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| Response Form to the 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 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\_EIM\_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\_EIM\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_EIM\_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 consistent application of the triggers for the use of Early Intervention Measures”).

**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. 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.

**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\_EIM\_00>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_EIM\_00>

**Questions**

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

<ESMA\_QUESTION\_EIM\_01>

CCP12 understands that under CCPRRR the competent authority has the authority to implement early interventions measures before the arrangements and tools set forth in a CCP’s rulebook are fully exhausted under three scenarios (i.e., infringement or potential infringement of capital and prudential requirements, risk to financial stability in the Union or one or more Member States, and a crisis situation threatens operations, such as the CCP’s ability to provide clearing services).

CCP12 however generally disagrees with the triggers proposed, as we believe they are far too prescriptive and fail to focus on identifying triggers that result in an outcome that would (or will likely) have a severe adverse effect on financial stability in the EU. While the Guidelines refer to financial stability in some instances the considerations themselves do not necessarily warrant circumstances that could lead to an adverse effect on stability, particularly when looking at each consideration/trigger independently, nor do the triggers necessarily identify 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). Generally, it seems that any infringement or even potential infringement of a CCP’s prudential requirements could lead to early intervention. This is highly inappropriate, since early intervention should always be a last resort because, as explained further below, it can undermine the incentives that characterize the central clearing model and creates uncertainty as to how the CCP’s rulebook will operate. Ultimately, these outcomes could undermine financial stability by preemptively pushing the CCP into resolution.

Given these potential negative outcomes, CCP12 is highly concerned by the prospect of a competent authority intervening before the CCP has had the opportunity to fully exhaust the arrangements and tools provided for under its rulebook. CCPs have worked with clearing members, regulators, and market participants to develop these arrangements and tools, which are embedded in CCPs’ rulebooks to help balance incentives and inform market participants’ expectations during a CCP recovery. They have been carefully calibrated to address stress events and appropriately incentivize the active participation of market participants in the default management and recovery process. Accordingly, the CCPs’ rulebooks provide not only the proper balance of incentives for all participants, but also as much certainty as is possible during periods of stress. CCP12 strongly encourages competent authorities, to the maximum extent possible, to defer to the recovery arrangements and tools set forth in a CCP’s rulebook and recovery plan to ensure a CCP recovery proceeds as market participants expect.

With respect to the triggers, CCP12 supports ESMA’s statement that the triggers set forth in the Guidelines do not oblige competent authorities to automatically apply early interventions measures. These should be applied only in the most severe of situations. Even where these triggers do apply, the facts and circumstances regarding the need for early intervention should be carefully considered and a level of flexibility should be provided to the CCP such that it may carry out the provisions of its recovery plan as designed. Therefore, CCP12 would encourage ESMA to clarify that the measures taken under the Guidelines always need to be suitable, necessary, and proportionate to the observed situation. Generally, CCP12 would recommend that each of the following criteria must be met for early intervention to occur and thus, such criteria should be reflected in any Guidelines:

* The CCP’s viability is clearly in question, such that it is likely unable to provide its critical clearing services in a safe and sound manner;
* There is, or highly likely to be, serious adverse effects on financial stability in the EU; and
* No actions taken by the CCP would address the circumstances at hand and alternatively, there is no viable private sector alternative.

<ESMA\_QUESTION\_EIM\_01>

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

<ESMA\_QUESTION\_EIM\_02>

CCP12 generally disagrees with the proposal on procedures as set out in Guideline 1. Notwithstanding CCP’s concerns with the triggers proposed in the Guidelines, as described in this response, given that the range of triggers for early intervention as outlined in the Guidelines cover numerous events, we would like to highlight those competent authorities should ensure that the measures chosen for early intervention are proportional to the severity of the deficiency observed at the CCP. Therefore, we believe that observed deficiencies that should be considered for early intervention should be material and that the CCP is not able to address them by itself, including through a private sector alternative, in a timely manner. Furthermore, the procedures should ensure that there is an evaluation by competent authorities that early intervention is necessary to avoid adverse effects on financial stability in the EU.

<ESMA\_QUESTION\_EIM\_02>

1. : 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.

<ESMA\_QUESTION\_EIM\_03>

While CCP12 appreciates the focus on financial stability in Guideline 2, we generally disagree with the proposal. In assessing if financial stability risk is presented to the EU, competent authorities must consider the unique facts and circumstances surrounding the event, which the parameters proposed do not make clear would occur. While some of the parameters proposed may be relevant for a specific event, they are not universally applicable.

<ESMA\_QUESTION\_EIM\_03>

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

<ESMA\_QUESTION\_EIM\_04>

Given the negative outcomes of early intervention highlighted in CCP12’s response to Question 1, CCP12 generally disagrees with the proposed Guideline 3. In particular, the ability for competent authorities to enact early intervention measures where the CCP is “likely to infringe in the near future” its capital requirements could lead to an inappropriately early intervention by authorities. Even if CCP losses are well within buffers and within annual projections (i.e., the CCP has not breached its regulatory capital requirement), this could be deemed by authorities as a ***likely*** infringement and inappropriately lead to intervention. In addition to CCP12’s recommendation in its response to Question 1, to the extent ESMA believes it must adopt Guidelines relating specifically to capital requirements, any trigger should make clear that events that trigger the use early intervention measures 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 outcome.

