
**EACH response to the ESMA consultation
on Draft Guidelines on the consistent
application of the triggers for the use of
Early Intervention Measures (Article 18(8)
CCPRRR))**

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 “ESMA consultation on Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures (Article 18(8) CCPRRR)” (hereinafter called “The consultation”).

Clarification of triggers and assessment for applying early intervention measures

Question 1: Do you have any general comments on the draft Guidelines on triggers for the use of early intervention measures?

EACH broadly agrees with ESMA’s general comments on the draft Guidelines on triggers for the use of early intervention measures. We agree that national competent authorities (NCAs) should be in a position to investigate breaches and determine whether early intervention would be appropriate. However, **we do not find that there is a clear distinction between Business as Usual (BAU) supervisory duties of NCAs and triggers i.e. the specific point in time at which an early intervention could be warranted.**

Despite the fact that the intention of CCP RRR was to complement EMIR, we find that **most of the requirements under Article 18(1) of the CCP RRR are existing intervention measures that NCAs can already take.** In our view, ESMA’s guidance and triggers chosen are too detailed and comprehensive, creating a significant overlap between BAU supervisory practices and conditions where early intervention would be needed.

With regard to individual triggers, and as we explain further in our response, these often refer to single incidents rather than reoccurring incidents that the CCP has not been able to address in a timely manner. Single incidents are part of the BAU supervisory processes and should not be the triggers for early intervention, particularly with regard to a CCP’s risk model for example which will have been approved by the NCA. We believe that breaches that should be considered for early intervention must be material, repeated and with the CCP in question having no clear plan to address them.

Furthermore, we would note that in conjunction with the “early warning indicators” in CCP recovery plans, **some early warning indicators could trigger breaches in a CCP’s capital requirement and/or prudential requirements.** For example, as a result of a significant default of a clearing member, chances are that the CCP’s capital requirements under EMIR

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could be temporarily breached. That would not necessarily mean that an early intervention assessment would be required, nor that risk posed to financial stability of the Union has increased to such extreme as to intervene a CCP. Instead, we believe that breaches to be considered for early intervention must not only be material but also repeated and with the CCP in question having no clear plan to address them. We therefore kindly request ESMA and NCAs to refrain from a mechanistic implementation of the Guidelines and rather opt for an expert judgment of the NCA in applying them.

In addition, we believe that it is not clearly specified how ESMA envisages NCAs addressing legal responsibilities for their decisions in the early intervention phase. We respectfully consider that there is not enough clarity as to who assumes responsibility for actions taken when, for example, senior management has been removed.

Finally, we believe that the point in time of early intervention is not clearly defined which can create uncertainty for the CCP and its members, particularly in times of stress.

Procedure for assessment of triggers and corresponding indicators

Guideline 1 – Procedure

Question 2: Do you agree with the proposal on procedures as set out in Guideline 1? If not, please elaborate.

We agree with the proposal on the procedures set out in Guideline 1. We would highlight however that triggers in a default and non-default event can be very different. In a default scenario, the resolution authority might not have sufficient time to go through an extensive analysis of the current market condition.

In addition, EACH notes that there is **no requirement for the competent authorities to assess the proportionality of a proposed early intervention measure to the severity of the deficiency observed at the CCP**. We would encourage ESMA to consider requiring competent authorities to **ensure that measures taken are proportional** to the observed situation. Further, it should be ensured that any early intervention measure taken under these Guidelines adequately addresses the observed issue at the CCP and that the CCP itself is unable to address it itself in a timely manner. Therefore, as indicated in the previous question, we would encourage ESMA to ensure that any measures taken under these Guidelines are suitable, necessary, and proportionate to the observed issue.

Given that the range of triggers for early intervention foreseen in the Guidelines are very broad, such an approach could help ensuring a consistent application across the Union.

Guideline 2 – Assessing financial stability in the Union or in a Member State

Question 3: Do you agree with the proposal on how to assess financial stability in the Union or in a Member State, as set out in Guideline 2? If not, please elaborate.

We respectfully believe that the proposal to assess financial stability in the Union or in a Member State is **excessively granular and risks turning the assessment into a very lengthy process**. As noted in our response to question 2, in a default event, NCAs will not have sufficient time to conduct such an extensive market analysis. Also, we believe that triggers chosen are too detailed and comprehensive, creating a significant overlap between BAU supervisory practices under EMIR and conditions where early intervention would be needed.

We would note that all EU CCPs are authorised and supervised under EMIR and their nature, size, concentration and any given interoperable arrangements are all well documented. As CCP RRR is intended to complement EMIR, we find that the assessment under Guideline 2 is rather overlapping and will not produce any tangible results when it comes to the decision for an early intervention.

Therefore, **we believe that Guideline 2 should be deleted**, as the **assessment**, if necessary, should be **done in advance** and not during the assessment of a market incident posing a risk to financial stability.

Trigger based on EMIR capital requirements

Guideline 3 – Trigger on capital requirements

Question 4: Do you agree with the proposed Guideline 3 and in particular the proposed indicators to assess capital requirements? If not, please elaborate.

We broadly agree with the first trigger in respect of the capital requirements under Article 16 of EMIR. We note that under a default event where a CCP would be using the entire tranche of its SITG, it might not have sufficient amount of resources available to fully replenish it. As such, it could be in breach of Article 16 of EMIR; however, this does not necessarily mean that it would be subject to an early intervention. We **do not believe that it is right to mandate CCPs to maintain capital buffers at the level of the SITG to prevent them from triggering early intervention**.

