Final Report

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

31 January 2022 | ESMA91-372-1700

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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 ('CCPRRR')[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 CCPRRR.

Article 18(1) of CCPRRR lists the triggers which allow the competent authority to take early intervention measures i.e. where (i) a CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of Regulation (EU) No 648/2012, (ii) the CCP poses a risk to financial stability in the Union or in one or more of its Member States or (iii) 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 provide competent authorities with guidance on the situations under which they should consider the application of early intervention measures to central counterparties (CCPs). Specifically, the Guidelines provides indicators guiding on the application of the triggers prompting the consideration of whether to apply early intervention measures.

The Guidelines do not entail that competent authorities should automatically apply early intervention measures where a trigger under Article 18(1) of CCPRRR 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) of CCPRRR has occurred but where none of the indicators are relevant to the situation.

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.

ESMA published the Consultation Paper with its draft Guidelines under Article 18(8) of CCPRRR on 12 July 2021. The consultation ended on 20 September 2021. ESMA also held a public hearing on the Consultation Paper (along with other consultation papers issued by ESMA under CCPRRR) on 14 September 2021.

ESMA has also sought advice from the Securities and Markets Stakeholder Group. The Final Report (and the accompanying final Guidelines) assesses and takes, where suitable, into account the feedback provided by the respondents to the consultation.

This Final Report provides the final Guidelines providing indicators for the triggers to be considered by the competent authorities for the purposes of determining if to decide to apply any early intervention measure.

Contents

Section 1 sets out the definitions and abbreviations used throughout this Final Report and 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 Guidelines on the consistent application of the triggers for the use of the Early Intervention Measures under Article 18(8) of CCPRRR.

Annex I sets out Article 18 of CCPRRR on Early Intervention Measures, Annex II contains the cost and benefit assessment, Annex III includes the Advice of the Securities and Markets Stakeholder Group and Annex IV provides for the Guidelines.

Next Steps

These Guidelines have now been published.

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.

1 OJ L 2021:022

1 Definitions and Abbreviations

Unless otherwise specified, the terms used in this Final Report and in these Guidelines have the same meaning as in CCPRRR, EMIR and the Delegated Regulation 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]

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*

Delegated Regulation 153/2013	Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties[5]
Delegated Regulation 152/2013	Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties[6]

The following abbreviations are used in this Final Report:

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

5 OJ L 52, 23.2.2013, p. 41
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 early intervention 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.

5. ESMA shall promote the consistent application of the triggers for the use of the measures listed in (a) to (m) of Article 18(1) of CCPRRR, hence the triggers refer to the situations 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 examples that *could be seen as signalling* that a check needs to be undertaken, to assess 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.

6. Where a need has been identified by the competent authority for the use on an early intervention measure in accordance with Article 18(1) of CCPRRR, such early intervention measure has to be chosen from the list provided for in the same article.

7. On 12 July 2021, ESMA launched a public consultation on the draft Guidelines on early intervention measures with the deadline for consultation responses on 20 September 2021. The public consultation aimed at receiving stakeholders' feedback on a list of questions and on the draft Guidelines. This Final Report, and the accompanying final Guidelines, takes into account the feedback

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

provided by the respondents to the consultation. ESMA has also sought advice from the Securities and Markets Stakeholder Group.

3 Scope and applicability of early intervention measures

8. 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) of CCPRRR to issue Guidelines promoting the consistent application of the triggers for the use of the measures referred to in Article 18(1) of CCPRRR.

9. Article 18(8) of CCPRRR 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."

10. Article 18(1) of CCPRRR lists the triggers which allow the competent authority to take early intervention measures i.e. 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.

11. 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) of CCPRRR, therefore the Guidelines set out indicators helping to identify the situations possibly giving rise to early intervention measures, to ensure that competent authorities apply the triggers listed under Article 18(1) of CCPRRR in a similar way when assessing and deciding on the application of such measures.

12. Hence, the objective of introducing these indicators 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 listed under Article 18(1) of CCPRRR across the European Union (i.e., ensure convergence at EU level).

13. The final decision whether to apply the early intervention measures or not remains with the competent authority. The set of indicators further 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 triggers specified under paragraph 1 of Article 18 of CCPRRR applies but where no indicator under the Guidelines for early intervention measure has been identified.

14. The indicators 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 CCPRRR, *without specifying which indicator would trigger which specific measure.*

15. These Guidelines should be read in conjunction with other regulatory instruments developed by ESMA pursuant to CCPRRR 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.

3.1 Aim of the triggers and indicators for early intervention measures

16. In order to give competent authorities stronger capabilities to handle crises in failing CCPs, Article 18(1) of CCPRRR introduce 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.

17. 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."*

18. Assessment of the compliance of a CCP with the requirements laid down in EMIR, Delegated Regulation 153/2013 and Delegated Regulation 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, Delegated Regulation 153/2013 and Delegated Regulation 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.

19. 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) of CCPRRR, to require the CCP to undertake certain early intervention measures as listed therein.

3.2 Early intervention measures compared to recovery

20. ESMA notes that the early intervention measures sit within the CCPRRR regulatory framework and not within EMIR.

21. Recovery is initiated by the CCP, as Article 9(7) of CCPRRR[8] states that where a CCP intends to activate its recovery plan, it shall notify the competent authority. 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 refrains from taking measures provided for in their recovery plan despite the fact that the relevant indicators have been met, the competent authority shall immediately assess whether the circumstances require the use of early intervention powers in accordance with Article 18 of CCPRRR. 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.

22. ESMA notes that some of the early intervention measures involve activating the CCP's recovery plan but that the decision to implement the recovery plan is decided by the CCP. Hence, for the decision to apply early intervention measures (and indirectly partly the recovery plan), 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 of CCPRRR) hence it may be assumed that the CCP itself may not consider its situation sufficiently deteriorated to require the activation of its recovery plan.

23. ESMA also notes that the powers of early intervention measures include the power to restrict or prohibit any remuneration of equity and instruments treated

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.

as equity, including dividend payments and buybacks by the CCP in Article 18(1)(m) of CCPRRR, which should be read in conjunction with the possibility for competent authorities under Article 45(a)[9] of EMIR and 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.

3.2.1 Summary of consultation responses

24. Some respondents noted that whilst they broadly agree that competent authorities should be in a position to investigate breaches and determine whether early intervention would be appropriate, they do not find that there is a clear distinction between business as usual (BAU) competent authority supervisory duties and situations in which an early intervention could be warranted.

25. Such respondents argued that the intention of CCPRRR is to complement EMIR, and most of the powers under Article 18(1) of CCPRRR are existing intervention measures competent authorities can already take. Hence, such respondents argue that single incidents that are part of BAU supervisory processes should not initiate an early intervention particularly with regards to a CCP's risk model for example which will have been approved by the competent authority. In their view, the process envisaged under the Guidelines attempts to reinforce BAU processes under EMIR compliance instead of creating a "pre-Resolution framework" in which the competent authority could determine whether any further action is necessary.

26. Also, it was noted that ESMA's guidance and included indicators are very detailed and comprehensive creating significant overlap between EMIR and CCPRRR requirements and requires that there should be a clear distinction between end of BAU regulatory oversight under EMIR and triggers, thresholds and start of measures under CCPRRR. Some respondents noted 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.

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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.

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.

27. One respondent noted that there is a great overlap between "early warning indicators" in CCP recovery plans and "early intervention", where for example, a significant default of a clearing member could result in breaches in the CCP's capital requirements under EMIR but that would not necessarily mean that an early intervention assessment would be required.

28. It was noted by one respondent that 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.

29. One respondent was 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. The respondent noted that the 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 and that 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. Therefore, 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. Based on this the respondent strongly encouraged 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.

3.2.2 ESMA's feedback

30. ESMA notes that the CCPRRR provides for specific early intervention powers and notes that the intention of the new early intervention power is to provide the competent authority with the power to assess the situation and decide if an early intervention measure is warranted and to act accordingly. The action of the competent authority is therefore not subject to, or dependent on, the actions and measures taken by the CCP. ESMA notes that this is the intention and aim of CCPRRR regime of early intervention measures. Also, the rulebook of the CCP cannot limit early intervention powers in a way that the competent authority cannot intervene if the rulebook is not exhausted, this sequence of actions is not supported by CCPRRR and hence no changes to this effect has been made.

