European Securities and Markets Authority

Consultation Paper

Draft Guidelines further specifying the circumstances for temporary restrictions in the case of a significant non-default event in accordance with Article 45a of EMIR

12 July 2021 | ESMA91-372-1358

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. 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'.

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 'Data protection'.

Who should read this paper?

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

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1 Executive Summary

Reasons for publication

Article 87 of the Regulation (EU) 2021/23 (‘CCPRRR’) introduces a new Article 45a in Regulation (EU) 648/2012 (EMIR), which allows an competent authority to request a CCP to limit or restrict dividends payments, shares buy-backs and payments of bonuses to the CCP’s senior management following a significant non-default event.

Paragraph 3 of the new Article 45a of EMIR mandates ESMA to issue draft Guidelines in accordance with Article 16 of Regulation (EU) 1095/20120 (‘ESMA Regulation’), to specify the circumstances in which the competent authority may require the CCP implement the restrictions.

The purpose of this consultation paper is to seek views from all interested stakeholders on these draft Guidelines.

Contents

Section 3 of this consultation paper sets out the background and the mandate for the Guidelines and Section 4 provides for the circumstances for temporary restrictions in a significant non-default event.

Section 5 outlines the approach chosen by ESMA, and in particular how the NCA may assess that a non-default event is significant.

Next Steps

The consultation will be open until 20 September 2021. ESMA will consider the feedback received to the consultation in Q3 2021 and expects to publish the guidelines and the final report by Q1 2022.

2 Legislative references, Abbreviations and Definitions

The following legislative references are used in this consultation paper:

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), (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[1]
EMIR	European Market Infrastructures Regulation – Regulation (EU) No 648/2012 of the European Parliament and Council of 4 July 2012 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]
RTS 152/2013	Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties[4]
RTS 153/2013	Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties[5]

The following abbreviations are used in this consultation paper:

CCP	Central Counterparty
CM	Clearing Member

[1] OJ L 22, 22.1.2021, p. 1–102
[2] OJ L 201, 27.7.2012, p. 1
[3] OJ L 331, 15.12.2010, p. 84
[4] OJ L 52, 23.2.2013, p. 37
[5] OJ L 52, 23.2.2013, p. 41

CPMI	Committee on Payments and Market Infrastructures
EC	European Commission
EEA	European Economic Area
ESCB	European System of Central Banks
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
EU	European Union
FSB	Financial Stability Board
IOSCO	International Organisation of Securities Commissions
OJ	The Official Journal of the European Union
OTC	Over-the-counter
RTS	Regulatory Technical Standards

Unless otherwise specified, the terms used in this consultation paper have the same meaning as in CCPRRR, EMIR and the RTS 152/2013 an 153/2013.

3 Background and mandate

1. CCPRRR was adopted on 16 December 2021 and entered into force on 12 February 2021. This Regulation introduces a recovery and resolution framework for EU CCPs, which objective is (i) to ensure that EU CCPs set out measures to recover from financial distress, (ii) to maintain the critical functions of a CCP which is failing or likely to fail while winding up the remaining activities through normal insolvency proceedings, and (iii) to preserve financial stability and avoid a significant adverse effect on the financial system and its ability to serve the real economy while minimising the cost of a CCP's failure to taxpayers.

2. With regards to the recovery phase, CCPRRR further reinforces the preparedness of EU CCPs, with an obligation to draw up and maintain a recovery plan specifying the measures to be taken in the case of both default and non-default events. The Regulation also grants competent authorities' new responsibilities in the preparation of and mitigation of financial stress in, recovery, including early intervention powers which enable the competent authorities to remedy the deterioration of a CCP's financial and economic situation before the CCP reaches resolution.

3. Article 87 of CCPRR introduces a new Article 45a in EMIR, which grants competent authorities with the power to temporarily *request the CCP* to refrain from undertaking the following actions:

   "(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."

   Those actions are jointly referred to as "restricted actions" in this paper.

