



European Securities and
Markets Authority

Consultation Paper

Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures (Article 18(8) CCPRRR)



Responding to this paper

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

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- 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 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.

The collection of confidential responses is without prejudice to the scope of Regulation (EC) No 1049/2001. Possible requests for access to documents will be dealt in compliance with the requirements and obligations laid down in Regulation (EC) No 1049/2001.

Data protection

Information on data protection can be found at <https://www.esma.europa.eu/data-protection> under the heading Data Protection.

Who should read this paper?

All interested stakeholders are invited to respond to this consultation. In particular, this paper may be specifically of interest for EU central counterparties, national competent authorities in

charge of the supervision of EU central counterparties, EU authorities involved in the EU CCPs' recovery and resolution process, clearing members and clients of clearing members.



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Executive Summary

Reasons for publication

These Guidelines, developed in accordance with Article 16 of Regulation (EU) No 1095/2010 ('ESMA Regulation') pursuant to Article 18(8) of 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 ('CCP RRR')¹, are addressed to competent authorities and aim at promoting the consistent application of triggers for the decision on the application of early intervention measures set out in Article 18(1) of CCP RRR.

The Guidelines provide competent authorities with guidance on the circumstances under which they should consider the application of early intervention measures to central counterparties (CCPs). Specifically, the Guidelines clarify the triggers through the identification of indicators, to elaborate on the circumstances prompting the consideration of whether to apply early intervention measures.

Pursuant to Article 18(1) CCPRRR early intervention measures may only be triggered in three listed scenarios, the first being where a CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of Regulation (EU) No 648/2012. The early intervention measures could also be triggered where the CCP poses a risk to financial stability in the Union or in one or more of its Member States or where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, in particular its ability to provide clearing services.

The Guidelines do not oblige competent authorities to automatically apply early intervention measures where a trigger under Article 18(1) has occurred nor do the Guidelines prevent competent authorities from applying early intervention measures where one of the triggers for early intervention listed under Article 18(1) has occurred but where none of the triggers under the Guidelines applies.

Competent authorities should, in each case and within the time available, decide whether and to which extent an early intervention measure should be applied on the basis of a comprehensive assessment of both qualitative and quantitative objective elements, taking into account all circumstances and information available at such time and to the extent relevant for the CCP, or if a limited assessment is justified due to time constraints.

These draft Guidelines are issued for public consultation in order to seek the views from all interested stakeholders on these Guidelines.

Contents

Section 1 sets out the definitions and abbreviations used throughout this consultation paper and draft Guidelines, while Section 2 contains information on the background and mandate.

Section 3 contains a general description of the applicability of early intervention measures and Section 4 contains the proposed Guidelines on the consistent application of the triggers for the use of the Early Intervention Measures under Article 18(8) of CCP RRR.

Annex I sets out Article 18 of CCP RRR on Early Intervention Measures, Annex II contains the cost and benefit assessment, Annex III provides a summary of the questions and Annex IV provides for the draft Guidelines.

Next Steps

The consultation will be open until 20 September 2021. ESMA will consider the feedback received to the consultation in Q3 2021 and expects to publish the guidelines and the final report by Q1 2022.

¹ OJ L 2021:022



1 Definitions and Abbreviations

Unless otherwise specified, the terms used in this consultation paper and in these draft Guidelines have the same meaning as in CCP RRR, EMIR and the RTS 153/2013.

In addition, the following terms apply:

Annual review and evaluation	as defined in Article 21 of EMIR and further specified in the ESMA Guidelines for common procedures and methodologies on supervisory review and evaluation process of CCPs developed in accordance with Article 21(6) of EMIR
Competent authority	an authority designated by a Member State in accordance with Article 22 of EMIR
EC	European Commission
EMIR	Regulation (EU) 648/2012 of 4 July 2012 of the European Parliament and Council 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
CCP Recovery and Resolution Regulation (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) 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 ⁴
RTS 153/2013	Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties ⁵

² OJ L 201, 27.7.2012, p.1

³ OJ L 331, 15.12.2010, p. 84

⁴ OJ L 2021:022 ; <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2021:022:FULL&from=EN>

⁵ OJ L 52, 23.2.2013, p. 41



RTS 152/2013

Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties⁶

The following abbreviations are used in this consultation paper:

<i>EU</i>	European Union
<i>ESMA</i>	European Securities and Markets Authority
<i>CCP</i>	Central Counterparty
<i>ESFS</i>	European System of Financial Supervision

⁶ OJ L 52, 23.2.2013, p. 37

2 Introduction

1. The CCPRRR provides the EU's recovery and resolution framework for CCPs, bolstering the preparedness of CCPs and authorities and providing authorities with additional powers, and deals with the declining health of a CCP in a coordinated manner, thus contributing to the smooth functioning of financial markets.
2. The co-legislators adopted the regulation on recovery and resolution (CCPRRR)⁷ on 16 December 2020, which entered into force on 12 February 2021.
3. In order to preserve financial stability, it is necessary that competent authorities are able to; remedy the deterioration of a CCP's financial and economic situation before that CCP reaches a point at which authorities have no other alternative but to resolve it or to direct the CCP to change its recovery measures where they could be detrimental for overall financial stability.
4. The CCP RRR is composed of three pillars: preparation (Title III), early intervention (Title IV) and resolution (Title V). The second pillar is composed of early intervention measures specified in Article 18(1) of CCP RRR, removal of senior management and board (Article 19) and a provision of recompense to non-defaulting clearing members (Article 20).
5. The early intervention therefore constitutes a key component of supervisory action as it can prevent a weakness, identified by competent authorities, from developing into a threat to the CCP's safety and soundness. This becomes particularly true for CCP specific issues, often highly complex, (e.g. liquidity risk, prudential risk) where effective supervisory actions must be tailored to a CCP's individual characteristics, such as its size, structure, internal organisation as well as the nature, scope and complexity of the CCP's activities.
6. Many competent authorities have already in place their own approaches for early intervention in order to strengthen their capability to intervene should the situation of a CCP, in terms of capital, financial resources, liquidity, governance or prudential aspects, deteriorate, and/or present a risk for financial stability. In general, such framework of early intervention "warning signals" is complementary to the ongoing supervision of competent authorities.
7. The decision to trigger the implementation of a recovery plan should be the result of a very serious problem faced by the CCP. It is important that all different interests involved are carefully balanced. For the decision to trigger the early intervention measures, there is an additional layer of complexity to consider which is that the CCP may not have activated its recovery plans (if early intervention measures are triggered under Article 18) hence it may be assumed that the CCP itself may not consider its situation sufficiently deteriorated to require the activation of its recovery plan.

⁷ 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

8. ESMA shall promote the consistent application of the triggers for the use of the measures listed in (a) to (m) of Article 18(1), hence the triggers refer to the events, situations or scenarios, listed in Article 18(1) where the competent authority may decide to take any of the measures listed therein. The triggers, with the corresponding indicators provided for in the Guidelines, are exemplifying situations that could be seen as signalling that a check needs to be undertaken, i.e. as a checklist for competent authorities to see if the identified shortcomings of the CCP may be managed within the normal supervisory powers under EMIR or if the shortcomings are of such a magnitude that the CCPRRR should apply, and thereby envisaging the competent authority to apply the additional powers provided for under this regulation to manage the shortcomings identified.
9. Where early intervention measures are triggered under Article 18(1) of the CCPRRR, the measures listed in the Article include, for instance (the full list is set out below), restricting or prohibiting any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering an event of default, including dividend payments and buybacks by the CCP(Article 18(1)(m) RRR), or requiring the CCP to implement measures under its recovery plan (Article 18(1)(b) RRR).

- (a) require the CCP to update the recovery plan in accordance with Article 9(6) of this Regulation, where the circumstances that required early intervention are different from the assumptions set out in the initial recovery plan;
- (b) require the CCP to implement one or more of the arrangements or measures set out in the recovery plan within a specific timeframe. Where the plan is updated pursuant to point (a), those arrangements or measures shall include any updated arrangements or measures;
- (c) require the CCP to identify the causes of the infringement or likely infringement as mentioned in paragraph 1 and draw up an action programme, including suitable measures and timeframes;
- (d) require the CCP to convene a meeting of its shareholders or, if the CCP fails to comply with that requirement, convene the meeting itself. In both cases the competent authority shall set the agenda, including the decisions to be considered for adoption by the shareholders;
- (e) require one or more members of the board or senior management to be removed or replaced where any of those persons is found unfit to perform their duties pursuant to Article 27 of Regulation (EU) No 648/2012;
- (f) require changes to the business strategy of the CCP;
- (g) require changes to the legal or operational structures of the CCP;
- (h) provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP and the valuation of its assets and liabilities in accordance with Article 24 of this Regulation, including any information acquired through on-site inspections;
- (i) require, where necessary and in accordance with paragraph 4, the implementation of the CCP's recovery measures;
- (j) require the CCP to abstain from the implementation of certain recovery measures where the competent authority has determined that the implementation of those measures may have an adverse effect on financial stability in the Union or in one or more of its Member States;

(k) require the CCP to replenish its financial resources in a timely manner in order to comply or maintain compliance with its capital and prudential requirements;

(l) require the CCP to instruct clearing members to invite their clients to participate directly in auctions organised by the CCP when the nature of the auction justifies this exceptional participation. Clearing members shall inform their clients comprehensively about the auction following the instructions received from the CCP. In particular, the CCP shall specify the deadline after which it will not be possible to participate in the auction. Clients shall directly inform the CCP before this deadline of their willingness to participate in the auction. The CCP shall then facilitate the bidding process for those clients. A client shall only be authorised to participate in the auction if it is able to demonstrate to the CCP that it has set up the appropriate contractual relationship with a clearing member to execute and clear the transactions that may result from the auction;

(m) restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering an event of default, including dividend payments and buybacks by the CCP, and it may restrict, prohibit or freeze any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of Regulation (EU) No 648/2012.

