
**EACH response to the ESMA consultation
on Draft Guidelines further specifying the
circumstances for temporary restrictions in
the case of a significant non-default event
in accordance with Article 45a of EMIR**

September 2021

Introduction

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

EACH appreciates the opportunity to provide feedback to the ESMA Consultation Paper “Draft Guidelines further specifying the circumstances for temporary restrictions in the case of a significant non-default event in accordance with Article 45a of EMIR” (hereinafter called “The consultation”).

Section 4 – Circumstances for temporary restrictions in a significant non-default event

Question 1: Do you agree with the proposed indicators to trigger the obligation for a competent authority to assess if to apply the restrictions set out under Article 45a of EMIR. If not, please explain why.

EACH would like to put forward some comments and suggestions concerning the Guidelines proposed by ESMA in the consultation.

Guideline 1

Where the competent authority identifies a non-default event, the competent authorities should assess a series of indicators to determine whether the non-default event poses a significant risk to the CCP's capital and hence would justify a restriction on the CCP, i.e. to require the CCP to refrain from undertaking any actions referred to in Article 45a(1) of EMIR. The indicators to be assessed by the competent authority should include (but not be limited to) the ones listed below:

- a) Whether following a non-default event, a realised, estimated or forecasted loss will, or is likely to, reduce the CCP's capital level below the notification threshold referred to in Article 1(3) of RTS 152/2013.*
- b) Whether following a non-default event a realised, estimated or forecasted loss results or is likely to result in a significant deterioration of the CCP's capital buffer, without triggering the notification threshold and resulting from either:
 - a gradual loss where the reason for the deterioration is considered very likely to continue to reduce the capital of the CCP at a significant pace, hence there is a risk that the CCP will infringe its notification threshold in a near future; or**

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- a sudden loss or expected loss where there is a risk that the CCP will infringe the notification threshold

EACH suggestion

We would like to highlight that the two indicators presented seem to show a certain degree of overlap, and it is not very clear what the difference between the two is. In addition, it has to be noted that, according to indicator (b), a significant deterioration of the CCP's buffer could also trigger temporary restrictions **even if not hitting the notification threshold**: it is important to keep in mind in this case that certain CCP losses are usually within a CCP's annual cash flow projections and, although well within the buffer, are likely to be deemed a significant deterioration. However, despite the fact that the CCP's regulatory capital **will not be breached** the national competent authority could restrict dividend pay-out for up to 5 years or cut the variable compensation over multi-year periods.

We would therefore kindly suggest **deleting indicator 1(b)** and **keeping 1(a) as guidance**.

Guideline 2

Where the competent authority identifies a non-default event, the competent authority should assess a series of indicators to determine whether the non-default event poses a significant risk to the CCP's ability to perform its critical functions, hence would justify a restriction on the CCP, i.e. to require the CCP to refrain from undertaking any actions referred to in Article 45a(1) of EMIR. The indicators to be assessed by the competent authority should include (but not be limited to) the ones listed below:

- *Whether the CCP is incurring and failing to recover from a material operational event, such as a cyber-attack or natural disaster, which prevents or has the potential to prevent the CCP from operating its full clearing service(s) or fulfilling all or part of its obligations towards its clearing members and where this may have a financial impact in the medium-term;*
- *Whether the failure of a critical third-party entity prevent or has the potential to prevent the CCPs from operating its full clearing service(s) or fulfilling all or part of its obligations towards its clearing members, including settlement of transactions and payments of margin calls and where this may have a financial impact in the medium-term;*
- *Whether the CCP is losing, or is at risk of losing, clearing volumes or clearing member(s), or where there is a general loss of clearing members' or stakeholders' confidence in the CCP and where this may put the CCP in the position that it is no longer able to carry out its business activities and where this may have a financial impact in the medium-term. This may be evidenced by:*
 - o *a reduction in submitted transactions for clearing;*
 - o *the intention of clearing members to terminate their contracts with the CCP (termination notice).*

EACH suggestion

The failure of a critical third-party entity preventing the CCP from operating its full clearing service should **not be an indicator that triggers Article 45 (a) restrictions** as the **CCP has no control over a third-party entity**. Third-party providers are chosen on the basis of extensive due diligence reviews which cover all possible operational risk and compliance issues before the final decision is made. Their operational capabilities under extraordinary market conditions can be assessed to a certain extent and those institutions are also regulated entities. Also, in some cases there is an active clearing members' representation in CCP's Risk Committees that provide opinions concerning third-party providers.

Regarding the potential loss of clearing volumes or clearing members, the reduction of volumes or number of clearing member might **not be directly related to the CCP's business activities or its inability to perform at the required level**. It may rather be linked to clients' choice of clearing or other commercial decisions.

We would therefore respectfully suggest **retaining the 1st paragraph** (i.e. material operational event with significant medium term financial impact) and **removing the 2nd and 3rd sub-paragraphs** (i.e. 3rd party event and the drop in volumes).

Question 2: If you prefer other indicators, please describe them and why they would be more suitable.

An alternative approach could be to consider a **non-default event as "significant" only if CCP RR Article 31 is triggered**, i.e. the **resolution authority requests non-defaulting clearing members to make a contribution in cash** to the CCP up to twice the amount equivalent to their contribution to the CCP's default fund.

EACH would like to remind the importance of distinguishing among **two main types of non-default events**:

- Those non-default events that are the **sole responsibility of the CCP**;
- Non-default event whose responsibility is to be **shared among different stakeholders** and that occurred despite the CCP complying with all the rules.

For this reason, EACH believes that all stakeholders involved (e.g. CCP or clearing members) should bear the losses caused by a non-default event if they are responsible for them unless other arrangements are indicated in the CCP rulebook. Loss allocation for non-default losses should be proportional to the level of responsibility and/or benefits extracted from a service of each stakeholder.