31. ESMA notes the limitation under CCPRRR in relation to the mechanics and processes of recovery and resolution actions and would therefore not provide further guidance on the aspects of exhausting the recovery plan before early intervention measures are taken as Article 18 of CCPRRR envisages early intervention measures can indeed be taken before the recovery plan is activated or for that matter, exhausted. To conclude, early intervention measures should be applied in accordance with the applicable legal framework whenever the

competent authority is of the view that the situation requires it, and such action is not dependent on the activation of the recovery plan by the CCP.

4 The Guidelines – introduction

4.1 Assessing the need for early intervention measures - the assessment of severeness

32. 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]".

33. This is also explained in the Commission's 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."

34. ESMA notes that for early intervention measures to apply, one of the triggers for assessment under Article 18(1) of CCPRRR and as further clarified in these Guidelines, should have occurred and in addition the competent authority should have decided that the situation is of such a significance that at least one of the early intervention measures is envisaged to apply or that none of the indicators included in these Guidelines has occurred but the competent authority still has decided that the application of Article 18(1) of CCPRRR is triggered and at least one of the early intervention measures is envisaged to apply.

11 Recital 34 of RRR

35. To complement the limits for the application of early intervention measures the competent authority shall in accordance with Article 18 of CCPRRR 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 members, linked trading venues and FMIs are established.

36. In addition, the competent authority shall only apply the early intervention measures of implementing the CCP's recovery measures 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.

37. 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 therefore would require that the situation is of a severe and serious type.

4.1.1 Summary of consultation responses

38. On one hand the proposed indicators were supported, however on the other hand, criticism was raised, where one of the respondents generally disagreed with the triggers proposed, as they are seen as 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 Union. It is argued that whilst 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 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. It was noted that the triggers, as noted in the consultation paper, do not oblige competent authorities to automatically apply early interventions measures, however they should in the respondents view only be applied in the most severe situations.

39. It was also noted in the responses that the Guidelines include any infringement or even potential infringement of a CCP's prudential requirements as potentially leading to early intervention. One respondent concluded them as highly inappropriate, since early intervention always should be a last resort because it

can undermine the incentives that characterise the central clearing model and it creates uncertainty as to how the CCP's rulebook will operate. Ultimately, it was argued that these outcomes could undermine financial stability by pre-emptively pushing the CCP into resolution.

40. Another respondent highlighted that any observed deficiencies considered when assessing possible early intervention measures should be material, and there should be a caveat that early intervention, as a rule, is only appropriate where the CCP in question is unable to address these deficiencies itself in a timely manner. Hence it was argued that to achieve a consistent application of the rules across Member States, competent authorities should ensure that the measures they take under these Guidelines are suitable, necessary, and proportionate to the observed situation.

41. One respondent argued that the following criteria should 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.

42. Some respondents noted that they 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.

4.1.2 ESMA's feedback

43. Article 18(1) of CCPRRR refers to specific triggers i.e. (i) the CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of Regulation (EU) No 648/2012, or (ii) poses a risk to financial stability in the Union or in one or more of its Member States, or (iii) 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, where the competent authority may take early intervention measures.

44. ESMA takes note of the reservations presented in the responses, however, also notes that the aim of the CCPRRR needs to be borne in mind when discussing the aim of the Guidelines. ESMA has to 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, hence ESMA is not empowered to change in any way the

triggers already set out in Article 18(1) of CCPRRR but to promote their constant application. ESMA would therefore conclude that the Guidelines cannot contain qualifications where not envisaged for under Article 18(1) of CCPRRR.

45. In particular, certain Guidelines are considered to assess the possibility for further qualifications, however ESMA notes that the applicability of the triggers in relation to infringements of EMIR, in Article 18 of CCPRRR is clear, whilst for “likely to infringe” there is room for qualification in how the indicators are drafted and there are already qualifications included in the current version of the Guidelines. Hence, the Guidelines already contain qualifications however ESMA has considered below on how the Guidelines can be slightly recalibrated where judged appropriate.

46. Also, as noted in the consultation paper, there are some “safeguards” under Article 18 (3) to 18(6) of CCPRRR, in particular the competent authority shall apply the measure in point (i) Article 18(1) of CCPRRR (require the implementation of the recovery measures) where that measure is in the public interest and is necessary to achieve certain objectives.

47. In addition, where the conditions referred to in Article 18(1) of CCPRRR 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 this paragraph.

48. ESMA notes the limitation under Article 18(4) to Article 18(1)(i) of CCPRRR and that these specific limitations are not made wider applicable to the full list of set out under Article 18(1) of CCPRRR.

49. ESMA, based on the wording and scope of the mandate under Article 18 of CCPRRR, is not empowered to change in any way any of those triggers by adding qualifications not envisaged for under Article 18 of CCPRRR.

4.2 The triggers related to the CCP infringement of capital or prudential requirements

50. 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. 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.

51. To conclude, the situation 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 significant 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 will not require a decision as to the application of early intervention measures.

4.3 The triggers related to the CCP posing a risk to financial stability in the Union or in one or more of its Member States

52. The envisaged triggers 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.

53. 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.

4.4 The triggers related to the indications of an emerging crisis situation that could affect the operations of the CCP, in particular, its ability to provide clearing services

54. The last trigger 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.

55. ESMA has developed indicators clarifying the situations 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.

4.5 Summary of consultation responses

4.5.1 Legal responsibilities

56. Some respondents believed that it is not clearly specified how ESMA envisages competent authorities addressing legal responsibilities for their decisions in the early intervention phase and consider that there is not enough clarity as to who assumes responsibility for actions taken when, for example, senior management has been removed.

4.5.2 Linking the early intervention measure to the observed issue

57. It is noted by a respondent that it should be ensured that any early intervention measure taken adequately addresses the observed issue at the CCP and that the CCP itself is unable to address it itself in a timely manner and ESMA is encouraged to ensure that any measures taken are suitable, necessary, and proportionate to the observed issue.

58. It is also noted 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 and would encourage ESMA to consider requiring competent authorities to ensure that measures taken are proportional to the observed situation.

4.6 ESMA's feedback

59. ESMA initially notes that CCPRRR contains requirements under Article 18 related to the applicability of early intervention measures and in addition thereto, general requirements on decision making under Article 7 of CCPRRR applies to the process. ESMA concludes that it is not envisaged under the mandate for ESMA to provide further guidance on this, i.e., to ensure convergence on the actual application of measures under the early intervention measures, and hence outside the scope of the Guidelines.

4.7 Information sharing

60. 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 situations considered to have resulted in an assessment whether to apply any of the early intervention measures under Article 18(1) of CCPRRR, as this may be seen as an early sign of deterioration of the situation of the CCP, even where the competent authority has decided not to activate the procedure for applying any early intervention measures.

5 ESMA Guidelines on triggers for the use of early intervention measures

5.1 ESMA's Mandate

61. Article 18(8) of CCPRRR 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."

5.2 Subject Matter

62. According to Article 18(1) of 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 CCPRRR. Pursuant to Article 18(8) of CCPRRR, these Guidelines promote the consistent application of the triggers for the use of such early intervention measures.

63. The assessment of whether a situation qualifies as a trigger under Article 18(1) of CCPRRR 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.

5.3 Clarification of triggers and assessment for applying early intervention measures

64. 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 EMIR.

65. ESMA shall promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of Article18 of CCPRRR.

66. 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 further guidance on the relevant articles under EMIR that should be considered in the assessment.

67. 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 of EMIR to be considered for each capital or prudential requirement. Any infringement directly leading to a decision to apply an early intervention measure, would be considered disproportionate and not in line with the discretion provided to competent authorities by Article 18(1) of CCPRRR, 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.