3 Applicability of early intervention measures

10. In order to give competent authorities stronger capabilities to handle crises in failing CCPs Article 18(1) of the CCP RRR introduced a common set of early intervention measures in addition to the supervisory powers already granted to competent authorities in EMIR. These measures may be used by competent authorities in cases where a CCP infringes or is likely in the near future to infringe the capital and prudential requirements of EMIR, or poses a risk to financial stability in the Union or in one or more of its Member States, or where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services.

11. Article 18(8) of the CCP RRR on early intervention measures sets out ESMA's mandate:

ESMA shall, by 12 February 2022, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of this Article.

Recital 34

Early intervention powers should be conferred on competent authorities in addition to their powers provided for in the national law of Member States or under Regulation (EU) No 648/2012 for circumstances other than those considered to be early intervention. Early intervention powers should include the power to restrict or prohibit any remuneration of equity and instruments treated as equity, including dividend payments and buybacks by the CCP, to the fullest extent possible without triggering an event of default, and also the power to restrict, prohibit or freeze any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management.

Article 18

1. Where a CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of Regulation (EU) No 648/2012, or poses a risk to financial stability in the Union or in one or more of its Member States, or where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services, the competent authority may:

[...]

8. ESMA shall, by 12 February 2022, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of this Article.

12. ESMA notes that the early intervention measures sit within the CCPRRR regulatory framework and not within EMIR. This indicates that the early intervention measures should be applied within the scope of CCPRRR. This indicate the stage at which the early intervention measures add value to the management of the CCP, i.e. where the situation of the CCP is of such severeness that the supervision powers under EMIR need to be complemented by the powers provided to the competent authorities under the early intervention measures under CCPRRR.

13. ESMA further notes that the Recital 34 of CCPRRR states that:

Early intervention powers should be conferred on competent authorities in addition to their powers provided for in the national law of Member States or under Regulation (EU) No 648/2012 for circumstances other than those considered to be early intervention.

14. This indicates that the early intervention measures are deemed as an additional tool at the disposal of the competent authorities, and they are complementary to the powers assigned to them to fulfil their daily supervisory tasks under EMIR. The competent authority possesses the power under Article 18(1), to require the CCP to undertake certain early intervention measures as listed therein.

15. ESMA noted in its assessment that recovery is initiated by the CCP, as Article 9(7)⁸ states that where a CCP intends to activate its recovery plan, it shall notify the competent authority. The article further notes that the competent authority may require the CCP to refrain from taking that measure where the recovery measure that the CCP intends to take may cause significant adverse effects to the financial system or is unlikely to be effective. Finally, there is a reference to early intervention measures, noting that where the CCP either takes measures provided for in their recovery plan despite the fact that the relevant indicators have not been met, or refrain from taking measures provided for in their recovery plan despite the fact that the relevant indicators have been met, the competent authority

⁸ Where a CCP intends to activate its recovery plan, it shall notify the competent authority of the nature and magnitude of the problems it has identified, setting out all relevant circumstances and indicating the recovery measures or other measures it intends to take to address the situation as well as the envisaged time-frame to restore its financial soundness by use of those measures. Where the competent authority considers that a recovery measure that the CCP intends to take may cause significant adverse effects to the financial system or is unlikely to be effective, it may require the CCP to refrain from taking that measure.

shall immediately assess whether the circumstances require the use of early intervention powers in accordance with Article 18. Hence, notwithstanding the power to apply early intervention measures under Article 18(1) of CCPRRR, the competent authority may also apply early intervention measures under Article 9 of CCPRRR as set out above.

16. Triggers refers to the events, scenarios or situations as listed under Article 18(1) where the CCP either infringes certain requirements or poses a risk to financial stability or where, in the view of the competent authority, the operations of the CCPs may be affected. ESMA understands that these Guidelines should promote the consistent application of such triggers for the use of the early intervention measures listed in (a) to (m) of Article 18(1), therefore the Guidelines sets out indicators for the triggers, to ensure that competent authorities apply the triggers in the same way to assess and decide on the application of early intervention measures. However, the final decision whether to apply the early intervention measures or not remains with the competent authority.
17. Where the conditions under Article 18(1) are met the competent authority shall notify ESMA and the resolution authority and consult the supervisory college *on the envisaged measures provided for in that paragraph*.
18. ESMA notes that for early intervention measures to apply, one of the triggers for assessment under Article 18(1) and as further clarified in these Guidelines, should have occurred and in addition the competent authority should have decided that the event is of such a significance that at least one of the early intervention measures are envisaged to apply or that none of the triggers under the Guidelines has occurred but the competent authority still has decided that the application of Article 18(1) is triggered and at least one of the early intervention measures is envisaged to apply.
19. ESMA also notes that while not required by CCPRRR, in a context of good cooperation between the competent authority and the supervisory college, the competent authority could inform the supervisory college of events, scenarios or situations considered to have triggered an assessment under Article 18(1), as this may be seen as an early sign of deterioration of the situation of the CCP, even where the decision of the competent authority has been not to activate the procedure for applying any early intervention measures.
20. ESMA also notes that the powers of early intervention measures include the power to restrict or prohibit any remuneration of equity and instruments treated as equity, including dividend payments and buybacks by the CCP in Article 18(1)(m), which should be read in conjunction with the possibility for competent authorities under Article 45a⁹ of EMIR and

⁹ Temporary restrictions in the case of a significant non-default event

1. In the case of a significant non-default event as defined in point (9) of Article 2 of Regulation (EU) 2021/23, the competent authority *may require* the CCP to refrain from any of the following actions for a period specified by the competent authority, that cannot exceed five years:

- (a) making a dividend distribution or give an irrevocable commitment to make a dividend distribution, except for rights to dividends specifically referred to in Regulation (EU) 2021/23 as a form of compensation;
- (b) buy-back of ordinary shares;
- (c) creating an obligation to pay variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of this Regulation, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of this Regulation.



the obligation of the competent authorities under the second subparagraph of Article 9(8)¹⁰ of CCPRRR, to undertake a similar restriction on distribution of dividends.

3.1 Assessing the need for early intervention measures

21. ESMA notes that where the competent authority assesses the triggers, to decide if to apply any early intervention measures, the information it holds will differ from the information the CCP holds in its assessment on the possible activation of its recovery plan, hence the triggers will be drafted with this in mind.
22. ESMA also notes that some of the early intervention measures involve activating the CCP's recovery plan, which also indicates that the processes of recovery and early intervention measures are interlinked.

3.1.1 The assessment of severeness

23. Supervision of the CCP is conducted under EMIR and where a circumstance of a certain magnitude or importance is detected, the additional powers under the CCPRRR apply, such as recovery measures (applied by the CCP) and early intervention measures (applied by the competent authority) to ensure signs of distress are captured early enough to safeguard the financial system.

“In order to preserve financial stability, it is necessary that competent authorities are able to remedy the deterioration of a CCP's financial and economic situation before that CCP reaches a point at which authorities have no other alternative but to resolve it or to direct the CCP to change its recovery measures where they could be detrimental for overall financial stability. Competent authorities should therefore be granted early intervention powers to avoid or minimise adverse effects on financial stability or on the interests of clients that could result from the CCP's implementation of certain measures.”¹¹

24. This is further supported by the approach taken by the Commission in its Proposal (sec.4.2.5) for RRR where it is stated “Competent authorities are granted specific powers to intervene in the operations of CCPs where their viability is at risk but before they reach the point of failure or where their actions may be detrimental for overall financial stability. The powers would complement those in EMIR, constituting specific supervisory options in these circumstances.”
25. To complement the restrictedness of the application of early intervention measures the competent authority shall only apply them after taking account of the impact of those measures in other Member States where the CCP operates or provides services and after informing the relevant competent authorities, in particular where the CCP's operations are critical or important for local financial markets, including the places in which clearing

¹⁰ Where the competent authority is informed in accordance with the first subparagraph of paragraph 7 of this Article, it shall restrict or prohibit any remuneration of equity and instruments treated as equity, including dividend payments and buybacks by the CCP, to the fullest extent possible without triggering an event of default, and it may restrict or prohibit any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of Regulation (EU) No 648/2012.

¹¹ Recital 34 of RRR

members, linked trading venues and FMIs are established. In addition the competent authority shall apply the early intervention measures of implementing the CCP's recovery measures only where that measure is in the public interest and is necessary to achieve certain objectives such as maintaining (a) the financial stability in the Union or in one or more of its Member States, (b) the continuity of the critical functions of the CCP and access to critical functions on a transparent and non-discriminatory basis, or (c) maintaining or restoring the financial resilience of the CCP. Hence. ESMA notes that to employ the early intervention measures, the situation would need to contain a degree of severeness such as an emerging crisis as referred to under Article 18(1).

Article 18

3. The competent authority shall only apply the measures in points (a) to (m) of paragraph 1 after taking account of the impact of those measures in other Member States where the CCP operates or provides services and after informing the relevant competent authorities, in particular where the CCP's operations are critical or important for local financial markets, including the places in which clearing members, linked trading venues and FMIs are established.

4. The competent authority shall apply the measure in point (i) of paragraph 1 only where that measure is in the public interest and is necessary to achieve any of the following objectives:

- (a) to maintain the financial stability in the Union or in one or more of its Member States;
- (b) to maintain the continuity of the critical functions of the CCP and access to critical functions on a transparent and non-discriminatory basis;
- (c) to maintain or restore the financial resilience of the CCP.

The competent authority shall not apply the measure in point (i) of paragraph 1 in relation to measures involving the transfer of property, rights or liabilities of another CCP.

26. Having regard to the above, it can be concluded that early intervention measures exist in parallel to the supervisory powers attributed to the competent authorities under EMIR. Hence, these measures are without prejudice to and supplement the powers under EMIR. In that respect it is therefore likely that the actual detection of the triggers that would lead to applying the early intervention measures will take place in the course of the daily supervision of the CCPs under EMIR. However, the application of the early intervention measures itself should take place under CCPRRR and under those circumstances prescribed by CCPRRR and would require that the circumstance is of a severe and serious type, rather than mere deviations from the prudential or capital obligations under EMIR.

