

Guidelines

Further specifying the circumstances for temporary restrictions in the case of a significant non-default event in accordance with Article 45a of EMIR

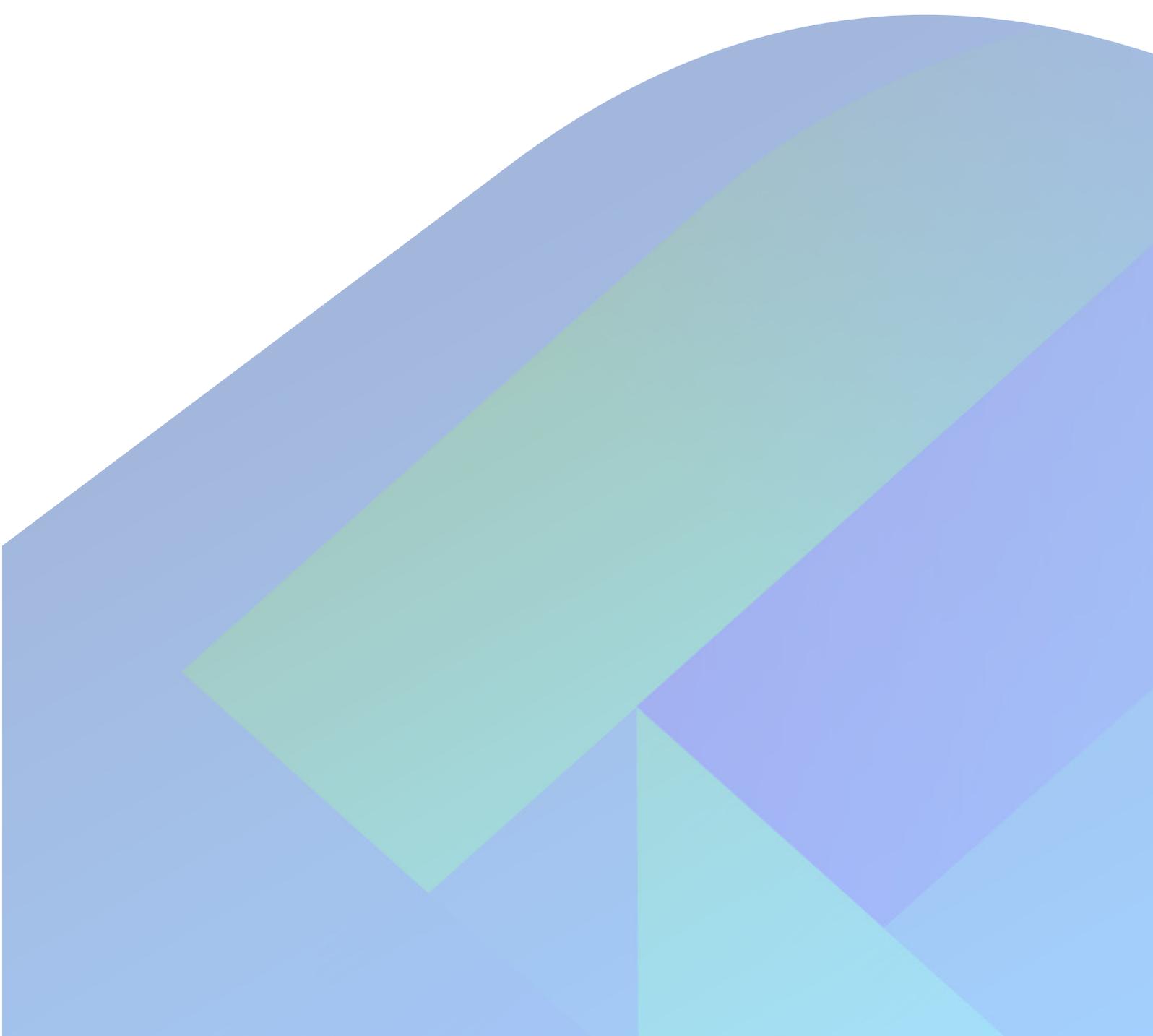


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I. Scope

Who?

These Guidelines apply to competent authorities designated pursuant to Article 22 of EMIR.

What?

These Guidelines apply in relation to Article 45a of EMIR, which mandates ESMA to draft guidelines further specifying the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the restricted actions referred to in Article 45a(1) of EMIR, for a period specified by the competent authority, that cannot exceed five years.