4. Under the new Article 45a(3) of EMIR, ESMA is mandated to draft Guidelines further specifying the circumstances in which the competent authority *may require the CCP to refrain from undertaking any of the restricted actions referred to above,* for a period specified by the competent authority, that cannot exceed five years.

> *Article 2(9) of the CCPRRR*
>
> *(9) 'non-default event' means a scenario in which losses are incurred by a CCP for any reason other than a default event, including but not limited to, business, custody, investment, legal or operational failures or fraud, including failures resulting from cyber-attacks;*

New article 45a of EMIR- 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.

The competent authority shall not restrict the CCP from undertaking any of the actions referred to in the first subparagraph, if the CCP is legally obliged to undertake that action and the obligation predates the events pursuant to the first subparagraph.

2. The competent authority may decide to waive the restrictions in paragraph 1 where it deems that waiving those restrictions would not reduce the quantity or availability of the CCP's own resources, in particular own resources available for use as a recovery measure.

3. ESMA shall by 12 February 2022 draft guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the actions referred to in paragraph 1 of this Article.';

5. ESMA also notes that similar requirements may be found under Article 9 of the CCPRRR where the competent authority *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, discretionary pension benefits or severance packages to senior management. This possibility is also to be found under Article 18 of the CCPRRR where the competent authority *may* apply similar restrictions on the CCP as under Article 9 of the CCPRRR.

Recital 34 of the CCPRRR

[…] Early intervention powers should include the power to 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 also the power to 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.

Article 9 Recovery Planning

7.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. […]

Following the notification received under the second subparagraph of paragraph 6 of this Article, the competent authority shall immediately assess whether the circumstances require the use of early intervention powers in accordance with Article 18.

8. The competent authority shall promptly inform the resolution authority and the supervisory college, and the resolution authority shall promptly inform the resolution college, of any notification received in accordance with the second subparagraph of paragraph 6 and with the first subparagraph of paragraph 7, and of any subsequent instruction by the competent authority in accordance with the second subparagraph of paragraph 7.

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.

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**: […]

(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.

4 Circumstances for temporary restrictions in a significant non-default event

6. As just noted, the competent authority's power under the new Article 45a of EMIR to require the CCP to refrain from making dividends payments is in substance similar to the one granted to competent authorities when a recovery plan is triggered or early intervention is

decided. This power is granted to the competent authorities as a supervisory tool, that may be used to prevent an identified weakness from developing into a threat to the CCP's safety and soundness.

7. In accordance with Article 16 of Regulation (EU) 1095/2010 (the ESMA Regulation), ESMA shall issue Guidelines with a view to establish consistent, efficient and effective supervisory practices across the EU.

8. The purpose of the Guidelines is to provide competent authorities with guidance on the circumstances under which they should consider setting temporary restrictions on a CCP's ability to pay monetary distributions such as dividends, buy-back shares, or to restrict creating new obligations for i.e. variable bonuses payments to senior management, hence the Guidelines should help promoting consistent supervisory practices across the EU.

9. A competent authority may only impose such temporary restrictions following a significant non-default event. ESMA therefore proposes that these Guidelines should provide further indications, specifying the circumstances i.e. the indicators, with regards to *when* the competent authority should consider whether a non-default event is significant, and therefore may require the CCP to refrain from undertaking any of the restricted actions.

10. As the possibility to apply restrictions on the CCPs is within the discretion of the competent authority, ESMA is mandated to ensure that the competent authorities assess the need to apply the restrictions in similar situations to ensure convergence among the CCPs in the situation of a significant non-default event.

11. Hence, the Guidelines provide competent authorities with guidance on the circumstances under which they should consider requiring the CCP to refrain from undertaking certain restricted actions to protect their capital resources. The Guidelines therefore identifies indicators and elaborate on the circumstances prompting the consideration of whether to require the CCP to refrain from undertaking such restricted actions.

12. The indicators provided in these Guidelines do not oblige competent authorities to require the CCP to refrain from undertaking any of the restricted actions nor do the Guidelines prevent competent authorities to apply any restrictions where such indicators are not met but where the competent authority has identified the necessity for a restriction to apply.

