



European Securities and
Markets Authority

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 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 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 under the heading [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

Name of the company / organisation	European Commodity Clearing AG
Activity	Central Counterparty
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_EIM_00>

European Commodity Clearing AG is an EMIR-authorized central counterparty (CCP) and a subsidiary of the Deutsche Börse Group. European Commodity Clearing AG provides clearing services for commodity derivatives markets.

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European Commodity Clearing AG appreciates the opportunity to provide feedback to ESMA's consultation regarding the Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures.

<ESMA_COMMENT_EIM_00>

Questions

Q1 : Do you have any general comments on the draft Guidelines on triggers for the use of early intervention measures?

<ESMA_QUESTION_EIM_01>

ECC broadly agrees with ESMA's general comments on the draft Guidelines on triggers for the use of early intervention measures. We agree that NCAs should be in a position to investigate breaches and determine whether early intervention would be appropriate, however we don't find that there is a clear distinction between BAU supervisory duties of NCAs and triggers/specific point in time in which an early intervention could be warranted. We find that the process envisaged attempts to reinforce BAU processes under EMIR instead of creating a "pre-Resolution Framework" in which the NCA could determine whether any further action is necessary. Despite the fact the CCP RRR intends to secure operation of a CCPs critical functions, defined to be the functions whose failure poses risks to the Union or a Member States financial system or real economy, we find that assessment for the risk a CCP poses to financial stability and the triggers allowing early intervention measures do not refer to this general requirement, but seemingly extend to all CCPs and all activities of a CCP. We propose that this RTS clarify that all assessments and triggers refer to a CCPs systemic relevance for the financial sector or the real economy.

Despite the fact that the intention of CCP RRR was to complement EMIR, we find that most of the requirements under Article 18(1) of the CCP RRR are existing intervention measures that NCAs can already take. In our view ESMA's guidance and triggers chosen are very detailed and comprehensive creating a significant overlap between BAU supervisory practices and conditions where early intervention would be needed. As with CRD/CRR and BRRD and the detailing EBA opinions, there should be a clear distinction between end of business-as-usual regulatory oversight under EMIR and triggers, thresholds and start of measures under CCPRRR.

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

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

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

<ESMA_QUESTION_EIM_01>

Q2: Do you agree with the proposal on procedures as set out in Guideline 1? If not, please elaborate.

<ESMA_QUESTION_EIM_02>

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

In addition, ECC notes that there is no requirement for the competent authorities to assess the proportionality of a proposed early intervention measure to the severity of the deficiency observed at the CCP. We would encourage ESMA to consider requiring competent authorities to ensure that measures taken are proportional to the observed situation. As the range of triggers for early intervention foreseen in the Guidelines are very broad, such a proportionality assessment could help ensuring a consistent application across the Union. Further, adding a proportionality assessment to the Guidelines would avoid a situation where an early intervention measure chosen would interfere with a CCP's freedom to conduct business.

<ESMA_QUESTION_EIM_02>

Q3: 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>

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

We would note that all EU CCPs are authorised and supervised under EMIR and their nature, size, concentration and any given interoperable arrangements are all well documented. As CCP RRR is intended to complement EMIR, we find that the

assessment under Guideline 2 is overlapping and will not produce any tangible results when it comes to the decision for an early intervention.

The CCP has to provide, as part of its recovery plan, an analysis of its critical functions. This analysis is validated by the NCA and resolution authority. As one of the results of this analysis, a determination whether a failure of the CCP has an impact on the financial stability in the Union or in a Member state or not. It is not plausible why guideline 2 states comparable indicators as required for identification of critical functions. Here we see the risk that ESMA's analysis under this guideline 2 in a potential stress or crisis situation might deviate from the analysis of critical functions. We propose to align the requirements and result for analysis of critical functions with the assessment on financial stability in the Union or in a Member State for purpose of early intervention measures. Therefore, we believe that Guideline 2 should be deleted, as the assessment, if necessary, should be done in advance and not during the assessment of a market incident posing a risk to financial stability.

<ESMA_QUESTION_EIM_03>

Q4: 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>

In general ECC sees problems in the definition and quantification of certain parameter as definition for "likely", "near future" or "estimated" is missing. We expect ESMA to provide further guidance.

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

<ESMA_QUESTION_EIM_04>

Q5: 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>

In general, we believe that an EMIR infringement alone should not automatically trigger an early intervention measure. As already indicated in our response to Question 2, observed deficiencies that could trigger early intervention should be material (i.e.,

more severe than EMIR infringements) and beyond the capacity of the CCP itself to resolve in a timely manner.

In addition, we would note that terms such as ‘difficulties’, ‘issues’, ‘insufficiencies’, ‘shortfalls’, and the like can be interpreted extremely broadly, with the result that even relatively minor deficiencies could in theory prompt early intervention by the competent authority in one Member State, but only at a much later stage in another Member State. This is a particular concern when considered in conjunction with Lit. (a) of Guideline 5, which reads: ‘An identified concern is material, left unresolved, repeating or increasing.’ The ambiguous wording can be interpreted to mean that a concern need not be ‘material’ in order to be a trigger for early intervention, with the implication that essentially any audit finding or minor issue could prompt early intervention. We would therefore call on ESMA to use more precise wording to specify how severe deficiencies need to be in order to indicate a likely future breach of the EMIR prudential requirements, and to quantify these where appropriate.

<ESMA_QUESTION_EIM_05>

Q6 : 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>

ECC sees the need for further specification of different parameters including the definition of magnitudes when triggering possible risks of financial stability.

ECC believes especially the following parameter need further specification:

1. the CCP’s margins and collateral policies may lead to procyclicality and creating liquidity issues at the clearing members (including clients and indirect clients); as from our perspective these relate to the financial capacity of a CCP’s clearing members. It is not possible for a CCP to guarantee that its clearing members are financially sound; this is the responsibility of each clearing member and their respective competent authorities.

2. 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.

3. There are corporate events that are likely to negatively affect the soundness of the CCP.

4. 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).

These factors should be better quantified. Without further specification, the phrases can be interpreted in many different ways. To reiterate, the objective of these Guidelines is to promote the consistent application of the early intervention measures, and we believe that this can only be achieved if the criteria are defined in a manner that does not allow for multiple competing interpretations.

<ESMA_QUESTION_EIM_06>

Cost and Benefit Analysis Questions:

Q7: 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>

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Q8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

<ESMA_QUESTION_EIM_08>

TYPE YOUR TEXT HERE

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