



European Securities and
Markets Authority

Response Form to the Consultation Paper

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



Responding to this paper

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

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **20 September 2021**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input - Consultations’.

Instructions

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

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_EIM_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_EIM_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_EIM_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open consultations” → “Consultation on the consistent application of the triggers for the use of Early Intervention Measures”).

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper?

All interested stakeholders are invited to respond to this consultation. In particular, this paper may be specifically of interest for EU central counterparties, national competent authorities in charge of the supervision of EU central counterparties, EU authorities involved in the EU CCPs' recovery and resolution process, clearing members and clients of clearing members.

General information about respondent

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

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_EIM_00>

Eurex Clearing is an EMIR-authorized central counterparty (CCP) and a subsidiary of the Deutsche Börse Group. Eurex Clearing provides clearing services for cash and derivatives markets in listed and over-the-counter (OTC) financial instruments.

Eurex Clearing appreciates the opportunity to provide feedback to ESMA's consultation regarding the Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures. We would generally like to highlight that any observed deficiencies considered when assessing possible early intervention measures should be material, and there should be a caveat that early intervention is as a rule only appropriate where the CCP in question is unable to address these deficiencies itself in a timely manner. For 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. We have also provided some targeted comments on Guidelines 1, 2, 4, 5, 6, 8 and 9.

We trust our comments are considered a useful contribution to the specification of the new CCP RR regime ensuring an effective implementation. Eurex Clearing remains at the disposal of ESMA for any questions or additional feedback.

<ESMA_COMMENT_EIM_00>

Questions

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

<ESMA_QUESTION_EIM_01>

Please also refer to our introductory remarks and the answers to the following questions. We would generally like to highlight that any observed deficiencies considered when assessing possible early intervention measures should be material, and there should be a caveat that early intervention is as a rule only appropriate where the CCP in question is unable to address these deficiencies itself in a timely manner. For a consistent application of the rules across Member States, competent authorities should therefore ensure that the measures they take under these Guidelines are suitable, necessary, and proportionate to the observed situation.

<ESMA_QUESTION_EIM_01>

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

<ESMA_QUESTION_EIM_02>

We agree with Guideline 1 in general, but would recommend an explicit requirement for the competent authority to assess the proportionality of the proposed early intervention measure(s) in relation to the severity of the deficiency observed at the CCP. We would further suggest that ESMA requires competent authorities to assess whether the proposed early intervention measures could adequately address the observed deficiencies at the CCP (suitability assessment) and to verify that the CCP would be unable to address the issues it is facing itself in a timely manner (necessity assessment).

Given that the range of possible early intervention triggers and measures provided for in Article 18 of Regulation (EU) 2021/23 is very broad, we believe that consistent application of the rules would be better ensured if competent authorities were required to assess that the measures they take under this Article are suitable, necessary, and proportionate to the observed situation.

<ESMA_QUESTION_EIM_02>

Q3 : Do you agree with the proposal on how to assess financial stability in the Union or in a Member State, as set out in Guideline 2? If not, please elaborate.

<ESMA_QUESTION_EIM_03>

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<ESMA_QUESTION_EIM_03>

Q4 : Do you agree with the proposed Guideline 3 and in particular the proposed indicators to assess capital requirements? If not, please elaborate.

<ESMA_QUESTION_EIM_04>

Please also refer to our response to the following question.

<ESMA_QUESTION_EIM_04>

Q5 : Do you agree with the proposed Guideline 4 and in particular the proposed indicators to assess EMIR prudential requirements? If not, please elaborate.

<ESMA_QUESTION_EIM_05>

In general, we believe that an EMIR infringement alone should not automatically trigger an early intervention measure. As already indicated in our response to Question 2, observed deficiencies that could trigger early intervention should be material (i.e., more severe than EMIR infringements) and beyond the capacity of the CCP itself to resolve in a timely manner.

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

<ESMA_QUESTION_EIM_05>

Q6 : Do you agree with the proposed Guidelines 5 to 9 and in particular the proposed indicators, to assess financial stability in the Union or in one or more of its Member States or to assess an emerging crisis situation that could affect the operations of the CCP? If not, please elaborate.

<ESMA_QUESTION_EIM_06>

We generally agree with Guidelines 5 to 9, but would like to address the following specific points:

Regarding Lit. (a) of Guideline 5, which reads: 'An identified concern is material, left unresolved, repeating or increasing.' The ambiguous wording can be interpreted to mean that a concern need not be 'material' in order to be a trigger for early intervention; we would suggest changing this to 'An identified concern is material *and is* left unresolved, repeating or increasing.' As the early intervention measures allow for far-reaching intervention into a CCP's business, we are of the view that they 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.

Regarding Lit. (a), (c) and (d) of Guideline 6 regarding the trigger in relation to a CCP's impact on other entities presenting risks to financial stability, from our perspective these relate to the financial capacity of a CCP's clearing members. It is not possible for a CCP to guarantee that its clearing members are financially sound; this is the responsibility of each clearing member and, in extreme cases, of the relevant competent authority. We would also like to point out that part of the reason CCPs exist is because not all market participants are financially sound at all times. Lit. (a) specifically 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. Lit. (c) and (d) 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. In our view, it is the responsibility of each clearing member to ensure that it can fulfil these pre-agreed and transparent obligations; 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. We would therefore ask that ESMA 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.

We would also like to raise concerns regarding the trigger on a CCP's financial viability in Guideline 8, especially Lit. (b) and (d). For Lit. (b), since Guideline 8 relates to the financial viability of the CCP we would suggest incorporating similar wording to that used for civil actions under Lit. (a), namely, 'Issued or anticipated regulatory sanctions where the amount at risk may jeopardize the financial viability or soundness of the CCP'.

Regarding Lit. (d) of Guideline 8, we would note that a CCP has no control over the financial situations or creditworthiness of its clearing members. As such, we think 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.

Guideline 9 should, in our opinion, be better quantified. 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. To reiterate, the objective of these Guidelines is to promote the consistent application of the early intervention measures, and we believe that this can only be achieved if the criteria are defined in a manner that does not allow for multiple competing interpretations. We would also note that Guideline 9 is the only Guideline under which factors not directly tied to actual observed issues at the CCP may be considered as grounds for early intervention. Instead, it asks competent authorities to assess whether market or segment crises 'could' have a material impact on the CCP's operations. While we accept that Guideline 9 is foreseen by the Level 1 text, we believe 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.

<ESMA_QUESTION_EIM_06>

Cost and Benefit Analysis Questions:

Q7: Do you agree with the Option 2, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?

<ESMA_QUESTION_EIM_07>

Please refer to our answers to the previous questions.

<ESMA_QUESTION_EIM_07>

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

<ESMA_QUESTION_EIM_08>

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