# Final Report

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

31 January 2022 | ESMA91-372-1704

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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 a 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.

The new Article 45a(3) of EMIR mandates ESMA to 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 to implement the restrictions (the 'Guidelines').

ESMA published a Consultation Paper with its draft Guidelines under Article 45a of EMIR on 12 July 2021. The consultation ended on 20 September 2021. ESMA received 6 responses. ESMA also held a public hearing on the Consultation Paper (along with other consultation papers issued by ESMA under CCPRRR) on 14 September 2021.

This Final Report provides the final Guidelines on the circumstances in which the competent authority may require the CCP to implement restrictions on dividend payments, shares buy-backs and payments of bonuses to the CCP's senior management.

The Final Report takes into account the feedback provided by the respondents to the consultation, as well as the advice from the Securities and Markets Stakeholders Group.

## Contents

Sections 2 and 3 of this Final Report set out the definitions, background and mandate for the Guidelines. Section **Error! Reference source not found.** provides the feedback statement. This section presents the comments received from respondents to the consultation as well as the rationale for the decisions that have been made by ESMA on whether and how to introduce some changes to the draft Guidelines that ESMA consulted on.

Finally, Section 4 contains all relevant annexes. Annex I sets out the legislative mandate for developing the Guidelines. Annex II includes the cost and benefit analysis for the Guidelines. Annex III provides the advice of the Securities and Markets Stakeholder Group. Annex IV contains the proposed 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.

# 2 Legislative references, Abbreviations and Definitions

The following legislative references are used in this report:

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| 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] |
| Delegated Regulation 152/2013 | Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties[4] |
| Delegated Regulation 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 report:

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| *CCP* | Central Counterparty |
| *CP* | Consultation Paper |
| *EC* | European Commission |

[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

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| *ESMA* | European Securities and Markets Authority |
| *EU* | European Union |
| *OJ* | The Official Journal of the European Union |
| *OTC* | Over-the-counter |
| *RTS* | Regulatory Technical Standards |

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

# 3 Background and mandate

## 3.1 Legal basis

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. CCPRRR also grants to 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 CCPRRR 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 report.

*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 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 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 CCPRRR where the competent authority *may* apply similar restrictions on the CCP as under Article 9 of CCPRRR.

**Recital 34 of 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 Feedback statement on the proposed Guidelines

6. The indicators described in these 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.

7. It is noted that restrictions on dividends, buy-backs of ordinary shares and remuneration payments are already available as part of the early intervention powers and recovery powers in the recovery phase, therefore the indicators presented in these Guidelines clarify the legal framework for supervisory actions aimed at covering losses where in the course of day-to-day supervision a non-default event qualifies as “significant”. ESMA also notes that there will be some overlap of the proposed triggers for applying the restrictions under Article 45a of EMIR and those circumstances under which recovery and early intervention measures might be taken. ESMA further notes that whilst there are some overlaps or similarities in situations that might prompt the application of restrictions there are differences in the scope and method in which they would be applied. The 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) of EMIR 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 a difference in the circumstances under which the restrictions could or must be applied – being day-to-day supervision under EMIR for the purpose of these Guidelines and recovery or early intervention already under the CCPRRR framework. Finally, it is reasonably expected that the application of the restrictions and the stage at which it takes place will depend on the peculiarities and factual circumstances of each individual situation at hand.

8. In establishing the indicators for guiding competent authorities on 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.

9. 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.

10. 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.

11. Breaching any of the indicators identified in these Guidelines should prompt the competent authorities to assess the above aspects of the CCP and to adopt a decision, in case a significant non-default event is identified, to request the CCP to refrain from undertaking any of the restricted actions listed in Article 45a(1) of EMIR.

## 4.1 Guideline 1 – indicators of a material impact on the CCP's capital position

### 4.1.1 Consultation Paper (and accompanying Guidelines)

12. The first set of indicators proposed by ESMA in the CP aims at identifying whether a non-default event has or is likely to have a material impact on a CCP's capital position.

13. 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.

14. 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.

15. 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 the indicators set out in Guideline 1.

16. As a result, the first proposed Guideline specified that where a competent authority identifies a non-default event, it 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.

17. The proposed indicators to be assessed by the competent authority were defined as follows:

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 Delegated Regulation 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.