3.1.2 The CCP infringes capital or prudential requirements

27. ESMA notes that by referring to "infringes, or is likely to infringe in the near future", the situation referred to is where the CCP has, in the view of the competent authority, infringed the capital and prudential requirements of EMIR, including the cases where the CCP has not yet activated its recovery plan. The reference to "likely to infringe in the near future" requires the competent authority to be of the view that it is not only a risk that the CCP

infringes but it is likely that the CCP infringes in the future, even if not yet, hence here the situation requires an amount of certainty of this to occur. The competent authority may deem immediate action as required to minimise the risk of the CCP actually infringing its capital and prudential requirements or posing a risk to financial stability.

28. To conclude, the circumstance that triggers the assessment and decision on the application of an early intervention measure is referred to as an infringement or likely infringement, however the significance of the infringement is not referred to as a requirement under Article 18 of CCPRRR. This means that even a less significant infringement could trigger an assessment to decide on the application of an early intervention measure. However for an early intervention measure to be justified and applied the effect of the event has to pose a severe risk to the CCP and where the competent authority determines that the powers under CCPRRR should be applied to complement the supervisory powers under EMIR to achieve the result to remedy the deterioration of a CCP's financial and economic situation before that CCP reaches a point at which authorities have no other alternative but to resolve it. This is reflected in Guideline 1, aimed to ensure that the competent authority should consider the severeness of the infringement, as all infringements may not require a decision as to the application of early intervention measures. In addition, the competent authority would be bound by the requirements set out under paragraphs 3 and 4 of Article 18 of CCP RRR.

3.1.3 The CCP poses a risk to financial stability in the Union or in one or more of its Member States

29. The envisaged circumstance in this section refers to the CCP posing a risk to the financial stability in the Union or one of its Member States. There is no requirement of an actual or potential infringement, instead the event detected by the competent authority requires a risk for the financial stability to be present for the competent authority to assess if early intervention measures should be applied.
30. ESMA presents in the Guidelines the main aspects to bear in mind in undertaking the assessment if the event qualifies as posing a risk to the financial stability in the Union or one of its Member States.

3.1.4 Indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services

31. The last circumstance captures an emerging crisis that could affect the operations of the CCP, but again with significant consequences: a crisis affecting the operations of the CCP, and in particular its ability to provide clearing services.
32. ESMA has developed indicators clarifying the triggers where it is considered suitable for the competent authority to assess if early intervention measures should be applied, such as where the CCP's financial or operational viability is negatively affected and where this could primarily affect the CCP's ability to provide clearing services.

3.2 Scope of Mandate

33. ESMA is mandated to foster sound and effective supervision and to drive supervisory convergence across the EU under its founding regulation (ESMA Regulation). ESMA has been assigned a mandate under Article 18(8) CCPRRR to issue Guidelines promoting the consistent application of the triggers for the use of the measures referred to in Article 18(1) of the CCP RRR.
34. Assessment of the compliance of a CCP with the requirements laid down in EMIR, RTS 153/2013 and RTS 152/2013 is also the focus of competent authorities as specified in Article 22 of EMIR. Given that competent authorities shall apply supervisory measures where there is evidence that a CCP does not meet or is likely to infringe the requirements laid down in EMIR, RTS 153/2013 and RTS 152/2013, there is a clear link between the objective elements prompting the application of both supervisory and early intervention measures. Hence, the assessment of whether a CCP 'infringes or is likely to infringe' the capital and prudential requirements of EMIR is primarily done by competent authorities based on their ongoing supervision and comprehensive annual review and evaluation, as described in Article 21 of EMIR and further specified in ESMA Guidelines on common procedures and methodologies on supervisory review and evaluation process of CCPs, developed in accordance with Article 21(6) of EMIR.
35. In addition, as noted above, early intervention measures can be triggered on the basis of other circumstances which may not be immediately factored into the outcomes of the annual review and evaluation. In particular, they can be triggered by the identification of a risk to the financial stability in the Union or in one or more of its Member States. Lastly, early intervention measures could be triggered by other indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services.
36. These Guidelines provide competent authorities with guidance on the circumstances under which they should consider the application of early intervention measures towards CCPs.
37. The objective of introducing these triggers is to assist competent authorities when deciding whether and to what extent to apply early intervention measures, thereby fostering a consistent approach to the triggers across the European Union (i.e. ensure convergence at EU level). The set of triggers described in these Guidelines does not oblige competent authorities to automatically apply early intervention measures nor prevent competent authorities from applying early intervention measures where the competent authorities have identified a clear need for an early intervention and where one of the situations specified under paragraph 1 of Article 18 CCPRRR applies but where no trigger under the Guidelines for early intervention measure has been identified.
38. The triggers for the decision on whether to apply early intervention measures provided in these Guidelines refer to the application of any or all of the measures listed in Article 18(1) of the CCP RRR, without specifying which circumstance would trigger which specific measure.



39. These Guidelines should be read in conjunction with other regulatory instruments developed by ESMA pursuant to the CCP RRR as well as with the ESMA Guidelines on common procedures and methodologies on supervisory review and evaluation process of CCPs, developed in accordance with Article 21(6) of EMIR.

4 ESMA Draft Guidelines on triggers for the use of early intervention measures

4.1 ESMA's Mandate

40. Article 18(8) of the CCP RRR on early intervention measures sets out ESMA's mandate:

ESMA shall, by 12 February 2022, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of this Article.

4.2 Status of these Guidelines

41. These Guidelines will be issued in accordance with Article 16 of ESMA Regulation and will be addressed to competent authorities. In accordance with Article 16(3) of ESMA Regulation, competent authorities must make every effort to comply with the Guidelines.
42. ESMA Guidelines specify ESMA's view of appropriate supervisory practices within the ESFS or of how EU law should be applied in a particular area. ESMA therefore expects all competent authorities to which the Guidelines are addressed to comply with the Guidelines. Competent authorities to which the Guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes).

4.3 Reporting requirements

43. Pursuant to Article 16(3) of ESMA Regulation, competent authorities must inform ESMA of whether they (i) comply, (ii) do not comply but intend to comply, or (iii) do not comply and do not intend to comply with these Guidelines. In case of non-compliance, competent authorities must state their reasons for non-compliance, within two months from 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.
44. A template for such notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.

4.4 Subject Matter

45. According to Article 18(1) of the CCPRRR, in situations where a CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of EMIR, or poses a

risk to financial stability in the Union or in one or more of its Member States, or where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services, competent authorities shall have at their disposal at least the set of early intervention measures listed in Article 18(1) of the CCP RRR. Pursuant to Article 18(8) of the CCP RRR, these Guidelines promote the consistent application of the triggers for the use of such early intervention measures.

46. The assessment of whether an event, scenario or situation qualify as a trigger under Article 18(1) is carried out by competent authorities based on their comprehensive assessment, including their ongoing supervision and their annual review and evaluation, as further specified in the ESMA Guidelines on common procedures and methodologies on supervisory review and evaluation process of CCPs, developed in accordance with Article 21(6) of EMIR.

4.5 Clarification of triggers and assessment for applying early intervention measures

47. The competent authority may, in accordance with Article 18(1) of CCPRRR, decide to undertake any of the early intervention measures as set out in (a) to (m) of this Article, where a CCP for example infringes, or is likely to infringe in the near future, the prudential requirements of Regulation (EU) No 648/2012.
48. ESMA shall promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of Article 18 of CCPRRR.
49. ESMA notes that the infringement itself of a capital or prudential requirement would be covered under Article 18(1) of CCPRRR, hence the aim of the Guidelines should be to provide further clarification on two aspects, one is that the competent authority should consider the severeness of the infringement as set out in Guideline 1, as all infringements may not require a decision as to the application of early intervention measures and secondly, the Guidelines provide for further specification as to the relevant articles under EMIR that should be considered in the assessment.
50. ESMA has therefore concluded that where there is *an infringement* of capital or prudential requirement, this trigger would need less clarifications and there would be a limited need for further guidance to ensure a consistent application of the trigger by the competent authority. Hence ESMA has only stated the relevant Article to be considered for each capital or prudential requirement. However, for an infringement to directly trigger a decision on the application of the early intervention measure, this would most likely be considered as disproportionate, hence ESMA provides guidance to promote a consistent application of those triggers by applying a procedure as set out in Guideline 1, to assess the severeness of the infringement to cater for a consistent application of the triggers for infringements.
51. ESMA further notes that the trigger “likely to infringe in the near future” would benefit from further guidance to promote the consistent application of the triggers for the use of early

intervention measures, hence ESMA has provided guidance using the concept of “deterioration” as a guiding principle for the assessment to be undertaken by the competent authority. Also, these triggers are subject to the procedures as set out in Guideline 1, to assess the severeness of the infringement to cater for a consistent application of the triggers.

52. Meeting the triggers identified in these draft Guidelines should prompt the competent authorities, as further specified under Guideline 1:

- a. to further investigate the situation, if the cause of the event triggering the possible use of the early intervention measure(s) is not yet known, and
- b. to make a decision whether to apply early intervention measures taking into account the urgency of the situation and the magnitude of the event and considering whether the circumstance may, in the reasonable opinion of the competent authority, for example result in market wide effects, hence early intervention measures would be justified to complement any supervisory action under EMIR to manage the situation of the CCP.

53. Any material deterioration or anomalies identified through the monitoring of indicators should promptly be considered for further investigation. Specifically, the competent authorities should determine their cause, assess the materiality of the potential impact on the CCP and document the cause and outcome of the assessment. Where a CCP’s prudential indicators deteriorate significantly competent authorities should take a decision on whether to apply early intervention measures.

54. Competent authorities should, in each case and within the time available, decide whether an early intervention measure should be applied on the basis of a comprehensive assessment of both qualitative and quantitative objective elements, taking into account all circumstances and information available at such time and to the extent relevant for the CCP, or if a limited assessment is justified due to timing constraints. Hence, depending on the significance of the deterioration or anomalies in prudential indicators, their causes and the materiality of the potential prudential impact on the CCP, competent authorities, in the interest of time, may decide to apply early intervention measures immediately upon determination of the cause and the overall impact of the anomaly.