68. ESMA further notes that the phrase "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.

69. Meeting the indicators identified in these Guidelines should prompt the competent authorities, as further specified under Guideline 1:

- 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

- 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.

5.3.1 Guideline 1 Procedure

Guideline 1 Procedure - as proposed in the consultation paper (page 22)

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:

- further investigate the situation;
- 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
- 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.

5.3.1.1 Summary of consultation responses

70. There was a general concern and a request to qualify the possibility for authorities to act where an indicator is met, and an assessment may be carried out by the authority. Those comments are set out under 3.2.1 but are also relevant for this part.

71. In the targeted responses, there was on one side, a general support for the proposal and agreement with the procedures as set out in Guideline 1.

72. However, one respondent noted that whilst supporting the Guideline 1, there were some further aspects to be considered, such as the difference between a default and non-default event. In a default scenario, the resolution authority might not have sufficient time to go through an extensive analysis of the current market condition.

73. Another aspect noted by several respondents was that they would like to ensure that the measures chosen for early intervention are proportional to the severity of the deficiency observed at the CCP and that an observed deficiency 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.

74. On the other hand, there was one respondent that disagreed with the proposed Guideline 1 as the range of indicators for early intervention as outlined in the Guidelines cover numerous events.

5.3.1.2 ESMA’s feedback

75. ESMA notes the overall comments to the Guidelines, the request for qualifications, and notes that there are two aspects regarding possible qualifications:

- The first aspect is to qualify or limit **when** an indicator is met and entails the assessment by the authority;

- The second aspect is to **qualify or limit the possibility for the authority to take action** and decide on the application of the early intervention measures.

76. This section is on the second aspect, on procedures, where the first aspect is primarily considered under Guidelines 3 and 4.

77. ESMA initially notes that whilst the situation leading to an assessment under Article 18(1) of CCPRRR for the possible application of early intervention measures may derive from BAU supervision of the CCP (or not), *the actual application* of such early intervention measures is very different from actions taken under the normal BAU of the CCP. Hence it follows from the triggers described in Article 18(1) of CCPRRR that the competent authority has to be able to assess a situation, also deriving from a BAU situation, to inform itself of the risks and severity of the situation and this assessment should take place when a trigger has occurred. The aim of the triggers referring to a situation that could be occurring at normal BAU, is to ensure the competent authority can act (where needed) in a swift and effective manner to hopefully mitigate a possible crisis. It is clear that the competent authority has to be able to exercise its judgement at a suitable time, to decide if to apply any early intervention measures and this is to ensure this new empowerment, to the competent authority, is effective.

78. ESMA notes that the Guidelines providing the indicators for the triggers are aimed at providing guidance to the competent authority in assessing where a trigger is met, hence there is no automatic application of an early intervention measure just based on an indicator being met and this has been further clarified under the Guidelines.

79. ESMA is, based on above, of the view that the indicators should be able to be identified fairly easily to ensure they give the competent authority the correct “warning” signal to assess the situation before its deterioration, where this is a risk. However, it is noted that before a competent authority decides to apply early intervention measures several aspects are to be considered, including the processes under CCPRRR and the “significance” assessment under this Guideline 1.

80. ESMA concludes that the Guideline 1 will be amended to further clarify that where an indicator is met, this results in an assessment being undertaken by the competent authority and not an application of early intervention measures.

81. Based on the above, Guideline 1 will not be amended to restrict the possibility for the competent authority to decide if an early intervention measure should be applied as such a limitation is not aligned with the CCPRRR nor aligned with the spirit of the new empowerment to assist in the overall aim to mitigate risks for crisis.

82. ESMA further notes (as per above) that the scope of the Guidelines does not cover a convergence on which exact measure has to be taken.

83. Based on this only minor drafting improvements has been made to Guideline 1.

5.3.1.3 Guideline 1 Procedure

84. Where one of the triggers as listed under Article 18(1) of CCPRRR has occurred and where the competent authority, applying these Guidelines, considers that such a situation could entail an assessment under this Article on whether to apply any of the early intervention measures, the competent authority should:

a. further investigate the situation;

b. assess the severity of the situation, by considering whether the 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. take the following aspects into account in the decision on whether to apply an early intervention measure ;

- the urgency of the situation,
- the magnitude of event,
- the overall viability of the CCP; and
- whether the 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 is undertaking the requirements provided for in paragraphs 3 to 7 of Article 18 of CCPRRR, such as the consultation of the supervisory college.

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

Guideline 2 Assessing financial stability in the Union or in a Member State - as proposed in the consultation paper (pages 22 and 23)

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:

- 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.

- 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.

- 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.

- 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.

5.3.2.1 Summary of consultation responses

85. There was some support for the proposal on how to assess financial stability in the European Union (EU) or in a Member State, as set out in Guideline 2.

86. However, it was noted in the responses that the analysis required for such an assessment is complex and propose that ESMA and competent authorities leverage some of the work on the analysis according to Article 25 (2c) of EMIR whether Tier-2 CCPs or some of their clearing services are of such substantial systemic importance that a CCP should not be recognised to provide certain clearing services or activities as part of the methodology developed for this analysis will be also helpful for the analysis of the impact of an EU CCP on the EU or other EU Member States.

87. Other respondents challenged this Guideline 2, noting that the proposal is excessively granular and risks turning the assessment into a very lengthy process. One respondent further noted that in a default event, competent authorities will not have sufficient time to conduct such an extensive market analysis. It was mentioned 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 CCPRRR is intended to complement EMIR, respondents found that the assessment under Guideline 2 is rather overlapping and will not produce any tangible results when it comes to the decision for an early intervention.

88. One respondent generally disagreed with the proposal, noting that 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.

89. It was also noted that in times of stress both CCPs and competent authorities would want to place all resources available in addressing the situation which has triggered the assessment. Therefore, such respondent believed that this assessment, if necessary, should be done in advance and not during the assessment of a market incident posing a risk to financial stability.

90. One respondent noted that all EU CCPs are authorised and supervised under EMIR and their nature, size, concentration and any given interoperable arrangements are all well documented and as CCP RRR is intended to complement EMIR, they 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.

91. One respondent saw a risk that ESMA's analysis under this Guideline 2, in a potential stress or crisis situation, might deviate from the analysis of critical functions. They proposed 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.

92. There was overall a support for Guideline 2 to 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.

5.3.2.2 ESMA's feedback

93. ESMA notes that one of the triggers under Article 18(1) of CCPRRR refers to the CCP posing a risk to the financial stability in the Union or in one or more of its Member States hence the aspect of financial stability and how it to be assessed is an aspect that should be included in the Guidelines as part of the mandate to promote the consistent application of the triggers. Based on this ESMA will not delete Guideline 2.

94. ESMA in addition notes that, as stated in the scope of Guideline 2, it serves the purpose of providing guidance to the competent authority as to how to assess financial stability for the purpose of Guidelines 5 and 6, i.e. the Guidelines serving the purpose of providing the relevant indicators to consider in light of the trigger "poses a risk to financial stability in the Union or in one or more of its Member States" under CCPRRR and as further developed under the relevant Guidelines.

95. ESMA further notes the comments on when to apply this assessment. ESMA agrees that to assess if a CCP poses a risk to the financial stability in the Union or in a Member State is a complex assessment and less suited to be done in a crisis, however the Guideline 2 does not state when the authority should consider the aspect of financial stability and ESMA would assume that the competent authority in its preparatory work in relation to recovery and resolution, considers the overall position of a CCP and the potential risk it may pose in a crisis to the financial stability of the Union or a Member State. The

actual assessment has to be done at the time of the event, but the underlying assessments and information should have been done before this point in time.

96. Based on this no changes are considered justified by ESMA in relation to Guideline 2.

5.3.2.3 Guideline 2 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:

    i. 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;

ii. 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.

5.4 Triggers based on EMIR capital requirements

97. 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	Delegated Regulation 152/2013 articles 1 to 5

98. In accordance with Article 16 of EMIR and articles 1 to 5 of Delegated Regulation 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.