### 4.1.2 Summary of Consultation Responses

18. Regarding Guideline 1 on the indicators signalling a capital deterioration, all respondents agree that the breach of the 110% notification threshold, as defined under Article 1(3) of Delegated Regulation 152/2013, should be used as a reference point to determine that a significant non-default event is likely to materially impact the CCP's capital position.

19. However, the majority of respondents expressed concerns that under proposed Guideline 1(b), a significant deterioration of the CCP's capital buffer could trigger temporary restrictions, even where the notification threshold is not hit. Respondents argue that certain CCP losses are within a CCP's cash flow projection, and although well within the buffer could be considered as "significant" under Guideline 1(b) and trigger restrictions in accordance with Article 45a of EMIR.

20. Respondents argue that such events where the notification threshold is not hit (i.e. the buffer is still not impacted) should not trigger restrictions, and suggest removing Guideline 1(b).

### 4.1.3 ESMA's feedback

21. Considering the overall comments received on Guideline 1(b) and acknowledging that the proposed drafting may trigger restrictions under Article 45a in an unnecessarily high number of situations, ESMA suggested to remove Guideline 1(b). Guideline 1 would then only focus on the assessment of whether the notification threshold is breached or likely to be breached following a non-default event.

## 4.2 Guideline 2

### 4.2.1 Consultation Paper (and accompanying Guidelines)

22. The second set of indicators proposed by ESMA in the Consultation Paper aimed to identify whether a non-default event adversely affects or is likely to adversely affect the CCP's ability to perform its critical functions.

23. Indeed, even where the CCP did not report or identify any material impact on its capital resources, ESMA noted that 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.

*24.* The indicators the competent authorities should assess in order to determine whether 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 placing restrictions on the actions referred to in Article 45a of EMIR.

25. As a result, Guideline 2 specifies that 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.

26. The proposed indicators to be assessed by the competent authority were defined as follows:

    a) 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.

    b) 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.

    c) 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).

### 4.2.2 Summary of Consultation Responses

27. Regarding Guideline 2 on the indicators capturing the ability to perform its critical functions, most respondents argue that the failure of a critical third-party entity preventing the CCP from operating its full clearing services should not trigger the restrictions under Article 45a. Respondents argue that this would be excessive as the CCP has no control over a third-

party entity. They also claim that third-party providers go through extensive due diligence reviews and are subject to operational risk assessments.

28. In addition, most respondents argue that the reduction of volumes or number of clearing members at a CCP might not necessarily be related to the CCP's business activities or to its ability to perform at the required level, but that it could be linked to commercial decisions from clients and clearing members.

29. As a result, most respondents suggested to remove the proposed Guidelines 2(b) and 2(c).

### 4.2.3 ESMA's feedback

30. While acknowledging the concerns raised regarding Guideline 2(b) on critical third-party entities, ESMA however appreciates that the failure of a third party could still endanger the ability of a CCP to perform its obligations, which could result in operational failure and/ or financial losses. Hence ESMA believes it is appropriate for the competent authority to consider this aspect when assessing the possibility to impose restrictions.

31. ESMA therefore decided to retain Guideline 2(b) in its proposed drafting.

32. In addition, having noted the answers to the public consultation, and acknowledging that the decrease in clearing volumes may not necessarily signal a risk to the CCP's ability to perform its critical functions, ESMA deleted the proposed Guideline 2(c).

## 4.3 Additional indicators

### 4.3.1 Summary of Consultation Responses

33. A respondent proposed an additional indicator for the purpose of Guideline 1 on the capital deterioration. It was suggested that where the CCP starts allocating any cost of the non-default losses to clearing participants, either as part of the recovery plan or outside recovery, temporary restrictions under Article 45a of EMIR should be triggered.

34. In addition, one respondent suggests that a non-default event should be considered as "significant" only where in accordance with Article 31 of CCPRRR the resolution authority has requested non-defaulting clearing members to make cash contributions to the CCP.

### 4.3.2 ESMA's feedback

35. While ESMA agrees that the allocation of non-default losses to clearing participants would most probably signal the occurrence of a non-default event, it is understood that such loss allocation would only happen as part of pre-agreed allocation tools within the recovery plan, or under the request of a resolution authority in resolution. In either case, ESMA notes that restrictions to dividends payments, shares buy-backs and bonuses payments are already envisaged, either under Article 9(8) or Article 18 of CCPRRR.