55. Where a deterioration or anomaly has been identified and hence triggered an assessment of the possible use of early intervention measures, the outcomes of such investigations and decisions on the possible application of early intervention measures (including the reasons for not taking a measure), should be clearly documented by the competent authorities in accordance with general supervisory procedures.

56. ESMA considers that investigations and assessments undertaken by a competent authority in line with these Guidelines would benefit from being noted in the annual review of the CCP.

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

4.6 Procedure for assessment of triggers and corresponding indicators

4.6.1 Guideline 1 Procedure

57. Where one of the events, scenarios or situations as listed under Article 18(1) of CCPRRR has occurred and where it, in the view of the competent authority applying these Guidelines, considers that such an event, scenario or situation would trigger the assessment under Article 18(1) for the application of early intervention measures, the competent authority should;

- a. further investigate the situation;
- b. assess the severity of the event, scenario or situation, by considering whether the event, scenario or situation poses a significant risk to the CCP, may adversely affect the CCP's overall viability or may be detrimental for overall financial stability; and
- c. decide on the application of an early intervention measure taking into account;
 - the urgency of the situation,
 - the magnitude of event,
 - the overall viability of the CCP; and
 - if the event, scenario or situation could be detrimental for the financial stability in the Union or in a member State.

This assessment shall take place before or at the same time as the competent authority undertakes the requirements provided for under paragraphs 3 to 7 under Article 18 of CCPRRR, such as the consultation of the supervisory college.

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

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

58. When assessing if a CCP will pose a risk to the financial stability of the Union or one of its Member States as referred to in Guidelines 5 and 6, the competent authority should consider the (i) nature and complexity, (ii) size and market share, (iii) concentration and (iv) interoperability and interconnectedness of the CCP, to assess if the situation detected at the CCP gives rise to financial stability concerns, i.e. the systemic magnitude of the situation at the CCP.

The competent authority may consider the following parameters in its assessment:

- a. With respect to the CCP's **nature and complexity**, (i) the countries where the CCP provides or intends to provide clearing services; (ii) the extent to which the CCP

provides other services in addition to clearing services; (iii) the type of financial instruments cleared or to be cleared by the CCP; (iv) whether the financial instruments cleared or to be cleared by the CCP are subject to the clearing obligation under Article 4 of Regulation (EU) No 648/2012.

- b. With respect to the **size and market share** of the CCP within the Union, or even within the economy of each Member State, competent authorities should consider, (i) for each EU currency, the volumes cleared by the CCP per asset class, both in absolute and relative values (compared to volumes of instruments in such currency cleared across all CCPs), (ii) the maximum amount of margins collected by the CCP (iii) the estimated largest payment obligation on a single day in total that would be caused by the default of any one or two largest single clearing members (and their affiliates) in extreme but plausible market conditions and (iv) the amount of total liquid financial resources committed to the CCP by entities established in the Union or that are part of a group subject to consolidated supervision in the Union.
- c. With respect to **concentration**, the significant concentration of a CCP with respect to the EU financial system or any of its member state can be measured by:
 - The absolute and relative exposures (open interest of securities transactions, securities financing transactions and exchange traded derivatives; and notional outstanding of OTC derivatives transactions) born by EU clearing members of the CCP and born by clearing members of each Member State;
 - The absolute and relative levels of margins, default funds and liquid resources provided by EU clearing members of the CCP and provided by clearing members of each Member State.
- d. Where indicators reveal a strong **interoperability or interconnectedness** between the CCP and another CCP or other FMIs within the financial system in one or more of the Member States, the competent authorities should consider if the event that triggered the assessment for the application of early intervention measures is posing a risk (or likely to pose a risk) to the financial stability within the Union or one of its Member States.

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.

4.7 Trigger based on EMIR capital requirements

59. In accordance with ESMA Guidelines on common procedures and methodologies on supervisory review and evaluation process of CCPs, competent authorities should use the below articles to assess potential infringements of capital requirements.

EMIR	Supplementing RTS
Article 16	RTS 152/2013 articles 1 to 5

60. In accordance with Article 16 of EMIR and articles 1 to 5 of RTS 152/2013, a CCP should hold at all times a sufficient amount of capital, including retained earnings and reserves, to ensure an orderly winding-down, and cover for the CCP's credit, counterparty, market, operational, legal and business risks which are not covered through the default waterfall.

4.7.1 Guideline 3 Trigger on capital requirements

61. The competent authority may in accordance with Article 18 of CCPRRR decide to undertake any of the early intervention measures as set out in (a) to (m) of this Article, where a CCP infringes, or is likely to infringe in the near future, the capital requirements of EMIR.

62. The indicators that should be used when assessing whether the CCP is *likely to infringe in the near future* the capital requirements of EMIR are listed below and are to be monitored by the competent authorities. The below indicators are designed to identify a likely infringement due to a worrying deterioration of the CCP's capital.

63. Triggers for capital requirements

The first trigger in respect of capital requirements is where the CCP *infringes* the requirement under Article 16 of EMIR and Articles 1 to 5 of RTS 152/2013.

The second trigger in respect of capital requirements is where the CCP is *likely to infringe in the near future* the requirement under Article 16 of EMIR and articles 1 to 5 of RTS 152/2013.

Indicators for the second trigger should be met, for example:

- a) Where a realised, estimated or forecasted loss will reduce the CCP's capital level below the notification threshold referred to in Article 1(3) of RTS 152/2013 and where it is likely that the capital requirements are likely to be infringed with the passing of time.
- b) Where a realised, estimated or forecasted loss results or is likely to result in a significant deterioration of the CCP's capital, without triggering the notification threshold and resulting from either:
 - a gradual loss of the capital over a period of time where the reason for the deterioration is considered very likely to continue to reduce the capital of the CCP at a significant pace, hence it is likely that the CCP will infringe its notification threshold with the passing of time; or
 - a significant sudden or expected loss where it is likely that the CCP will infringe the notification threshold in the near future.

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

4.8 Trigger based on EMIR prudential requirements

64. In accordance with ESMA Guidelines on common procedures and methodologies on supervisory review and evaluation process of CCPs, competent authorities should use the requirements set out in the articles listed below to assess infringements or likely infringements of prudential requirements.

	Prudential requirements [Chapter 3 of EMIR]	EMIR	Supplementing RTS 153/2013
B	Exposure Management	Article 40	
C	Margin requirements	Article 41	Articles 24 to 28
D	Default Fund	Article 42	Articles 29 to 31
D	Other financial resources	Article 43	
E	Liquidity risk controls	Article 44	Articles 32 to 34
F	Default waterfall	Article 45	Articles 35 to 36
G	Collateral requirements	Article 46	Articles 37 to 42
H	Investment Policy	Article 47	Articles 43 to 46
I	Default procedures	Article 48	
J	Review of models, stress testing and back testing	Article 49	Articles 47 to 61
K	Settlement	Article 50	

65. Where there is an infringement or likely infringement (in the near future) of Articles 40-50 of EMIR and Articles 24-61 of RTS 153/2013 this will trigger an assessment by the competent authority of whether to decide to apply early intervention measures. The list of triggers set out below is to ensure the competent authorities react in a similar way to the signs of significant concerns that may appear and be noted during the supervision of the CCP.

4.8.1 Guideline 4 Trigger on prudential requirements

66. The competent authority may in accordance with Article 18 of CCPRRR decide to undertake any of the early intervention measures as set out in (a) to (m) of this Article, where a CCP infringes, or is likely to infringe in the near future, the prudential requirements of EMIR.

67. The indicators that should be used when assessing whether the CCP is *likely to infringe in the near future* any of the prudential requirements under EMIR are listed below and are to be monitored by competent authorities. Where one of them is met, the competent authority should assess whether to decide on potentially applying early intervention measures. The indicators are designed to identify any likely infringement of the prudential aspects of the CCP due to a sudden, significant or material deterioration.

68. Triggers for prudential requirements

A. Exposure management:

The first trigger in respect of prudential requirements is where the CCP *infringes* the requirement under Article 40 of EMIR to measure and assess its liquidity and credit exposures to each clearing member.

The second trigger in respect of prudential requirements is where the CCP *is likely to infringe in the near future* the requirement under Article 40 of EMIR to measure and assess its liquidity and credit exposures to each clearing member.

An indicator for the second trigger should be met, for example, where the CCP shows a sudden and significant deterioration or a continued deterioration in the measurements and assessments undertaken by the CCP, measured by indicators such as (but not limited to):

- a) difficulties in consolidating trades of clearing members;
- b) issues in confirming positions and/or settling transactions;
- c) establishing valid price sources, difficulties in price reconciliation or the prices lacks details or stale prices are increasingly detected;
- d) operational incidents hindering the calculation or the collection of collateral requirements increase in magnitude or in frequency;

and where any of the above detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for exposure management.

B. Margin Requirements:

The first trigger in respect of margin requirements is where the CCP *infringes* the requirements *under Article 41 of EMR or Articles 24 to 28 of RTS 153/2013*.

The second trigger in respect of margin requirements is where the CCP *is likely to infringe* in the near future the requirement under Article 41 of EMR or Articles 24 to 28 of RTS 153/2013;

An indicator for the second trigger should be met, for example, where the CCP shows a sudden and significant deterioration or a continued deterioration in its margin management and in particular in its margin calls, measured by indicators such as (but not limited to):

- a) where there are repeated issues such as mistakes in margins calls as noted by back-testing or the requested margin calls do not reflect the volatility of the market; or
- b) where changes in the market may result in a longer default management time horizon, higher bid-ask spreads or concentrated positions and where these changes are not reflected and mitigated in the margins of the default management protocol, with the result that the overall margins may be inadequate in the event where the CCP needs to liquidate a portfolio.

C. Default fund and other financial resources

The first trigger in respect of the default fund requirements and for other financial resources is where the CCP *infringes* the requirements under Article 42 of EMIR or Articles 29 to 31 of RTS 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of RTS 153/2013.

The second trigger in respect of the default fund requirements and for other financial resources is where the CCP *is likely to infringe in the near future* the requirements under Article 42 of EMIR or Articles 29 to 31 of RTS 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of RTS 153/2013.