5.4.1 Guideline 3 Triggers related to capital requirements

99. 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 infringes, or is likely to infringe in the near future, the capital requirements of EMIR.

100. 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.

Guideline 3 Trigger on capital requirements - as proposed in the consultation paper (page 24)

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 Delegated Regulation 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 Delegated Regulation 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 Delegated Regulation 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.

5.4.2 Summary of consultation responses

101. There was on one hand support for the proposed Guideline 3, many respondents broadly agreed with the indicators in relation to the triggers for the capital requirements under Article 16 of EMIR. However, on the other hand, several respondents provided comments on the Guideline 3 as set out below.

102. It was noted, and one respondent expressed a concern, that some of the early warning indicators could imply breaches in a CCP's capital requirement and/or prudential requirements, for example, as a result of a significant default of a clearing member, the CCP's capital requirements under EMIR could be temporarily breached. It was therefore argued that this would not necessarily mean that an early intervention assessment would be required nor that risk posed by to financial stability of the Union has increased to such extremes.

103. One respondent noted that individual indicators often refer to single incidents rather than reoccurring incidents that the CCP has not been able to address in a timely manner and it was argued that single incidents are part of the BAU supervisory processes and should not entail early intervention, particularly with

regard to a CCP's risk model for example which will have been approved by the competent authority.

104. Several respondents noted that they did not believe 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. It was noted that under an event of default, where a CCP would be using the entire tranche of its own dedicated resources (SITG), it might not have sufficient amount of resources available to fully replenish it. As such, it could be in breach of Article 16 of EMIR however, EMIR provides CCPs 6 months to replenish SITG. Therefore, they find Guideline 3 to be contradicting EMIR. In addition, they did not believe that it is right to mandate CCPs to maintain capital buffers at the level of the SITG to prevent them from triggering early intervention.

105. One respondent noted that regarding the '*significant sudden or expected loss where it is likely that the CCP will infringe the notification threshold in the near future*' they believed that this indicator is very difficult to monitor. This concern is shared with a few respondents, one of them noting the problems in the definition and quantification of certain parameters like "likely", "near future" or "estimated" is missing and expected ESMA to provide further guidance.

106. There is one respondent which generally disagreed with the proposed Guideline 3 arguing that 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.

107. The respondent that challenged Guideline 3, believed that such indicators could further destabilise the CCP in times of stress, place the CCP's management under unnecessary pressure which is the situation to be avoided in the first place.

108. Several respondents repeated the argument that the indicator and triggering should be qualified and one respondent noted that to the extent ESMA believes it must adopt Guidelines relating specifically to capital requirements, any indicator should make clear the use of early intervention measures is dependent on the occurrence of situations that would (or likely will) substantially deplete all of the CCP's capital and there is no likely prospect to avoid this outcome.

109. One respondent linked the early intervention measures to the fundamentals of the CCPRRR and the intent to secure operation of a CCPs critical functions, defined to be the functions which failure poses risks to the Union or a Member States financial system or real economy. Hence, the respondent found that the assessment for the risk a CCP poses to financial stability and the indicators allowing early intervention measures do not refer to this general requirement,

but seemingly extent to all CCPs and all activities of a CCP and propose that the Guidelines clarify that all assessments and indicators refer to a CCPs systemic relevance for the financial sector or the real economy.

110. One respondent kindly requested ESMA and competent authorities to refrain from a mechanistic implementation of the Guidelines and rather opt for an expert judgment of the competent authorities in applying them.

5.4.3 ESMA's feedback

111. ESMA notes the overall comments to the Guidelines, the request for qualifications, and notes that there are two aspects on the aspect of qualifications:

- The first aspect is to qualify or limit **when** an indicator is met and entails the assessment by the authority;

- The second aspect is to **qualify or limit the possibility for the authority to take action** and decide on the application of the early intervention measures.

112. The following sections on Guidelines 3-9 is on the first aspect, on indicators, where the second aspect is primarily considered under Guideline 1.

113. ESMA notes the limitation under Article 18 of CCPRRR where the conditions listed (i) infringes or (ii) is likely to infringe in the near future, hence the scope to qualify the indicators are very limited under (i) but where the qualification can be slightly adjusted under (ii), however, the triggers under Article 18(1) of CCPRRR are all alternative and not cumulative (separated by "or") hence there is no possibility to qualify the infringements with the requirement for the CCP to pose a risk to the financial stability etc.

114. ESMA first notes that *if* the effect of an indicator being met *is* that an early intervention measure would have been automatically activated, ESMA would to some extent agree with the comments provided, however, this is not the case.

115. The purpose of the indicators, and as is further elaborated on above, is to provide signals at an early stage for the competent authority to be able to assess the situation and decide if an early intervention measure should be applied bearing in mind both the requirements under CCPRRR and Guideline 1.

116. One example of this aspect in the responses is the comment that the CCP has used the entire tranche of its SITG and where it might not have sufficient amount of resources available to fully replenish it and as such, it could be in breach of Article 16 of EMIR however, EMIR provides CCPs 6 months in order to replenish SITG hence it is argued that Guideline 3 contradicts EMIR. ESMA does not share this analysis as the trigger is intended to capture both an infringement and the situation where it is likely for the CCP to infringe the requirement under

EMIR in the near future. The situation described would therefore be a situation of interest to the competent authority to assess, for example by considering if the CCP in their view would be able to replenish the SITG or not and if not, if this is a sign of a more severe issue in the CCP that would require the possible application of early intervention measures to mitigate the situation before it escalates.

117. It is proposed that an indicator should be where the occurrence of the event would (or likely will) substantially deplete all of the CCP's capital and where there is no likely prospect to avoid this outcome. Again, it seems to be a misunderstanding on the effect of the indicators and triggers being met, as per above, the indicators and triggers would result in an assessment if to decide to apply early intervention measures and bearing this in mind, the indicator as proposed by the respondent would come into play too late and would not provide the possibility for the competent authority to, in time, mitigate a risk in a CCP by applying the relevant intervention measures.

118. ESMA also notes that the triggers under Article 18(1) of CCPRRR do not envisage for the breaches to be repeated, hence the Guidelines are not introducing this concept.

119. Based on above ESMA would disagree with the comments requesting to subject Guideline 3 to further qualifications, such as to require the CCP to, in addition to the trigger on capital requirement, also pose a risk to the financial stability in the Union or a Member State or even requesting to recalibrate the indicators to apply at a later stage (and this would in addition not be in line with the applicability of the triggers under Article 18 of CCPRRR). Hence the indicators are in ESMAs view correctly calibrated under Guideline 3 to provide the warning signs they are intended to do, and only minor drafting improvements have been made.

5.4.4 Guideline 3 Triggers on 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 Delegated Regulation 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 Delegated Regulation 152/2013.

Indicators for the identification of the second trigger are, for example, any of the following:

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 Delegated Regulation 152/2013 and where it is likely that the capital requirements will 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 breaching the notification threshold and resulting from either:

i. 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;

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

5.5 Triggers based on EMIR prudential requirements

120. Competent authorities should apply the requirements set out in the Articles of EMIR 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	

121. Where there is an infringement or likely infringement (in the near future) of Articles 40-50 of EMIR and Articles 24-61 of Delegated Regulation 153/2013 this will trigger an assessment by the competent authority of whether to decide to apply early intervention measures. The list of indicators 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.

5.5.1 Guideline 4 Trigger on prudential requirements

122. 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 infringes, or is likely to infringe in the near future, the prudential requirements of EMIR.

123. 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 identified, 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.

5.5.2 List of indicators for prudential requirements

Guideline 4 Trigger on prudential requirements – as proposed in the consultation paper (pages 25 to 30)

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 reconsolidating 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.

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 Delegated Regulation 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 Delegated Regulation 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.

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 Delegated Regulation 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of Delegated Regulation 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 Delegated Regulation 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of Delegated Regulation 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.

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 Delegated Regulation 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 Delegated Regulation 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.

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 Delegated Regulation 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 Delegated Regulation 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.

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 Delegated Regulation 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 Delegated Regulation 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.