36. ESMA therefore did not consider this additional indicator for Guideline 1.

37. Regarding the proposal to link the restrictions to Article 31 of CCPRRR being applied, ESMA considers that this indicator is overly restrictive, as by definition, for Article 31 to be applied, the CCP would need to have been placed in resolution, whereas the restrictions under Article 45a of EMIR can also be triggered outside of resolution.

38. ESMA therefore did not consider this additional indicator.

## 4.4 Cost and benefit analysis

### 4.4.1 Consultation Paper

39. In the consultation paper, ESMA considered two policy options:

    a. 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.

    b. Option 2: To further specify the criteria by establishing a limited set of indicators.

40. ESMA chose 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.

### 4.4.2 Summary of Consultation Responses

41. Two respondents expressed their support for Option 2, while the rest of respondents did not react on the cost-benefit analysis.

### 4.4.3 ESMA's feedback

42. Considering the answers to the public consultation, ESMA does not propose to change its approach in the Final Report.

# 5 Annexes

## 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.';*

# Annex II - Cost-benefit analysis

1. Introduction

Pursuant to Article 45a(3) 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 Article 45a(1) of EMIR.

Article 16 of 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 Final Report 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 (to be issued under EMIR) it should be noted that important policy decisions regarding distress of a CCP have already been taken under the legislation primarily dealing with the recovery and resolution of CCPs (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

Different 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 are set out below. 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 identify indicators and elaborate on the circumstances prompting the consideration of whether to require the CCP to refrain from undertaking certain restricted actions.

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

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| **Specific objective** | 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. |
| **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 and proper functioning 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: | |
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| **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.<br><br>ESMA notes that the costs are envisaged for by CCPRRR and EMIR.<br><br>On the basis of the analysis above, ESMA concludes that the benefits of issuing these Guidelines outweigh the costs. |

# Annex III – Advice of the Securities and Markets Stakeholder

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

# Annex IV – Proposed Guidelines

# Guidelines

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

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# 1 Scope

**Who?**

These Guidelines apply to competent authorities designated pursuant to Article 22 of EMIR.

**What?**

These Guidelines apply in relation to Article 45a of EMIR, which mandates ESMA 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 in Article 45a(1) of EMIR, for a period specified by the competent authority, that cannot exceed five years.

**When?**

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

# 2 Legislative references, abbreviations and definitions

**Legislative references**

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| 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[7] |
| 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[8] |
| 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[9] |
| Delegated Regulation 152/2013 | Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 on capital requirements for central counterparties[10] |
| Delegated Regulation 153/2013 | Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 on requirements for central counterparties[11] |

**Abbreviations**

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|---|---|
| *CCP* | Central Counterparty |
| *EC* | European Commission |
| *ESMA* | European Securities and Markets Authority |

[7] OJ L 22, 22.1.2021, p. 1–102
[8] OJ L 201, 27.7.2012, p. 1
[9] OJ L 331, 15.12.2010, p. 84
[10] OJ L 52, 23.2.2013, p. 37
[11] OJ L 52, 23.2.2013, p. 41

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|---|---|
| *EU* | European Union |
| *OJ* | The Official Journal of the European Union |
| *OTC* | Over-the-counter |
| *RTS* | Regulatory Technical Standards |

**Definitions**

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

# 3 Purpose

43. These Guidelines are issued pursuant to Article 16 of ESMA Regulation and Article 45a(3) of EMIR and are addressed to the competent authorities. In accordance with Article 16(3) of ESMA Regulation, competent authorities must make every effort to comply with the Guidelines.

44. 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 Article 2(29) of EMIR.

45. 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.

46. 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.

47. 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.

# 4 Compliance and reporting obligations

**Status of the Guidelines**

48. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and CCPs must make every effort to comply with these Guidelines.

49. Competent authorities to which these Guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate.

**Reporting requirements**

50. Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities to which these Guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the Guidelines.

51. In case of non-compliance, competent authorities must also notify ESMA within two months of 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.

52. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

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

## 5.1 Guideline 1

Where the competent authority identifies a non-default event, it should assess if the following indicator is met 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:

a) 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 Delegated Regulation 152/2013.

## 5.2 Guideline 2

Where the competent authority identifies a non-default event, it should assess if the following indicators are met 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:

a) 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.

b) Where the failure of a critical third-party entity prevents 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.