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| Response Form to the Consultation Paper  |
| Draft Guidelines further specifying the circumstances for temporary restrictions in the case of a significant non-default event in accordance with Article 45a of EMIR |

**Responding to this paper**

ESMA invites comments on all matters in this consultation 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](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_DVDS\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_DVDS\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_DVDS\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on the circumstances for temporary restrictions in the case of a significant non-default event”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper?**

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs) as well as from direct or indirect clearing members of CCPs.

**General information about respondent**

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| --- | --- |
| Name of the company / organisation | CCP12 - The Global Association of Central Counterparties |
| Activity | Central Counterparty |
| Are you representing an association? |[x]
| Country/Region | Other |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_DVDS\_00>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_DVDS\_00>

**Questions**

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

<ESMA\_QUESTION\_DVDS\_01>

While CCP12 recognizes that the indicators proposed by ESMA are ones that a CCP should surely monitor, we believe that such indicators are not necessarily indicative of a significant non-default event, as explained further below with respect to the Guidelines proposed. For a non-default event to be significant and consequently to potentially require the application of temporary restrictions, the event should, or be highly likely to, result in an outcome that could have a severe adverse effect on the financial stability in the EU. If this is not met, then the CCP should have the opportunity to address the event as it deems appropriate, pursuant to its rules and recovery plan, if applicable. This should be made clear in any Guidelines adopted by ESMA.

For example, the following Guidelines are not indicative of significant non-default events:

* While CCP12 believes the intention of ESMA, regarding Guideline 1, was to capture events relating to a capital deterioration that would (or likely will) substantially deplete all of the CCP’s capital and there is no likely prospect to avoid this, the triggers proposed do not clearly achieve this. By way of example, under Guideline 1(b), “a significant capital deterioration” of the CCP’s buffer could trigger temporary restrictions even if it does not hit the notification threshold and while ESMA uses the word “significant” by no means is such an event significant, as demonstrated by the maintenance of capital above the buffer amount. Even if a CCP losses are well within buffers and within annual projections, a significant deterioration might not breach the CCP’s regulatory capital. In such cases, temporary restrictions should not apply. Recognizing that ESMA must adopt Guidelines in this area, CCP12 suggests altogether deleting 1(b) and keeping 1(a) as guidance, but also making clear that events that trigger the use of restrictions are dependent on the occurrence of events that would (or likely will) substantially deplete all of the CCP’s capital and there is no likely prospect to avoid this.
* While CCP12 believes the intention of ESMA, with regard to Guideline 2, was to capture events that would leave the CCP unable to provide its critical clearing services in a safe and sound manner (i.e., its viability clearly is in question), the triggers proposed do not clearly do this. By way of example, under Guideline 2, the failure of a critical third-party entity preventing the CCP from operating its full clearing service, should not be an indicator kicking off Article 45(a) restrictions as the CCP has no control over a third-party entity. Third-party providers are chosen based on extensive due diligence reviews which cover all possible operational risk and compliance issues before the final decision is made. Their operational capabilities under extraordinary market conditions can be assessed to a certain extent and those institutions are also regulated entities. Therefore, CCPs only have limited control and supervision of our third-party providers. Additionally, regarding the potential loss of clearing volumes or clearing members, a reduction of volumes or number of clearing memberships is not directly related to the CCP’s business activities or its ability to perform at the required level.
1. Regarding both events described above, they are not necessarily indicative of any shortcomings in risk management or that the CCP can no longer provide its critical clearing services in a safe and sound manner. Therefore, recognizing that ESMA must adopt Guidelines in this area, CCP12 would suggest retaining the first paragraph (i.e. material operational event with significant medium term financial impact) and removing the second and third sub paragraphs (i.e. third-party event and the drop in volumes), but also making clear that events that trigger the use of restrictions are dependent on the occurrence of events that would leave the CCP unable to provide its critical clearing services in a safe and sound manner (i.e., its viability is clearly in question).

Notwithstanding the above, for avoidance of doubt, CCP12 notes that the triggers for the use of temporary restrictions should be dependent on an event having, or likely having, a severe adverse effect on the financial stability of the EU.

<ESMA\_QUESTION\_DVDS\_01>

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

<ESMA\_QUESTION\_DVDS\_02>

No comment.

<ESMA\_QUESTION\_DVDS\_02>

1. : Do you agree with the Option 2 of the cost-benefit analysis, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?

<ESMA\_QUESTION\_DVDS\_03>

No comment.

<ESMA\_QUESTION\_DVDS\_03>

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

<ESMA\_QUESTION\_DVDS\_04>

No comment.

<ESMA\_QUESTION\_DVDS\_04>