When?

These Guidelines apply from two months after the date of publication on ESMA's website in the official languages of the European Union.

II. Legislative references, abbreviations and definitions

Legislative references

CCPRRR	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), (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 ¹
EMIR	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 ²
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ³
Delegated Regulation 152/2013	Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties ⁴
Delegated Regulation 153/2013	Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties ⁵

¹ OJ L 22, 22.1.2021, p. 1–102

² OJ L 201, 27.7.2012, p. 1

³ OJ L 331, 15.12.2010, p. 84

⁴ OJ L 52, 23.2.2013, p. 37

⁵ OJ L 52, 23.2.2013, p. 41

Abbreviations

<i>CCP</i>	Central Counterparty
<i>EC</i>	European Commission
<i>ESMA</i>	European Securities and Markets Authority
<i>EU</i>	European Union
<i>OJ</i>	The Official Journal of the European Union
<i>OTC</i>	Over-the-counter
<i>RTS</i>	Regulatory Technical Standards

Definitions

Unless otherwise specified, the terms used in these Guidelines have the same meaning as in CCPRRR, EMIR, Delegated Regulation 152/2013 and Delegated Regulation 153/2013.

III. Purpose

1. These Guidelines are issued pursuant to Article 16 of ESMA Regulation and Article 45a(3) of EMIR and are addressed to the competent authorities. In accordance with Article 16(3) of ESMA Regulation, competent authorities must make every effort to comply with the Guidelines.
2. According to Article 45a of EMIR, in the case of a significant non-default event as defined in point (9) of Article 2 of CCPRRR, the competent authority may require the CCP to refrain from undertaking any of the restricted actions for a period specified by the competent authority, that cannot exceed five years. The actions the CCP shall refrain from undertaking are (a) making a dividend distribution or give an irrevocable commitment to make a dividend distribution, except for rights to dividends specifically referred to in CCPRRR as a form of compensation; (b) buy-back of ordinary shares; and (c) creating an obligation to pay variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of EMIR, discretionary pension benefits or severance packages to senior management as defined in Article 2(29) of EMIR.
3. The competent authority shall not restrict the CCP from undertaking any of the restricted actions, if the CCP is legally obliged to undertake that action.
4. The Guidelines provide competent authorities with guidance on the circumstances under which they should consider requiring the CCP to refrain from undertaking certain restricted actions to protect their capital resources. The Guidelines therefore identify indicators and elaborate on the circumstances prompting the consideration of whether to require the CCP to refrain from undertaking these actions.
5. The indicators provided in these Guidelines do not oblige competent authorities to require the CCP to refrain from undertaking any of the restricted actions nor do the Guidelines prevent competent authorities from requiring the CCP to refrain from undertaking any restricted actions where the indicators are not met, but where the competent authority has identified the necessity for a restriction to apply.

IV. Compliance and reporting obligations

Status of the Guidelines

6. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and CCPs must make every effort to comply with these Guidelines.
7. Competent authorities to which these Guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate.

Reporting requirements

8. Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities to which these Guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the Guidelines.
9. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages of their reasons for not complying with the Guidelines.
10. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

V. Guidelines on the circumstances for applying temporary restrictions in the case of a significant non-default event

Guideline 1

Where the competent authority identifies a non-default event, it should assess if the following indicator is met to determine whether the non-default event poses a significant risk to the CCP's capital and hence would justify requiring the CCP to refrain from undertaking any of the actions referred to in Article 45a(1) of EMIR:

- a) Where 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 Delegated Regulation 152/2013.

Guideline 2

Where the competent authority identifies a non-default event, it should assess if the following indicators are met to determine whether the non-default event poses a significant risk to the CCP and may adversely affect the CCP's ability to perform its critical functions, hence would justify requiring the CCP to refrain from undertaking any actions referred to in Article 45a(1) of EMIR:

- a) Where the CCP is incurring or failing to recover from a material operational event, such as a cyber-attack or natural disaster, which prevent the CCP from operating its full clearing service(s) or fulfilling all or part of its obligation towards its clearing members (including clients and indirect clients) and where this may have a financial impact in the medium-term.
- b) Where the failure of a critical third-party entity prevents or has the potential to prevent the CCPs from operating its full clearing service(s) or fulfilling all or part of its obligation towards its clearing members (including clients and indirect clients), including settlement of transactions and payments of margin calls and where this may have a financial impact in the medium-term.