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 Delegated Regulation 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 Delegated Regulation 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:

- a lack of involvement by the CCP in recent investment decisions,
- insufficiency in applying investment processes,
- shortfalls in the monitoring of the CCP's investments,
- erroneous booking of investment trades,
- ineffective monitoring of the arrangements or the credit quality of its financial counterparties or financial service providers, or
- 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.

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.

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 Delegated Regulation 153/2013.

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 Delegated Regulation 153/2013.

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.

5.5.2.1 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.

5.5.3 Summary of consultation responses

124. There was on one hand support for the proposed Guideline 4, a few respondents broadly agreed with the indicators in relation to the triggers in respect of the prudential requirements. However, on the other hand several respondents provided comments on the Guideline 4.

125. Some respondents were of the view that there is a clear overlap with BAU CCP supervision, but also noting then that CCPRRR will provide the competent authority with additional powers in case a CCP does not comply with EMIR requirements.

126. There were several respondents disagreeing with the proposed Guideline 4 mainly noting that 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. Also, it was noted that a single breach in a competent authority risk capital assessment, as well as other items identified in the proposed Guideline 4, does not by itself justify a possible early intervention. It was noted that there are already processes and procedures under EMIR in place to address such non-recurring incidents and therefore, they did not believe that an EMIR prudential assessment would be required for a competent authority to assess whether there is a need for an early intervention.

127. One respondent in particular noted that on model review, the aim of stress testing is mostly to test resources of the CCP, and it is unlikely that stress testing (other than reverse stress testing) is suitable for model review or suitable to identify model shortcomings.

128. Some respondents noted that infringements in the assessment of liquidity and credit exposures to each clearing member, should not happen if the models

have been approved by the competent authorities. The only case where such infringements could appear is following a default scenario.

129. It was also noted by some respondents that in relation to '*mistakes in margins calls as noted by back-testing or the requested margin calls do not reflect the volatility of the market'*, this indicates that the model in production is not working properly. Competent authorities could ask the CCP to review it risk model but that in itself would not justify a possible early intervention.

130. Similarly, the indicators relating to the default fund and other financial resources but also liquidity controls and default waterfall form part of the competent authority's supervisory duties whereby a regulator notes a weakness in models, rules etc. it has the right to oblige the CCP to take an action without being into a pre-resolution mode.

131. The need to define terms such as 'difficulties', 'issues', 'insufficiencies', 'shortfalls" was noted, as they 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.

132. In addition, to the specific concerns raised above, some respondents challenged, in the same way as done under other Guidelines, the suitability of having single incidents triggering an assessment, and the view of some respondents is that a single breach in a competent authority's risk capital assessment does not by itself justify a possible early intervention.

133. The view among several respondents was that an EMIR infringement should not automatically justify an early intervention trigger. Such respondents noted that there are processes and procedures in place under EMIR to address such non-reoccurring incidents and therefore, it is not believed that an EMIR prudential assessment would be required for a competent authority to assess whether there is a need for an early intervention. Triggers for early intervention should be material and reoccurring infringements for which the CCP has not taken appropriate action to rectify.

134. One respondent noted that in general, an EMIR infringement alone should not automatically justify 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.

135. One respondent noted that to the extent ESMA believes it must adopt Guidelines relating specifically to EMIR prudential requirements, this indicator in particularly should make clear that it refers to situations 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.

5.5.4 ESMA's feedback

136. ESMA notes the limitation under Article 18 of CCPRRR where the conditions listed (i) infringes or (ii) is likely to infringe in the near future, hence the scope to qualify the indicators are very limited under (i) but where the qualification can be slightly adjusted under (ii), however, the triggers under Article 18(1) of CCPRRR are all alternative and not cumulative (separated by "or") hence there is no possibility to qualify the infringements with the requirement for the CCP to pose a risk to the financial stability etc.

137. ESMA also notes that the feedback provided by ESMA under Guideline 3 is also relevant here, under Guideline 4. For example, ESMA again notes that the effect of an indicator being met is an assessment if to apply any early intervention measures.

138. ESMA has considered the more specific comments provided in the answers and noted the request to define terms such as 'difficulties', 'issues', 'insufficiencies', 'shortfalls" as they 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. ESMA notes two things, firstly, as per above, no qualification is envisaged under CCPRRR and in relation to the second part of the triggers "likely to infringe in the near future" there are qualifications included under the Guidelines, and secondly the result of the use of undefined terms will not create a deviating application of the early intervention measures as the triggers themselves will "only" prompt an assessment, hence once a competent authority is to decide on the application of an early intervention measures after careful considerations. Based on this, ESMA sees no reason to define those concepts as they are all signs of an identified problem and therefore these should not cause any issue under their application.

139. ESMA notes the various comments on margin calls and on model reviews and stress testing where some respondents required amendments. ESMA has made some adjustments in the Guideline to accommodate certain requested changes under Guideline 4.

140. ESMA again notes that the triggers under Article 18(1) of CCPRRR do not envisage for the breaches to be repeated, hence the Guidelines are not introducing this concept and in addition, just because an issue is repeated would not per se make early intervention measures necessary and would not mean

that normal supervisory powers cannot manage this situation. In any case, the driver behind the triggers for early intervention is to detect the issues and the risks that should be mitigated at an early stage to avoid a crisis situation and to be able to capture those situations the indicators need to signal early warnings and be supplemented by supervisory flexibility and room for judgements.

141. ESMA is of the view that the indicators are correctly calibrated under Guideline 4 to provide the warning signs they are intended to do, but again, and reiterating this point, not automatically entail an early intervention measure.

142. Based on above ESMA would disagree on the comments requesting to subject Guideline 4 to further qualifications or to recalibrate the indicators to apply at a later stage (and this would in addition not be in line with the applicability of the triggers under Article 18 of CCPRRR). ESMA is of the view that no changes in relation to how the indicators are calibrated under Guideline 4 are justified however certain improvements have been made to the Guideline based on the comments received.

5.5.5 Guideline 4 Triggers on prudential requirements

5.5.5.1 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 identification of the second trigger, is, 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) any of the following:

a) difficulties in reconsolidating 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.

5.5.5.2 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* Delegated Regulation *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 Delegated Regulation 153/2013;

An indicator, for the identification of the second trigger, is, 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 noted by back-testing results;

b) where there are material shortcomings in the margin management, with the result that the overall margins may be inadequate in the event where the CCP needs to liquidate a portfolio.

5.5.5.3 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 Delegated Regulation 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of Delegated Regulation 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 Delegated Regulation 153/2013 or the requirements under Article 43 of EMIR Article 41 of EMR or Articles 24 to 28 of Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, 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.

5.5.5.4 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 Delegated Regulation 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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger is, 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.

5.5.5.5 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 Delegated Regulation 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 Delegated Regulation 153/2013.

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

5.5.5.6 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 Delegated Regulation 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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is , for example, where 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 or default procedures requirements.

5.5.5.7 Investment policy

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* Delegated Regulation *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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, for example, where:

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 any of the following:

   i. insufficiency in applying investment processes,

   ii. shortfalls in the decision making and monitoring processes relating to the CCP's investments,

   iii. erroneous booking of investment trades,

   iv. ineffective monitoring of the arrangements or the credit quality of its financial counterparties or financial service providers,

   v. 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.

5.5.5.8 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 identification of the second trigger, is, 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) any of the following, 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;

c) the CCP's efforts to assess the transfer of positions 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.

5.5.5.9 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 Delegated Regulation 153/2013.

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 Delegated Regulation153/2013.

An indicator, for the identification of the second trigger, is, 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) any of the following, where:

a) there are signs that the frequency of reviewing and applying stress tests/back tests are reducing;

b) there are concerns identified in relation to the independency of the reviews;

c) 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.

5.5.5.10 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 identification of the second trigger, is, for example, where:

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;

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.

5.6 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.

143. Other types 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.

5.6.1 Summary of consultation responses

144. There was on one hand support for the proposed Guidelines 5 to 9, many respondents broadly agreed with the indicators in relation to the triggers signalling 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.