<ESMA\_QUESTION\_EIM\_04>

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

<ESMA\_QUESTION\_EIM\_05>

Given the negative outcomes of early intervention highlighted in CCP12’s response to Question 1, CCP12 generally disagrees with the proposed Guideline 4. In particular, the ability for competent authorities to enact early intervention measures where the CCP does, or is ***likely*** to, infringe one of its prudential requirements overlaps with the supervisory duties of CCPs’ national competent authorities under EMIR. In general, an EMIR infringement alone should not automatically trigger early intervention, as such infringement (or even likely infringement) is not inherently indicative that adverse effects on financial stability in the EU are likely to occur, and as such infringement – particularly in the case of only just a ***likely*** infringement – does not mean that a CCP is unable to provide its critical clearing services in a safe and sound manner. In fact, intervening based on the indicators proposed in Guideline 4 alone, without giving the CCP the opportunity to promptly remediate the matter, runs counter to the objectives of supporting financial stability, as it likely will lead to lack of confidence in the CCP.

The approach under Guideline 4 described, whereby the national competent authority (“NCA”) would be looking at Key Risk Indicators (“KRIs”), overlaps with NCAs supervisory duties under EMIR. A single breach in an NCAs risk capital assessment, as well as other items identified in the proposed Guideline 4, does not by itself justify a possible early intervention. There are already processes and procedures under EMIR in place to address such non-recurring incidents and therefore, we do not believe that an EMIR prudential assessment would be required for an NCA to assess whether there is a need for an early intervention.

In addition to its recommendation in its response to Question 1, to extent ESMA believes it must adopt Guidelines relating specifically to EMIR prudential requirements, this trigger in particularly should make clear that events that trigger the use early intervention measures 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) and that the CCP itself, including through a private sector alternative, cannot address such events.

<ESMA\_QUESTION\_EIM\_05>

1. : 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.

<ESMA\_QUESTION\_EIM\_06>

Given the negative outcomes of early intervention highlighted in CCP12’s response to Question 1, CCP12 generally disagrees with the proposed Guidelines 5 to 9. As such, CCP12 would refer ESMA to its recommendation in its response to Question 1. Moreover, in line with CCP12 observations with the proposed Guidelines 3 and 4, it seems that the proposed Guidelines 5 to 9 capture events that a CCP could address independently without the need for early intervention measures.

Notwithstanding the above, to extent ESMA believes it must adopt Guidelines specifically in these areas, CCP12 would like to provide some targeted comments:

* Regarding Lit. a of Guideline 5, we would like to caution against choosing a wording that would leave room for interpretation and would encourage ESMA to clarify that an identified concern should in any case be material to trigger early intervention. More broadly, regarding Guideline 5, CCP12 would refer ESMA to its response to Question 5.

Regarding Lit. a, c, d of Guideline 6 (plus Lit. d of Guideline 8), we would like to highlight that these relate to the financial situations of clearing members, over which a CCP has no control. It is not and should not be the responsibility of a CCP to control a clearing member’s ability to meet the requirements arising from that clearing member’s relationship with the CCP as agreed in the rulebook. CCP12 would therefore ask for a clarification of these indicators, tying them to aspects that are within the direct responsibility of the CCP.

* Regarding Guideline 9, CCP12 would again ask that it be clarified that a focus should be on situations which present an adverse effect on the financial stability, notably a quantification as the current wording around “material amount of default” or “significant issues in the functioning of a market” leaves room for interpretation.

<ESMA\_QUESTION\_EIM\_06>

**Cost and Benefit Analysis Questions:**

1. : 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)?

<ESMA\_QUESTION\_EIM\_07>

CCP12 disagrees with the conclusion of ESMA and the proposed approach (Option 2). Recognizing that ESMA must adopt guidelines pursuant to CCPRRR, CCP12 believes, that Option 1 is the better option out of the options proposed, since it would provide for a clear determination as to whether an early intervention needs to be assessed based on avoiding adverse effects on financial stability in the EU, as recommended above. We find that the list of indicators should primarily be developed with the EU and its Member States in mind. We do not believe that such a granular list of indicators would provide the necessary certainty to both NCAs and CCPs and most importantly provide a clear set of circumstances under which the NCA should consider stepping in. We would instead advocate for a smaller set of indicators developed by NCAs that can be easily applied in any given circumstance within their respective jurisdiction and that focus on identifying where adverse effects on financial stability in the EU have, or are highly likely to, occur.

<ESMA\_QUESTION\_EIM\_07>

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

<ESMA\_QUESTION\_EIM\_08>

Not applicable.

<ESMA\_QUESTION\_EIM\_08>