13. To conclude, a competent authority *may* require the CCP to refrain from undertaking any of the restricted actions where (i) a non-default event has occurred and (ii) one or several of the indicators established by the Guidelines applies, leading the competent authority to consider that the non-default event is of such significance that restrictions should apply.

5 ESMA Draft Guidelines on the circumstances for applying temporary restrictions in the case of a significant non-default event

5.1 ESMA's Mandate

14. Article 45a(3) of EMIR describes ESMA's mandate:

ESMA shall by 12 February 2022 draft guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the actions referred to in paragraph 1 of this Article.

5.2 Status of these Guidelines

15. These Guidelines will be issued pursuant to Article 16 of ESMA Regulation and Article 45a(3) of Regulation (EU) 648/2012 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.

16. The 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).

5.3 Reporting requirements

17. 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.

18. 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.

5.4 Subject Matter

19. According to Article 45a of EMIR, in the case of a significant non-default event as defined in point (9) of Article 2 of CCPRRR, the competent authority may require the CCP to refrain from undertaking any of the restricted actions for a period specified by the competent authority, that cannot exceed five years. The actions the CCP shall refrain from undertaking are (a) making a dividend distribution or give an irrevocable commitment to make a dividend distribution, except for rights to dividends specifically referred to in CCPRRR as a form of compensation; (b) buy-back of ordinary shares; and (c) creating an obligation to pay variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of EMIR, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of EMIR.

20. The competent authority shall not restrict the CCP from undertaking any of the restricted actions, if the CCP is legally obliged to undertake that action.

21. The Guidelines provide competent authorities with guidance on the circumstances under which they should consider requiring the CCP to refrain from undertaking certain restricted actions to protect their capital resources. The Guidelines therefore identify indicators and elaborate on the circumstances prompting the consideration of whether to require the CCP to refrain from undertaking these actions.

22. The indicators provided in these Guidelines do not oblige competent authorities to require the CCP to refrain from undertaking any of the restricted actions nor do the Guidelines prevent competent authorities from requiring the CCP to refrain from undertaking any restricted actions where the indicators are not met, but where the competent authority has identified the necessity for a restriction to apply.

5.5 Indicators where the competent authority should assess restrictions

23. The indicators described in these draft Guidelines should provide guidance to the competent authorities on when to assess, following a non-default event, whether they should require the CCP to refrain from undertaking any of the restricted actions listed in Article 45a (1)(a) – (c) of EMIR. In other words, these indicators should describe whether a non-default event can be considered as "significant" and require an assessment by the competent authority to decide whether restrictions should apply.

24. It is noted that restrictions on dividends, buy-backs of ordinary shares are already available as part of the early intervention powers and recovery powers in the recovery phase, therefore the indicators presented in these Guidelines should complement those supervisory actions coverage for losses for the specific scenario where in the day to day supervision of the CCP a non-default event qualifies as "significant". However, bearing in mind the other initiatives ESMA notes there will be some overlap of the proposed triggers and the triggers under both recovery and early intervention measures. ESMA further notes

that whilst there are some overlaps this would likely both be intentional and not create a problem as there are differences in the scope and method in the application of the triggers. Two main aspects noted are, firstly that there is a difference in scope, as the restriction on variable remuneration under both article 45a(1)(c) and these Guidelines is on the creation of an obligation to pay variable remuneration, whereas both recovery and early intervention measures restrict the payment of such remunerations. Secondly, there is the difference in who activates and is in control of the application of such restrictions (i.e. the competent authority or the CCP, where the restrictions apply as a consequence of the latter's actions). Finally, it should also be noted that the process will depend on the situation at hand, hence this could lead to differences in application and in the legislative power under which restrictions on certain distributions are activated and applied.