An indicator for the second trigger should be met, for example, where the default fund and/or other resources are considered significantly inadequate. This could be evidenced by the CCP internal stress-test result i.e. its ability to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members and the reason for this result is not likely to be corrected by the CCP within the timeframes established.

D. Liquidity risk controls

The first trigger in respect of the liquidity risk controls requirements is where the CCP *infringes* the requirements under Article 44 of EMIR or Articles 32 to 34 of RTS 153/2013.

The second trigger in respect of the liquidity risk controls requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 44 of EMIR or Articles 32 to 34 of RTS 153/2013.

An indicator for the second trigger should be met, for example, where the liquidity position of the CCP deteriorates within a short period of time, and the reason for this deterioration is considered very likely to continue to reduce the liquidity available to the CCP at a significant amount and speed. The causes for this may include the withdrawal of service agreements or providers, increased liquidity requirements not met by increased liquidity provisions, or the deterioration of collateral quality.

E. Default waterfall

The first trigger in respect of the default waterfall requirements is where the CCP *infringes* the requirements under Article 45 of EMIR or Articles 35 to 36 of RTS 153/2013.

The second trigger in respect of the default waterfall requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 45 of EMIR or Articles 35 to 36 of RTS 153/2013.

An indicator for the second trigger should be met where, for example, there are issues such as a legal risk affecting the enforceability of the waterfall.



F. Collateral requirements

The first trigger in respect of the collateral requirements is where the CCP *infringes* the requirements under Article 46 of EMIR or Articles 37 to 42 of RTS 153/2013.

The second trigger in respect of the collateral requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 46 of EMIR or Articles 37 to 42 of RTS 153/2013.

An indicator for the second trigger should be met where, for example, the CCP shows a continued deterioration in the management of its collateral requirements, measured by indicators such as (but not limited to) where the CCP has on several occasions mismanaged its collateral requirements or applies inadequate haircuts, potentially evidenced by the CCP's back-tests against market moves and any of those detected deteriorations are repeated or increasing and with time, there is a clear risk that the CCP will infringe its collateral requirements.

G. Investment

The first trigger in respect of the investment policy requirements is where the CCP *infringes* the requirements under *Article 47 of EMIR or Articles 43 to 46 of RTS 153/2013*.

The second trigger in respect of the investment policy requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 47 of EMIR or Articles 43 to 46 of RTS 153/2013.

An indicator for the second trigger should be met where, for example;

- a) the CCP shows a continued deterioration in relation to investments and the management of the investment policy requirements, where, with time, there is a clear risk that the CCP will infringe its investment policy requirements or affect its capital position, potentially evidenced by:
 - i. a lack of involvement by the CCP in recent investment decisions,
 - ii. insufficiency in applying investment processes,
 - iii. shortfalls in the monitoring of the CCP's investments,
 - iv. erroneous booking of investment trades,
 - v. ineffective monitoring of the arrangements or the credit quality of its financial counterparties or financial service providers, or
 - vi. concerns on the possibility to liquidate the investments with minimal adverse price effect;

and where any of those detected deteriorations are repeated or increasing; or



- b) the CCP experiences investment losses either regularly or rapidly, and the build-up of losses is likely to challenge the capital position of the CCP.

H. Default procedures

The first trigger in respect of the default procedures requirements is where the CCP *infringes* the requirements under Article 48 of EMIR.

The second trigger in respect of the default procedures requirements is where the CCP is *likely to infringe in the near future* the requirements under Article 48 of EMIR.

An indicator for the second trigger should be met, for example, where the CCP shows a continued deterioration in its management of the default procedures, measured by indicators such as (but not limited to) where;

- a) the CCP repeatedly fails to undertake actions to improve its default procedures further to the identification of shortcomings in these procedures;
- b) the approach taken by the CCP to ensure enforceability of the default procedures is subject to shortcomings or is not working; or
- c) the CCP's efforts to assess the transfer is lacking details,

and where any of those detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for default procedures.

I. Review of models, stress testing and back testing

The first trigger in respect of the requirements for review of models, stress testing and back testing controls is where the CCP *infringes* the requirements under Article 49 of EMIR or Articles 47 to 61 of RTS153/2013.

The second trigger in respect of the requirements for review of models, stress testing and back testing controls is where the CCP *is likely to infringe in the near future* the requirements under Article 49 of EMIR or Articles 47 to 61 of RTS153/2013.

An indicator for the second trigger should be met, for example, where the CCP shows a continued deterioration in its management of the review of models, stress testing and back testing, measured by indicators such as (but not limited to):

- a) the CCP, models do not preform adequately evidence by stress tests and back tests;
- b) there are signs that the frequency of applying stress tests/back tests are reducing;
- c) there are concerns identified in relation to the independency of the reviews; or

- d) the input used in its stress testing are not quality checked, vague, subject to interpretation and is therefore leading to less detailed or precise outcomes,

and where any of those detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for the review of stress testing and back testing.

J. Settlement

The first trigger in respect of the settlement requirements is where the CCP *infringes* the requirements under Article 50 of EMIR and Articles 50a-d of EMIR.

The second trigger in respect of the settlement requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 50 of EMIR and Articles 50a-d of EMIR.

An indicator for the second trigger should be met where, for example;

- a) the CCP does not meet, or there is a clear risk that the CCP will not meet, its settlement obligations in any of the relevant currencies as they fall due and where any of those detected failures are not remedied within a given time period, is significant, repeated or increasing, and where, with time, there is a clear risk that the CCP will infringe its obligation under EMIR; or
- b) the CCP shows a continued deterioration in its management of the settlement liabilities of the CCP, for example where the CCP is not continuously exploring the possibility to use central bank money or where the steps taken by the CCP to strictly limit cash settlement risks are less efficient, and where any of those detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for default procedures.

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.

4.9 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

69. The third type of triggers are where the CCP poses a risk to the financial stability in the Union or in one or more of its Member States or that there are indications of an emerging crisis situation that could affect the operations of the CCP and in particular its ability to provide services.

70. ESMA has concluded that it is not possible to list all aspects of the scenarios or situations that can be considered to trigger an assessment of possible events posing a risk to the Union or a Member State, hence all such material discoveries of infringements, breaches or near-breaches, shortfalls of EMIR or other applicable rules and other identified

mismanagements (other than under those captured under Guideline 3 and 4) or other concerning discoveries will be considered as **identified concerns** where they are material, 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.

71. The indicators are designed to capture identified concerns where it would be advisable for the competent authority to initiate its assessment and decide on the application of early intervention measures.

4.9.1 Guideline 5 Trigger in relation to identified concerns of EMIR compliance

72. Trigger on identified concerns of EMIR compliance

The indicators for the trigger on EMIR compliance are listed below and are to be monitored by competent authorities. Where one of them is met, the competent authority should assess and decide on the potential application of early intervention measures.

An indicator should be met, for example, where:

- a. an identified concern is material, left unresolved, repeated or increasing;
- b. there are clear signs that the CCP is likely to fail to undertake material corrections of findings as requested by the competent authority in relation to the relevant EMIR requirements; or
- c. there are clear signs that:
 - i. the CCP will fail, or there is a significant risk that the CCP will fail, to make when due, material payments;
 - ii. the CCP will fail, or there is a significant risk the CCP will fail, to comply with core agreement or perform material obligations as they fall due;
 - iii. the CCP makes its payments with an increased delay.

and where any of those detected failures or concerns are not remedied within a given time period, is significant, repeated or increasing, and with the passing of time,

- there is a clear risk that the CCP will pose a risk to the financial stability of the Union or one of its Member States; or
- there is a clear risk that the identified concern will, or is likely to, negatively affect the CCP's ability to perform its clearing services in the Union or one of its Member States.

An **identified concern** means any material discoveries of infringements, breaches, near-breaches shortfalls in its application of EMIR or other applicable rules and other

identified mismanagements or other concerning discoveries as to the CCP's ongoing compliance with the EMIR requirements and where the discovery is not covered by Guidelines 3 and 4.

4.9.2 Guideline 6 Trigger in relation to a CCP's impact on other entities with risks to the financial stability

73. Trigger on a CCP's impact on other entities with risks to the financial stability

The indicators for the trigger on a CCP's impact on other entities with risks to the financial stability are listed below and are to be monitored by competent authorities and where one of them is met, to be assessed by the competent authority to decide on the application of early intervention measures.

An indicator should be met, for example, where:

- a) the CCP's margins and collateral policies may lead to procyclicality and creating liquidity issues at the clearing members (including clients and indirect clients);
- b) an operational incident of the CCP that may materially adversely affect (i) the services of other FMIs or (ii) other entities such as exchanges or matching platforms has happened or is likely to happen;
- c) the amount of liquid resources the CCP is able to claim whether in BAU or in a default scenario is likely to pose a threat to the stability of a counterparty required to provide such resources to the CCP; or
- d) the CCP is inflicting or likely to inflict a cost or a requirement on clearing members that will put at risk the access to clearing for such members of the affected services.

and if the identified issue is left unresolved, is repeated or increasing and where, with time, there is a clear risk that the CCP will pose a risk to the financial stability of the Union or one of its Member States.

4.9.3 Guideline 7 Trigger on a CCP's operational viability

74. Trigger on a CCP's operational viability

The indicators for the trigger on a CCP's operational viability are listed below and are to be monitored by competent authorities. Where one of them is met, the competent authority should assess and decide on the potential application of early intervention measures.

An indicator should be met where the competent authority identifies indications of an emerging crisis situation at the CCP that could affect the operations of the CCP, such as operational or organisational shortcomings, risks or constraints that will, or are likely to, negatively affect the CCP's operational viability and in particular its ability to provide its clearing services.