145. However, on the other hand, several respondents provided certain targeted comments or reflections on the Guidelines 5 to 9.

146. One respondent generally disagreed with the proposed Guidelines 5 to 9 in light of overall challenge of the Guidelines, mainly in relation to missing qualifications and that also Guidelines 5 to 9, in line with the comments provided to the proposed Guidelines 3 and 4, seem to capture events that a CCP could address independently without the need for early intervention measures.

147. One respondent saw the need for further specification of different parameters including the definition of magnitudes when triggering possible risks of financial stability. The respondent also noted that these factors should be better quantified. Without further specification, the phrases can be interpreted in many different ways. The respondent, again noted that, the objective of the Guidelines is to promote the consistent application of the early intervention measures, and they believed that this can only be achieved if the criteria are defined in a manner that does not allow for multiple competing interpretations.

5.6.2 ESMA's feedback

148. ESMA notes that the feedback provided by ESMA under Guidelines 3 and 4 is also relevant here.

149. ESMA further notes the request for the definitions of magnitudes when triggering possible risks of financial stability and for the indicators to be better quantified as without further specification, the phrases can be interpreted in many different ways and the aim of the Guidelines is to promote the consistent application of the early intervention measures. There seem (as previously noted) to be the understanding that the reference to "consistent application" of the early intervention measures should be understood as to the *application of such measures*, where instead the Guidelines cater for a "consistent application" of the triggers to *assess and decide if to apply early intervention measures*.

150. This is an important distinction and one of the reasons for this approach under the Guidelines is to ensure the early intervention measures are indeed not executed automatically too early but that the application of those measures is the result of an assessment and judgement of the competent authority on a case-by-case basis. To establish a Guideline that would result in the actual triggering of the early intervention measures would, in ESMAs view, not fulfil the mandate bearing in mind the underlying aim of those new powers is to create early warning signs, and in this situation the indicators would most likely be met far too late to add value, as they would be calibrated to be applied later to ensure early intervention measures are not applied automatically where not needed.

151. As the driver behind the triggers for early intervention is to detect the risks that should be mitigated at an early stage to avoid a crisis situation and hence, the indicators should be wide enough to capture all relevant situations and be supplemented by supervisory flexibility and room for judgements, hence ESMA is of the view that the request for materiality and quantifications, is not aligned with the objective of the Guideline.

152. ESMA again reiterates that there is an intentional overlap with BAU but, as described earlier, the result of a trigger being met is entirely different from a compliance check of EMIR.

5.6.3 Guideline 5 Triggers in relation to identified concerns of EMIR compliance

153. ESMA has concluded that it is not possible to list all aspects of the scenarios or situations that can be considered to entail 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 Guidelines 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.

154. 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 possible application of early intervention measures.

Trigger on identified concerns of EMIR compliance – as proposed in the consultation paper (pages 31 and 32)

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:

- ➢ the CCP will fail, or there is a significant risk that the CCP will fail, to make when due, material payments;
- ➢ 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;
- ➢ 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.

5.6.3.1 Summary of consultation responses

155. One respondent noted that the indicator/trigger identified in Guideline 5 seems to overlap with Guideline 4.

156. One comment was made on the indicator whereby the CCP makes payments with increased delays, and the respondent notes that there have been past incidents where due to central bank payment system outages, i.e., where there is a market wide incident CCPs would be forced to conclude payments with some delays. This is due to the fact that CCPs will fall back to payment arrangements which may be slower than normal, and the respondents suggests changing this trigger to ‘recurring failure to pay over consecutive/weeks’.

157. Some respondents would caution against, in (a) of Guideline 5, 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. A similar comment is made by another respondent noting that the wording “An identified concern is material, left unresolved, repeating or increasing” is ambiguous and can be interpreted to mean that a concern need not to be ‘material’ in order to be a trigger for early intervention. They would suggest changing this to “An identified concern is material and is left unresolved, repeating or increasing.” The reason being that the early intervention measures allow for far-reaching intervention into a CCP's business, hence should be reserved only for very serious indications of deficiencies at the CCP and not used to address relatively minor issues that would be more appropriately addressed with the tools and powers available to competent authorities under other applicable laws and regulations.

5.6.3.2 ESMA’s feedback

158. ESMA notes that the feedback provided by ESMA under the previous Guidelines are also relevant here, under Guideline 5. Guideline 5 complements Guideline 4, as Guideline 5 states that it does not apply where the discovery is already covered by Guidelines 3 or 4, hence no overlap.

159. ESMA agrees to clarify that an identified concern should be material to trigger an assessment if to decide to apply early intervention measures.

160. ESMA have sympathy for the comment on where a payment delay is, for example, due to incidents outside the control of the CCP, however as Guideline 5 is already qualified, ESMA sees no reason to explicitly exclude the scenario described by the respondent. Hence, only minor drafting improvements has been made to Guideline 5.

5.6.3.3 Guideline 5 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.

Indicators, for the identification of the trigger on EMIR compliance, are, for example, any of the following situations, where:

a. an identified concern is material and is 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;

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.

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

Trigger on a CCP's impact on other entities with risks to the financial stability – as proposed in the consultation paper (page 32)

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.

5.6.4.1 Summary of consultation responses

161. The respondents generally agreed with the indicator, however they have a few targeted comments.

162. One comment was made on the procyclicality of margins under this Guideline 6, and it is noted that there may be instances where this is unavoidable due to unprecedented volatility. Margin models by design react to new conditions. They would therefore suggest amending this indicator to 'overtly procyclical' i.e., avoiding large step changes versus what they might expect as normal uplift during a period like COVID related market volatility of March 2020.

163. Some respondents noted that under Guideline 6 points (a), (c) and (d) regarding the indicators in relation to a CCP's impact on other entities presenting risks to financial stability, seemed from the respondent perspective to relate to the financial capacity of a CCP's clearing members hence it was argued that it would not be possible for a CCP to guarantee that its clearing members are financially sound; this is the responsibility of each clearing member and, in extreme cases, of the relevant competent authority. The respondents encouraged ESMA to redefine these indicators to tie them directly to issues that

fall within the direct responsibility of the CCP, for example the effectiveness of the anti-procyclicality margin buffer design. It was noted that one of the reasons for CCPs to exist is because not all market participants are financially sound at all times.

164. It was also specifically noted by some respondents that point (a) under Guideline 6, places the burden of avoiding procyclicality solely on CCPs, but it is the responsibility of clearing members to understand the margin requirements for the CCPs at which they conduct business and to ensure they have the treasury capacity to meet margin calls.

165. It was further specifically noted by some respondents that points (c) and (d) under Guideline 6 effectively challenge the enforceability of a CCP's default rules by stating that a CCP's competent authority may intervene in the CCP's business where the CCP's enforcement of its own previously agreed contractual rights might affect other entities. It was argued that this is the responsibility of each clearing member to ensure that it can fulfil these pre-agreed and transparent obligations and if the clearing member is unable to do so, the competent authority should intervene at that entity and not at the CCPs at which it is a clearing member.

5.6.4.2 ESMA’s feedback

166. ESMA notes that the feedback provided by ESMA under the previous Guidelines are also relevant here, under Guideline 6.

167. ESMA agrees to change the reference to “overtly procyclical’, i.e. clearly or unusually procyclical. ESMA notes the request for recalibrating the Guideline 6 points (a), (c) and (d) regarding the indicators in relation to a CCP’s impact on other entities presenting risks to financial stability. ESMA disagrees that these indicators requires the CCP to guarantee that its clearing members are financially sound and ESMA would agree that this is the responsibility of each clearing member (however there are requirements on CCPs to ensure clearing members adhere to certain standards), however, the purpose of this Guideline is not to identify issues under the CCPs remit, but to assess if the CCP may create risks at its linked entities and if this risk could even establish itself as a risk to the financial stability of the Union or any of the Member States. Hence, it is for the competent authority to assess this risk and to, where decided to be needed, use the early intervention measures to mitigate this risk. In addition, the comment on placing the burden on the CCP to avoid procyclicality also refers to the clearing members also being responsible in this case, however, again the trigger is not to detect issues in the CCP but to detect issues due to a situation that has occurred at the CCP. Based on this, the Guidelines will be left unchanged as the indicators are in ESMAs view correctly described.