25. In establishing the indicators for guiding competent authorities when to qualify a non-default event as significant, one aspect to consider is the magnitude of the losses incurred by the CCP and their impact on the CCP's capital position. It is for the competent authority to decide to apply a restriction on the CCP's ability to distribute part of its profits, where it is likely that the non-default event (which may be combined with an adverse market scenario), has or is likely to have a material impact on the CCP's capital position. In such a situation, capital resources are used to absorb losses and ensure that the CCP is able to continue its operations and this should take priority over discretionary dividend distributions, share buy-backs and the entry into new bonus or other remuneration obligations.

26. Another aspect to consider, when assessing whether a non-default event can be considered as "significant", is to independently assess and quantify (where possible) the impact that the non-default event may pose to the CCP's ability to continue providing clearing services. In other words, the indicators should help identify a situation where the impact on the CCP's capital position is not yet known, but where there is a likelihood that the CCP's ability to continue providing clearing services is or is likely to be negatively affected.

27. The indicators that should guide the decision by the competent authority to apply restrictions therefore cover two aspects:

(a) Whether the non-default event has or is likely to have a material impact on the CCP's capital position; and

(b) Whether the non-default event adversely affects or is likely to adversely affect the CCP's ability to perform its critical functions.

28. Breaching any of the indicators identified in these draft Guidelines should prompt the competent authorities to assess the above aspects of the CCP and to make a decision whether to request the CCP to refrain from undertaking any of the restricted actions listed in Article 45a(1) of EMIR.

5.5.1 Indicators that the non-default event has or is likely to have a material impact on the CCP's capital position

29. In accordance with Article 16 of EMIR and Articles 1 to 5 of RTS 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.

30. In a non-default event, the CCP is expected to rely primarily on its own capital to cover for the losses incurred, before resorting to recovery measures that may involve financial contributions from its clearing members. Where a non-default event incurs losses to the CCP's capital, it may therefore be appropriate to apply temporary restrictions on the CCP's ability to undertake the restricted actions in Article 45a(1) of EMIR , to ensure that the CCP is able to make good those losses and face any further capital loss.

31. Hence the CCP's capital position compared to its capital requirements should be used as the reference point of the significance of a non-default event. The 110% notification threshold should serve as a reference point for those indicators.

5.5.1.1 Guideline 1:

Where the competent authority identifies a non-default event, the competent authorities should assess a series of indicators to determine whether the non-default event poses a significant risk to the CCP's capital and hence would justify a restriction on the CCP, i.e. to require the CCP to refrain from undertaking any actions referred to in Article 45a(1) of EMIR.

The indicators to be assessed by the competent authority should include (but not be limited to) the ones listed below:

a) *Whether following a non-default event, a realised, estimated or forecasted loss will, or is likely to, reduce the CCP's capital level below the notification threshold referred to in Article 1(3) of RTS 152/2013*.

b) *Whether following a non-default event a realised, estimated or forecasted loss results or is likely to result in a significant deterioration of the CCP's capital buffer, without triggering the notification threshold and resulting from either:*
   - *a gradual loss where the reason for the deterioration is considered very likely to continue to reduce the capital of the CCP at a significant pace, hence there is a risk that the CCP will infringe its notification threshold in a near future; or*
   - *a sudden loss or expected loss where there is a risk that the CCP will infringe the notification threshold.*

5.5.2 Indicators that a non-default event adversely affects or is likely to adversely affect the CCP's ability to perform its critical functions

32. Even where the CCP did not report or identify any material impact on its capital resources, a non-default event may be considered as significant where the national competent authority assesses that it may adversely affect and impact the CCP's capacity to continue providing critical functions.

33. The indicators the competent authorities should assess in order to determine if to require the CCP to refrain from undertaking any of the actions referred to in Article 45a of EMIR are the indicators signalling that a non-default event may adversely affect the CCP's operational capacity to continue providing critical functions, hence justifying to place restrictions on the actions referred to in Article 45a of EMIR.

5.5.2.1 Guideline 2

Where the competent authority identifies a non-default event, the competent authority should assess a series of indicators to determine whether the non-default event poses a significant risk to the CCP's ability to perform its critical functions, hence would justify a restriction on the CCP, i.e. to require the CCP to refrain from undertaking any actions referred to in Article 45a(1) of EMIR.

