

$$B_1 = I_{majority} + I_{support}$$

Where:

$I_{majority}$  is an indicator that reflects the nature of the CCP's majority shareholder.  $I_{majority} = 2\%$  if the CCP has a majority shareholder unrated or rated below investment grade (excluding publicly owned groups), 0% otherwise;

$I_{support}$  is an indicator that reflects the support from the parent company  $I_{support} = 0\%$  if the CCP benefits from a contractually agreed material financial support from its parent company in the event of a default or non-default event, including committed lines or insurance contracts, 2% otherwise.

### Article 9

#### Remuneration of the senior management

This parameter  $B_2$  reflects the extent to which the remuneration of the senior management could be directly and contractually impacted following a default or a non-default event. It shall range from 0% to 4% and be calculated as follows:

$$B_2 = I_{\%amount} + I_{\%staffDL} + I_{\%staffNDL}$$

Where:

$I_{\%amount}$  is an indicator reflecting share of the senior management total variable remuneration subject to claw back clauses. Its value shall range between 0% and 2%, and shall be set as  $I_{\%amount} = \max(0; 0.02 \times (1 - 2P_{amount}))$  where  $P_{amount}$  is the average percentage of the CCP's senior management total variable remuneration subject to claw back clauses in the event of losses in excess of margins in a default and/or non default event. This indicator shall reach its minimum value where  $P_{amount} = 50\%$ ;

$I_{\%staffDL}$  is an indicator reflecting percentage of the senior management staff subject to claw back in case of default losses. Its value shall range between 0% and 1%, and shall be set as  $I_{\%staffDL} = \max(0; 0.02 \times ((1 - P_{\%staffDL}))$  where  $P_{\%staffDL}$  is the percentage of the CCP's senior management (expressed as a % of the total senior management FTEs) subject to variable remuneration claw back in case of default losses ;

$I_{\%staffNDL}$  is an indicator reflecting percentage of the senior management staff subject to claw back in case of non-default losses. Its value shall range between 0% and 1%, and shall be set as  $I_{\%staffNDL} = \max(0; 0.02 \times ((1 - P_{\%staffNDL}))$  where  $P_{\%staffNDL}$  is the percentage of the CCP's senior management (expressed as a % of the total senior management FTEs) subject to variable remuneration claw back in case of non-default losses.

#### Article 10

### The clearing members' and clients' involvement in the CCP's risk governance

The parameter  $B_3$  linked to the clearing members' and clients' involvement in the CCP's risk governance shall range from 0% to 5%. It shall be calculated as follows:

$$B_3 = I_{investment} + I_{incentives} + I_{finIncent}$$

Where:

$I_{investment}$  is an indicator reflecting the involvement of clearing members and clients in the investment decision process.  $I_{investment}=0\%$  if clearing members are involved in the investment decision and bear some of the potential losses, 1% otherwise;

$I_{incentives}$  is an indicator reflecting the incentives for clearing members in the default management process.  $I_{incentives}=0\%$  if there are incentives for clearing members to participate in the default management process, 1% otherwise;

$I_{incentivesFI}$  is an indicator reflecting the financial incentives for clearing members in the default management process.  $I_{incentivesFI}=0\%$  if there are financial incentives of penalties for clearing members to participate in auctions, or forced allocations rules where auctions fail, 1% otherwise.

#### Article 11

### Maintenance of the additional amount of the CCPs' pre-funded dedicated own resources

1. If the additional amount of pre-funded dedicated own resources falls below the required additional amount calculated in accordance with Article 1(1), the CCP shall immediately inform, in writing, its competent authority. The CCP shall also inform its competent authority in writing if the additional amount is further reduced afterwards. The notification to the CCP's competent authority shall indicate in detail the remaining additional amount of pre-funded dedicated own resources and if any further reduction to that amount may be expected in the next five business days. The written notification shall also contain the reasons for the breach and provide a comprehensive description of the measures and the timetable for the replenishment of the amount.
2. Where a subsequent default of either one or more clearing members or a non-default event occurs before the CCP has reinstated the full additional amount of its pre-funded dedicated own resources as calculated in accordance with Article 1(1), only the residual amount of the additional amount shall be used for the purpose of Article 9(14) of Regulation (EU) No 2021/23.
3. A CCP shall reinstate the additional amount of pre-funded dedicated own resources at the latest within 20 working days from the first notification referred to in paragraph 1.
4. Where the percentage level determined in accordance with paragraph 1 of Article 2 is higher than 10%, by derogation from Article 47(1) of Regulation (EU) 648/2012 a CCP may invest the excess requested amount of additional pre-funded dedicated own resources in gold and financial instruments considered as highly liquid collateral in accordance with Article 46(1) of Regulation (EU) 648/2012, provided that such assets are included in the CCP's collateral policy and subject to paragraph 5.
5. The eligible investments referred to in paragraph 4 shall exclude bank guarantees, derivatives and equities.
6. A CCP shall put in place the necessary procedures set out under Article 12 and Article 13 before using the additional assets for investments as set out in paragraph 4.

#### *Article 12*

#### **Procedure for applying recovery measures where the additional amount is not immediately available**

1. Where, following a default or a non-default event, the additional amount of pre-funded dedicated own resources calculated in accordance with Article 1(1) are not immediately available, the CCP shall immediately inform its competent authority and its clearing members and provide a detailed description of the additional amount of pre-funded dedicated own resources unavailable, and the reason for this unavailability.
2. Where, following a default or non-default event as referred to in paragraph 1, the CCP collects financial resources from non-defaulting members, the amount shall cover the



unavailable additional amount of pre-funded dedicated own resources and shall be distributed among the non-defaulting clearing members proportionally to their default fund contributions.

#### *Article 13*

##### **Procedure for the compensation of non-defaulting clearing members**

1. Where non-defaulting clearing members have provided a financial contribution to the CCP in accordance with Article 12, the CCP shall take all reasonable measures to reimburse the non-defaulting clearing members by [monetising] the assets used to invest the additional amount of pre-funded dedicated own resources calculated in accordance with Article 1(1) at the latest within 20 working days after the notification of the funds' unavailability.
2. Subject to paragraph 4, the CCP shall reimburse the non-defaulting clearing members within a reasonable timeframe and continue until all amounts have been recouped.
3. The reimbursement of all amounts due to the non-defaulting clearing members shall be made in cash, in the same currency in which it was provided to the CCP.
4. The amounts due from the CCP shall be paid to the non-defaulting clearing members after (i) the servicing of operational costs, (ii) any due and payable debt obligation has been paid and (iii) any recompense to be paid within the timeframe set out in accordance with Article 3 Delegated Regulation [XXX] on recompense.
5. Where the reimbursement extends over more than 120 working days from the date of the initial recovery measure that required the financial contribution of non-defaulting clearing members, an annual interest shall be paid on the amounts due. The interest rate shall be the ECB rate for principal refinancing operations plus 2 percentage points.

#### *Article 14*

##### **Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission*  
*The President*