Regarding the '*significant sudden or expected loss where it is likely that the CCP will infringe the notification threshold in the near future*' we believe that this trigger is very difficult to monitor. We **do not believe that an early intervention is appropriate if the capital requirements are not infringed** while at the same time the **CCP has taken immediate action** to reverse the current situation.

Trigger based on EMIR prudential requirements

Guideline 4 – Trigger on prudential requirements

Question 5: Do you agree with the proposed Guideline 4 and in particular the proposed indicators to assess EMIR prudential requirements? If not, please elaborate.

EACH respectfully disagrees with the proposed Guideline 4 and in particular with the proposed indicators to assess EMIR prudential requirements. We believe that the **approach described**, whereby the NCA would be looking at Key Risk Indicators (KRIs), **overlaps with NCAs supervisory duties**. In addition, a single breach in an NCA's risk capital assessment does not by itself justify a possible early intervention.

For example, infringements in the assessment of liquidity and credit exposures to each clearing member as per paragraph 68, should not happen if the models have been approved by the NCAs. The only case where such infringements could appear is following a default scenario. Regarding '*mistakes in margins calls as noted by back-testing or the requested margin calls do not reflect the volatility of the market*', indicate that the model in production is not working properly. NCAs could ask the CCP to review its risk model but that in its entirety would not justify a possible early intervention.

In a similar vein, we find that triggers relating to the **default fund and other financial resources** but also **liquidity controls and default waterfall** form part of the **NCA's supervisory duties** whereby when a regulator notes a weakness in models, rules etc. it has the right to oblige the CCP to take an action **without being into a pre-resolution mode**.

Finally, we believe that **an EMIR infringement should not automatically justify an early intervention trigger**. There are processes and procedures in place under EMIR to address such non-reoccurring incidents and therefore, we do not believe that an EMIR prudential assessment would be required for an NCA to assess whether there is a need for an early intervention. Triggers for early intervention as noted in question 1 and question 2 should be material and reoccurring infringements for which the CCP has not taken appropriate action to rectify. In more detail, we believe that the wording in paragraph 70 is too ambiguous and may intend that triggers for early interventions would (in the plain reading) be any individual material concern, and/or any unresolved/repeated/increasing concern whether material or not. We therefore suggest the following: "*identified concerns where they are material ***and are*** left unresolved, repeated or increasing and where, with time, there is a clear risk that the CCP poses a risk to the financial stability in the Union or in one or more of its Member States or of an emerging crisis situation that could affect the operations of the CCP.*"

Triggers signalling a risk to financial stability in the Union or in one or more of its Member States or of an emerging crisis situation that could affect the operations of the CCP

[Guideline 5 – Trigger in relation to identified concerns of EMIR compliance](#)

[Guideline 6 – Trigger in relation to a CCP’s impact on other entities with risks to the financial stability](#)

[Guideline 7 – Trigger on a CCP’s operational viability](#)

[Guideline 8 – Trigger on the CCP’s financial viability](#)

[Guideline 9 – Trigger for emerging crisis](#)

Question 6: Do you agree with the proposed Guidelines 5 to 9 and in particular the proposed indicators, to assess financial stability in the Union or in one or more of its Member States or to assess an emerging crisis situation that could affect the operations of the CCP? If not, please elaborate.

EACH generally agrees with ESMA’s proposed Guidelines 5 to 9, Nevertheless, we would like to provide some targeted comments on some of the elements included in those Guidelines. As indicated in our answer to the previous question, regarding Lit. (a) of Guideline 5, we would like to caution again against choosing a wording that would leave **room for interpretation** that a concern would *not* explicitly need to be “material” in order to be a trigger for early intervention – it would be sufficient if it is “left unresolved, repeating or increasing”. We would encourage ESMA to clarify that **an identified concern should always be material to trigger early intervention.**

Regarding Lit. (a), (c), (d) of Guideline 6 (plus Lit. (d) of Guideline 8), we would like to highlight that these relate to the financial situations of clearing members, over which a CCP has no control. It is not and should **not be the responsibility of a CCP to control a clearing member’s ability to meet the requirements** arising from that clearing member’s relationship with the CCP, as agreed in the rulebook. The appropriate point of supervisory intervention in cases where a clearing member cannot meet its obligations to a CCP at which it conducts business is that clearing member, and not the CCP. EACH would therefore ask for a clarification of these indicators, tying them to aspects that are within the direct responsibility of the CCP. Regarding Guideline 9, we would again ask for clarification, notably a quantification as the current wording around “material amount of default” or “significant issues in the functioning of a market” leaves room for interpretation.

Cost and Benefit analysis

Question 7: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?

We note that **option 1** as described in the Consultation Paper, which specifies the principles as guidelines for the competent authorities to decide on the triggers for the application of the early intervention measures, is a **better option that would provide for a clear determination as to whether an early intervention needs to be assessed**. We find that the list of indicators should primarily be developed with the **local market in mind**. Furthermore, as noted in our responses above, we do not believe that such a granular list of indicators would provide the necessary certainty to both NCAs and CCPs and most importantly the clear set of circumstances under which the NCA would be forced to step in. Instead, we believe that a smaller set of indicators should be developed by NCAs that can be easily applied in any given circumstance within their respective jurisdiction.