The indicators to be assessed by the competent authority should include (but not be limited to) the ones listed below:

– *Whether the CCP is incurring and failing to recover from a material operational event, such as a cyber-attack or natural disaster, which prevents or has the potential to prevent the CCP from operating its full clearing service(s) or fulfilling all or part of its obligations towards its clearing members and where this may have a financial impact in the medium-term;*

- *Whether the failure of a critical third-party entity prevent or has the potential to prevent the CCPs from operating its full clearing service(s) or fulfilling all or part of its obligations towards its clearing members, including settlement of transactions and payments of margin calls and where this may have a financial impact in the medium-term;*

- *Whether the CCP is losing, or is at risk of losing, clearing volumes or clearing member(s), or where there is a general loss of clearing members' or stakeholders' confidence in the CCP and where this may put the CCP in the position that it is no longer able to carry out its business activities and where this may have a financial impact in the medium-term . This may be evidenced by:*

    - *a reduction in submitted transactions for clearing;*

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

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

Question 2: If you prefer other indicators, please describe them and why they would be more suitable.

6 Annexes

6.1 Annex I Legislative mandate

New article 45a of EMIR

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.

The competent authority shall not restrict the CCP from undertaking any of the actions referred to in the first subparagraph, if the CCP is legally obliged to undertake that action and the obligation predates the events pursuant to the first subparagraph.

2. The competent authority may decide to waive the restrictions in paragraph 1 where it deems that waiving those restrictions would not reduce the quantity or availability of the CCP's own resources, in particular own resources available for use as a recovery measure.

3. ESMA shall by 12 February 2022 draft guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the actions referred to in paragraph 1 of this Article.';

6.2 Annex II Cost-benefit analysis

1. Introduction

Pursuant to the third paragraph of Article 45a of EMIR ESMA shall by 12 February 2022 draft Guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the restricted actions as set out in paragraph 1 of Article 45a of EMIR.

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 options which were analysed during the process of drafting the Guidelines.

The Guidelines included in this CP are of a mandatory nature, i.e. they are envisaged in EMIR in order to ensure uniform, consistent and coherent application of Union Law.

There are directly applicable provisions in EMIR 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 the event of a non-default event affecting the CCP.

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[6].

2. Cost-benefit analysis

Below is detailed the different corresponding policy options on how to further specify the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the restricted actions pursuant to its power under Article 45a(1) of EMIR. This power is granted to the competent authorities as a supervisory tool, that may be used to prevent a weakness, identified by competent authorities, from developing into a threat to the CCP's safety and soundness. The Guidelines therefore identifies indicators and elaborate on the circumstances prompting the consideration of whether to require the CCP to refrain from undertaking certain restricted actions.

Specific objective	The Guidelines provide competent authorities with guidance on the circumstances under which they should consider requiring the

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2016%3A0368%3AFIN

	CCP to refrain from undertaking certain restricted actions to protect their capital resources.
Policy option 1	To further specify the circumstances by establishing an extensive list of indicators each containing a granular list of aspects to be covered by each indicator.
How would this option achieve the objective?	This option would meet the mandate as it would further specify the circumstances for the competent authorities to assess, however, whilst providing the competent authority with a wide list of indicators to assess on a continuous basis, this could well be seen as unproportionate bearing in mind the aim of the limited assessment to be undertaken by the competent authority and may result in a higher number of requests for information to the CCP, that again could be considered as too burdensome bearing in mind the aim of the indicators.
Policy option 2	To further specify the criteria by establishing a limited set of indicators.
How would this option achieve the objective?	This option would provide less indicators but would still ensure the important aspects that could impact the capital of the CCP are assessed regularly by the competent authority.
Which policy option is the preferred one?	Option 2, given that Option 1 could be seen as too burdensome and not proportionate bearing in mind the limited scope of the assessment to be undertaken by the competent authority.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?	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 EMIR in order to ensure uniform, consistent and coherent application of Union Law.