When assessing the presence of any operational or organisational shortcomings, risks or constraints, the competent authority shall consider at least the following situations:

- a. Loss of critical staff, such as risk management personnel or other personnel involved in the management of trades, collateral, or the liquidation strategy of a defaulting member.
- b. The presence of a major operational risk loss event/incident or a major reputational incident such as IT failures, fraud, cyber-attacks and natural disasters where the CCP is unable, or is likely to be unable, to recover from or to address in a timely manner.
- c. The failure of a critical third-party entity prevents the CCPs to fulfil all or part of its obligation towards its participants, including settlement of transactions and payments of margin calls.
- d. A CCP may be unable to address severe operational constraints in a timely manner, where for instance business continuity plans prove not to be adequate to restore the CCP's operations.
- e. Operational events at the CCP are of increased frequency or magnitude, including where the CCP shows a continued deterioration of assessing risk and shortcomings in its IT systems or identified IT issues are left unresolved.
- f. There is an increased frequency or magnitude of operational constraints at interconnected entities such as (i) interoperable CCPs, (ii) FMIs or (iii) service providers (on which the CCP relies to provide its critical functions such as IT cloud services).
- g. There are corporate events that are likely to negatively affect the soundness of the CCP.

4.9.4 Guideline 8 Trigger on the CCP's financial viability

75. Trigger for the CCP's financial viability

The indicator for the trigger on a CCP's financial viability is described below and is to be monitored by competent authorities. Where it is met, competent authority should assess and decide on the potential application of early intervention measures.

The indicator should be met where the competent authorities identify indications of an emerging crisis situation at the CCP that will, or is likely to, negatively affect the CCP's financial viability and that could risk the CCP's operations and in particular its ability to provide its clearing services.

When assessing this indicator, the competent authority should consider at least the following situations:

- a. The CCP is facing legal action from clearing members or external stakeholders or there is an ongoing or expected litigation, where the amount at risk, or the known or unknown settlement amount, may jeopardize the financial viability or soundness of the CCP.
- b. Issued or anticipated regulatory sanctions or the CCP receives significant remarks from external auditors.
- c. Increase in costs and/or reduction in income leading to a doubt of the viability of the CCP as a going concern.
- d. The membership of the CCP undergoes material adverse changes such as a deterioration in the creditworthiness of clearing members.
- e. The CCP is experiencing a loss of clearing members or confidence in its ability to manage risks, operationally and/or financially, which may put it in the position that it is no longer able to carry out its business activities and jeopardize the financial soundness of the CCP. This may be evidenced by:
 - i. a decrease in transactions submitted for clearing,
 - ii. the intention of clearing members to terminate their contracts with the CCP (termination notice).

4.9.5 Guideline 9 Trigger for emerging crisis

76. Trigger for emerging crisis

The indicator for the trigger of emerging crisis due to external effects is described below and is to be monitored by competent authorities. Where it is met, the competent authority should assess and decide on the potential application of early intervention measures.

The indicator should be met, for example, where the competent authorities identifies an emerging crisis situation outside the CCP that could materially affect the operations of the CCP and in particular its ability to provide its clearing services.

When assessing this indicator, the competent authority should consider at least the following situations:

- a) A material amount of defaults in a given sector; or
- b) Significant issues in the functioning of a market or market segment.

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.

Annex I: Article 18 of the CCP RRR on Early Intervention Measures

TITLE IV EARLY INTERVENTION

Article 18

Early intervention measures

1. Where a CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of Regulation (EU) No 648/2012, or poses a risk to financial stability in the Union or in one or more of its Member States, or where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services, the competent authority may:

- (a) require the CCP to update the recovery plan in accordance with Article 9(6) of this Regulation, where the circumstances that required early intervention are different from the assumptions set out in the initial recovery plan;
- (b) require the CCP to implement one or more of the arrangements or measures set out in the recovery plan within a specific timeframe. Where the plan is updated pursuant to point (a), those arrangements or measures shall include any updated arrangements or measures;
- (c) require the CCP to identify the causes of the infringement or likely infringement as mentioned in paragraph 1 and draw up an action programme, including suitable measures and timeframes;
- (d) require the CCP to convene a meeting of its shareholders or, if the CCP fails to comply with that requirement, convene the meeting itself. In both cases the competent authority shall set the agenda, including the decisions to be considered for adoption by the shareholders;
- (e) require one or more members of the board or senior management to be removed or replaced where any of those persons is found unfit to perform their duties pursuant to Article 27 of Regulation (EU) No 648/2012;
- (f) require changes to the business strategy of the CCP;
- (g) require changes to the legal or operational structures of the CCP;
- (h) provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP and the valuation of its assets and liabilities in accordance with Article 24 of this Regulation, including any information acquired through on-site inspections;
- (i) require, where necessary and in accordance with paragraph 4, the implementation of the CCP's recovery measures;

- (j) require the CCP to abstain from the implementation of certain recovery measures where the competent authority has determined that the implementation of those measures may have an adverse effect on financial stability in the Union or in one or more of its Member States;
- (k) require the CCP to replenish its financial resources in a timely manner in order to comply or maintain compliance with its capital and prudential requirements;
- (l) require the CCP to instruct clearing members to invite their clients to participate directly in auctions organised by the CCP when the nature of the auction justifies this exceptional participation. Clearing members shall inform their clients comprehensively about the auction following the instructions received from the CCP. In particular, the CCP shall specify the deadline after which it will not be possible to participate in the auction. Clients shall directly inform the CCP before this deadline of their willingness to participate in the auction. The CCP shall then facilitate the bidding process for those clients. A client shall only be authorised to participate in the auction if it is able to demonstrate to the CCP that it has set up the appropriate contractual relationship with a clearing member to execute and clear the transactions that may result from the auction;
- (m) restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering an event of default, including dividend payments and buybacks by the CCP, and it may restrict, prohibit or freeze any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of Regulation (EU) No 648/2012.

2. For each of the measures referred to in paragraph 1, the competent authority shall set an appropriate deadline and evaluate the effectiveness of those measures once they have been taken.

3. The competent authority shall only apply the measures in points (a) to (m) of paragraph 1 after taking account of the impact of those measures in other Member States where the CCP operates or provides services and after informing the relevant competent authorities, in particular where the CCP's operations are critical or important for local financial markets, including the places in which clearing members, linked trading venues and FMIs are established.

4. The competent authority shall apply the measure in point (i) of paragraph 1 only where that measure is in the public interest and is necessary to achieve any of the following objectives:

- (a) to maintain the financial stability in the Union or in one or more of its Member States;
- (b) to maintain the continuity of the critical functions of the CCP and access to critical functions on a transparent and non-discriminatory basis;
- (c) to maintain or restore the financial resilience of the CCP.

The competent authority shall not apply the measure in point (i) of paragraph 1 in relation to measures involving the transfer of property, rights or liabilities of another CCP.

5. Where a CCP uses contributions to the default fund of the non-defaulting clearing members in accordance with Article 45(3) of Regulation (EU) No 648/2012, it shall inform the competent authority and the resolution authority without undue delay and explain whether that event reflects weaknesses or problems of that CCP.



6. Where the conditions referred to in paragraph 1 are met, the competent authority shall notify ESMA and the resolution authority and consult the supervisory college on the envisaged measures provided for in paragraph 1.

Following those notifications and the consultation of the supervisory college, the competent authority shall decide whether to apply any of the measures provided for in paragraph 1. The competent authority shall notify the decision on the measures to be taken to the supervisory college, the resolution authority and ESMA.

7. The resolution authority, following the notification of the first subparagraph of paragraph 6 of this Article, may require the CCP to contact potential purchasers in order to prepare for its resolution, subject to the conditions laid down in Article 41 and the confidentiality provisions laid down in Article 73.

8. ESMA shall, by 12 February 2022, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of this Article.



Annex II: Cost and Benefit analysis

1. Introduction

Pursuant to the eighth paragraph of Article 18 of CCPRRR, ESMA shall, by 12 February 2022, issue Guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of Article 18.

Article 16 of the ESMA Regulation requires ESMA, where appropriate, to analyse the potential costs and benefits relating to proposed Guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the proposed Guidelines.

The objective of performing a cost-benefit analysis is to assess the costs and benefits of the various policy or technical options which were analysed during the process of drafting the Guidelines.

The Guidelines included in this Consultation Paper are of a mandatory nature, i.e. they are envisaged in EMIR in order to ensure uniform, consistent and coherent application of Union Law.

There are directly applicable provisions in CCPRRR that might not be applied in a uniform, consistent and coherent way within the Union in the absence of a clarification from ESMA on the indicators to be assessed by competent authorities where a non-default event occurs at a CCP.

In carrying out a cost-benefit analysis on the Guidelines it should be noted that the main policy decisions have already been taken under the primary legislation (CCPRRR) and the impact of such policy decisions have already been analysed to some extent by the Impact Assessment by the European Commission¹².

2. Cost-benefit analysis

Below are detailed the different corresponding policy options on how to promote the consistent application of the triggers for the use of the measures referred to in Article 18(1) of CCPRRR.

Under Article 18 of CCPRRR, the power to apply early intervention measures is granted to the competent authorities as a tool under the CCPRRR, that may be used to prevent a weakness, identified by competent authorities, from developing into a threat to the CCP's and the financial markets safety and soundness. The Guidelines therefore clarify the triggers and provide corresponding indicators to elaborate on the circumstances prompting a decision of the competent authority on the application of early intervention measures.

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN>

Specific objective	The Guidelines clarify triggers and provide indicators to elaborate on the circumstances prompting the decision of the competent authority on the application of early intervention measures.
Policy option 1	To specify principles as guidelines for the competent authorities to decide on the triggers for deciding on the application of the early intervention measures.
How would this option achieve the objective?	This option would likely meet the mandate as it would promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of Article 18, it would however create a lower level of convergence as the actual triggers would be determined by the competent authorities.
Policy option 2	To further clarify the triggers and providing for corresponding indicators for the competent authority to assess where they are to decide on whether to apply early intervention measures.
How would this option achieve the objective?	This option would meet the mandate as it would promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of Article 18 and would create a high level of supervisory convergence as the triggers that should, at least, be considered by the competent authorities would be listed in the Guidelines.
Which policy option is the preferred one?	Option 2, given that Option 1 could be seen as too vague and may fall short of the aim in ensuring convergence in the assessments on the application of early intervention measures.
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 responsible for issuing the Guidelines and the mandate given to ESMA is of a mandatory nature, i.e. the Guidelines are envisaged in CCPRRR in order to ensure uniform, consistent and coherent application of Union Law.