168. Finally, there is a comment that argues that letters (c) and (d) under Guideline 6 effectively challenge the enforceability of a CCP's default rules by stating that a CCP's competent authority may intervene in the CCP's business where the

CCP's enforcement of its own previously agreed contractual rights might affect other entities and instead the competent authority should intervene at that entity and not at the CCPs at which it is a clearing member. ESMA disagrees to this conclusion and notes that the ability for the competent authority to intervene where risks are detected is precisely the purpose of law, i.e., to provide a public authority with powers to be used in the public interest. Based on this, the Guidelines will be left unchanged as the indicators are in ESMAs view correctly described and only minor drafting improvements has been made to this Guideline.

5.6.4.3 Guideline 6 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.

Indicators, for the identification of the trigger on a CCP's impact on other entities with a risk to financial stability, is, for example, any of the following situations where:

a) the CCP's margins and collateral policies may lead to overtly 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;

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.

5.6.5 Guideline 7 Trigger on a CCP's operational viability

Trigger on a CCP's operational viability – as proposed in the consultation paper (pages 32 and 33)

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 constrains 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 constrains, 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 of 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 constrains 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.

5.6.5.1 Summary of consultation responses

169. The respondents generally agreed with the indicator; however, one respondent encouraged point (a) and (g) of Guideline 7 to be further specified.

5.6.5.2 ESMA's feedback

170. ESMA has not identified a need to adjust point (a) and (g) of Guideline 7 and only minor drafting improvements has been made to this Guideline.

5.6.5.3 Guideline 7 on a CCP's operational viability

The indicators for the trigger for the identification of 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.

The indicator is 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 constrains 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 constrains, 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 of 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 constrains 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.

5.6.6 **Guideline 8 Trigger on the CCP's financial viability**

Trigger for the CCP's financial viability – as proposed in the consultation paper (pages 33 and 34)

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:

   - a decrease in transactions submitted for clearing,

   - the intention of clearing members to terminate their contracts with the CCP (termination notice).

5.6.6.1 Summary of consultation responses

171. The respondents generally agreed with the indicator; however had a few targeted comments.

172. One respondent noted that looking at the CCP’s financial viability is the most important but reflected on that this indicator will overlap with the indicator in Guideline 3 on capital requirements.

173. Some respondents raised concern regarding the indicator on a CCP’s financial viability in Guideline 8, especially point (b) and (d). It was noted for point (b), that since Guideline 8 relates to the financial viability of the CCP it is suggested that a similar wording to that used for civil actions under point (a), namely, “Issued or anticipated regulatory sanctions where the amount at risk may jeopardize the financial viability or soundness of the CCP” is incorporated.

174. Some respondents noted that under point (d) of Guideline 8, the CCP has no control over the financial situations or creditworthiness of its clearing members and one respondent noted that 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. As such, the respondents thought this indicator should be rephrased to instead require the competent authority to assess whether the CCP's own responses are proving sufficient to account for an adverse material change in the CCP's membership. This could include, for example, whether it is following its own monitoring and escalation processes for the credit risk assessment of its clearing members (e.g., terminating the memberships of clearing members that no longer meet the participation requirements) or whether its margining requirements and model are proving appropriate to manage the situation. It was asked that ESMA clarifies these indicators, tying them to aspects that are within the direct responsibility of the CCP.

175. One respondent would encourage point (e) of Guideline 7 to be further specified.

5.6.6.2 ESMA’s feedback

176. ESMA notes that the feedback provided by ESMA under the previous Guidelines are also relevant here, under Guideline 8.

177. ESMA has considered the comment on overlap between Guideline 3 and Guideline 8 and concluded that whilst there is a common denominator, the trigger underlying Guideline 3 requires an infringement or a “likely to infringe” situation where this is not the case for Guideline 8, where the aim is to capture the requirement under Article 18(1) of the CCPRRR requiring a trigger to be assessed in relation to where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, the CCPs financial viability, and in particular, its ability to provide clearing services. Hence the scope is different as Guideline 8 looks to the financial viability of the CCP without requiring any infringements but would only be relevant where the ability to provide clearing services could be affected. Therefore, there is no overlap and both aspects are required to be assessed under CCPRRR.

178. ESMA has amended Guideline 8, point (b), to include the suggested wording "Issued or anticipated regulatory sanctions where the amount at risk may jeopardize the financial viability or soundness of the CCP" to be aligned with point (a).

179. ESMA has amended Guideline 8, point (d) in the same manner as point (b), however, whilst ESMA appreciates the comments received and the suggestions made, the aim of this trigger is not within the control of the CCP but identifies a situation where an assessment is justified and has left the remining part of point (d) unchanged.

180. ESMA has also considered the request for point (e) of Guideline 8 to be further specified but would not agree that there is a need to further elaborate on this aspect. In addition to this only some minor drafting improvements has been made to this Guideline 8.

5.6.6.3 Guideline 8 on a 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, for the identification of the trigger on a CCP's financial viability, is 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 where the amount at risk may jeopardize the financial viability or soundness of the CCP 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 where these changes may jeopardize the financial viability or soundness of the CCP.

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, or

ii. the intention of clearing members to terminate their contracts with the CCP (termination notice).

5.6.7 Guideline 9 Trigger for emerging crisis

Trigger for emerging crisis – as proposed in the consultation paper (page 34)

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 identify 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.

5.6.7.1 Summary of consultation responses

181. Some respondents pointed out that it should be clarified that a focus should be on situations which present an adverse effect on the financial stability and note that Guideline 9 should be better quantified as without further specification, the phrases *'material amount of defaults'* and *'significant issues in the functioning of a market or market segment'* can be interpreted in many different ways. The same reason is provided that the objective of these Guidelines is to promote the consistent application of the early intervention measures, hence the respondent believe that this can only be achieved if the indicators are defined in a manner that does not allow for multiple competing interpretations.

182. One respondent also noted that Guideline 9 is the only Guideline under which indicators not directly tied to actual observed issues at the CCP level may be considered as grounds for early intervention. Instead, it requires competent authorities to assess whether market or segment crises 'could' have a material impact on the CCP's operations. The respondent acknowledged that Guideline 9 is foreseen by the Level 1 text, but believed that a more narrowly defined and quantifiable approach to this Guideline would be more appropriate, as material concerns do not need to have arisen at the CCP itself before the criteria in

Guideline 9 can be used in assessing the appropriateness of early intervention measures.

5.6.7.2 ESMA's feedback

183. ESMA notes that the feedback provided by ESMA under the previous Guidelines are also relevant here, under Guideline 9.

184. ESMA notes again, that the important aspect of the indicator is that it is possible for it to be identified at a sensible time to ensure relevant assessments are undertaken, hence ESMA would not agree to the need for further specification and quantifications as there is no value added. If there is no reason to be concerned, this would be the outcome of the relevant authorities' assessment and hence no early intervention measure will be taken.

185. ESMA agrees that the indicators do establish a different type of assessment, however as also noted by the respondent, this is envisaged under CCPRRR. ESMA does not see value in limiting its applicability, as it is important that the competent authority is able to consider those aspects if concerns are identified. Only minor drafting improvements has been made to this Guideline 9.

5.6.7.3 Guideline 9 an 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, for the identification of the trigger of an emerging crisis, is, for example, where the competent authorities identify 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;

b) Significant issues in the functioning of a market or market segment.

ANNEXES

Annex I: Article 18 of the CCPRRR 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 of CCPRRR.

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 Final Report are of a mandatory nature, i.e. they are envisaged in CCPRRR 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.

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 Commission[12].