Impacts of the proposed policies:	
Policy option 1	

Benefits	It will provide the competent authority with several indicators to assess to determine if the competent authority should restrict the CCP from undertaking any of the restricted actions.
Regulator's costs	Moderate, as some costs are envisaged in order to establish tools for monitoring and assessing all the indicators.
Compliance costs	For the CCP moderate as the competent authority may not have all of the information needed to assess the indicators, and where not, may request such information from the CCP.
Policy option 2	
Benefits	It will provide the competent authority with a limited set of indicators to assess to determine if the competent authority should restrict the CCP from undertaking any of the restricted actions.
Regulator's costs	Fairly low but some costs are envisaged in order to establish tools for monitoring and assessing the indicators.
Compliance costs	For the CCP low as the competent authority should have the information to assess the indicators, and where not, may request such information from the CCP but here it should be limited in scope.
	The costs implied by these Guidelines can be summarised as the cost of the competent authority to ensure certain indicators are monitored and assessed in the event of a non-default event. Hence 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 indicators to be assessed once there is a non-default event. ESMA notes that the costs are envisaged for by the CCPRRR and EMIR. On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs.

Question 3: Do you agree with the Option 2 of the cost-benefit analysis, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?

Question 4: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

6.3 Annex III Summary of questions

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

Question 2: If you prefer other indicators, please describe them and why they would be more suitable.

Question 3: Do you agree with the Option 2 of the cost-benefit analysis, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 2)?

Question 4: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

6.4 Annex VI Guidelines

Guideline 1

Where the competent authority identifies a non-default event, the competent authorities should assess a series of indicators to determine whether the non-default event poses a significant risk to the CCP's capital and hence would justify requiring the CCP to refrain from undertaking any of the actions referred to in Article 45a(1) of EMIR.

The indicators to be assessed by the competent authority should include (but not be limited to) the ones listed below:

1. Where following a non-default event a realised, estimated or forecasted loss is likely to result in a significant capital deterioration without triggering the notification threshold referred to in Article 1(3) of RTS 152/2013 as a result of either:

    - a gradual loss and the reason for the deterioration is considered very likely to continue to reduce the capital of the CCP at a significant amount and speed, hence there is a risk that the CCP will infringe or that it is likely that the capital requirements will be infringed with the passing of time; or

    - a sudden loss or expected loss where there is a risk that the CCP will infringe the capital requirements.

2. Where following a non-default event, a realised, estimated or forecasted loss will or is likely to reduce the CCP's capital level below the notification threshold referred to in Article 1(3) of RTS 152/2013.

Guideline 2

Where the competent authority identifies a non-default event, the competent authority should assess a series of indicators to determine whether the non-default event poses a significant risk to the CCP and may adversely affect the CCP's ability to perform its critical functions, hence would justify requiring the CCP to refrain from undertaking any actions referred to in Article 45a(1) of EMIR.

The indicators to be assessed by the competent authority should include (but not be limited to) the ones listed below:

1. Where the CCP is incurring or failing to recover from a material operational event, such as a cyber-attack or natural disaster, which prevent the CCP from operating its full clearing service(s) or fulfilling all or part of its obligation towards its clearing members (including clients and indirect clients) and where this may have a financial impact in the medium-term.

2. Where the failure of a critical third-party entity prevent or has the potential to prevent the CCPs from operating its full clearing service(s) or fulfilling all or part of its obligation towards its clearing members (including clients and indirect clients), including settlement of transactions and payments of margin calls and where this may have a financial impact in the medium-term.

3. Where the CCP is losing, or is at risk of losing, clearing volumes or clearing member(s), or where there is a general loss of clearing members or stakeholders confidence in the CCP and where this may put the CCP in the position that it is no longer able to carry out its business activities and where this may have a financial impact in the medium-term. This may be evidenced by:

    - unwillingness of clearing members (including clients and indirect clients) to submit new transactions for clearing and this could be identified by, for example, a reduction in submitted transactions for clearing or a change in clearing pattern;

    - a shift in trade allocation to other CCPs servicing the same trading venue; or

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