Impacts of the proposed policies:	
Policy option 1	
Benefits	It will provide principles for the competent authorities to determine on the triggers to be assessed to determine on the application of the early intervention measures.
Regulator's costs	Probably quite high as the competent authority have to create the list of indicators and monitor them.
Compliance costs	For the CCP no compliance costs.
Policy option 2	
Benefits	It will provide the competent authority with a predetermined list of triggers and indicators to monitor and, based on this assessment, will lead the competent authority to determine on the potential application of early intervention measures.
Regulator's costs	Moderate costs to monitor the triggers and indicators.
Compliance costs	For the CCP no compliance costs.
	<p>The costs for Option 2 can be summarised as the cost of the competent authority to monitor the triggers and to determine on the potential application of early intervention measures.</p> <p>The cost of implementing an ongoing monitoring and assessment will vary depending on the nature of existing procedures of the competent authority and a one-off cost may be required to accommodate for those triggers and corresponding indicators to be assessed.</p> <p>ESMA notes that the costs are envisaged for by the CCPRRR.</p> <p>On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs.</p>

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)?

Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.



Annex III: Summary of Questions

Questions on proposed Guidelines

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

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

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.

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

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.

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.

Questions on the cost-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)?

Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Annex IV: Draft Guidelines on Early Intervention Measures

1 Guideline: Procedure

Where one of the events, scenarios or situations as listed under Article 18(1) of CCPRRR has occurred and where it, in the view of the competent authority, applying these Guidelines, considers that such an event, scenario or situation would trigger the assessment under Article 18(1) for the application of early intervention measures, the competent authority should;

- a. further investigate the situation;
- b. assess the severity of the event, scenario or situation, by considering whether the event, scenario or situation poses a significant risk to the CCP, may adversely affect the CCP's overall viability or may be detrimental for overall financial stability; and
- c. decide on the application of an early intervention measure taking into account;
 - the urgency of the situation,
 - the magnitude of event,
 - the overall viability of the CCP; and
 - if the event, scenario or situation could be detrimental for the financial stability in the Union or in a member State.

This assessment shall take place before or at the same time as the competent authority undertakes the requirements provided for under paragraphs 3 to 7 under Article 18 of CCPRRR, such as the consultation of the supervisory college.

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

When assessing if a CCP will pose a risk to the financial stability of the Union or one of its Member States as referred to in Guidelines 5 and 6, the competent authority should consider the (i) nature and complexity, (ii) size and market share, (iii) concentration and (iv) interoperability and interconnectedness of the CCP to assess if the situation detected at the CCP gives rise to financial stability concerns, i.e. the systemic magnitude of the situation at the CCP.

The competent authority may consider the following parameters in its assessment:

- a. With respect to the CCP's **nature and complexity**, (i) the countries where the CCP provides or intends to provide clearing services; (ii) the extent to which the CCP provides other services in addition to clearing services; (iii) the type of financial instruments cleared or to be cleared by the CCP; (iv) whether the financial instruments cleared or to be cleared by the CCP are subject to the clearing obligation under Article 4 of Regulation (EU) No 648/2012.
- b. With respect to the **size and market share** of the CCP within the Union, or even within the economy of each Member State, competent authorities should consider,

- (i) for each EU currency, the volumes cleared by the CCP per asset class, both in absolute and relative values (compared to volumes of instruments in such currency cleared across all CCPs), (ii) the maximum amount of margins collected by the CCP (iii) the estimated largest payment obligation on a single day in total that would be caused by the default of any one or two largest single clearing members (and their affiliates) in extreme but plausible market conditions and (iv) the amount of total liquid financial resources committed to the CCP by entities established in the Union or that are part of a group subject to consolidated supervision in the Union.
- c. With respect to **concentration**, the significant concentration of a CCP with respect to the EU financial system or any of its member state can be measured by:
- The absolute and relative exposures (open interest of securities transactions, securities financing transactions and exchange traded derivatives; and notional outstanding of OTC derivatives transactions) born by EU clearing members of the CCP and born by clearing members of each Member State;
 - The absolute and relative levels of margins, default funds and liquid resources provided by EU clearing members of the CCP and provided by clearing members of each Member State.
- d. Where indicators reveal a strong **interoperability or interconnectedness** between the CCP and another CCP or other FMIs within the financial system in one or more of the Member States, the competent authorities should consider if the event that triggered the assessment for the application of early intervention measures is posing a risk (or likely to pose a risk) to the financial stability within the Union or one of its Member States.

3 Guideline: Triggers for capital requirements

The first trigger in respect of capital requirements is where the CCP *infringes* the requirement under Article 16 of EMIR and Articles 1 to 5 of RTS 152/2013.

The second trigger in respect of capital requirements is where the CCP is *likely to infringe in the near future* the requirement under Article 16 of EMIR and articles 1 to 5 of RTS 152/2013.

Indicators for the second trigger should be met, for example:

- a) Where a realised, estimated or forecasted loss will reduce the CCP's capital level below the notification threshold referred to in Article 1(3) of RTS 152/2013 and where it is likely that the capital requirements are likely to be infringed with the passing of time.
- b) Where a realised, estimated or forecasted loss results or is likely to result in a significant deterioration of the CCP's capital, without triggering the notification threshold and resulting from either:
 - a gradual loss of the capital over a period of time where the reason for the deterioration is considered very likely to continue to reduce the capital of the CCP at a significant pace, hence it is likely that the CCP will infringe its notification threshold with the passing of time; or



- a significant sudden or expected loss where it is likely that the CCP will infringe the notification threshold in the near future.

4 Guideline: Triggers for prudential requirements

4.1 Exposure management

The first trigger in respect of prudential requirements is where the CCP *infringes* the requirement under Article 40 of EMIR to measure and assess its liquidity and credit exposures to each clearing member.

The second trigger in respect of prudential requirements is where the CCP *is likely to infringe in the near future* the requirement under Article 40 of EMIR to measure and assess its liquidity and credit exposures to each clearing member.

An indicator for the second trigger should be met, for example, where the CCP shows a sudden and significant deterioration or a continued deterioration in the measurements and assessments undertaken by the CCP, measured by indicators such as (but not limited to):

- a) difficulties in consolidating trades of clearing members;
- b) issues in confirming positions and/or settling transactions;
- c) establishing valid price sources, difficulties in price reconciliation or the prices lacks details or stale prices are increasingly detected;
- d) operational incidents hindering the calculation or the collection of collateral requirements increase in magnitude or in frequency;

and where any of the above detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for exposure management.

4.2 Margin Requirements

The first trigger in respect of margin requirements is where the CCP *infringes* the requirements *under Article 41 of EMR or Articles 24 to 28 of RTS 153/2013*.

The second trigger in respect of margin requirements is where the CCP is *likely to infringe* in the near future the requirement under Article 41 of EMR or Articles 24 to 28 of RTS 153/2013;

An indicator for the second trigger should be met, for example, where the CCP shows a sudden and significant deterioration or a continued deterioration in its margin management and in particular in its margin calls, measured by indicators such as (but not limited to):

- a) where there are repeated issues such as mistakes in margins calls as noted by back-testing or the requested margin calls do not reflect the volatility of the market; or

- b) where changes in the market may result in a longer default management time horizon, higher bid-ask spreads or concentrated positions and where these changes are not reflected and mitigated in the margins of the default management protocol, with the result that the overall margins may be inadequate in the event where the CCP needs to liquidate a portfolio.

4.3 Default fund and other financial resources

The first trigger in respect of the default fund requirements and for other financial resources is where the CCP *infringes* the requirements under Article 42 of EMIR or Articles 29 to 31 of RTS 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of RTS 153/2013.

The second trigger in respect of the default fund requirements and for other financial resources is where the CCP *is likely to infringe in the near future* the requirements under Article 42 of EMIR or Articles 29 to 31 of RTS 153/2013 or the requirements under Article 43 of EMIR Article 41 of EMR or Articles 24 to 28 of RTS 153/2013.

An indicator for the second trigger should be met, for example, where the default fund and/or other resources are considered significantly inadequate. This could be evidenced by the CCP internal stress-test result i.e. its ability to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members and the reason for this result is not likely to be corrected by the CCP within the timeframes established.

4.4 Liquidity risk controls

The first trigger in respect of the liquidity risk controls requirements is where the CCP *infringes* the requirements under Article 44 of EMIR or Articles 32 to 34 of RTS 153/2013.

The second trigger in respect of the liquidity risk controls requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 44 of EMIR or Articles 32 to 34 of RTS 153/2013.

An indicator for the second trigger should be met, for example, where the liquidity position of the CCP deteriorates within a short period of time, and the reason for this deterioration is considered very likely to continue to reduce the liquidity available to the CCP at a significant amount and speed. The causes for this may include the withdrawal of service agreements or providers, increased liquidity requirements not met by increased liquidity provisions, or the deterioration of collateral quality.

4.5 Default waterfall

The first trigger in respect of the default waterfall requirements is where the CCP *infringes* the requirements under Article 45 of EMIR or Articles 35 to 36 of RTS 153/2013.



The second trigger in respect of the default waterfall requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 45 of EMIR or Articles 35 to 36 of RTS 153/2013.

An indicator for the second trigger should be met where, for example, there are issues such as a legal risk affecting the enforceability of the waterfall.

4.6 Collateral requirements

The first trigger in respect of the collateral requirements is where the CCP *infringes* the requirements under Article 46 of EMIR or Articles 37 to 42 of RTS 153/2013.

The second trigger in respect of the collateral requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 46 of EMIR or Articles 37 to 42 of RTS 153/2013.

An indicator for the second trigger should be met where, for example, the CCP shows a continued deterioration in the management of its collateral requirements, measured by indicators such as (but not limited to) where the CCP has on several occasions mismanaged its collateral requirements or applies inadequate haircuts, potentially evidenced by the CCP's back-tests against market moves and any of those detected deteriorations are repeated or increasing and with time, there is a clear risk that the CCP will infringe its default procedures requirements.