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 provide competent authorities with guidance on the situations under which the authorities should consider if to apply any of the early intervention measures to central counterparties. Hence, the Guidelines sets out indicators to assist the authorities in identifying 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 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 of CCPRRR through principles, it would however create a lower level of convergence as the actual situations, identified based on the principles would be determined by the competent authorities.
Policy option 2	To further specify the situations underlying the triggers by providing for the corresponding indicators identifying situations 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 of CCPRRR and would create a high level of supervisory convergence by providing guidance on the situations by the use of indicators that, at least, should be considered by the competent authorities.
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	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

not, what other body is concerned / needs to be informed or consulted?	uniform, consistent and coherent application of Union Law.

Impacts of the policies:

Policy option 1	
Benefits	It will provide principles for the competent authorities to use when assessing the situations and determine on the application of the early intervention measures.
Regulator's costs	Probably quite high as the competent authority have to create the scenarios and the list of indicators and monitor the triggers.
Compliance costs	For the CCP no compliance costs.
Policy option 2	
Benefits	It will provide the competent authority with a predetermined list of scenarios and indicators to monitor and use in the assessment of the triggers, 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.
	The costs for Option 2 can be summarised as the cost of the competent authority to monitor the triggers using these Guidelines and to determine on the potential application of early intervention measures. 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. ESMA notes that the costs are envisaged for by the CCPRRR. On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs.

Summary of consultation responses

Option 2 has support.

However, some respondents preferred Option 1. It was argued that Option 1, which specifies the principles as guidelines for the competent authorities to decide on the triggers for the application of the early intervention measures, is a better option that would provide for a clear determination as to whether an early intervention needs to be assessed and this is based on the view that the list of indicators should primarily be developed with the local market in mind.

Such respondent did not believe that a granular list of indicators would provide the necessary certainty to both competent authorities and CCPs and most importantly the clear set of circumstances under which the competent authority would be forced to step in. Instead, this respondent believed that a smaller set of indicators should be developed by competent authorities 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’s feedback

ESMA does not agree with using Option 1 for these Guidelines and has not amended the cost and benefit assessment beside some minor clarifications.

Annex III: Advice of the Securities and Markets Stakeholder Group

In accordance with Article 16 of the ESMA Regulation, ESMA has requested the advice of the Securities and Markets Stakeholder Group (SMSG). The SMSG has not provided any comment.

Annex IV: Guidelines on Early Intervention Measures

Guidelines

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

Table of Contents

I. Scope

Who?

1. These Guidelines apply to competent authorities designated under Article 22 of EMIR that supervise CCPs authorised under Article 14 of EMIR.

What?

2. These Guidelines relate to common procedures and methodologies for the supervisory review and evaluation process pursuant to Article 21 of EMIR. These Guidelines do not introduce new requirements for CCPs in addition to the ones specified in EMIR or the relevant technical standards.

When?

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

II. Legislative references and abbreviations

Legislative references

CCPRRR	Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) 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[13]
EMIR	Regulation (EU) 648/2012 of 4 July 2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories[14]
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[15]
Delegated Regulation 152/2013	Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties[16]
Delegated Regulation153/2013	Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties[17]

Abbreviations

BAU	Business as Usual
CCP	Central Counterparty
EC	European Commission
EEA	European Economic Area
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority

[13] OJ L 22, 22.1.2021, p. 1–102
[14] OJ L 201, 27.7.2012, p.1
[15] OJ L 331, 15.12.2010, p. 84
[16] OJ L 52, 23.2.2013, p. 37
[17] OJ L 52, 23.2.2013, p. 41

ESRB	European Systemic Risk Board
EU	European Union

Definitions

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

III. Purpose

5. These Guidelines are based on Article 18(8) of CCPRRR and issued in accordance with Article 16 of the ESMA Regulation.

6. The objectives of these Guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure the common, uniform and consistent application of Article 18(1) of EMIR.

7. In particular, these Guidelines seek to provide competent authorities with guidance on the situations under which they should consider the application of early intervention measures to CCPs. Specifically, the Guidelines provide indicators guiding on the application of the triggers prompting the consideration of whether to apply early intervention measures.

IV. Compliance and reporting obligations

Status of these Guidelines

8. 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.

9. 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).

Reporting requirements

10. 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.

11. 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.

V. Guidelines on the consistent application of the triggers for the use of Early Intervention Measures

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.

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 constrains. Hence, depending on the significance of the deterioration or anomalies in 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.

Where a trigger (considering the indicators) has been identified and hence lead to 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.

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.

Guidelines 1 and 2 aim to set out the procedures in applying the Guidelines 3 to 9.

Guideline 1: Procedure

Where one of the triggers, as listed under Article 18(1) of CCPRRR, has occurred and where the competent authority, applying these Guidelines, considers that such a situation could entail an assessment under this Article on whether to apply any of the early intervention measures, the competent authority should:

a. further investigate the situation;

b. assess the severity of the situation, by considering whether the 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. take the following aspects into account in the decision on whether to apply an early intervention measure:

- the urgency of the situation,
- the magnitude of event,
- the overall viability of the CCP; and
- whether the 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 is undertaking the requirements provided for in paragraphs 3 to 7 of Article 18 of CCPRRR, such as the consultation of the supervisory college.

Guideline 2: 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:

i. 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;

ii. 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.

Guideline 3: 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 Delegated Regulation 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 Delegated Regulation 152/2013.

Indicators for the identification of the second trigger are, for example, any of the following:

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 Delegated Regulation 152/2013 and where it is likely that the capital requirements will 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 breaching the notification threshold and resulting from either:

i. 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

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

Guideline 4: 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 identification of the second trigger, is, 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) any of the following:

a) difficulties in reconsolidating 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* Delegated Regulation *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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, 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) any of the following:

a) where there are repeated issues noted by back-testing results;

b) where there are material shortcomings in the margin management, 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 Delegated Regulation 153/2013 or the requirements under Article 43 of EMIR, Article 41 of EMR or Articles 24 to 28 of Delegated Regulation 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 Delegated Regulation 153/2013 or the requirements under Article 43 of EMIR Article 41 of EMR or Articles 24 to 28 of Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, 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 Delegated Regulation 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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger is, 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 Delegated Regulation 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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, for example, where 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 Delegated Regulation 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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is , for example, where 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 or default procedures requirements.

g. Investment policy

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* Delegated Regulation *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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, for example, any of the following, where:

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. insufficiency in applying investment processes,

   ii. shortfalls in the decision making and monitoring processes relating to the CCP's investments,

   iii. erroneous booking of investment trades,

iv. ineffective monitoring of the arrangements or the credit quality of its financial counterparties or financial service providers,

v. concerns on the possibility to liquidate the investments with minimal adverse price effect,

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

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 identification of the second trigger, is, 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) any of the following, 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;

c) the CCP's efforts to assess the transfer of positions 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 Delegated Regulation153/2013.

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 Delegated Regulation 153/2013.

An indicator, for the identification of the second trigger, is, 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) any of the following, where:

a) there are signs that the frequency of reviewing and applying stress tests/back tests are reducing;

b) there are concerns identified in relation to the independency of the reviews;

c) the input used in its stress testing is 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 identification of the second trigger, is, for example, any of the following, where:

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;

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.

Guideline 5: 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.

Indicators, for the identification of the trigger on EMIR compliance, are, for example, any of the following situations, where:

a. an identified concern is material and is 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;

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 or 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.

Guideline 6: 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, for the identification of the trigger on a CCP's impact on other entities with a risk to financial stability, is, for example, any of the following situations where:

a) the CCP's margins and collateral policies may lead to overtly 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;

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.

Guideline 7: 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, for the identification of the trigger on a CCP's operational viability, is 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 constrains 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 constrains, 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 of 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 constrains 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.

Guideline 8: 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, for the identification of the trigger on a CCP's financial viability, is 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 where the amount at risk may jeopardize the financial viability or soundness of the CCP 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 where these changes may jeopardize the financial viability or soundness of the CCP.

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, or

ii. the intention of clearing members to terminate their contracts with the CCP (termination notice).

Guideline 9: 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, for the identification of the trigger of an emerging crisis, is , for example, where the competent authorities identify 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:

i. A material amount of defaults in a given sector.

ii. Significant issues in the functioning of a market or market segment.