4.7 Investment

The first trigger in respect of the investment policy requirements is where the CCP *infringes* the requirements under *Article 47 of EMIR or Articles 43 to 46 of RTS 153/2013*.

The second trigger in respect of the investment policy requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 47 of EMIR or Articles 43 to 46 of RTS 153/2013.

An indicator for the second trigger should be met where, for example;

- a) the CCP shows a continued deterioration in relation to investments and the management of the investment policy requirements, where, with time, there is a clear risk that the CCP will infringe its investment policy requirements or affect its capital position, potentially evidenced by:
 - i. a lack of involvement by the CCP in recent investment decisions,
 - ii. insufficiency in applying investment processes,
 - iii. shortfalls in the monitoring of the CCP's investments,
 - iv. erroneous booking of investment trades,
 - v. ineffective monitoring of the arrangements or the credit quality of its financial counterparties or financial service providers, or



- vi. concerns on the possibility to liquidate the investments with minimal adverse price effect;

and where any of those detected deteriorations are repeated or increasing; or

- b) the CCP experiences investment losses either regularly or rapidly, and the build-up of losses is likely to challenge the capital position of the CCP.

4.8 Default procedures

The first trigger in respect of the default procedures requirements is where the CCP *infringes* the requirements under Article 48 of EMIR.

The second trigger in respect of the default procedures requirements is where the CCP is *likely to infringe in the near future* the requirements under Article 48 of EMIR.

An indicator for the second trigger should be met, for example, where the CCP shows a continued deterioration in its management of the default procedures, measured by indicators such as (but not limited to) where;

- a) the CCP repeatedly fails to undertake actions to improve its default procedures further to the identification of shortcomings in these procedures;
- b) the approach taken by the CCP to ensure enforceability of the default procedures is subject to shortcomings or is not working; or
- c) the CCP's efforts to assess the transfer is lacking details,

and where any of those detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for default procedures.

4.9 Review of models, stress testing and back testing

The first trigger in respect of the requirements for review of models, stress testing and back testing controls is where the CCP *infringes* the requirements under Article 49 of EMIR or Articles 47 to 61 of RTS153/2013.

The second trigger in respect of the requirements for review of models, stress testing and back testing controls is where the CCP *is likely to infringe in the near future* the requirements under Article 49 of EMIR or Articles 47 to 61 of RTS153/2013.

An indicator for the second trigger should be met, for example, where the CCP shows a continued deterioration in its management of the review of models, stress testing and back testing, measured by indicators such as (but not limited to) where:

- a) the CCP, models do not preform adequately evidence by stress tests and back tests;
- b) there are signs that the frequency of applying stress tests/back tests are reducing;

- c) there are concerns identified in relation to the independency of the reviews; or
 - d) the input used in its stress testing are not quality checked, vague, subject to interpretation and is therefore leading to less detailed or precise outcomes,
- and where any of those detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for the review of stress testing and back testing.

4.10 Settlement

The first trigger in respect of the settlement requirements is where the CCP *infringes* the requirements under Article 50 of EMIR and Articles 50a-d of EMIR.

The second trigger in respect of the settlement requirements is where the CCP *is likely to infringe in the near future* the requirements under Article 50 of EMIR and Articles 50a-d of EMIR.

An indicator for the second trigger should be met where, for example;

- a) the CCP does not meet, or there is a clear risk that the CCP will not meet, its settlement obligations in any of the relevant currencies as they fall due and where any of those detected failures are not remedied within a given time period, is significant, repeated or increasing, and where, with time, there is a clear risk that the CCP will infringe its obligation under EMIR; or
- b) the CCP shows a continued deterioration in its management of the settlement liabilities of the CCP, for example where the CCP is not continuously exploring the possibility to use central bank money or where the steps taken by the CCP to strictly limit cash settlement risks are less efficient, and where any of those detected deteriorations are repeated or increasing and where, with time, there is a clear risk that the CCP will infringe the requirements for default procedures.

5 Guideline: Trigger in relation to identified concerns of EMIR compliance

The indicators for the trigger on EMIR compliance are listed below and are to be monitored by competent authorities. Where one of them is met, the competent authority should assess and decide on the potential application of early intervention measures.

An indicator should be met, for example, where:

- a. an identified concern is material, left unresolved, repeated or increasing;
- b. there are clear signs that the CCP is likely to fail to undertake material corrections of findings as requested by the competent authority in relation to the relevant EMIR requirements; or
- c. there are clear signs that:

- i. the CCP will fail, or there is a significant risk that the CCP will fail, to make when due, material payments;
- ii. the CCP will fail, or there is a significant risk the CCP will fail, to comply with core agreement or perform material obligations as they fall due;
- iii. the CCP makes its payments with an increased delay.

and where any of those detected failures are not remedied within a given time period, is significant, repeated or increasing, and with the passing of time,

- there is a clear risk that the CCP will pose a risk to the financial stability of the Union or one of its Member States; or
- there is a clear risk that the identified concern will, or is likely to, negatively affect the CCP's ability to perform its clearing services in the Union or one of its Member States.

An **identified concern** means any material discoveries of infringements, breaches, near-breaches shortfalls in its application of EMIR or other applicable rules and other identified mismanagements or other concerning discoveries as to the CCPs ongoing compliance with the EMIR requirements and where the discovery is not covered by Guidelines 3 and 4.

6 Guideline: Trigger in relation to a CCP's impact on other entities with risks to the financial stability

The indicators for the trigger on a CCP's impact on other entities with risks to the financial stability are listed below and are to be monitored by competent authorities and where one of them is met, to be assessed by the competent authority to decide on the application of early intervention measures.

An indicator should be met, for example, where:

- a) the CCP's margins and collateral policies may lead to procyclicality and creating liquidity issues at the clearing members (including clients and indirect clients);
- b) an operational incident of the CCP that may materially adversely affect (i) the services of other FMIs or (ii) other entities such as exchanges or matching platforms has happened or is likely to happen;
- c) the amount of liquid resources the CCP is able to claim whether in BAU or in a default scenario is likely to pose a threat to the stability of a counterparty required to provide such resources to the CCP; or
- d) the CCP is inflicting or likely to inflict a cost or a requirement on clearing members that will put at risk the access to clearing for such members of the affected services.

and if the identified issue is left unresolved, is repeated or increasing and where, with time, there is a clear risk that the CCP will pose a risk to the financial stability of the Union or one of its Member States.

7 Guideline: Trigger on a CCP's operational viability

The indicators for the trigger on a CCP's operational viability are listed below and are to be monitored by competent authorities. Where one of them is met, the competent authority should assess and decide on the potential application of early intervention measures.

An indicator should be met where the competent authority identifies indications of an emerging crisis situation at the CCP that could affect the operations of the CCP, such as operational or organisational shortcomings, risks or constraints that will, or are likely to, negatively affect the CCP's operational viability and in particular its ability to provide its clearing services.

When assessing the presence of any operational or organisational shortcomings, risks or constraints, the competent authority shall consider at least the following situations:

- a. Loss of critical staff, such as risk management personnel or other personnel involved in the management of trades, collateral, or the liquidation strategy of a defaulting member.
- b. The presence of a major operational risk loss event/incident or a major reputational incident such as IT failures, fraud, cyber-attacks and natural disasters where the CCP is unable, or is likely to be unable, to recover from or to address in a timely manner.
- c. The failure of a critical third-party entity prevents the CCPs to fulfil all or part of its obligation towards its participants, including settlement of transactions and payments of margin calls.
- d. A CCP may be unable to address severe operational constraints in a timely manner, where for instance business continuity plans prove not to be adequate to restore the CCP's operations.
- e. Operational events at the CCP are of increased frequency or magnitude, including where the CCP shows a continued deterioration of assessing risk and shortcomings in its IT systems or identified IT issues are left unresolved.
- f. There is an increased frequency or magnitude of operational constraints at interconnected entities such as (i) interoperable CCPs, (ii) FMIs or (iii) service providers (on which the CCP relies to provide its critical functions such as IT cloud services).
- g. There are corporate events that are likely to negatively affect the soundness of the CCP.

8 Guideline: Trigger on the CCP's financial viability

The indicator for the trigger on a CCP's financial viability is described below and is to be monitored by competent authorities. Where it is met, competent authority should assess and decide on the potential application of early intervention measures.

The indicator should be met where the competent authorities identify indications of an emerging crisis situation at the CCP that will, or is likely to, negatively affect the CCP's



financial viability and that could risk the CCP's operations and in particular its ability to provide its clearing services.

When assessing this indicator, the competent authority should consider at least the following situations:

- a. The CCP is facing legal action from clearing members or external stakeholders or there is an ongoing or expected litigation, where the amount at risk, or the known or unknown settlement amount, may jeopardize the financial viability or soundness of the CCP.
- b. Issued or anticipated regulatory sanctions or the CCP receives significant remarks from external auditors.
- c. Increase in costs and/or reduction in income leading to a doubt of the viability of the CCP as a going concern.
- d. The membership of the CCP undergoes material adverse changes such as a deterioration in the creditworthiness of clearing members.
- e. The CCP is experiencing a loss of clearing members or confidence in its ability to manage risks, operationally and/or financially, which may put it in the position that it is no longer able to carry out its business activities and jeopardize the financial soundness of the CCP. This may be evidenced by:
 - i. a decrease in transactions submitted for clearing,
 - ii. the intention of clearing members to terminate their contracts with the CCP (termination notice).

9 Guideline: Trigger for emerging crisis

The indicator for the trigger of emerging crisis due to external effects is described below and is to be monitored by competent authorities. Where it is met, the competent authority should assess and decide on the potential application of early intervention measures.

The indicator should be met, for example, where the competent authorities identifies an emerging crisis situation outside the CCP that could materially affect the operations of the CCP and in particular its ability to provide its clearing services.

When assessing this indicator, the competent authority should consider at least the following situations:

- a) A material amount of defaults in a given sector; or
- b) Significant issues in the functioning of a market or market segment.